

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.

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There was no relevant constitutional case-law during the reference period 1 May 2013 – 31 August 2013 for the following countries:

Canada, Ireland, Luxembourg, Norway, Romania, “The former Yugoslav Republic of Macedonia” and Turkey.

Armenia

Constitutional Court

Statistical data

1 May 2013 – 31 August 2013

- 94 applications have been filed, including:
 - 13 applications filed by the President
 - 1 application has been filed by the Criminal Court of Appeal
 - 2 applications filed by the Human Rights Defender
 - 78 applications filed by individuals
- 24 applications have been admitted for review, including:
 - 13 applications filed by the President
 - 1 application filed by the Criminal Court of Appeal
 - 2 applications filed by the Human Rights Defender
 - 8 applications as individual complaints
- 7 applications cases have been admitted for review, including:
 - 3 applications as individual complaints
 - 15 applications concerning the compliance of obligations stipulated in international treaties

Important decisions

Identification: ARM-2013-2-003

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 31.05.2013 / **e)** / **f)** On the conformity of the provisions of Criminal Code with the Constitution / **g)** *Tegekagir* (Official Gazette) / **h)**.

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:

Constitutional Court, right, to apply / Right, judicial protection / Review, judicial act / Case, reopening / Circumstance, new / Evidence, new.

Headnotes:

The effectiveness of the right to apply to the Constitutional Court to reopen a case based on new circumstances requires legislation to review judicial acts based on the Court's decisions. This will allow a person to obtain a remedy for the violation of his/her rights by the application of unconstitutional norms. The purpose of such a regulation is access to justice, as well as to guarantee the effectiveness of the judicial protection of the persons' constitutional rights.

Summary:

I. The applicants challenged Part 2 of Article 426.9 of the Criminal Code, which is dedicated to the issue of reopening a case based on new or newly emerged circumstances. The applicants noted that the right to apply to the Constitutional Court is not possible if its decision, by which a norm has been declared to be in breach of or in compliance with the Constitution, does not consider reparation. To the applicants, the review of the judicial act, including the application of the unconstitutional norm, is performed *ipso facto*.

II. The Constitutional Court stated that the main issue related to the judicial act remains in force. The enforcement of an unconstitutional legal provision despite the fact that proceedings to review the judicial act based on new circumstances have been brought. The Court emphasised that the constitutional content and purpose of instituting the review are for the reparation of the violated rights, which requires the elimination of the negative consequences that resulted from the violation.

The Court noted that the aforementioned, in its turn, demands restoring the situation that existed before the violation occurred. In this regard, the Court stated that recovery of the violated rights may be ensured by withdrawing the legal force of the related judicial act. Thus the judicial act will be abolished, and this requirement should be stipulated by law.

The Court stated that the notion of "review of a judicial act" based on new circumstances is equivalent in its content to the notion of "reparation of a case" and "reopening of a case". The Court considered that the review may occur only if new consideration of the case is guaranteed. The Court also held that the review of the judicial act on the

basis of new circumstances shall, *ipso facto*, lead to the reversal of the judicial act, including the application of the unconstitutional norm and to the reversal of the judicial act violating a conventional right.

The Court also defined the legal approaches to comply with the legislation and the process to implement review, as described below:

1. Statement of new circumstance to apply for the review and evidence proving the new circumstances attached thereto, in addition to all other requisites, shall be sufficient ground for commencing review proceedings;
2. Review proceedings may be rejected only if upon consideration of the application within the commenced review proceedings, it is found that the circumstances stated in the application are not the basis for reviewing the judicial act; and
3. Legal approaches expressed in the judicial acts that serve as new circumstances shall be taken into account within the new consideration of the judicial act, which loses its legal force.

The Court also addressed the regulation set forth in the challenged norm, which stipulates that the judicial act will not change as a result of its review based on new circumstances if the judge determines that the new circumstances do not influence the outcome of the case. The Court stated that in reality, the regulation serves as a guarantee for the protection of the rights.

Languages:

Armenian.



Austria Constitutional Court

Important decisions

Identification: AUT-2013-2-001

a) Austria / b) Constitutional Court / c) / d) 27.06.2013 / e) B 823/2012-11 / f) / g) / h) www.icl-journal.com; CODICES (German).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Procedural fairness, principle.

Headnotes:

In administrative penalty proceedings, the right to a fair trial pursuant to Article 6 ECHR is not violated if the Independent Administrative Panel dispenses with an oral hearing in line with the case-law of the European Court of Human Rights and if the main aim of the applicant's request for an oral hearing has been considered in its decision.

Summary:

I. The applicant runs a restaurant in Upper Austria. Because the restaurant is composed of just one single room (67 m²) without a dividing wall for a special smoking area, smoking within this room is prohibited in accordance with the Austrian Tobacco Act (*Tabakgesetz*, "partial smoking ban"). In December 2010, the District Authority (*Bezirkshauptmannschaft*, hereafter, the "Authority") issued a provisional penal order (*Strafverfügung*). Relying on Section 13c.2 of the Austrian Tobacco Act, it sentenced the applicant to pay two fines of 150 EUR each. The applicant was accused of failure to comply with the obligation to indicate the smoking ban and for not ensuring adherence to the smoking ban.

The Authority dismissed the applicant's objection against this provisional penal order, rendering a formal decision (*Bescheid*). The Authority argued that according to Austrian Laws, restaurants with just one room between 50 m² and 80 m² dedicated to the supply of food or drinks to guests can only be a smoking area when a formal decision of the competent Federal Office for Historical Monuments (*Bundesdenkmalamt*) exists, dismissing the applicant's request to carry out structural changes (e.g. a dividing wall) within the room (Section 13a.3.c Tobacco Act). Such decision had not (yet) been existent at the time the provisional penal order was issued.

The applicant appealed the decision to the Upper Austrian Independent Administrative Panel (*Unabhängiger Verwaltungssenat*, hereafter, the "Panel") and requested an oral hearing in order to be able to subsequently file such a decision by the Federal Office for Historical Monuments with the Panel. The Panel granted the appeal by refraining from the fine, while reprimanding the applicant. In addition, the Panel dispensed with an oral hearing by virtue of Section 51e.3 of the Administrative Offences Act 1991 (*Verwaltungsstrafgesetz*). It held that the "resolutive condition" of the request was fulfilled because the Panel had taken into account the declining decision of the Federal Office for Historical Monuments, which had been released in the meantime and submitted by the applicant.

This decision was challenged before the Constitutional Court. The applicant claimed (*inter alia*) a violation of his constitutionally guaranteed right to an oral hearing.

II. Initially, the Court stresses that it does not have to evaluate whether the absence of the oral hearing was in line with Section 51e of the Administrative Penal Act, but exclusively whether it was in accordance with the right to a fair trial guaranteed by Article 6 ECHR.

The Court holds that administrative penalty proceedings fall into the scope of this fundamental right. Corresponding to its case-law in these proceedings, Article 6 ECHR is violated if the competent authority (Independent Administrative Panels being a "tribunal" in the sense of Article 6 ECHR) convicts the appellant (even only by reprimand) without an oral hearing unless the circumstances justify its absence. The circumstances abound, such as when the case raises no questions of fact or law that cannot be adequately resolved based on the case-file and the parties' written observations (*ECHR, Döry v. Sweden*, no. 28394/95, 12 November 2002, paragraphs 37 ff). Referring to its Decision VfSlg 19.632/2012, the Court reiterates that,

"an oral hearing may be dispensed with if the allegations submitted suggest that a further clarification of the basis for its decision-making cannot be expected by an oral hearing".

The Court emphasises that with the reprimand, the Panel imposed the mildest possible sanction under the prevailing circumstances. Furthermore, it points out that the Panel took into account the declining decision of the Federal Office for Historical Monuments submitted by the applicant, which to present before the Panel was – according to his application – the main aim of his request for an oral hearing. Thus, the facts of the case were clear and the decision could be rendered based on the case-file, especially the Authority's formal decision and the applicant's written submissions. Consequently the Court holds that the Panel did not violate the right to a fair trial under Article 6 ECHR.

Supplementary information:

The fulltext of judgment B 823/2012-11 concerns also other legal questions which are, however, not relevant in the given context.

Languages:

German.



Belarus

Constitutional Court

Important decisions

Identification: BLR-2013-2-003

a) Belarus / **b)** Constitutional Court / **c)** / **d)** 05.07.2013 / **e)** D-833/2013 / **f)** On the conformity of the Law on “Investments” to the Constitution / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 3/2013 / **h)** www.kc.gov.by; CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation.**

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

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

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

Keywords of the alphabetical index:

Capital, investment / Investment, foreign / Judicial protection / Pre-trial, procedure / Property, right, inviolability / Property, right, restriction.

Headnotes:

As regards provisions of the Law relating to the pre-trial settlement of disputes between an investor and the Republic of Belarus, each party to a legal relationship may, concerning any violation of its rights, freedoms and legitimate interests, use all legal remedies provided by law, including judicial recourse. The pre-trial settlement procedure is solely an additional legal remedy and cannot constitute a limitation of the constitutional right to judicial protection, as well as a restriction of court jurisdiction.

Summary:

I. The Constitutional Court in open court session in the exercise of obligatory preliminary review considered the constitutionality of the Law on “Investments” (hereinafter, the “Law”).

The Law guarantees the rights of investors and the protection of investments. Thus, the Law stipulates that foreign investors are guaranteed the free transfer, outside the boundaries of compensation, of profit (income) and other legally obtained funds related to investments on the state territory as well as payments made for the benefit of a foreign investor and related to investment activity after payment of taxes and fees (duties) and other compulsory payments to the national and local budgets, and public non-budgetary funds established by legislation (Article 11.1 and 11.2).

According to Article 12 of the Law, property which is a form of investment or its result may not be nationalised or requisitioned without compensation (Article 12.1); nationalisation is possible only for the reason of public need and subject to timely and full compensation for the value of nationalised property and other damages caused by nationalisation (Article 12.2); and requisition is only possible in the case of natural disasters, accidents, epidemics, epizootics and in other circumstances of extraordinary nature, for the public interest by decision of state bodies under the conditions and the procedure specified by law with the payment of compensation to the investor for the value of requisitioned property (Article 12.4).

II. The Constitutional Court noted that the legislator has established the legal regulation of these social relations with regard to the provisions of the Constitution, according to which the inviolability of property is protected by law (Article 44.2); and compulsory alienation of property shall be permitted only by reason of public need, under the conditions and the procedure specified by law, with timely and full compensation for the value of the alienated property (Article 44.5).

Provisions of the Law which guarantee the right to judicial protection (one of the fundamental human rights enshrined in the Constitution) are aimed at the protection of investors.

In its analysis of the provisions of the Law relating to the pre-trial settlement of disputes between an investor and the Republic of Belarus (Article 13.1) the Constitutional Court confirmed its legal position. According to this position each party to a legal relationship may, concerning a violation of its rights, freedoms and legitimate interests, use all legal

remedies provided by law, including judicial recourse. The possibility to resort to pre-trial settlement of a dispute in order to protect rights, freedoms and legitimate interests is an additional legal remedy and it cannot be considered as a limitation of the constitutional right to judicial protection, as well as restriction of court jurisdiction.

At the same time the Constitutional Court drew attention to Article 13.3 of the Law. This provision provides for the possibility, at the investor's choice, to settle disputes between a foreign investor and the Republic of Belarus that are not under the exclusive jurisdiction of the courts of the Republic of Belarus: by the court of arbitration which is established for the settlement of each specific dispute according to the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL) (paragraph two); and by the International Centre for Settlement of Investment Disputes (ICSID) (hereinafter, the "Centre"), if the foreign investor is a citizen or a legal entity of a member country of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (paragraph three).

The Court's analysis of the content of the above-mentioned provisions of the Law indicates that the legislator, in regulating social relations in the field of investments, proceeded on the basis of part one of Article 8 of the Constitution, which stipulates that the Republic of Belarus shall recognise the supremacy of the generally recognised principles of international law and shall ensure the compliance of laws therewith.

The Constitutional Court highlighted the provisions of the Law which impose certain restrictions on investment activity. Thus, in accordance with the provisions of Article 6 of the Law, investment in the property of legal entities with a dominant position in consumer markets is not permitted without the consent of the competition authority in cases provided by the competition legislation as well as in activities prohibited by the legislative acts. Restrictions of investment activity can also be established by legislative acts in the interests of national security (including protection of environmental, historical and cultural treasures), public order, protection of morals, public health, or the rights and freedoms of other persons.

Article 11.4 of the Law provides that the transfer of funds mentioned in part two of this Article can be limited on the conditions and the procedure specified by the legislative acts and/or according to a court ruling adopted in accordance with the legislation and entered into force.

In reaching its interpretation of the constitutional and legal meaning of these provisions of the Law the Constitutional Court proceeded from the above-mentioned provisions of Article 13.2 and 13.4 of the Constitution, and of Article 44.6 of the Constitution, which stipulates that the exercise of the right of property shall not be contrary to social benefit and security, or be harmful to the environment or historical and cultural treasures, or infringe upon the rights and legally protected interests of others.

The Constitutional Court held that the challenged legal regulation does not violate the principle of equality of all before the law enshrined in Article 22 of the Constitution because restrictions of investment activity provided in the Law secure a due balance between the interests of individuals, society and the state; they are legally acceptable and socially justified. In its previous decisions the Constitutional Court had noted that the right to possess, enjoy and dispose property may be restricted by law in compliance with Articles 23 and 44 of the Constitution.

This restriction of the property rights and interests ought to satisfy the requirements of justice, to be adequate to constitutional aims of protection of the rights and freedoms of other persons and to be based on law.

The Constitutional Court held that the Law on "Investments" is in conformity with the Constitution.

Languages:

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



Identification: BLR-2013-2-004

a) Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 08.07.2013 / **e)** D-845/2013 / **f)** On the conformity of the Law on "Making Alterations and Addenda to the Law on "International Treaties" to the Constitution / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 3/2013 / **h)** www.kc.gov.by, CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

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

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

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

3.15 General Principles – **Publication of laws.**

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

Keywords of the alphabetical index:

Information, duty to provide / Treaty, international / Treaty, constitutional requirements / Treaty, publication / Treaty, publication of reservations.

Headnotes:

Considering that provisionally applied treaties form a part of the legal system of the Republic of Belarus, and taking into account that they may contain provisions directly affecting the rights, freedoms and obligations of citizens, a procedure for official publication of international treaties provisionally applied by the Republic must be established at the legislative level in order to remove the legal uncertainty caused by the absence in the Law on “International Treaties” of provisions on the official publication of such international treaties.

Summary:

The Constitutional Court in open court session in the exercise of obligatory preliminary review considered the constitutionality of the Law on “Making Alterations and Addenda to the Law on “International Treaties”.

The Constitutional Court noted that the alterations and addenda that make additions to the list of subjects who have the right to conclude international treaties define the legal nature and the place in the legal system of treaties between the Republic of Belarus and the subjects of international law that are not states or international organisations but have appropriate powers to enter into international relations. Such an approach of the legislator is in concordance with the constitutional principle of supremacy of law and the corollary principle of legal certainty.

In the Constitutional Court’s view, the addenda prescribing that motions on the ratification of international treaties, on the approval (adoption) of such treaties as well as on the provisional application of interstate or intergovernmental treaties ought to contain (amongst other documents) an opinion of the Ministry of Foreign Affairs on the conformity of that

international treaty to the international obligations, aimed at monitoring the implementation of international obligations and implementation of Article 8.1 of the Constitution. According to Article 8.1, the Republic of Belarus shall recognise the supremacy of the generally recognised principles of international law and shall ensure the compliance of legislation therewith. In addition they are consistent with the international law principle *pacta sunt servanda* enshrined in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969 according to which every treaty in force is binding upon the parties to it and must be performed by them in good faith.

The Constitutional Court noted that the procedure established by the legislator for the entry into force of amendments to international treaties complies with the constitutional principle of supremacy of law and its corollary principle of legal certainty. It aims at the improvement of conventional practice in respect of foreign states and other subjects of international law.

The Constitutional Court also considered that fixation by the Law of the procedure of publication of amendments to international treaties provides for the constitutional citizen’s right to receive, store and disseminate complete, reliable and timely information on international life (Article 34.1 of the Constitution). Such an approach of the legislator aims at informing the general public that amendment to an international treaty is adopted and is to be implemented, and also aims at establishing consistent law-enforcement practice and at strengthening guarantees of constitutional rights and freedoms.

The obligation of a state body, or department of a state body, to inform, in a timely manner, the Ministry of Foreign Affairs of the selection of a concrete person (i.e., a group) entitled to commit appropriate legal actions on the conclusion of interstate or intergovernmental treaties is enshrined in Article 1.4 of the Law. The Constitutional Court noted that the word “timely” supposes a subjective assessment of this period by a law-enforcer and may lead to different approaches that hinder the generation of consistent practice in the conclusion of interstate and intergovernmental treaties.

The Constitutional Court also highlighted the legal uncertainty caused by the absence in the Law on “International Treaties” of special provisions on the official publication of provisionally applied treaties. At the same time, such treaties may contain provisions directly affecting the rights, freedoms and obligations of citizens of the Republic of Belarus.

According to Article 32.8 of the Law on International Treaties an international treaty, or a part thereof that is provisionally applied by the Republic of Belarus before it enters into force, is to be implemented in the same procedure as international treaties that have entered into force. In the Constitutional Court's view, the analysis of this provision indicates that provisionally applied treaties form part of the legal system of the Republic of Belarus. In this regard the Constitutional Court drew the attention of the legislator to the necessity to establish a procedure for the official publication of provisionally applied treaties.

The Constitutional Court recognised the Law on "Making Alterations and Addenda to the Law on "International Treaties"" to be in conformity with the Constitution.

Languages:

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



Belgium Constitutional Court

Important decisions

Identification: BEL-2013-2-005

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 06.06.2013 / **e)** 78/2013 / **f)** / **g)** *Moniteur belge* (Official Gazette), 30.09.2013 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Road traffic, offence / Drink driving / Equality / Evidence, rights of defence / Evidence, verification.

Headnotes:

It is not inconsistent with the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) to make provision, in the Road Traffic Act, for a right to a second expert opinion in the form of a blood test only in the case of driving under the influence of an alcohol level of at least 0.35 milligrams per litre of exhaled breath and not in the less severely punished case of an alcohol level of at least 0.22 milligrams.

Summary:

I. D.V. appeared before the Police Court in Ghent for driving a vehicle while under the influence of alcohol. A breath test showed an alcohol level of 0.34 milligrams per litre of exhaled breath. Under the Road Traffic Act, driving a vehicle while under the influence of an alcohol level of at least 0.22 milligrams per litre of exhaled breath (which corresponds to 0.5 grams per litre of blood) is a criminal offence (fines range from 25 to 500 euros). For an alcohol level of 0.35 milligrams (0.8 grams per litre of blood) or more, the penalties are more severe (200 to 2000 euros).

Depending on the alcohol level, the methods used to obtain evidence that an offence has been committed are also different. If a breath test performed by means of an approved device shows an alcohol level of more than 0.35 milligrams per litre of exhaled breath, a blood test is performed by a doctor in the cases specified in Article 63.1 of the Road Traffic Act.

In such cases, the person concerned has the right under Article 63.3 of the Act to request a second expert opinion. Given that the Act provides for this possibility of a second expert opinion only where the alcohol level found is more than 0.35 mg/l and not where it is between 0.22 and 0.35 mg/l, the Police Court asked the Constitutional Court whether this legal provision is contrary to the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution).

II. The Court observed that the replacement of blood testing by breath testing has its origins in legislation enacted in 1990 and that, as may be seen from the preparatory documents for the provision in question, scientific research had shown that breath testing by means of an approved device was just as reliable as blood testing, which is a much more laborious procedure and takes a considerable time; among other things, because of the need for a doctor's involvement.

Since Parliament's aim was to increase road safety, in particular by improving the chances of catching offenders in the act and introducing harsher penalties, the Court observes that it was not without reasonable justification that blood testing was, in principle, replaced by breath testing, based on the premise that the reliability of breath testing is scientifically proven, and taking into account the above considerations relating to the efficiency of blood alcohol testing.

The Court further noted that it may be seen from the preparatory documents for the 1990 Act that Parliament provided for the possibility of a second expert opinion in the form of a blood test because the penalties are more severe in the case of alcohol levels of at least 0.35 milligrams per litre of exhaled breath. According to the preparatory documents, this difference of treatment is also justified by the fact that the risk of accidents increases sharply from that level upwards.

The difference in the penalty scales is also linked to the rules relating to immediate payment of fines. At the lower levels of alcohol intoxication, police officers are required to offer the driver concerned the possibility of immediate payment. In the Court's view, it may be inferred from this that Parliament's intention was to deal with the lower levels of alcohol

intoxication as often as possible through the immediate collection of a sum corresponding to the minimum fine.

In the Court's view, Parliament, wishing to establish a system for testing blood alcohol that could be properly and efficiently implemented, assumed that it was unnecessary, particularly in view of the reliability of breath testing, to provide for a right to a second expert opinion based on a blood test in the case of persons in whom a lower alcohol level is found because a less serious offence is involved and the rights of the defence are sufficiently guaranteed by the possibility of requesting a second or even third breath test.

The Court concluded that the restriction of the right to a second expert opinion in the form of a blood test to cases in which an alcohol level of at least 0.35 milligrams per litre of exhaled breath is measured is not disproportionate to the aims pursued and is reasonably justified.

Languages:

French, Dutch, German.



Identification: BEL-2013-2-006

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 19.06.2013 / **e)** 92/2013 / **f)** / **g)** *Moniteur belge* (Official Gazette), 25.09.2013 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

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

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

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

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

Keywords of the alphabetical index:

Child, adoption / Child, *kafalah* / Child, protection / Child, welfare / Social assistance.

Headnotes:

Owing to the differences between adoption as provided for under Belgian civil law and the institution of *kafalah* as provided for under Moroccan law, Parliament is not obliged to award to persons in whose care a child is placed under the *kafalah* system the grant which it established for parents who adopt a child under the provisions of the Civil Code.

Furthermore, the refusal of an adoption grant when a child is placed in a person's care under *kafalah* does not have disproportionate consequences for the child because, as a member of the household of the adults caring for him or her under *kafalah*, the child is entitled to family allowances.

Summary:

I. The Labour Court of Liège referred a question to the Constitutional Court concerning the compatibility of a provision of the laws governing family allowances with the rights of the child (Article 22bis of the Constitution) and the principles of equality and non-discrimination (Articles 10 and 11 of the Constitution, taken alone or in conjunction with Articles 2 and 20 of the Convention on the Rights of the Child, Article 8 ECHR and Article 1 Protocol 1 ECHR).

Under the legal provision in question, the adoption grant is not payable in respect of children with an unknown father who are abandoned by their mother and placed in a person's care under the Moroccan law on caring for abandoned children (*kafalah*). The question put to the Court actually concerned the constitutionality of the difference in treatment between these children and children adopted under Belgian law.

II. After explaining what is involved in the *kafalah* of an abandoned child and the effects of the judicial decision to grant *kafalah*, the Court concluded that this placing of an abandoned child in a person's care as provided for under Moroccan law differs clearly from adoption as referred to in the provision in question, which is governed by the Belgian Civil Code.

The Court concluded from its assessment that the fact that a person entrusted under Moroccan law with the care of an abandoned child is not entitled to an adoption grant infringes neither the rights of the child

as enshrined in Article 22bis of the Constitution nor the rights of the child to alternative care and special assistance under Articles 2.1 and 20 of the Convention on the Rights of the Child. The object of the provision in question is not to regulate private and family life, and it does not constitute interference by the public authorities with the child's right to respect for private and family life as safeguarded by Article 8 ECHR.

As regards the right secured by Article 1 Protocol 1 ECHR, the object of the provision in question is not to regulate the status of the property of a child or, *a fortiori*, the property of a child who, born to an unknown father and abandoned by his or her mother, has been placed in a person's care under Moroccan law.

The Court further noted that, owing to the differences between adoption as provided for under Belgian civil law and the institution of *kafalah* as provided for under Moroccan law, Parliament was not obliged to award to persons in whose care a child is placed under the *kafalah* system the grant which it established for parents who adopt a child under the provisions of the Belgian Civil Code. The Court added that the refusal of an adoption grant when a child is placed in a person's care under *kafalah* does not have disproportionate consequences for the child because, being part of the household of the adults caring for him or her under *kafalah*, the child is entitled to family allowances.

Languages:

French, Dutch, German.

*Identification:* BEL-2013-2-007

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 18.07.2013 / **e)** 106/2013 / **f)** / **g)** *Moniteur belge* (Official Gazette), 17.09.2013 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

3.13 General Principles – **Legality.**

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

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

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

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

Keywords of the alphabetical index:

Child, best interests / Minor, foreign, remedy, right / Minor, judicial guarantees / Minor, protection / Minor, foreign, unaccompanied.

Headnotes:

Lack of effective legal protection of unaccompanied foreign minors from a member state of the European Economic Area, if they are in a vulnerable situation, violates the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) read jointly or severally in conjunction with Article 22bis of the Constitution, Article 14 ECHR and Article 2 of the Convention on the Rights of the Child. This discrimination originates in lack of legislative provisions.

The authority hearing an unaccompanied foreign minor must take account of the child's age and discernment together with his or her desire whether or not to be heard.

A law with the aim of clarifying and enshrining in the law the status of unaccompanied foreign minors, prescribing an effort to find a lasting solution suited to the situation of each minor, and safeguarding the minor from a measure of removal for as long as a lasting solution is not found, is placed in the continuum of Article 22bis of the Constitution, Articles 3 and 10 of the Convention on the Rights of the Child and Article 5 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008.

Summary:

I. The French-speaking Belgian section of the non-profit association *Défense des Enfants International* (*Defence for Children International*) ("D.E.I. Belgique") lodged an application with the Constitutional Court to set aside the provisions of the law of 12 September 2011 "amending the law of 15 December 1980 on foreigners' entry to the territory, residence, settlement

and removal, with a view to the granting of a temporary residence permit to an unaccompanied foreign minor" and another provision of a law of 19 January 2012 on the same subject.

By means of the impugned legislative provisions the legislator had intended to improve, clarify and enshrine in the law the status of unaccompanied foreign minors in Belgian territory in the absence of parents or guardian, which status was formerly settled by a circular. The legislator's concern was to grant a particularly vulnerable group protection and to seek a lasting solution for each minor while guaranteeing them a more stable residence situation pending this solution.

The applicant nevertheless raised several arguments against the legislative apparatus, most of them derived from violation of the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) or of the rights of the child (Article 22bis of the Constitution) in conjunction with Article 14 ECHR and certain provisions of the Convention on the Rights of the Child.

It firstly criticised the impugned law for not protecting unaccompanied foreign minors (hereinafter, "UFM") from a state of the European Economic Area.

II. The Court observed that UFM who were nationals of a state of the European Economic Area were indeed not covered by the impugned law, just as they were not covered by an earlier law which instituted guardianship of UFM. During the drafting work, the legislator had nevertheless considered that these European minors, despite their smaller numbers, were also to be protected but that specific provisions should be made for them. The Court held that it was not reasonably justifiable for European UFM not to be under legislative protection.

It considered, however, that there was no cause to rescind the words – non-member of the European Economic Area – in the legislative provision so as to extend the entire scope of the law to European UFM, having regard to the objective differences existing between these minors and other unaccompanied foreign minors. The protection of European foreign minors by a circular was nevertheless insufficient once these UFM found themselves in a vulnerable situation. It did not afford the same guarantees of legal certainty as a law and did not allow the requirement of equality contained in Article 22bis.5 of the Constitution to be met.

The Court further observed that neither did the freedoms guaranteed by the European Union Treaty allow offsetting of this lack of protection in cases

concerning citizens not of age, hence without capacity, and not accompanied by a person holding a parent's or guardian's authority over them.

The Court thus found a violation of Articles 10 and 11 of the Constitution read in conjunction with Article 22bis of the Constitution, Article 14 ECHR and Article 2 of the Convention on the Rights of the Child. It pointed out, however, that this discrimination originated not in the impugned provision but in the lack of a legislative provision clarifying and enshrining the status of unaccompanied foreign minors from a member state of the European Economic Area. This could only be remedied by the action of the legislator who, in devising this system of protection, should take account of the specificities arising from European Union law. A reservation was included in the operative part of the judgment.

The Court moreover dismissed all the other pleas and the application to set aside, but made three further reservations of interpretation in its judgment, which are reproduced in the operative part.

The first reservation concerns the guarantees which should attend the hearing of a minor accompanied by his or her guardian. Although these guarantees are not embodied in the law, the Court considered that the authority holding the hearing should observe them. It should take account of the child's age and discernment together with his or her desire whether or not to be heard. This authority should also conduct the hearing in accordance with the purpose of the law, generally placed in the continuum of Article 22bis of the Constitution, Articles 3 and 10 of the Convention on the Rights of the Child and Article 5 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008.

The second reservation of interpretation concerns a provision enabling a minister or minister's deputy to alter the lasting solution on "learning" that false or misleading information has been communicated, false or forged documents transmitted, deception committed or other unlawful means used. The Court held that the word "learns" (*apprend*) was due to an "oversight" on the part of the legislator and that the word should be construed as meaning "finds" (*constate*), as in another provision of the law.

The final reservation of interpretation concerns a provision of the law to the effect that the provisions of the relevant chapter do not apply where it transpires that the UFM has committed acts deemed capable of disturbing the public peace, public order or national security. The Court held that the legislator, in excluding the application of the legislative provisions to these foreign minors, could not exempt the

competent authority from considering the child's specific interest in the continuum of the constitutional and international provisions, in accordance with the purpose of law. The impugned provision should be combined with other legislative provisions, from which it followed that any decision taken by the minister or the minister's deputy must notably take account of the child's best interests. Interpreted in this way, the impugned provision did not infringe Article 22bis of the Constitution read in conjunction with Articles 3, 22 and 40 of the Convention on the Rights of the Child.

Languages:

French, Dutch, German.



Identification: BEL-2013-2-008

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 18.07.2013 / **e)** 107/2013 / **f)** / **g)** *Moniteur belge* (Official Gazette), 17.09.2013 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status.**
 5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality.**
 5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum.**

Keywords of the alphabetical index:

Asylum, request / Asylum, seeker / Asylum, safe countries of origin.

Headnotes:

It is not contrary to the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) that an asylum request lodged by a national of a "safe country of origin" should be considered only if this person proves that he or she is persecuted in the country concerned or incurs a genuine risk there of serious harm.

Summary:

I. The non-profit organisation *Association pour le droit des Étrangers* (Association for the Rights of Foreigners) and a number of other non-profit associations lodged with the Constitutional Court an application to set aside the law of 19 January 2012 amending the law of 15 December 1980 on foreigners' entry to the territory, residence, settlement and removal. It was apparent from the application that its object was limited to Section 9 of the impugned law, inserting a Section 57/6/1 in the aforementioned law of 15 December 1980.

It is permissible under the impugned provision not to consider an asylum request lodged by an applicant originating from a safe country where it is apparent that the person concerned adduces no evidence showing that he or she is persecuted in the country concerned or incurs a genuine risk of serious harm there. The impugned provision constitutes the implementation of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Articles 29 *et seq.* of which deal with the concept of "safe countries of origin".

The applicants contended, *inter alia*, that the impugned provision constituted discrimination between asylum seekers according to whether or not the country whence they came was a safe country within the meaning of the impugned provision: if so, it burdened them with a presumption that they had no valid fear of being persecuted within the meaning of the International Convention on the Status of Refugees signed in Geneva on 28 July 1951, or of sustaining serious harm of the kind referred to by Sections 48/3 and 48/4 of the law of 15 December 1980; this presumption resulted in a heavier burden of proof than was imposed on other asylum seekers.

II. The Court observed firstly that the difference in treatment complained of arose from the implementation of Directive 2005/85/EC, providing in Article 31.1 that a safe country of origin can only be regarded as such if the asylum seeker has not submitted any serious grounds for believing the contrary; this difference was thus founded on an objective criterion and the impugned provision constituted an appropriate measure in relation to the objective pursued.

The Court next examined whether or not the measure carried disproportionate effects. In that respect it found, *inter alia*, that the law admittedly used other terms than, albeit with no intent to diverge from, those appearing in the Directive: the presumption would be

upheld if the applicant refrained from speaking or did so without "adducing serious evidence to the contrary" (recital 17 and, in like terms, preambular paragraph 21 of the aforementioned Directive 2005/85/EC). The impugned provision also reproduced the criteria used by the directive to define safe countries.

The Court further pointed out that the impugned provision, in only requiring the applicant to make plainly apparent from his/her statements that there existed as far as he/she was concerned a well-founded fear of persecution or serious grounds for believing that he/she incurred a genuine risk of sustaining serious harm as defined by law, did not require him/her to fulfil the conditions for being declared a refugee.

These conditions would be examined when the request had been considered at the conclusion of the procedure instituted by the impugned provision and therefore having a separate object, confined to ascertaining whether the requester adduced serious evidence of a kind to reverse the presumption made in pursuance of Directive 2005/85/EC and the statute transposing it into Belgian law. The decision not to entertain the request was based on substantive evidence. The rapid examination of the evidence did not have disproportionate effects given the guarantees which surrounded the making of the list of countries considered safe.

The Court concluded that this complaint of the applicants (and a series of other complaints which they relied on) could not be allowed. It nevertheless made two reservations of interpretation reproduced in the operative part of the judgment concerning unaccompanied foreign minors and other vulnerable persons such as the disabled, aged or distressed.

Cross-references:

- Judgment no. 106/2013, 18.07.2013.

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Important decisions

Identification: BIH-2013-2-002

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 24.05.2013 / **e)** AP 369/10 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 51/13 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

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

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

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

Keywords of the alphabetical index:

Divorce, right, denial.

Headnotes:

A prohibition for husbands to file for divorce during the pregnancy of their wife and until their child reaches the age of 3 years, is a violation of the prohibition of discrimination under Article II.4 of the Constitution and Article 14 ECHR in respect of the right of access to court, as an aspect of the right to a fair trial under Article II.3.e of the Constitution and Article 6.1 ECHR.

Summary:

I. In the present case, the appellant's divorce petition was essentially rejected as inadmissible in terms of the provision of Article 43 of the Family Law. Under the provision, the husband does not have the right to divorce during the pregnancy of his wife and until their child reaches the age of three years. In the relevant proceedings, it was established that the appellant was the husband of the respondent and that

the minor child of the marriage of the appellant and the respondent, at the time of the divorce petition had been filed, had not reached the age of three years. Consequently, the Court established that the appellant, in terms of the said provision, was not entitled to file for divorce.

The appellant considers, *inter alia*, that the challenged rulings are in violation of the right to a fair trial under Article II.3.e of the Constitution and Article 6.1 ECHR and the right not to be discriminated against under Article II.4 of the Constitution and Article 14 ECHR.

II. The Constitutional Court considers that the provision of Article 43 of the Family Law, the basis of the appellant's divorce petition being rejected, in itself, gives rise to differential treatment of spouses, that is of men and women, in respect of their right of access to a court, i.e. their right to file a petition for divorce. Hence, based on the said provision, the appellant/husband is denied the right of access to court unlike the respondent, his wife. On the other hand, a wife is entitled without restriction to file a petition for divorce during her pregnancy and until her child reaches the age of three years. Therefore, in view of the Constitutional Court, the relevant provision itself makes a distinction between spouses on the ground of gender in respect of their right of access to court.

Accordingly, the question to be answered by the Constitutional Court is whether there is an objective and reasonable justification for such a differential treatment of spouses. That is, whether there is a justification for applying the said provision in practice for the purpose of protecting the best interest of the children, as foreseen by the provision of Article 5 Protocol 7 ECHR.

In this connection, the Constitutional Court requested information from the legislator and the competent Ministry, which had proposed the relevant law, as to the reasons and purpose of the provision of Article 43 of the Family Law. The legislator failed to submit any comment or observation. Nevertheless, the relevant Ministry submitted the reply requested by the Constitutional Court.

According to the Ministry, the purpose of the provision of Article 43 of the Family Law was to protect the interests of children and mothers, and secure the presence of both parents during the first years of a child's life. In addition, the Ministry stated that a specific financial situation of women in our society was taken into account. That situation was reflected in insufficient financial means to secure a living with a minor child and, therefore, the presence of a father

was required. Furthermore, according to the Ministry, women – mothers are mostly without sufficient financial resources, i.e. they are mostly unemployed as they stand little chance of securing a job at that phase of their life. Moreover, if they are employed, they usually have problems in getting compensation for the time of caring for a child and they often do not have a place to live when divorce occurs.

In view of the above, the question to be answered by the Constitutional Court is whether the reasons given by the Ministry constitute an objective and reasonable justification for the difference in treatment of spouses based on the provision of Article 43 of the Family Law and in terms of the standards of the European Convention.

In the opinion of the Constitutional Court, it is not possible in real life to prevent the husband, i.e. the father of the child, from physically leaving the mother and the child, without getting the divorce first. On the other hand, the Constitutional Court notes that the Family Law has a number of provisions specifically regulating the rights and responsibilities of the parents for children in their development and upbringing. Thus, the provision of Article 130 stipulates that the parents jointly have the primary responsibility for the upbringing and development of the child. Article 131.2 stipulates that the parents cannot renounce parental care. Furthermore, the Family Law regulates the issues relating to the maintenance of the spouse without sufficient financial resources. Therefore, it follows that the reasons and purpose of the provision of Article 43 of the Family Law, mentioned in the reply of the Ministry, are achieved through other provisions of the Family Law, which specifically regulate the issue of protecting the best interests of the children and the spouse without sufficient financial resources. Accordingly, there is no legal obstacle to protect, in accordance with the other relevant provisions of the Family Law, the interests of the children and the wife/mother, if such a protection is needed.

Therefore, in the view of the Constitutional Court, the reasons stated by the Ministry in its reply, do not constitute an objective and reasonable justification for the difference in treatment of spouses (men and women) in respect of the right of access to court. All the more so given that the Family Law contains the specific provisions regulating the issue of protecting the children and spouses. Also, considering the other provisions of the Family Law, the Constitutional Court notes that apart from the provision of Article 43, which makes a distinction between spouses, all the other provisions make no distinction between men and women with regards to their mutual rights and responsibilities as well as their rights and responsibilities towards their children.

Consequently, the Constitutional Court holds that the said provision gives rise to differential treatment between men and women on the ground of gender, in respect of their right of access to court. The Constitutional Court finds no objective and reasonable justification for such a differential treatment. In the view of the Constitutional Court, the same conclusion follows from the information provided by the relevant Ministry.

In view of the above, the Constitutional Court holds that the provision of Article 43 of the Family Law does not have the quality of law to the extent necessary to satisfy the standards of Article II.4 of the Constitution and Article 14 ECHR in respect of the right of access to court, as an aspect of the right to a fair trial under Article II.3.e of the Constitution and Article 6.1 ECHR. In the light of the above, the Constitutional Court holds that, in the present case, the appellant has been discriminated against on the ground of gender in respect of the right of access to court.

Therefore, the Constitutional Court concludes that in the present case, there is a violation of the prohibition of discrimination under Article II.4 of the Constitution and Article 14 ECHR in respect of the right of access to court, as an aspect of the right to a fair trial under Article II.3.e of the Constitution and Article 6.1 ECHR. It follows that the provision under Article 43 of the Family Law is neither in accordance with the Constitution nor with the European Convention.

Moreover, the Constitutional Court recalls that the rights and freedoms set forth in the European Convention and its Protocols apply directly in Bosnia and Herzegovina and have priority over all other laws, in terms of the provision of Article II.2 of the Constitution. In the case at hand, in the opinion of the Constitutional Court, the ordinary courts failed to apply the constitutional provisions which indicate that the European Convention and its Protocols have priority over all other law. Therefore, ordinary courts, deciding claims, have the constitutional obligation to apply international standards for the protection of human rights and freedoms. However, in the present case, the ordinary courts failed to do so.

Having regard to the conclusions in the present decision, the Constitutional Court holds that it is necessary that appropriate legislative measures be taken to ensure that both spouses have the right of access to court without discrimination on the ground of gender, within the meaning of Article II.4 of the Constitution and Article 14 ECHR and the right to a fair trial under Article II.3.e of the Constitution and Article 6.1 ECHR.

Languages:

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



Brazil

Supreme Court

Important decisions

Identification: BRA-2013-2-011

a) Brazil / **b)** Supreme Court / **c)** Plenum / **d)** 24.06.2009 / **e)** 101 / **f)** Claim of Noncompliance with a Fundamental Precept / **g)** *Diário da Justiça Eletrônico* (Official Gazette) 108, 04.06.2012 / **h)**.

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
 5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health.**
 5.5.1 Fundamental Rights – Collective rights – **Right to the environment.**
 5.5.2 Fundamental Rights – Collective rights – **Right to development.**

Keywords of the alphabetical index:

Assessment, impact, environmental / Environment, protection / Health, protection / Health, protection, precaution, principle / Precaution, principle / Development, sustainable.

Headnotes:

The rules issued by the Ministry of Development, Industry and Foreign Trade and the Environment National Council prohibiting Brazil's importation of used consumer goods, especially tyres, meet the constitutional right to health, to an ecologically balanced environment, and to the pursuit of sustainable economic development.

Summary:

I. The President filed a claim of non-compliance with the Supreme Court, contending that certain judicial decisions were in breach of the constitutional principles of the right to health (Article 196) and the right to an ecologically balanced environment (Article 225), given that those decisions authorised the import of worn tyres, which could be used as raw materials or as final goods in the domestic market.

The plaintiff alleged that those decisions also breached various rules issued by the Ministry of Development, Industry and Foreign Trade and by the National Counsel of the Environment, which prohibited the import of worn consumer goods, mainly, the import of tyres.

II. The Supreme Court, preliminarily and by majority, decided to hear the case, since the claim of non-compliance with a fundamental precept was the adequate procedure, because it has a subsidiary nature and the solution of controversies about the interpretation of fundamental principles does not have a specific procedure.

On the merits, also by majority, the Court partially granted the claim, to declare constitutional the rules that prohibit the import of worn tyres. Hence, the Court held unconstitutional the judicial decisions that authorised the import of these tyres. The Court excluded from this ruling those judicial decisions that became *res judicata*, if they were not challenged in a motion for relief, and the decisions that authorised the import of worn tyres from the countries of the Southern Common Market (hereinafter, "MERCOSUR"), if they were remoulded, due to a ruling of an *ad hoc* Arbitration Tribunal of MERCOSUR, on grounds of agreements signed between Brazil and other countries of the bloc.

The Court held that the rules are constitutional, on the basis that they are in compliance with the constitutional rights to health, to an ecologically balanced environment and to the pursuit of sustainable economic development. Such prohibition aims at avoiding an increase in domestic liability since there are not efficient means for an environmentally satisfactory disposal of such goods. Nowadays, serviceable tyres are recycled or recapped and those unserviceable are incinerated, emitting polluting gases in the atmosphere, or are disposed of outdoors, serving as a place for the dissemination of tropical diseases. The government must act to address this situation, either under the principle of foreseeability (which states that the government must act when there is an actual harm) or under the principle of precaution (which states that the government must act to avoid possible or future harm).

These rules also comply with the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, which, signed by Brazil and incorporated to the national legal order, allows signatories to ban the import of hazardous wastes. Furthermore, the rules are in accordance with the legality principle, since they were issued by the bodies that are responsible for the regulation of activities related to the foreign trade.

The Court also highlighted that the import of worn tyres could help the recycling industry and the creation of jobs. However, striking a balance between constitutional principles, the Court decided that the import of worn tyres actually causes more harm to the environment and that the right to free enterprise and free trade can only be ensured to economic activities that are compromised with the environment (Article 170.IV).

III. In a separate opinion, a dissenting Justice, on the preliminary question, argued that the claim of non-compliance with a fundamental precept should not be heard, because there were appeals to challenge the judicial decisions. On the merits, the dissenting Justice stated that the rules were not the adequate means to prohibit the import of worn tyres, because citizens only could be prohibited from performing an act if there was an expressly statute forbidding it, issued by the National Congress.

Supplementary information:

- Articles 170.IV, 196 and 225 of the Federal Constitution;
- Article 27 of Rule 8/1991 of the Department of Foreign Trade (DECEX, in the Portuguese acronym);
- Decree 875/1993, that ratified the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;
- Article 4 of Resolution 23/1996 of the Environment National Council (CONAMA, in the Portuguese acronym);
- Article 1 of Resolution 235/1998 of the Environment National Council (CONAMA);
- Article 1 of Rule 8/2000 of the Foreign Trade Secretariat (SECEX, in the Portuguese acronym);
- Article 1 of Rule 2/2002 of the Foreign Trade Secretariat (SECEX);
- Articles 2 and 47-A of Decree 3.179/1999;
- Article 39 of Rule 17/2003 of the Foreign Trade Secretariat (SECEX);
- Article 40 of Rule 17/2004 of the Foreign Trade Secretariat (SECEX).

Languages:

English (translation by the Court).



Identification: BRA-2013-2-012

a) Brazil / **b)** Supreme Court / **c)** Full Court / **d)** 22.06.2011 / **e)** 943 / **f)** Request for a writ of injunction / **g)** *Diário da Justiça Eletrônico* (Official Gazette) 81, 02.05.2013 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Lacuna, legislative / Omission, legislative / Power, legislative, duty to legislate / Notice, right.

Headnotes:

The Supreme Court consolidated its case-law on requests for a writ of injunction concerning legislative omission, affirming that the Court no longer merely acknowledges the legislative delay, but delivers normative decisions and sets time-periods in which legislative omission is to be addressed.

Summary:

I. This case refers to a request for a writ of injunction filed by a worker due to the legislative delay to regulate the constitutional right to the previous notice of termination according to the period worked, as guaranteed by Article 7^o.XXI of the Federal Constitution.

The plaintiff alleged that he had received only one minimum wage as paid previous notice, after he had worked several years, and contended that the previous notice should be proportional to the period worked and that the Court should declare the legislative delay to regulate such right, as the Constitution of 1988 was enacted more than twenty years ago.

II. The Supreme Court unanimously granted the request for the writ of injunction. First, the Court explained the evolution in its case-law concerning the effects of decisions on requests for writs of injunction, from only acknowledging the legislative delay, to currently admitting a normative solution to its decisions, aiming at implementing constitutionally guaranteed rights. Thus, the Court began to stipulate a term to the Legislative Branch to regulate the right and, if the gap persists, the claimant could file for damages against the Federal Government. Furthermore, the Court began to consider valid the

application of analogous sub-constitutional rules. However, the Court emphasised that, unlike other precedents (concerning the right to strike and special retirement), the previous notice proportional to the period worked does not have a normative parameter to be a reference for the normative decision. Hence, the Court debated about the best parameter to be adopted, but, due to a multiplicity of suggestions, it decided to grant the request and postpone the final proclamation of the result to another session, in order to consolidate the proposals.

In the meantime, Law 12.506 was published on 11 October 2011, regulating the previous notice proportional to the period worked. In a new session, the Court decided that the issuance of the regulating law would not make this request moot. The Court stated that the workers that were dismissed had filed this request and the Court had granted it before the Law was enacted. The Court only postponed the proclamation of the result. Hence, the Court decided that, though the law does not have retroactive effects, it is possible to adopt its parameters, which are thirty days of previous notice, after a year of work period, added with three days for each year of work in the same corporation, until the maximum of sixty days, totalling ninety days.

Supplementary information:

- Article 7^o.XXI of the Federal Constitution.

Languages:

English (translation by the Court).

*Identification:* BRA-2013-2-013

a) Brazil / **b)** Supreme Court / **c)** Full Court / **d)** 27.02.2013 / **e)** 31.816 / **f)** Appeal on preliminary injunction on request for a writ of *mandamus* / **g)** *Diário da Justiça Eletrônico* (Official Gazette) 88, 13.05.2013 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Procedure, legislative / Due process, legislative.

Headnotes:

National Congress has to vote on presidential vetoes in the time-frame stipulated in the Constitution. A preliminary decision issued in the case, because the final judgment, which must be compatible with the preliminary one, will need to have prospective effects, in order to safeguard legal certainty, given the length of time during which the failure to vote occurred, and due to the accumulation of more than three thousand vetoes on which a vote is pending. Were the definitive decision to have retrospective effects, congressional decisions taken during such period would be considered formally unconstitutional and the agenda of the National Congress would be hindered until voting has taken place on all pending vetoes.

Summary:

I. This case refers to an internal appeal filed against preliminary decision granted in a petition for a writ of *mandamus*. The preliminary decision ordered that the National Congress could not vote on the Partial Veto 38/2012 before voting in chronological order on all pending vetoes. On the other hand, it allowed the Legislative Branch to vote on other propositions, on the ground that the Article 66.4 and 66.6 of the Constitution provides that vetoes must be voted upon in the chronological order that they are submitted.

II. The Supreme Court, by majority, granted the internal appeal to revoke the preliminary decision, though it acknowledge the violation of the above-mentioned constitutional norms. The Court stated that the definitive decision will necessarily have prospective effects, in order to safeguard legal certainty, as the National Congress did not comply with the lapse to vote on vetoes during the last thirteen years and has accumulated more than three thousand pending vetoes to be voted. Thus, if the definitive decision does not have prospective effects, congressional decisions taken during such period would be considered formally unconstitutional and the agenda of the National Congress would be hindered until voting on all pending vetoes has taken place. As the definitive decision will have prospective effects and it must be compatible with the preliminary one, the Court could not uphold the preliminary decision.

III. In separate opinions, concurring Justices considered that Article 66.4 and 66.6 of the Constitution do not establish in chronological order to vote. They added that the Constitution expressly establishes the cases where the order is mandatory, as, for example, in cases of judicial orders of payments. Besides, courts in the country do not try cases in chronological order, but according to the social, political and economic context.

In other separate opinions, dissenting Justices who upheld the preliminary injunction argued that if the National Congress stays silent, even after the expiry of the time-frame for voting on a veto, it should lose its power to schedule its agenda, as established in Article 66.4 and 66.6 of the Constitution. Thus, after the expiry of the time-frame, the veto should be voted in the chronological order that it is submitted to the Legislative Branch, because the starting with the first veto regarding which the time-frame for voting expired would hinder the voting on all subsequent vetoes. They emphasised that, under the Constitution of 1969, there was a system of tacit approval of the presidential veto, if it was not voted upon in forty-five days. Hence, the aim of the Constitution of 1988 was to strengthen parliamentary discussions and to give the last word to the National Congress. However, they highlighted that, according to the Court's case law, the legislative branch could deliberate about other bills and propositions, other than presidential vetoes.

Supplementary information:

Federal Constitution of 1988:

Article 66. (...)

66.§1º - If the President of the Republic considers the bill of law, wholly or in part, unconstitutional or contrary to public interest, he shall veto it, wholly or in part, within fifteen work days, counted from the date of receipt and he shall, within forty-eight hours, inform the President of the Senate of the reasons of his veto.

(...)

66.§4º - The veto shall be examined in a joint session, within thirty days, counted from the date of receipt, and may only be rejected by the absolute majority of the Deputies and Senators, by secret voting.

(...)

66.§6º - If the period of time established in paragraph 4 elapses without a decision being reached, the veto shall be included in the order of the day of the subsequent session, and all other propositions shall be suspended until its final voting.

Cross-references:

- ADI 4.029

Languages:

English (translation by the Court).



Bulgaria

Constitutional Court

Statistical data

1 May 2013 – 31 August 2013

Total number of decisions: 5

Important decisions

Identification: BUL-2013-2-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 09.07.2013 / **e)** 13/2013 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 63, 16.07.2013 / **h)** CODICES (Bulgarian).

Keywords of the systematic thesaurus:

4.9.7.3 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Ballot papers.**

4.9.8 Institutions – Elections and instruments of direct democracy – **Electoral campaign and campaign material.**

4.9.9.3 Institutions – Elections and instruments of direct democracy – Voting procedures – **Voting.**

Keywords of the alphabetical index:

Elections, electoral law, violation / Elections, invalidation, total.

Headnotes:

The Constitutional Court may declare the total invalidation of an election where two conditions have been met – failure to comply with the general principles of electoral law set out in Article 10 of the Constitution and the finding of serious irregularities such as to vitiate the integrity of the election.

Summary:

I. The Constitutional Court received an application from 96 members of parliament from the 42nd legislature to annul the election of members of the National Assembly on 12 May 2013. The applicants alleged serious violations of the Constitution and the Electoral Code (hereinafter the EC), namely unlawful electoral campaigning on the day before and the actual day of the election by certain mass media and political parties and an alleged offence of preparing to commit fraud on 350 000 ballot papers discovered in the printing works responsible for printing the ballot papers. They also alleged violations of electoral legislation in voting taking place abroad, irregularities in the maintaining of the register of complaints by the Central Election Commission (hereinafter the CEC), and instances of vote buying in several constituencies and polling stations.

II. In accordance with the jurisdiction conferred upon it by Article 149.1.7 of the Constitution, the Court ruled on the legality of the election of a single member of parliament, of a group of members of parliament and of all 240 members of the National Assembly. In principle, where members of parliament are elected in accordance with a system of proportional representation, it is not necessary for them to be designated by name to ascertain the lawfulness of their election – it is sufficient to designate specific parliamentary mandates. Declaring the invalidation of the election of all members of parliament is certainly the most severe ruling in response to irregularities that have vitiated the electoral process. The legality of an election cannot be challenged except where there are irregularities directly contrary to the general principles of electoral law, such as equal, direct and secret suffrage (Article 10 of the Constitution) such as to vitiate the whole electoral process and modify the result. Such an approach is supported by the Venice Commission's Code of Good Practice in Electoral Matters which, in Section II.3.3e explicitly states that "The appeal body must have authority to annul elections where irregularities may have affected the outcome". In the Court's view, there is justification for the invalidation of the election in the following cases: no polling stations; limited access to polling stations; violation of the secrecy of the vote; fraud in connection with the ballot papers or electoral rolls on the day of the election; pressure on the electorate not to vote or to force them to vote against their will.

In its ruling on the allegations of violations of the rules on electoral campaigning, the Court referred to § 1.21 of the supplementary provisions of the EC which states: "within the meaning of this Code, campaigning

is an appeal for support for a candidate, a party or political coalition. If the name and symbol of a party or political coalition is placed on campaign material without an appeal for support, this shall not be considered as campaigning". Since the parameters of "campaigning" are laid down by legislation, the Court cannot give a broader definition of this concept, disregarding the legal definition. The applicants' attempt to rely on arguments to the effect that the irregularities in question "directly violated" the Constitution and not the EC could not justify a failure by the Constitutional Court to comply with its obligation to verify the lawfulness of the election on the basis of the electoral legislation. Furthermore, Article 133.6 of the EC did not prohibit the holding of topical debates or the right of citizens to receive information on matters of direct concern to them the day before the election or on the actual day of the election.

In principle, the violation of the prohibition of campaigning laid down in the EC constituted an administrative offence. The day before the election, the media broadcast various items of information and the representatives of certain political parties took advantage of this to pursue their electoral objectives. The evidence submitted to the Court showed that in the cases where the CEC had found administrative offences, it had ruled in the context of the administrative proceedings it had initiated and had taken no further action in respect of the complaints submitted the day before the election for which the investigations carried out had not found any violation in the light of the legal definition of the concept of "campaigning".

The Court found that there were no objective criteria to determine whether and to what extent a violation of the prohibition of campaigning the day before the election had been able to influence voter turnout and the election results. It was not possible to establish a causal link between the campaigning carried out by those taking part in the electoral process and the final result of the election through legal means which would produce conclusions that could serve as evidence before the Court. In principle, the choice exercised by voters depended on their mental processes and emotional experiences – two factors which could not be revealed by legal means in the course of the electoral process.

With regard to voter turnout estimates, it was not possible to conclude from the diverging results published the day before the election by the different survey institutes that these had influenced voters. Moreover, the publication by the prosecution service of a press release a few hours following the broadcasting of information by the media concerning

the discovery of fake ballot papers and the fact of having initiated a preliminary investigation could not be interpreted as participation in the electoral process or as a violation of the prohibition of electoral campaigning. The prosecution service was obliged to discharge the functions assigned to it without taking account of the electoral process which, by its very nature, was a political process.

In the Court's view, even if the irregularities during the voting taking place abroad alleged by the applicants could be proved, they would not be such as to vitiate the lawfulness of the election and justify total invalidation. In principle, such allegations of irregularities could be dealt with by the Constitutional Court only if the election was challenged by the members of parliament designated by name, which was not the case.

With regard to the allegations that four reports of irregularities submitted by citizens had been forwarded late to the CEC, it should be borne in mind that the EC did not lay down any timeframes within which the CEC must decide on complaints submitted to it except in the case of complaints against the decisions or actions of the electoral commissions. In addition, the complaints referred to in the application were not directed against those commissions and the CEC could deliver its decision even after the elections, given that it needed time to examine them.

The applicants also alleged that the CEC's register of complaints had not been maintained in accordance with the electoral legislation. However, the EC set forth a single obligation for the CEC – that of creating and keeping up-to-date an electronic register of the complaints submitted to it and the decisions issued relating to those complaints.

In support of their application, the applicants had also referred to criminal proceedings regarding vote buying that had been initiated and completed, and a journalistic investigation into that subject. According to the information provided by the prosecution service itself, 70 preliminary investigations for electoral irregularities had been initiated on 27 May 2013. All concerned the question of the criminal liability of individuals having committed offences under the electoral law such as requesting, offering, giving or receiving material advantages relating to the exercise of the right to vote. However, they did not always relate to the effective exercise of the right to vote against the voter's will.

In conclusion, the Constitutional Court held that the electoral offences, those currently being investigated and those that had been substantiated, even if they were to lead to final convictions, were not such as to

affect the overall result and did not constitute a reason for the total invalidation of the election of members of parliament in the 42nd legislature.

Languages:

Bulgarian.



Chile

Constitutional Court

Important decisions

Identification: CHI-2013-2-007

a) Chile / **b)** Constitutional Court / **c)** / **d)** 18.06.2013 / **e)** 2207-2012 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

5.2 Fundamental Rights – **Equality**.

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:

Cohabitation, certainty / Divorce, couple, separation, proof / Proof, standard / Provision, transitional.

Headnotes:

Differences in ruling on evidence for determining the date of cessation of cohabitation between marriages celebrated before and after the new Civil Marriage Law do not infringe the right to equality.

Summary:

I. The applicant, a judge hearing a case on divorce, requested the Constitutional Court to declare inapplicable the ruling of evidence for determination of the date of cessation of cohabitation established in the Civil Marriage Law. The applicant judge contended that the transitional norm is unconstitutional because it regulates differently those marriages celebrated prior to the promulgation of the new Civil Marriage Law (in 2004) in contrast to those celebrated subsequent to its enactment. The judge contended that this differentiation infringes the right to equality, in particular the equal exercise of procedural rights, since the cessation of cohabitation's date of those marriages celebrated after the promulgation of new Civil Marriage Law, as in the instant case, requires more elements of proof for its determination (i.e. a notarial deed). The transitional provision, on the other hand, establishes that no ruling on evidence is required to prove the date of the cessation of cohabitation to marriages celebrated prior to the entry of the new law.

II. The Constitutional Court rejected the applicant's arguments and held that the impugned norm is constitutional. The Court declared that the challenged differentiation is logical and reasonable to the extent that it seeks to prevent, by means of simulation, a prejudice to the objectives of the rule, as might occur in the event of a fraudulent agreement between spouses regarding the date of cessation of cohabitation. This possibility of simulation was not a possibility for those marriages celebrated before the promulgation of Civil Marriage Law.

Languages:

Spanish.



Identification: CHI-2013-2-008

a) Chile / **b)** Constitutional Court / **c)** / **d)** 18.06.2013 / **e)** 2250-2012 / **f)** / **g)** Official Journal, 06.12.2012 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Family, protection / Parental benefit / Parental support.

Headnotes:

The exclusion of full salary payment for civil servants during postnatal parental leave is not discriminatory and is not regressive for social security rights.

Summary:

I. In the year 2011, a labour reform established a new system of parental leave. In addition to parental leave that started from 6 weeks before birth and concluded at 12 weeks after birth, the new parental leave added

another 12 weeks when parental leave concludes. The latter is called “postnatal parental leave” and differs in some respects to parental leave. Thus, parental leave is only granted for the mother of the child (exceptionally granted for the father, i.e. in the event of the mother’s death), but “postnatal parental leave” can be granted to the father from the seventh week, until the 12 weeks of leave are completed. During the leave, the beneficiary becomes the subject of a state subsidy with a limit. So, when the mother has parental leave she becomes the subject of a subsidy paid by the state (not the employer) and also when she is on “postnatal parental leave”, but this subsidy has a limit (more than US\$ 3.000), so she does not receive a full wage if her salary is above this limit. It must be noted that during parental leave, the mother has full leave, meaning that she has the inalienable right to suspend her work obligations. Meanwhile, during the postnatal parental leave, the mother can choose whether she maintains full leave or works part time during the 12 weeks. This latter option was established by the legislator in order to diminish the impact of the limitation of the subsidy for workers that have a salary exceeding the limit, so they could earn a wage that complements the subsidy.

The two types of parental leave are granted for private sector workers as well as for civil servants. However, there are some differences concerning the limitation of the subsidy for private sector workers and public servants. While in the case of employees the subsidy has the same limitation for parental leave and postnatal parental leave, public servants have the right to full payment of their wage, with no limitation, for any leave (whether the cause is for illness or for pregnancy). Nevertheless, the labour reform excluded the full wage benefit for public servants during postnatal parental leave, so any public servant who earns above the subsidy limit obtains only the established subsidy amount during that period.

The plaintiffs are judges who gave birth and who are now beneficiaries of the postnatal parental leave. During the parental leave they received full wages, according to the benefit established for public servants for any leave, but since they earn wages in excess of the subsidy limits, their salary during the postnatal parental leave period will be considerably diminished. They alleged the inapplicability for unconstitutionality of the legal provision that was introduced by the labour reform that excludes full wage benefit during the postnatal parental leave, since during that period public servants only receive salary up to the subsidy limits. The plaintiffs contended that the exclusion of the full salary benefit during postnatal parental leave period infringes the rights to equality and non-discrimination in the

workplace, since postnatal parental leave is mostly used by women and there is an exclusive burden to be carried by them. They also claimed an infringement of the right to social security, because the exclusion of full payment is a regression on their rights, and that the norm consequently infringes the protection of family granted by the Constitution. They also contended that since there is no possible negotiation for salary amounts for public servants, although they may work part time, the amount of their wages cannot be increased through negotiation, unlike private sector workers.

II. The Constitutional Court held that the impugned norm is constitutional, on the basis that parental leave and postnatal parental leave are two different institutions granted on diverse grounds, and of different natures. Thus, parental leave is granted for the mother in order to recover from pregnancy and its associated aspects, whereas postnatal parental leave is provided to allow the parents to bond with their child. In this vein the exclusion of full salary payment during postnatal parental leave is based on the fact that this social benefit is not a leave for illness or pregnancy, as in the case of parental leave, and thus there is no infringement of the equality of female public servants compared to male public servants, since full salary payment during any leave applies indistinctly to men or women, but in case of postnatal parental leave, the goals pursued by the social institution are different (bonding with the child) and therefore its nature. The legislator has established a new social institution and, although perfectible, in its structure by excluding full salary payment there is no unconstitutional consequence. For that reason, the Court also rejected the claim of an infringement of the right to social security and eventual regression in the social benefits, since the postnatal parental leave has its own structure established by the legislator. Finally, the Court held that there is no infringement to family protection, since the establishment of this postnatal parental leave pursues precisely that goal, by granting a new social institution that permits more time for employees to reconcile family and work.

Languages:

Spanish.



Identification: CHI-2013-2-009

a) Chile / b) Constitutional Court / c) / d) 21.06.2013 / e) 2487-2013 / f) / g) / h) CODICES (Spanish).

Keywords of the systematic thesaurus:

4.9.8.3 Institutions – Elections and instruments of direct democracy – Electoral campaign and campaign material – **Access to media.**

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

Keywords of the alphabetical index:

Election, primaries, presidential / Election, propaganda, TV, free of charge.

Headnotes:

The establishment by law of a free-of-charge mandatory broadcast space for presidential candidates in a primary election is not contrary to the Constitution.

Summary:

I. The Constitutional Court reviewed the constitutionality of a bill on mandatory electoral space for open television (hereinafter, “TV”) broadcasting. This bill establishes that all open TV channels have to grant, free of charge, a 15-minute space for primary election advertising for a period of 15 days to all political parties or coalitions that participate in primary elections to determinate their own presidential candidates for the general election. Since the issues regulated by this bill concern primary elections regulations, according to the Constitution, it has the nature of organic law and therefore a constitutional review by the Court is mandatory.

During the bill’s discussion a number of parliamentarians raised questions concerning the constitutionality of the bill, and the Court examined whether the bill is constitutional or not, on the basis of those questions:

- a. is it unjust to establish a mandatory electoral space on TV for those who do not use the primary election mechanism, since they are excluded from using that space on TV?;
- b. is the obligation to open TV broadcasters a discriminatory public burden that infringes their autonomy?; and

- c. could it be an infringement upon the equality between political parties and independent candidates?

II. The Constitutional Court rejected these contentions by stating that the reviewed bill is constitutional.

First, the Court noted that primary elections are a mechanism established in the Constitution that political parties may use voluntarily for the election of candidates for public office. The results of those primary elections are binding for the political parties. The fact that this primary election mechanism is granted by the Constitution implies that such elections are not a privilege for political parties, nor do they establish a monopoly on electoral participation. This mechanism is also a public election, because all public electoral organs are involved in the primary election process. Second, the Court stated that television has a particular regulation. This particular regulation is given by the Constitution itself since it recognises a restricted ownership of broadcasting rights and also administrative supervision of television broadcasting. Those limitations are justified by the strong impact and influence of TV on audiences and the general public, involving therefore a public interest. Broadcast is also considered as a common good. Finally, the Court noted that electoral advertising can only be broadcast during periods established by law: both the period of general election and primary elections.

The Court also stated that this burden imposed on TV companies is just, because the limitation to property is proportionate and reasonable, considering the public function of broadcasting. This burden is proportionate considering the entire time for electoral space established by law (only 15 minutes for a period of 15 days). It is also proportionate considering other burdens imposed on TV channels, i.e. cultural programmes that must be broadcast at last for an hour per week. The Court also stressed that the electoral space broadcast schedules are agreed between TV operators and political parties, so TV channel owners have input into the broadcasting schedules.

The Court observed that TV companies are intermediary groups and therefore their autonomy is recognised by the constitutional system, but the particularities of broadcasting justify state regulation on that activity. Television is constitutionally structured in a way that it has to broadcast “correctly”, meaning as such guarantees for pluralism and democratic principles.

The Court held that there is no infringement of property rights by the legislator, because when a public function, such as broadcasting, is involved, a limitation to property is justified. The goal pursued by the bill is to grant an informed vote in a popular election, a primary election in this case, and television broadcasting fulfils that goal.

The Court held that the bill does not discriminate against independent candidates. Although the Constitution recognised the principle of equality between independent candidates and party candidates, the structure of primary election law allows independent candidates to participate in a political pact and run for a primary election against political party candidates. The Constitution establishes a primary election guarantee for the political parties, but they can invite independent candidates to participate in their primary elections. As such, primary elections guarantee more internal democracy within political parties and also decisions as to inviting an independent candidate for participation safeguard the autonomy recognised for political parties.

Finally, the Court held that mandatory electoral space broadcasting for primary elections promotes political pluralism and is a way to exercise an informed vote, and therefore is not contrary to the Constitution and a democratic society.

Languages:

Spanish.



Identification: CHI-2013-2-010

a) Chile / **b)** Constitutional Court / **c)** / **d)** 04.07.2013 / **e)** 2133-2013 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

5.3.14 Fundamental Rights – Civil and political rights – **Ne bis in idem.**

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

Keywords of the alphabetical index:

Public procurement, exclusion / Worker, fundamental right, protection.

Headnotes:

The exclusion for public contract bidding for those enterprises that have been sanctioned for infringement of worker's constitutional rights is not unconstitutional.

Summary:

I. The constitutional action concerned the constitutionality of a law which excludes companies from bidding for public contracts, for two years, which have been convicted by a labour judge for participating in an anti-union practice or an infringement of workers' constitutional rights.

The applicant is a company that was convicted by a labour tribunal for infringement of the fundamental rights of a worker and which was accordingly excluded from public contract bidding for two years. The applicant contended that this exclusion of public contracts bidding was unconstitutional because it infringed due process, the *ne bis in idem* principle and the right of equality and non-discrimination on economic issues.

First, the applicant argued that due process is infringed because the legislator imposes a sanction with no previous trial, denying therefore the right to defence on trial and the presumption of innocence. Second, the applicant contended that this exclusion constitutes double-jeopardy, because the company is being sanctioned twice for the same thing, namely the conviction by the judge and the exclusion from bidding for public contracts. Finally, the applicant argued that the impugned norm is unconstitutional because it infringes its right to equality and to non-discrimination on economic matters, because its possibilities to participate in public procurement have been irrationally diminished and disadvantaged as against other participants in public procurement exercises.

II. The Constitutional Court rejected the applicant's claim and held that the impugned norm is constitutional.

The Court declared that the exclusion established by law does not infringe the principle of due process. The sanction is a consequence of a previous trial, in which the applicant was convicted for its infringement of workers' constitutional rights. The procedure was established by law and guarantees all elements of due process.

The Court also held that there is also no infringement of the *ne bis in idem* principle. The Court states that there is number of legal interests protected by labour law by sanctioning infringement of a worker's constitutional right and the exclusion from public contract bidding of those companies that have been convicted for such infringement of fundamental rights. Thus, on one hand labour law sanctions the illicit conduct of an employer by breaching the basic human rights of a worker in his dismissal; on the other hand the impugned norm establishes the unsuitability of a company to participate in public bidding, because of its infringement of a worker's constitutional right.

Finally, the Court held that the sanction established by the legislator is rational and proportional. Thus, the exclusion from participating in public contracts for companies that have been convicted of workers' rights infringement is a differentiation that relies on a rational justification compared to those companies that remain included in that public bidding. First, because this exclusion is necessary to efficiently protect workers' constitutional rights in the workplace, meaning those rights every citizen is entitled to, even in the workplace. This protection of constitutional rights is highly important and this sanction established by law is adequate to pursue that goal. The Court also noted that no enterprise can deny the rule of law and that therefore it must assume the consequences of its actions.

Languages:

Spanish.



Identification: CHI-2013-2-011

a) Chile / **b)** Constitutional Court / **c)** / **d)** 04.07.2013 / **e)** 2273-2012 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.
 5.2 Fundamental Rights – **Equality**.
 5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.
 5.3.9 Fundamental Rights – Civil and political rights – **Right of residence**.

Keywords of the alphabetical index:

Discretion, administrative / Discretion, excessive / Expulsion, foreigner / Expulsion, procedure / Foreigner, right / Immigrant, expulsion / Immigration, procedure.

Headnotes:

Discretionary faculties to grant visas for immigrants requesting permanent residency are unconstitutional by not considering the equal treatment guaranteed by the Constitution to foreigners and nationals.

Summary:

I. The applicant is a Haitian national who was ordered to leave the country because he did not regulate his residency requirements. He challenged the Law on Foreigners in Chile as inapplicable due to unconstitutionality.

The particular norm impugned grants to the Ministry of Interior the faculty to grant visas discretionally, regarding to criteria of "convenience", "utility to the country" and international reciprocity. Prior to the Minister's decision the police must report to the Ministry providing guidelines for the grant or refusal of a visa to the individual concerned.

Among his arguments, the applicant contended that the order to leave the country, based on that Law, is an infringement to the right to equality between foreigners and nationals. He also claimed that the order infringes the presumption of innocence, the right to not to be judged by special commissions, and the right to due process.

II. In this particular case the Court examined the discretionary faculty of the Ministry of Interior to grant visas, in particular considering the “utility to the country and convenience” criteria, all of which is supported by a police report that provides guidelines to the administration to grant or reject a visa.

The Constitutional Court declared that the impugned norm is unconstitutional, because it infringes the right to equality, to equal protection of rights and to free movement and residency.

The Court observed that the Constitution recognises an equal entitlement of constitutional rights between nationals and foreigners, since the Fundamental Law does not make any difference between such entitlement by guaranteeing to “all persons” the civil rights. Thus, the right to free movement and residency is equally entitled to nationals and foreigners. The latter implies the right for foreigners to enter and exit the country under the condition of observing national law. Of particular importance is the case of migrants since they have the will to reside permanently in the country and so the protection of free movement and residency rights has a wider recognition.

The Court held that, since the Constitution recognises equal rights to foreigners and nationals, and considering that it also does not establish any ruling to deprive the right to free movement and residency to foreigners, the faculties granted to the administration must be reviewed according to constitutional rights standards. Thus, although foreigners have the right to emigrate, this does not mean an obligation on States to accept immigration, except for certain cases such as political refugees or asylum. The State may impose conditions on the entry of foreigners, but once the immigrant enters the country legally, the intensification of the protection of his rights increases. And so an immigrant who has legal residence in the country has the right to equal treatment of his constitutional rights, like a national.

The discretionary faculty granted to the administration must fulfil the proportionality test. In this vein, the criteria for granting a visa based on “utility for the country” and “convenience” are questionable. Since the vulnerability in society of a foreigner is evident, the establishment of social “utility” or “convenience” as a parameter for justifying the discretionary faculty of the administration can only be seen as an infringement of constitutional rights.

Finally, the Court noted that the police report does not satisfy constitutional standards as well. First, the report is binding on the administration, and the evidence shows that such reports contain only poor

arguments and incomplete information from the visa solicitor. Finally, the report cannot be refuted or invalidated by the immigrant. Therefore it infringes the equal protection of rights.

Languages:

Spanish.



Croatia

Constitutional Court

Important decisions

Identification: CRO-2013-2-007

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 30.04.2013 / **e)** U-III-5807/2010 / **f)** / **g)** *Narodne novine* (Official Gazette), 57/13 / **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.**

4.16.1 Institutions – International relations – **Transfer of powers to international institutions.**

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

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

Keywords of the alphabetical index:

European Convention on Human Rights, applicability / Criminal proceedings, court, role.

Headnotes:

The Constitutional Court, in proceedings instituted by constitutional complaint, must ensure that the competent bodies of state and public authority uphold their obligations to safeguard human rights and fundamental freedoms guaranteed by the Constitution. Since the Republic of Croatia, as a sovereign state, transferred part of its judicial jurisdiction to the European Court of Human Rights, in proceedings instituted by constitutional complaint before the Constitutional Court the legal standards which the European Court of Human Rights has built into its case-law are applied, and because a decision by the Constitutional Court is the final national decision in those proceedings, against which applicants are entitled to file an individual application to the European Court of Human Rights, the Constitutional Court must follow the rules that apply to the assessment of evidence in proceedings before

the European Court of Human Rights. Criminal prosecution authorities and the criminal courts must therefore take this obligation of the Constitutional Court into account, and follow the rules of the European Court of Human Rights on the assessment of evidence.

Only in this way can the implementation of the international obligation which the state accepted by ratifying the European Convention on Human Rights be ensured, thereby allowing disputes to be resolved at national level by direct application of European Convention on Human Rights and the case-law of the European Court of Human Rights in line with the principle of the subsidiarity of the European Convention on Human Rights supervisory system.

Summary:

I. The applicant lodged a constitutional complaint regarding criminal proceedings in which he had been found guilty by a final court judgment of several criminal offences in the field of business operations as was sentenced to a single prison sentence of four years.

He alleged that there had been a violation of the constitutional guarantee of equality of all before the law, prescribed by Article 14.2 in conjunction with the right set out in Article 18 of the Constitution (the right to effective resolution of an appeal against individual legal acts rendered in the first instance) and the right to a fair trial guaranteed by Article 29 of the Constitution and by Article 6 ECHR.

II. The Constitutional Court examined this case from the perspective of the right to a fair trial guaranteed by the Constitution and European Convention on Human Rights. It noted that in its case-law so far, which is aligned with the case-law of the European Court of Human Rights, it has established a series of principles which must be followed in order for court proceedings to be deemed fair. Courts must heed these principles when, in rendering their decisions, they assess, with the advantage of direct questioning, the facts and circumstances of the specific case, applying the relevant law. The task of the Constitutional Court in guaranteeing the constitutional and European Convention on Human Rights right to a fair trial is to examine whether the Court respected these relevant principles in the specific case.

In terms of the foreseeability of the applicant's criminal conviction, the Constitutional Court pointed out that the principle of a fair trial, as guaranteed by Article 29.1 of the Constitution, requires courts to state and explain in their judgments the legal and other grounds in commercial or other relevant law, or

case-law, or, where appropriate, the general rules of business, or commercial usage or commercial custom or commercial practice (hereinafter, the “relevant grounds”) that are relevant for the commission of the criminal offence under consideration.

This obligation on the part of the criminal courts stems from Article 292.1.6 of the Criminal Code, which sets out the criminal law responsibility of a person who, in order to obtain unlawful pecuniary gain for themselves or another legal person, “in another manner flagrantly violates the law or the rules of business regarding the use and management of assets”. The legislation specifies flagrant violation “of the law or rules of business”, and so criminal courts are expressly bound to state and explain in their judgments which laws or rules of business are involved in each specific case in which somebody is convicted on these legal grounds.

To remove all doubt in this matter, and for reasons of legal security, legal certainty and legal foreseeability and the specific circumstances of this case, the Constitutional Court held that the relevant grounds should have been stated and explained in the disputed judgments. However, if the case-law applicable to the applicant’s case did not in fact exist at the relevant time, the competent criminal courts should have explained in their judgments the legal situation that did exist and should have explained the applicant’s case in a manner appropriate to that situation.

Respect for these standards avoids the creation of the impression that criminal courts do not place clear and comprehensible limitations on the conduct of entrepreneurs, which would be more in the realm of civil law responsibility, and the creation of the impression that criminal courts do not present convincing arguments to show that the conduct of entrepreneurs does belong in the realm of criminal law and that it meets the definition of specific criminal offences in the area of business operations. It also avoids the impression being formulated that criminal courts sometimes engage in analysis and assessment of the economic justification of business moves by entrepreneurs, replacing the entrepreneurs’ business assessments – however mistaken or bad they may be – with their own.

The Constitutional Court held that the courts in the disputed judgments had failed to state or explain sufficiently the relevant grounds for the commission of the criminal offences for which the applicant was convicted, and in conjunction with the omissions in the rest of the courts’ findings, those omissions led to a general violation of his right to a fair trial.

In terms of the impact of the final civil judgment on the criminal proceedings against the applicant, the Constitutional Court noted that from the final civil judgment on the applicant’s ownership rights it stems that the entire series of actions by the applicant described in point 1 of the operative part of the first-instance judgment, to which the Supreme Court referred when it mentioned an incriminated “series of carefully planned and carefully coordinated business operations”, was lawful. It concluded that that the competent courts did not examine with sufficient care or at all the impact of the civil judgment regarding the applicant’s acquisition of ownership rights on the factual description and qualification and scope and definition of the criminal offences in points 1 and 5 of the first-instance judgment, even after that judgment became final.

The Constitutional Court found this omission to be a violation of the applicant’s right to a fair trial, both separately and in conjunction with the violation mentioned above.

In view of the procedural failings by the competent criminal courts, as a result of which the criminal proceedings against the applicant will have to be repeated in their entirety, the Constitutional Court did not deem it necessary to continue with a detailed review of his objections regarding the procedural failings by the Court in terms of the evidence presented and the assessment of the evidence for each individual criminal offence of which the applicant was convicted.

The Court deemed it sufficient to repeat the relevant legal standpoints of the European Court of Human Rights on that question, which were also accepted by the Constitutional Court.

Due to the quashing of some points of the operative part of the first- and second-instance judgments, and to avoid any possible misunderstanding which the partial quashing may cause, the Constitutional Court established that on the basis of this decision, the applicant should be released immediately.

Cross-references:

- Decision and Ruling no. U-III-3304/2011, 23.01.2013, *Bulletin* 2013/1 [CRO-2013-1-002];
- Ruling nos. U-I-1085/2000, U-I-23/2001, U-I-717/2001 and U-I-4025/2005, 30.04.2008;
- Ruling no. U-I-1455/2001, 24.11.2004;
- Ruling no. U-I-4142/2010, 14.06.2011.

European Court of Human Rights:

- *Delcourt v. Belgium*, no. 2689/65, 17.01.1970, Series A, no. 11, *Special Bulletin Leading cases* [ECH-1970-S-001];
- *Roche v. the United Kingdom* [GC], no. 32555/96, 19.10.2005;
- *Ireland v. the United Kingdom* [GC], no. 5310/71, 18.01.1978, Series A, no. 25, *Special Bulletin Leading cases* [ECH-1978-S-001];
- *Nachova and others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, 06.07.2005;
- *Soros v. France*, no. 50425/06, 06.10.2011;
- *Ahorugeze v. Sweden*, no. 37075/09, 27.10.2011;
- *Olujic v. Croatia*, no. 22330/05, 05.02.2009;
- *Suominen v. Finland*, no. 37801/97, 01.07.2003;
- *Ekbatani v. Sweden*, no. 10563/83, 26.05.1988;
- *Borgers v. Belgium*, no. 12005/86, 30.10.1991;
- *Erkapić v. Croatia*, no. 51198/08, 25.04.2013;
- *Sevinç and others v. Turkey*, no. 8074/02, 08.01.2008;
- *Bykov v. Russia* [GC], no. 4378/02, 10.03.2009;
- *Lisica v. Croatia*, no. 20100/06, 25.10.2010;
- *Barım v. Turkey*, no. 34536/97, 12.01.1999;
- *Jalloh v. Germany* [GC], no. 54810/00, 11.07.2006;
- *Laska and Lika v. Albania*, nos. 12315/04 and 17605/04, 20.04.2010;
- *Bönisch v. Austria*, no. 8658/79, 06.05.1985.

Languages:

Croatian, English.



Identification: CRO-2013-2-008

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 22.05.2013 / **e)** U-II-1118-2013 *et al* / **f)** / **g)** *Narodne novine* (Official Gazette), 63/13 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.3.3 General Principles – Democracy – **Pluralist democracy.**

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

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

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

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

Keywords of the alphabetical index:

Decision, executive, minister / Education, duty of the state / Education, programme, parents' conviction / Education, policy / Procedure, education, programme, defect.

Headnotes:

The role of the Constitutional Court is not to assess public policy. Its task is to assess the processes and outcomes of the legal regulation of individual areas to which those public policies relate. The state does not have absolute freedom in the realm of the means or the aims of public policies.

The essential principles on which a democratic society is based, within the meaning of Articles 1 and 3 of the Constitution (pluralism, tolerance and free-thinking), have a procedural aspect. Namely, the democratic nature of the procedure, within which social dialogue takes place on questions of general interest, is what the act itself, as the outcome of that procedure, may define as acceptable or unacceptable in Constitutional law.

The Constitution guarantees parents the right and freedom to decide independently on how their children are brought up, and establishes their responsibility regarding the right of each child to full and harmonious development of their personalities. This means that the right or freedom of parents to decide independently on their child's upbringing is limited by the right of the child itself to the full and harmonious development of its personality. From this right of the child is derived the obligation of the state to organise the public school system in such a way as to ensure the full and free development of the child's personality.

A positive obligation of the state exists in the area of the public school system, within the meaning of Article 63.1-2 of the Constitution and Article 2 Protocol 1 ECHR. From the responsibility of parents to ensure the rights of their child to a full and harmonious development of its personality stems the obligation of the state, when forming teaching programmes, to respect the different convictions of parents and their constitutional right and freedom to decide independently on the upbringing of their own

children. This constitutional obligation of the state may only be implemented when the parents are included in the process of forming the teaching content.

Therefore, the state is under a constitutional obligation to enable parents to participate in the process of creating teaching content; this is especially important in terms of teaching content relating to the differing “convictions” or “beliefs” of parents.

Summary:

I. Three natural persons, one political party and two associations of citizens asked the Constitutional Court to assess the conformity with the Constitution and the law, and a decision was adopted to repeal the Decision to Introduce, Monitor and Evaluate the Implementation of the Health Education Curriculum in Primary and Secondary Schools of 31 January 2013 of the Minister of Science, Education and Sports (hereinafter, the “Decision”), and its integral part: the Health Education Curriculum (hereinafter, the “Curriculum”).

The Curriculum consists of the following parts: introduction, suggestions for teachers and professional associates and a list of recommended literature, a table with the four teaching modules (I Healthy Living, II Preventing Addiction, III Prevention of Violent Behaviour and IV Sexual/Gender Equality and Responsible Sexual Behaviour) according to the school years and the number of lessons within home room classes, and a table with planned teaching content and expected outcomes.

The applicants disputed the conformity of the Decision with the Constitution, certain international acts (e.g. Article 9 ECHR and Article 2 Protocol 1 ECHR) and the law, alleging the following: no public debate was held before the Decision was adopted, the Curriculum was not subjected to any independent review, nor were parents’ councils given the possibility of expressing their opinion. Furthermore, the Curriculum was prepared almost in secret and imposed “overnight”, leaving schools with only two days to begin its implementation; the National Education and Teacher Training Council was also excluded from the process of preparation of the Curriculum, whose function, amongst other things, is to monitor the development of the national curriculum; the content of Module IV of the Curriculum is formative rather than informative in character, that is, it is not ethically neutral, which is in breach of the right of parents to choose the manner in which their children are brought up in a way that is ethically acceptable to them; other materials from the disputed

Module IV of the Curriculum are inappropriate for the age group they are intended for, etc.

II. The Constitutional Court did not consider the content of the Decision or the alleged value system ascribed to it by the applicants, but exclusively the procedural aspect of the Decision.

The right of parents to decide independently on the upbringing and education of their children is guaranteed by Article 63.1-2 of the Constitution. The responsibility of parents to ensure the right of the child to a full and harmonious development of its personality is developed in Article 93 of the Family Act. The responsibility of parents, within the meaning of Article 63.2 of the Constitution, is limited by the right of the child to a full and harmonious development of its personality. This means that parents do not have the right to keep their children in ignorance and prevent them from learning basic information or content important for the full and harmonious development of their personality. It is the task of the public school system to be neutral and, in a balanced teaching programme, in cooperation with parents, to provide children with basic information, which must be presented in an objective, critical and pluralistic manner.

In the Constitutional Court’s view, the state has not met its procedural, constitutional obligation to align the content of health education in state/public schools in a balanced manner with the constitutional right and freedom of parents to bring up their children. The process of the legal formation of the content of health education showed a significant lack of a democratic, pluralistic approach. The outcome of that process, the Decision, is not in conformity with Article 63.1-2 of the Constitution in the procedural aspect.

The content of health education for all schools in the national territory, as conceived for the 2012/2013 school year, was created in a national curriculum, which the competent Ministry adopted in the form of a regulation with binding legal force. The Constitutional Court has deemed it unacceptable that enactment of a regulation with such content and such legal force was not preceded by obtaining the opinion of parents’ councils (Article 137.4 of the Primary and Secondary School Education Act) nor was the National Council for Education and Teacher Training included in the process (Article 89.1.2 of the Primary and Secondary School Education Act), nor was any public debate conducted within a democratically organised institutional procedure on the content of that education programme, which one could reasonably expect to be controversial (Article 79 of the Act on the State Administration System). The enactment of the regulation was not even preceded by full preparation

in a technical, organisational and educational sense. It was especially unacceptable that the regulation came into force when the school year in which it was to be implemented (2012/2013) had already begun.

The applicants were only disputing Module IV of the Curriculum in terms of constitutional law. The Constitutional Court, however, abolished the Decision in its entirety, since the factors that were disputed under constitutional law related to the entire decision.

Cross-references:

European Court of Human Rights:

- *Campbell and Cosans v. The United Kingdom*, nos. 7511/76 and 7743/76), 25.02.1982, Series A, no. 48, *Special Bulletin Leading cases* [ECH-1982-S-001];
- *Folgerø and Others v. Norway* [GC], no. 15472/02, 29.06.2007.

Languages:

Croatian, English.



Identification: CRO-2013-2-009

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 11.06.2013 / **e)** U-VIIA-3278/2013 / **f)** / **g)** *Narodne novine* (Official Gazette), 71/13 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

4.9.9 Institutions – Elections and instruments of direct democracy – **Voting procedures.**

4.9.11.1 Institutions – Elections and instruments of direct democracy – Determination of votes – **Counting of votes.**

Keywords of the alphabetical index:

Dispute, electoral / Election, invalidity / Election, municipality / Election, result / Election, vote count, irregularity, relevance / Election, recount.

Headnotes:

Ballot papers cannot be recounted simply because the results of the elections show a small difference between candidates; a difference of just one vote is not sufficient grounds for a recount. If the legislature had intended the difference in the number of votes between the candidates to be a legally relevant reason for a recount of the ballot papers, it should have prescribed a general legal rule, of universal application, to establish what difference in the votes would result in the statutory obligation to conduct a recount of votes. Until such a rule enters into force, there must be adequate, objectively justified and relevant reasons for a recount, which must be explained. The recount procedure would then need to be formalised and conducted by the competent election body, especially when it is conducted at the order of the competent body by another election body (without competence). In the situation outlined above, a clear and unambiguous definition would be needed of the task of the election body without competence, and the purpose which the data obtained by the recount of the votes by the body without competence would serve and the effect of this.

Summary:

I. The political party Croatian Democratic Alliance of Slavonia and Barania (hereinafter, the “applicant”) lodged an appeal with the Constitutional Court against the decision of the County Election Commission of Osijek-Barania County (hereinafter, the “CEC”) which had rejected its objections regarding irregularities which occurred in the proceedings to elect the mayor of the Town of Belišće as being not well-founded.

The applicant pointed out that during the second round of voting for the election of the mayor of the Town of Belišće and his deputies, the Town Election Commission of the Town of Belišće (hereinafter, the “TEC”) and the CEC acted contrary to the Constitution and the Local Elections Act; certain irregularities occurred in the election proceedings. The actions by the competent election commissions, according to the applicant, had a direct impact on the result of the second round of voting in the mayoral elections because the challenged CEC decision changed the election result whereby Croatian Democratic Union’s candidate, Dinko Huis, LLB, won 2289 votes, and the applicant’s candidate Dinko Burić, MD, won 2288 votes. The Croatian Democratic Union’s candidate Dinko Huis was elected mayor of the Town of Belišće, although according to minutes taken by TEC Belišće, after the recount of votes of 3 June 2013, the election was won by 1 vote by the applicant’s candidate Dinko Burić.

II. The following facts and circumstances, related to two ballot papers (one from polling station no. 5 and the other from polling station no. 6), were found to be of relevance in terms of the legal resolution of this election dispute. From the results of the elections for mayor of the Town of Belišće on 3 June 2013, it was established that there were two ballot papers missing from the ballot boxes, that there was a difference between the total number of voters who came to vote (4691) and the total number of voters who voted, based on the number of ballot papers found in the ballot boxes (4689). These results are based on the data contained in the minutes of the election committees of 2 June 2013.

It was not disputed that a smaller number of ballot papers than the number of voters who cast their votes at a polling station was permitted by law; this was not considered to be an irregularity in election procedure. Therefore, the initial finding that there were two ballot papers fewer in the ballot boxes (4689) than the total number of voters who cast their votes on 2 June 2013 (4691) could not have aroused any suspicion in the regularity and legality of the voting procedure conducted.

However, in the procedure to recount the ballot papers, which the TEC conducted on 3 June 2013, it was established that there was no difference between the total number of voters who arrived to vote (4691) and the number of voters who actually voted, based on the number of ballot papers found in the ballot boxes (4691). The TEC later established (the applicant alleges only on the sixth recount of the ballot papers) that those two ballot papers had actually been in the ballot boxes all along, but the election committees had "counted them wrongly".

The Constitutional Court noted that, in view of the small difference in the number of votes for one or the other candidate, the fact that those two ballot papers, according to the TEC, which the CEC did not consider later – were actually in the ballot boxes at polling stations nos. 5 and 6 "from the start" (and as a result also in the envelopes in which the ballot papers were placed on 3 June 2013) was actually a new relevant fact, to which the TEC and the CEC were obliged to pay heed, and to explain in writing all the facts and circumstances related to it. The competent election commissions did not do this. Furthermore, no official check was undertaken of the unused ballot papers, which should have been done in this case.

The Constitutional Court reviewed the minutes of the work of the election committees in the election for the mayor of the Town of Belišće at polling station no. 5 and no. 6. It established that the data entered in the minutes from polling stations nos. 5 and 6 did not

provide answers to all the relevant questions when they are connected with the one "subsequently found" ballot paper at each of these two polling stations. The competent election commissions did not completely verify formally aligned data in view of the actual status of the election materials, that is, they did not verify all "groups" of ballot papers to remove the suspicion that the "subsequently found" ballot papers at each of those polling stations had been taken from the collection of unused papers. It is clear that neither the TEC nor the CEC included the unused ballot papers in any of the actions they undertook.

In view of the difference in the number of votes for each candidate, the omission described in the conduct of the TEC, which was not resolved by the CEC, was considered by the Constitutional Court to be legally relevant.

After the appeal proceedings were conducted, however, the Constitutional Court, whether from the relevant election documentation, from the statement by the president of the TEC of 3 June 2013 or the written observations of the TEC and the CEC, was unable to establish with complete certainty the actual status of the matter related to the two controversial ballot papers at the two polling stations in Belišće.

It is undisputed, however, that from the time the polling stations closed, the election materials were handled many times by a large number of authorised persons, and the data in the election documentation was changed many times, in relation to the second round of voting in the elections for the mayor of Belišće and his deputies. In such circumstances, a shadow of doubt may be cast, with one more potential comprehensive check undertaken by the Constitutional Court, over election materials that have already been examined many times. This must be avoided at all costs.

In this situation and in the light of the fact that the difference in the number of votes for both candidates is only one vote, and that two ballot papers are in dispute, the Constitutional Court respected the strict requirements set by election law. In accordance with Article 125.9 of the Constitution and Article 87.3 of the Constitutional Act on the Constitutional Court, the Court annulled the results of elections at two polling stations connected by the controversial ballot papers and held that the voting procedure needed to be repeated in those polling stations. This would be the only way to remove all doubt over the honesty of the election for mayor and his deputies of the Town of Belišće, and to ensure the external impression of its democratic and transparent nature.

Cross-references:

- no. U-VIIA-2613/2009, 27.05.2009;
- no. U-VIIA-2819/2009, 10.06.2009.

Languages:

Croatian, English.

*Identification:* CRO-2013-2-010

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 08.07.2013 / **e)** U-I-4469-2008 *et al* / **f)** / **g)** *Narodne novine* (Official Gazette), 90/13 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 3.16 General Principles – **Proportionality**.
 3.17 General Principles – **Weighing of interests**.
 5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

Keywords of the alphabetical index:

Company, share, offer, official, public, obligatory / Company, shareholders, protection, measure / Joint-stock companies, takeover, shareholder.

Headnotes:

A legal framework will only be acceptable in constitutional law if sanctions prescribed for offerors in takeover proceedings of joint stock companies remain effective and dissuasive but also proportionate to the legitimate aim being pursued (protection of shareholders with minority interests), limited in time, regulated to prevent legal uncertainty, ensuring a speedy resolution of the situation that has occurred in the joint stock company, and preventing minority shareholders from abusing the situation to influence changes in the shareholding structure.

Summary:

I. Several natural and legal persons submitted proposals requesting proceedings to review the constitutional compliance of Article 13.3 of the Act on the Takeover of Joint Stock Companies (hereinafter, the “Act”). The Constitutional Court resolved to repeal the legal provisions in question.

Article 13.3 of the Act (exclusion of voting rights) prevents the offeror and persons acting in concert with the offeror from exercising the voting rights attached to all the acquired shares of the offeree company in the following cases: where, after the obligation to announce a takeover bid has been created, they have failed, within the legally prescribed time limit, to submit an application for the approval of the announcement of the takeover bid, as of the date of such failure until the date of meeting this obligation; where the Croatian Financial Services Supervisory Agency (hereinafter, the “Agency”) has rejected or dismissed the application for the approval of the announcement of the takeover bid, as of the date of finality of the decision rejecting or dismissing the same application until the date of finality of the decision by virtue of which the Agency approves the announcement of the takeover bid; and where they have failed, after the Agency has approved the announcement of the takeover bid, to announce the same within the legally prescribed time limit, as of the date of such failure until the date of meeting this obligation.

The applicants questioned the conformity with the Constitution of the legal solution regulating situations where the Agency imposes a duty on an individual shareholder or group of shareholders to announce the takeover bid for a particular joint stock company when they exceed a certain control threshold (known as forced takeover). Such a situation, whereby the Agency, as a supervisory body, intervenes in private-law relations within a joint stock company, is, in the applicants’ view, unconstitutional. It is not proportionate to the aim pursued (protection of minority shareholders), and imposes on shareholder-offers a disproportionate burden in the takeover of joint stock companies.

II. The Constitutional Court reviewed whether the legal regulation of the so-called forced takeover of a joint stock company had a legitimate aim, and whether the measure prescribed by Article 13.3 was proportionate to that aim.

It found that the measure (or sanction) prescribed by Article 13.3 of the Act has a legitimate aim because it is directly aimed at protecting the interests of shareholders with minority interests when control is

acquired over their company, and is aimed at protecting the general interest, i.e. the objective legal order.

The Court held, however, that the legal framework of the regulation of the sanction prescribed by Article 13.3 was faulty. The offeror and persons acting in concert with the offeror, when the cases referred to in the Act occur (due to delay in executing or an objective inability to execute the obligations prescribed by Article 13.3) bear a disproportionate burden (risk of loss of status in society as majority shareholder, loss of influence over the company's legal destiny, prohibition on disposing of shares in the offeree company, prohibition on acquiring new shares, sanctions, potential for being sued for the buyout of shares, etc.) by contrast with the aim being pursued. However, disproportionately grave consequences occur for the offeree company, and potentially for the wider social community too.

The ultimate effect of Article 13.3 goes beyond establishing the legitimate protection of the rights of shareholders with minority interests. The term "shareholders with minority interests" can include all those who hold 74.99% interest in the equity capital or less. Rather, it "favours" the rights of those shareholders who retain the right to vote; there is no legal rule on a time limit to such favourable treatment. It allows shareholders with minority interests to manipulate the management of the company's operations to their benefit. The Act provides no efficient protective and control mechanisms to prevent this from happening. Nor does it provide a time limit for such a situation; it does not prescribe what will happen to the company if someone does not announce the takeover bid pursuant to the Agency's decision. The legal solution could result in a shareholder holding a significant number of shares being unable, for an indefinite time span, to participate in any way in the management of the company. They would be powerless to bring this state of affairs to an end, as they are prohibited from divesting the shares.

The Court pointed out that the legislator, when regulating sanctions for offerors, must always take as a starting point the cumulative effect of the various individual measures it prescribes, and establish a fair balance between the requirement of the general interest (which in this particular case includes the protection of shareholders with minority interests) and the protection of the offerors' rights.

The Constitutional Court concluded that despite the legitimate aim of Article 13.3, there had been significant disruption of the balance between the protection of the shareholders with minority interests

and the possible consequences of the loss of voting rights of the offeror and persons acting in concert with the offeror. It was a case of favouring shareholders with minority interests as opposed to protecting them, a situation brought about because the execution of the takeover, with the consequences such a "forced" takeover might have for the offeror, is carried out within a faulty legal framework. Appropriate protective mechanisms and appropriate time limits need to be put in place.

Article 13.3 of the Act does not meet the requirements of Article 3 of the Constitution (rule of law), and the solutions included therein fail to ensure an appropriate normative framework for restrictions to the freedom of enterprise referred to in Article 49.1 of the Constitution in the sense of Articles 16 and 50.2 of the Constitution.

Cross-references:

- Decision and ruling no. U-I-722/2009, 06.04.2011, *Bulletin* 2011/1 [CRO-2011-1-003];
- Decision no. U-I-1156/1999, 26.01.2000, *Bulletin* 2008/3 [CRO-2008-3-016];
- Ruling no. U-I-4362/2007, 10.02.2009;
- Ruling no. U-I-4120/2003 *et al.*, 21.02.2007.

European Court of Human Rights:

- *James and Others v. The United Kingdom*, no. 8793/79, 21.02.1986.

Languages:

Croatian, English.



Identification: CRO-2013-2-011

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 16.07.2013 / **e)** U-II-1304-2013 *et al* / **f)** / **g)** *Narodne novine* (Official Gazette), 99/13 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

5.4.21 Fundamental Rights – Economic, social and cultural rights – **Scientific freedom.**

Keywords of the alphabetical index:

Ordinance, issue, content / Academic title, appointment, requirements / Procedure, ordinance, defect.

Headnotes:

Article 68 of the Constitution does not only guarantee the individual right to freedom of scientific creativity. It is a fundamental standard which contains a value judgment about how the relationship of the state towards science should be regulated.

The field of higher education is an area of personal and autonomous responsibility for each member of that community. The state must not impose on that field any binding rules to promote a single concept of teaching or study, or one scientific theory. Article 68 of the Constitution protects each form of educational and scientific activity because it relates to everything which, in terms of content and form, may be considered to be a serious and systematic effort to discover the truth.

Legal certainty, as the most important characteristic of the rule of law, in the area of scientific work requires that all publications which were evaluated and assigned to individual categories at the time when the previous Ordinance was in force (which was the basis for the promotion of scientists to higher titles), must retain the same categorisation once the Ordinance has lost its force; they cannot be re-evaluated according to new rules or standards. They must be taken to be an unchanged basis from which further evaluation of the work of a scientist begins, according to the new rules or standards, regardless of whether those new rules or standards are milder or stricter than the previous ones. This is a minimum requirement which, as expressed in the objective system of values in Article 68 of the Constitution, must be respected. Derogation is only permitted in the case of a final court judgment establishing that a specific named scientist attained promotion to a higher academic title by committing a criminal offence.

Summary:

I. Several faculties and natural persons issued proposals requesting the Constitutional Court to review the conformity with the Constitution and the law of the Ordinance on Requirements for Appointment to Academic Titles adopted by the

National Council for Science (hereinafter, the “Ordinance”). The Constitutional Court resolved to repeal the Ordinance in its entirety.

The Ordinance prescribed the requirements for appointment to academic titles according to scientific area. For each area, the criteria were given in terms of quantity and quality. Extra requirements were prescribed for certain scientific areas. In the general provisions of the Ordinance the issues subject to regulation were set out, along with the authority to adopt separate regulations in individual scientific institutions. In the transitional and concluding provisions the transitional regime was regulated for procedures that had started before the Ordinance came into force.

II. The Constitutional Court grouped the objections the applicants had put forward into three categories. The first consisted of objections relating to omissions in the procedure to adopt the Ordinance. The second consisted of objections regarding the substantive criteria for appointment to academic titles prescribed by the Ordinance, which relate to the freedom of scientific creativity and the relationship of the state towards science (Article 68 of the Constitution). The third group of objections relating to the transitional and concluding provisions of the Ordinance are connected to the principle of legal certainty in the area of scientific work (Article 3 in conjunction with Article 68 of the Constitution).

In its assessment of the compliance of the process of adoption of the Ordinance with the law and other relevant regulations and with the requirements of the Constitution, the Constitutional Court noted that there could be no justification for the by-passing the prescribed rules for the adoption of a relevant act and/or general democratic procedural standards. It found that two of a total of six councils for scientific areas, within the meaning of the Article 19 of the Science and Higher Education Act and Articles 2.2 and 4 of the Ordinance on the Composition and Activities of Area Councils and Field Committees, did not participate in the preparation and adoption of the Ordinance.

The Constitutional Court reiterated that the adoption of regulations according to the prescribed rules and democratic procedural standards is a fundamental requirement, stemming from the rule of law in a democratic society. It held that in the process of adoption of the Ordinance, those rules and standards were not respected. The process was not, therefore, aligned with Article 1 of the Constitution (the democratic order of the state) and Article 3 of the Constitution (the rule of law as the highest value of the constitutional order of the state).

“Freedom of scientific creativity” within the meaning of Article 68.1 of the Constitution means the freedom of human activities the essence of which is to ask cognitive questions and find credible answers to them. Scientists are not only free in their choice of those questions and in finding ways to answer them. They are also free in their assessment of the results of their research and in their publication and dissemination in the community. Therefore, the right referred to in Article 68.1 of the Constitution is also the right of free communication, an essential requirement of scientific discourse, the freedom of expression, and affirmation of the national identity. The content of that constitutional right is perceived by the Constitutional Court, on the one hand, in the obligation of the state to refrain from limiting it (i.e. by defining standards on what “science” is, or leaving the definition of those standards to foreign databases of research deemed relevant in those countries) and, on the other hand, in the obligation to effectively support its realisation (i.e. by acknowledging the right of each registered scientist employed in public scientific institutions to work with the appropriate equipment in appropriate premises). There can only be two exceptions, where the state would be authorised to limit the freedom of scientific creativity: if somebody was using that freedom to bring down the national constitutional order or was conducting his scientific creativity in a way that violated human rights and fundamental freedoms (i.e. undertaking research against the guarantees of human dignity, life and physical inviolability).

Having assessed the potential for breach of fundamental constitutional values or protected constitutional assets within the way in which the criteria were prescribed for the evaluation of the work of scientists and their promotion, the Constitutional Court noted that the structural problems of Croatian science, including problems related to “the international visibility of national scientific production”, could not be resolved by “one-off tightening” of the requirements for appointment to an academic title, and particularly not by accepting the evaluation of the work of national scientists being reduced to the mechanical numeration of publications, which are not evaluated in accordance with what is written in them (i.e. the contribution they have made nationally to science, social progress and the functioning of society and the quality of work and life), but which are evaluated in terms of the (foreign) journal they are published in, or the (foreign) publisher they are published by, or the number of times they have been cited in a foreign database.

Finally, the Constitutional Court pointed out that the basic objection to the transitional provisions of the Ordinance related to the regime under which

evaluation would be conducted of papers by scientists published before the Ordinance came into force, and which were evaluated according to the old rules, or the standards in the procedures for the appointment of scientists to higher academic titles before the Ordinance came into force.

For reasons of legal certainty, the Constitutional Court established the constitutional law standpoint presented in the fourth section of Headnotes. Any other interpretation would mean the implicit revision of all academic titles recognised until that time, which would be in violation of Article 68.1 in conjunction with Article 3 of the Constitution.

Cross-references:

- Ruling no. U-II-5157/2005 *et al.*, 05.03.2012, *Bulletin* 2012/1 [CRO-2012-1-004];
- Ruling no. U-II-1118/2013 *et al.*, 22.05.2013, *Bulletin* 2013/2 [CRO-2013-2-007].

Languages:

Croatian, English.



Czech Republic

Constitutional Court

Statistical data

1 May 2013 – 31 August 2013

- Judgments of the Plenary Court: 5
- Judgments of panels: 75
- Other decisions of the Plenary Court: 7
- Other decisions of panels: 1 128
- Other procedural decisions: 30
- Total: 1 245

Important decisions

Identification: CZE-2013-2-004

a) Czech Republic / **b)** Constitutional Court / **c)** / **d)** 29.05.2013 / **e)** Pl. ÚS 10/13 / **f)** Church Restitution / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Restitution / Church / Legitimate expectation / Compensation, redress / Legislative process.

Headnotes:

The approach to restitution matters must consider the fact that parties to whom property is being returned had suffered a number of injustices, including those concerning the property. Through restitution laws, the democratic society attempts to at least partly mitigate the consequences of past property injustices and other injustices that arose from 25 February 1948 to 1 January 1990. Thus, under the restitution laws, the state and its bodies are required to proceed in accordance with the justified interests of the parties to whom harm was caused under the totalitarian communist regime. This harm is, now, at least partly compensated. The guiding principle must always be the abovementioned purpose of restitution. It is necessary

that the restitution laws be interpreted as favourably as possible in relation to the entitled persons, in the spirit of the attempt to mitigate certain injustices, as a result of which property was expropriated.

Summary:

I. On 29 May 2013, the Plenum of the Constitutional Court ruled on a petition initiated from a group of senators during a proceeding on the annulment of statutes and other legislative regulations. The Court annulled Article 5.i of Act no. 428/2012 Coll., on Property Settlement with Churches and Religious Societies and Amending Certain Acts. The parts of the proposal directed against Articles 19-25 of the Act were denied as manifestly unfounded; the remainder of the petition was dismissed.

II. The Court considered in detail all of the objections. However, the majority of the Plenum found only one provision of the Act to be unconstitutional, namely Article 5.i of the Act. This provision includes among the facts considered to be a property crime – nationalisation or expropriation of property without payment of fair compensation.

The Plenum concluded that it is necessary to annul the word “fair” in this provision. The reason is that it is neither obvious in the full context what amount of compensation would be considered fair nor the basis or criteria (whether historical or contemporary) for the assessment. Moreover, it is impermissible for the obligated party to decide whether the compensation was fair. The Court emphasised that the phrase “fair compensation” also did not appear in the previous restitution legislation. The remaining parts of the petition were dismissed or denied.

At the beginning, the Court rejected the petitioner’s claim that the Act was adopted in a legislative procedure that was unconstitutional. Regarding substantive objections, the Court emphasised its review of Act no. 428/2012 Coll. was based on its existing case law. That is, beginning as early as 2005, the Court reminded the legislature that the “blocking” provision of Article 29 of Act no. 229/1991 Coll. established the legitimate expectation of religious legal entities. The case law continued with Judgment file no. Pl. ÚS 9/07 of 1 July 2010, when the Court found the legislature’s inactivity to be unconstitutional. Subsequently, in several panel judgments, it opened the door to individual complaints that it described as restitution complaints because the established legitimate expectation had long since reached its figurative “age of majority.” Therefore, the Court concluded that it would now be at least surprising if it annulled a statute that fulfils the legitimate expectation and performs restitution.

The Court also considered the petitioners' general and historically-oriented objections that the property regime of churches rules out a possible renewal of their ownership rights. The reason is that in the past, churches were not and could not be the owners of the original property, or their ownership was subject to public law regulation.

Through a very detailed analysis of texts, period doctrine and case law, the Court concluded, on the contrary, that church entities essentially had full capacity to own property, and were the subjects holding property rights to individual things that were part of church property. It determined that church property was not subject to so-called public ownership and that this property was not excluded from property rights regulation under the General Civil Code and entrusted to church entities exclusive on the basis of public law entitlement. On the contrary, from the doctrine and case law of courts after 1948, the Court decided that in this period as well, church property was not of a public law nature and was, on the contrary, considered to be private property (in contrast to socialist ownership), not state property. Church property was also treated as private property in the case law of the courts after 1989, including the case law of the Court. Regarding entitled persons' claims for the release of things under the contested statute, the Court stipulated that one can speak of renewal of property rights in the true sense of the word, as it was understood in the former General Civil Code and the present Civil Code.

The Court also considered objections to individual provisions of the Restitution Act. It did not find unconstitutional the aim of the legislation, i.e. the mitigation of property injustices, which the Court itself had called for in its previous case law. Nor did it consider unconstitutional the definition of the decisive period, which it designated as a political decision. Regarding the determination or definition of original property in Article 2.a of the Act, the Court acknowledged that a sentence in it is semantically overloaded and that it is not clear what term the word "pertained" applies to.

However, the majority of the Plenum concluded that a constitutionally conforming interpretation can be found, namely the word "pertained" applies only to property rights and other property values, not to things. Regarding the determination of entitled persons, the Court stated that in the past, restitution also applied to certain legal entities, without raising any constitutional law questions. The Court also reviewed individual "types" of property injustices, the regulation of which it found, as stated above, unconstitutional only in the word "fair" (compensation) in Article 5.i of the Act.

The Court also considered objections concerning the legislative framework for financial compensation and settlement agreements. It stated that these must be assessed in the context of the fact that the Act is presently implementing a transition to a new regulation of the church-state relationship. In any case, the restitution legislation alone did not connect the attempt to renew property relationships exclusively to the beginning of the decisive period, but also took into account the current political and public interest. As a starting point, the Court noted the financial compensation is of a mixed character, not a purely compensatory character. Through it, the legislature is partially balancing the position of the affected churches, including vis-à-vis the Roman Catholic Church, which, in view of the separation of church and state, the Court considers completely legitimate.

Regarding the individual compensation amounts, which the petitioners asserted did not correspond to the scope of the original and unissued property, the Court emphasised that the subject matter of the proceeding cannot be the parties' presentation of proof of the exact property sizes and their valuations. The reason is that these facts are not tied to the constitutionality of the contested Act. It is obvious that the size of the original property, on which the background report was based (and previous negotiations between the state and churches), if it measures the rationality or constitutionality of Article 15.1 and 15.2 of the Act, does not exhibit signs of arbitrariness or error on the part of the legislature. However, it has a reasonable and appropriate connection to the available historical data. The Court also did not find the legislative framework for agreements between the state and the affected churches to be unconstitutional.

The Court did not find that Act no. 428/2012 Coll., the subject matter of which is the mitigation of property injustices and the separation of church and state, in anyway deviates from the religious neutrality of the state. The Court also explained why, in the hearing on 29 May 2013, it did not grant the proposal presented and did not adopt a resolution whereby it would submit a preliminary question to the Court of Justice of the European Union.

III. Dissenting opinions to the verdict and the reasoning of the judgment were submitted by Judges Jaroslav Fenyk, Vojen Guttler, Jan Musil and Pavel Rychetský.

Languages:

Czech.



Identification: CZE-2013-2-005

a) Czech Republic / **b)** Constitutional Court / **c)** / **d)** 20.06.2013 / **e)** Pl. ÚS 36/11 / **f)** Standard and above-standard health care, increase in co-payment for hospitalisation and the authority of health insurance companies to impose penalties on health care services providers / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

3.21 General Principles – **Equality.**

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

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

Keywords of the alphabetical index:

Health care / Health insurance / Fee.

Headnotes:

The framework in a statute must be sufficiently clear and applicable for those to whom it is addressed, even without an implementing decree. An implementing regulation should only provide details. It is inconsistent with Article 31 of the Charter of Fundamental Rights and Freedoms, if the legislature merely takes the first step toward defining standard and above-standard health care in a statute and sets forth only in an implementing decree the specific definition of what is free care under Article 31 of the Charter, i.e. the substantial part of the legislative framework, without which the institution is not viable.

In accordance with Article 31 of the Charter, hospitalisation that is, in the narrower sense, health care covered by public health insurance, must be provided for free, because the patient has no other alternative. The Charter requires that the established obligation of co-payment for inpatient care not be set in a blanket manner. In the absence of any differentiation or limits, such a framework is inconsistent with Article 31 of the Charter.

Summary:

I. In response to a petition from a group of parliamentary deputies, the Plenum of the Constitutional Court ruled on 20 June 2013 to annul certain provisions of the Act on Public Health Insurance. This included the framework for the division of healthcare into standard and above-standard care as of the day the judgment is promulgated in the Collection of Laws. Also annulled are related parts of the appendix to the Ministry of Health decree, which lists health care services with point values. The Court annulled, as of 31 December 2013, provisions to increase the co-payment for inpatient care and the authorisation of health insurance companies to impose penalties on health care services providers.

According to the petitioners, the formulations used to differentiate healthcare were vague. Defining the scope of the healthcare provided cannot be left merely to an implementing decree. Introducing two alternatives of health care denies the principle that people are equal in dignity and in rights. The petitioners objected that the amount of the increase in the co-payment for inpatient care without protective limits is a barrier to access to health care for certain social groups. They also objected that, because of the authorisation to impose penalties, a health insurance company can influence a health care services provider in relation to entering into, performing, or terminating an agreement on the provision and payment of covered services, especially if they are or were involved in a dispute.

II. Under Article 31 of the Charter, the funds of public health insurance must fully cover quality, full-value, and effective care as the basic, standard care. The difference between standard and above-standard care may not consist of differences in the suitability and effectiveness of treatment. If the treating physician decides to recommend a more expensive alternative for a particular diagnosis, he can do so only on the condition that it will be fully covered by public health insurance. The division of health care services covered by public health insurance funds into a basic alternative, fully covered by public insurance, and a more expensive alternative, is consistent with our constitutional order.

In order for executive norm-creating activity to be considered a constitutional and non-arbitrary exercise of power, it must always have limits on its norm creation set by law. It is true that the general foundation for basic and more expensive alternatives is contained directly in the Act. However, from the Court's point of view, it is important whether the framework in the Act (without an implementing

regulation) is sufficiently understandable to persons governed by the Act and whether it would be capable of application. An implementing regulation is meant to only provide details. The specific determination of what is free care within the intent of Article 31 of the Charter is contained only in the implementing regulation. In the Court's opinion, the legislature did not meet the requirements established by the constitutional order and repeatedly interpreted by current case law.

The fee for inpatient care is basically payment for "hotel services" and is seen as the equivalent of expenses that the patient would necessarily have anyway (even outside the medical facility). The increase in the co-payment for inpatient care does not in any way differentiate cases where the hospitalisation is merely a routine component of treatment, only related to health care services. In extreme cases, it can be replaced by a stay outside the health care facility, even if that were not a practical and optimal solution for the patient, and when the hospitalisation is a necessary component of the medical service itself.

According to the Court, one can hardly accept that during hospitalisation in an intensive care unit the patient is being provided "hotel services." In these cases the obligation to pay the fee conflicts with the text of Article 31 of the Charter. Hospitalisation that is health care in the narrow sense, covered by public health insurance, must be provided free, because for the patient there is no other alternative to it. The Court found the constitutional deficiency of the increase in the fee precisely in its insufficient differentiation and blanket application, in combination with the lack of any limits. The Public Health Insurance Act imposes obligations in a blanket manner; they have to be paid by non-earning persons, including socially at-risk groups, children, persons with health disabilities, etc. The combination of these factors can evoke a financially unbearable situation, not only for the abovementioned categories of patients. In any case, it denies the essence of solidarity in receiving health care. The exemption from fees for those insured persons who present a decision, announcement or confirmation issued by a body providing assistance in material need about the benefits allocated is not a measure that effectively mitigates the effects of the obligation. This requires the activity involved in arranging and obtaining official documents, which can hardly be expected or required from precisely those persons who are most socially burdened by the fee.

The Court also stated that the postulate of equality does not give rise to a general requirement that everyone must be equal with everyone else, but it

does give rise to a requirement that the law not give an advantage or disadvantage to one group over another with justification. Thus, the Court also accepts statutorily established inequality, if there are constitutionally acceptable reasons for it. However, that was not so in this case. The dominant position of the insurance companies, in combination with the authorisation to impose penalties and regulations on health care services providers, specifically limitations of services, financial penalties for medicine prescriptions and requested care that exceed the set limits, is not balanced out by anything on the side of the health care services providers. Thus, the insurance companies' authorisation to impose penalties exceeds the bounds of constitutionally acceptable inequality under Article 1 of the Charter. Moreover, this inequality is multiplied by the large range of most of the penalties.

III. The judge rapporteur in the matter was Jiří Nykodým. Dissenting opinions were submitted by Judges Stanislav Balík, Ivana Janů, Dagmar Lastovecká, Michaela Židlická and Vladimír Kúrka.

Languages:

Czech.



Identification: CZE-2013-2-006

a) Czech Republic / **b)** Constitutional Court / **c)** / **d)** 24.07.2013 / **e)** I. ÚS 1996/12 / **f)** Obligation of parents to support an adult handicapped child / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability**.
5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

Keywords of the alphabetical index:

Maintenance, dependent child / Pension, disability / Child, care.

Headnotes:

The allocation of a disability pension and contributions for care (or other benefits) does not automatically end the parental obligation to support a child not able to support itself. In judicial proceedings the general courts have sufficient discretion to take into account the individual and specific conditions of the child and the parents in order to determine whether the support obligation terminated, in view of the actual context.

Summary:

I. The complainant sought an increase in support payments in the general courts. The petitioner is not legally competent; she lives in a household with her mother, who cares for her all day. She is not able to support herself and receives a full disability pension of CZK 8,001 and a contribution for care of CZK 8,000 per month. Her father's average net monthly income was CZK 71,878. The father paid support payments of CZK 5,000 per month.

The first-instance court increased the support payments and ruled that there was a shortfall in support payments, because the complainant's expenses exceeded her income. In its opinion, the support obligation terminates absolutely only upon termination of the legal relationship between a parent and a child (upon death, adoption). The parents' support obligation continues until that time if the children are not able to support themselves.

The appeals court changed the first-instance court's decision when it agreed with the father's objection that his support obligation had already terminated. The appeals court stated that for a citizen who, for health reasons, lacks any earning abilities and opportunities, the lack of income from income-earning activity is replaced by the provision of other resources directly by the state (a disability pension, social benefits), which serve to ensure his support. If the complainant has available income from a disability pension and social benefits that compensate for her inability to secure income through income-earning activity, the support obligation of the parents to her has terminated.

II. The Constitutional Court stated that the objective impossibility of a child to support himself/herself independently, due to severe disability that leads to his/her being declared incompetent to perform legal acts cannot be applied to the detriment of the child – who, under Article 32.4 of the Charter, has a fundamental right to parental upbringing and care. To proceed otherwise would mean that after allocation of

social benefits the child no longer has a right to share the standard of living of his parents (and would not have the right to support from a parent). A child with such disadvantages did not cause his own disability and on the contrary, needs help in all respects, in order for his life to be as bearable as possible, within the context of considerably limited possibilities. The consequences (including property consequences, i.e. the support obligation) of the child's disability must be borne primarily by those who (as rational beings) brought the child into the world – voluntarily and with knowledge of all possible consequences – that, is the parents, provided that their financial situation objectively allows it.

The Court addressed the key question of the circumstances under which the support obligation of parents to children can be considered terminated in Judgment file no. I. ÚS 2306/12 of 13 March 2013. At the moment when a child becomes capable of supporting himself, the child has his income objectively in his own hands. As a rule, it is solely up to him what financial circumstances he will live in; if he is not active in this regard, he bears the negative consequences himself. If a child is objectively able to meet his needs himself, it would be unfair to allow his passivity in this area to burden his parents, in that the parents would continue to be responsible for supporting the child. Thus, the Court rejected the proposition that granting a full disability pension and contributions for care to a child should mean essentially the same situation as if the child were able to support himself.

In this case the appeals court did not consider the first-instance court's findings regarding the income and property situation of the persons involved, namely their standard of living. Allocation of social benefits cannot be considered an expression of the legislature's (state) belief that all persons who formally meet the criteria for allocation of benefits have the "same" living needs, the same "expenses" for achieving a certain standard of living, and that these are covered by this "same" amount. Also, it did not agree that the state, through social benefits, partly or fully (in the case of pensions) "removes" an individual from the natural family ties of dependence and responsibility, or at the material level, from the mutual support obligation of parents and children.

The general courts have sufficient discretion in judicial proceedings to take into account the individual and specific conditions on the part of a child and his parents. The first-instance court used its discretion when it concluded that despite the allocation of a pension and social benefits, the support obligation towards the complainant did not terminate, as her expenses still exceed her income. The Court did not

in any way review (confirm) these conclusions. If the appeals court did not question them in any way and did not take them into account, the justification for its decision in this situation was an expression of arbitrariness.

The Court found fault with the interpretation of Article 85 of the Act on the Family by the appeals court (i.e., that upon allocation of a disability pension and contribution for care the support obligation of parents to children terminates). The Court determined that it was extremely inconsistent with the principles of justice, with usual methods of interpretation, and with the standard legal dogma defined by the content of legal concepts. The contested decision must be classified as arbitrary application of a sub-constitutional right and hence, a violation of the complainant's fundamental right to a fair trial under Article 36.1 of the Charter and her fundamental rights arising from Article 32.4 of the Charter. Therefore, the Constitutional Right annulled the contested decision of the appeals court.

The judge rapporteur in the matter was Ivana Janů. No judge submitted a dissenting opinion.

Languages:

Czech.



France

Constitutional Council

Important decisions

Identification: FRA-2013-2-002

a) France / **b)** Constitutional Council / **c)** / **d)** 17.05.2013 / **e)** 2013-669 DC / **f)** Law opening marriage to same-sex couples / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 18.05.2013, 8281 / **h)** CODICES (French, English).

Keywords of the systematic thesaurus:

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

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

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

5.3.34 Fundamental Rights – Civil and political rights – **Right to marriage.**

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

Keywords of the alphabetical index:

Adoption / Couple, same-sex / Affiliation / Child, interest of / Medically assisted procreation / Surrogate gestation.

Headnotes:

Opening up the possibility for two persons of the same sex to marry and adopt is not inconsistent with any constitutional principle. The Constitutional Council does not have the same discretion in this matter as Parliament.

The Preamble to the 1946 Constitution, to which the Constitution refers, implies a requirement to ensure that adoption is consistent with the child's interests. When administrative authorities receive an application for approval to adopt, and when courts decide on the adoption, they must verify compliance with this requirement.

Summary:

I. The Constitutional Council ruled on the Law opening marriage to same-sex couples following an application by over sixty members of the National Assembly and over sixty members of the Senate.

II. The Constitutional Council examined both the provisions of the law opening marriage and adoption to same-sex couples and the provisions on adoption that the law renders applicable to same-sex couples. On the one hand, it held the Law opening marriage to same-sex couples to be constitutional. On the other hand, it held that the Preamble to the 1946 Constitution, to which the Constitution refers, implies a requirement to ensure that adoption is consistent with the child's interests. Consequently, to ensure compliance with this requirement, the Council entered a reservation relating to the adoption approval process, finding that the rules of the Civil Code implement this requirement in respect of adoption judgments.

The applicants contested first the manner in which the legislation had been passed, disagreeing with the content of the impact study and about the parliamentary procedure. The Constitutional Council dismissed these complaints, holding in particular that the constitutional requirements of clarity and sincerity of parliamentary debate had not been violated.

First of all, the Council gave its opinion on the possibility of same-sex marriage opened up by Article 1 of the law. It held that this choice made by Parliament, which was not for the Council to replace with its own assessment, was not contrary to any constitutional principle. In particular, it held that, although French legislation prior to 1946 and subsequent laws up to the law under review had regarded marriage as the union between a man and a woman, this rule affects neither fundamental rights, national sovereignty nor the organisation of the public authorities. Consequently, it cannot constitute a fundamental principle recognised by the laws of the Republic within the meaning of the first paragraph of the Preamble to the 1946 Constitution.

Secondly, in opening marriage to same-sex couples, the law permits adoption by same-sex couples and adoption within such couples. Here too, the Constitutional Council held that it did not have the same discretion as Parliament, which considered that the gender identity of persons seeking to adopt was not an obstacle to the establishment of a legal parent-child relationship by adoption.

On the one hand, the Council held that neither the purpose nor the effect of the impugned law was to recognise a "right to children" for same-sex couples.

On the other hand, it held that the 10th paragraph of the Preamble to the 1946 Constitution implies a requirement to ensure that adoption is consistent with the child's interests. The Council verified compliance with this requirement by the provisions applicable both to same-sex couples and to couples consisting of a man and a woman. For adoption purposes, these couples are subject to an approval procedure. The Constitutional Council held that, where all couples are concerned, the provisions relating to this approval should not result in approval being given without the administrative authorities verifying compliance in each case with the requirement that adoption should be consistent with the child's interests. It entered an interpretative reservation to this effect. Otherwise, the law referred to it does not derogate from Article 353 of the Civil Code, which requires the regional court to grant adoption only if it is consistent with the child's interests. This provision implements the constitutional rule that adoption may only be granted if it is consistent with the child's interests.

The Council noted that, prior to the 1946 Constitution, legislation relating to the conditions of adoption and the conditions for establishing a legal parent-child relationship had always included rules limiting or regulating the conditions under which a legal relationship can be established between a child and his or her father or mother. Consequently, there is no fundamental principle recognised by the laws of the Republic in this field.

The Council also held that the other provisions of the Civil Code, in particular those relating to legal parent-child relationships, were not rendered unintelligible by opening adoption to same-sex couples and allowing adoption within such couples. It held that there was no constitutional requirement for this reform to be accompanied by an amendment of the provisions of the Public Health Code relating to medically assisted procreation. The purpose of the latter is to remedy medically certified infertility of a couple consisting of a man and woman, whether married or not. The same applies to the provisions of the Civil Code prohibiting surrogate gestation.

Thirdly, the Council dismissed the applicants' complaints against the provisions of the law relating to surnames, the Labour Code, the use of orders, validation of marriages predating the law and the application of the law overseas. These various provisions are consistent with the Constitution.

Languages:

French, English.



Identification: FRA-2013-2-003

a) France / **b)** Constitutional Council / **c)** / **d)** 07.06.2013 / **e)** 2013-319 QPC / **f)** Mr Philippe B. [Defence of truth in respect of defamatory allegations referring to offences covered by an amnesty or subject to the statute of limitations, or which resulted in a conviction subsequently expunged through rehabilitation or retrial] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 09.06.2013, 9632 / **h)** CODICES (French).

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.**

Keywords of the alphabetical index:

Amnesty / Defamation / Statutory limitation / Rehabilitation / Retrial.

Headnotes:

A general and absolute prohibition on bringing evidence to establish the truth of defamatory allegations referring to facts constituting an offence covered by an amnesty or subject to the statute of limitations, or which resulted in a conviction subsequently expunged through rehabilitation or retrial, curtails freedom of expression to an extent not proportional to the aim pursued.

Summary:

I. The Court of Cassation applied to the Constitutional Council on 20 March 2013 for a priority ruling relating to the conformity of Article 35.c of the Law of 29 July 1881 with the rights and freedoms safeguarded by the Constitution.

Article 35 of the Law of 29 July 1881 specifies the cases in which a person charged with defamation may release himself from any liability by proving the truth of the defamatory allegations. Paragraph c) of this article prohibits bringing evidence to establish the truth of defamatory allegations by referring to facts constituting an offence covered by an amnesty or subject to the statute of limitations, or which resulted

in a conviction subsequently expunged through rehabilitation or retrial. The applicant argued that this prohibition infringed both freedom of expression and the rights of the defence.

II. The Council held that the object of the provisions relating to amnesty, statutory limitation, rehabilitation and retrial is not, per se, to prevent reference being made to facts resulting in a conviction covered by an amnesty or subject to the statute of limitations or a conviction subsequently expunged through rehabilitation or retrial. It was also not intended to prevent reference to facts constituting an offence covered by an amnesty or subject to the statute of limitations.

The restriction on freedom of expression resulting from Article 35.c applies without distinction to all statements or publications resulting from historical or scientific studies and allegations referring to events, the remembrance of which, or commentary on which, forms part of a general public debate.

For this reason, the Constitutional Council held that, by its general and absolute nature, this prohibition curtails freedom of expression to an extent not proportional to the aim pursued. It therefore violates Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen. This finding of unconstitutionality is applicable to all defamatory allegations, which have not received final judgment by the date of publication of this decision.

Languages:

French.



Identification: FRA-2013-2-004

a) France / **b)** Constitutional Council / **c)** / **d)** 14.06.2013 / **e)** 2013-314 QPC / **f)** Mr Jeremy F. [Absence of remedy in the event of an extension of the effects of a European arrest warrant] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 16.06.2013, 10024 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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:

European arrest warrant.

Headnotes:

The prohibition on appealing on points of law against a judgment of the indictment division on an application for extension of a European arrest warrant constitutes a restriction of the right to exercise an effective judicial remedy. This curtailment of the right to an effective judicial remedy has no justification either in the requirements of European Union law or in domestic law.

Summary:

I. The Court of Cassation applied to the Constitutional Council on 27 February 2013 for a priority ruling of constitutionality on the conformity of the words “not subject to appeal” in the fourth paragraph of Article 695-46 of the Code of Criminal Procedure (hereinafter, “CPP”) with the rights and freedoms safeguarded by the Constitution.

Article 695-46 of the CPP relates to the European arrest warrant (hereinafter, “EAW”). The EAW was established by a framework decision of the Council of the European Union of 13 June 2002. Rules relating to the EAW were introduced into the CPP by the law of 9 March 2004. Following the surrender of a person to another EU member state in execution of an EAW, Article 695-46 provides that, if an application is made to the indictment division either to extend the warrant to other offences or to authorise the onward surrender of the person to another state, it shall give a ruling within thirty days “not subject to appeal”.

II. By Decision no. 2013-314P QPC of 4 April 2013, the Constitutional Council applied to the Court of Justice of the European Union for a preliminary ruling. In a judgment delivered on 30 May 2013 under urgent procedure, this court clarified the interpretation of the framework decision of 13 June 2002 on the EAW. It held that that the decision does not preclude Member States from providing for an appeal to suspend the execution of a judicial decision that, within a 30-day-period of receiving the request, grants consent either to extend the warrant to other offences or to the

onward surrender of the person to another state. The Court merely stipulated that the final decision must be taken within the time-limit set in Article 17 of the framework decision, i.e. within a maximum of 90 days.

The Constitutional Council inferred from this interpretation that, because the decision of the indictment division is “not subject to appeal”, the fourth paragraph of Article 695-46 of the CPP does not necessarily follow from the decisions of the EU institutions relating to the EAW. It was thus for the Constitutional Council, to which the matter had been referred under Article 61-1 of the Constitution, to verify the conformity of this provision with the rights and freedoms safeguarded by the Constitution.

The Council held that, in depriving the parties of the possibility of appealing on points of law against the indictment division’s decision on the above-mentioned request, the impugned provisions of Article 695-46 of the CPP place an unjustified restriction on the right to exercise an effective judicial remedy.

Consequently, the Council held that the words “not subject to appeal” in the fourth paragraph of Article 695-46 of the Code of Criminal Procedure are unconstitutional. This finding of unconstitutionality takes effect from the date of publication of the Council’s decision. It is applicable to all appeals on points of law pending on that date.

Cross-references:

- 2013-314P QPC, 04.04.2013, *Bulletin* 2013/1 [FRA-2013-1-001].

Court of Justice of the European Union:

- no. C-168/13 PPU, 30.05.2013.

Languages:

French.



Identification: FRA-2013-2-005

a) France / **b)** Constitutional Council / **c)** / **d)** 05.07.2013 / **e)** 2013-331 QPC / **f)** Numéricâble SAS et al. [Sanctioning power of the Regulatory Authority for the Electronic Communications and Postal Sectors] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 07.07.2013, 11356 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.13 Institutions – **Independent administrative authorities.**

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:

Regulatory Authority for the Electronic Communications and Postal Sectors, sanctioning power.

Headnotes:

The Constitutional Council held the first twelve paragraphs of Article L. 36-11 of the Postal and Electronic Communications Code to be unconstitutional on the grounds that they do not guarantee a separation within the Regulatory Authority for the Electronic Communications and Postal Sectors between the functions of prosecuting and investigating possible infringements and the function of judging those same infringements. The principle of impartiality is therefore violated.

Summary:

I. On 29 April 2013, the *Conseil d'Etat* applied to the Constitutional Council for a priority ruling on an issue of constitutionality raised by the companies Numéricâble SAS and NC Numéricâble. This issue concerned the conformity of Article L. 36-11 of the Postal and Electronic Communications Code (hereinafter, "CPCE") with the rights and freedom safeguarded by the Constitution.

Article L. 36-11 of the CPCE concerns the sanctioning power of the Regulatory Authority for the Electronic Communications and Postal Sectors (hereinafter, "ARCEP"). Under the first twelve paragraphs of this article, the Authority is vested with the responsibility of punishing network operators and suppliers of electronic communications services for breaching laws and regulations governing their activities. The Authority is also responsible for

decisions taken to implement them. The applicants argued that these provisions did not guarantee a separation between ARCEP's powers of prosecution and investigation, and its sanctioning powers. The Constitutional Council allowed the complaint and held that the first twelve paragraphs of Article L. 3 -11 of the CPCE were unconstitutional.

II. The Constitutional Council first noted that, under Article L. 36-11 of the CPCE, responsibility for giving formal notice to operators or suppliers prior to imposing a sanction lies with the Director General of ARCEP, who sets a time-limit for the operator or supplier to comply with the notice. These provisions therefore entrust the Director General with the conduct of proceedings before the Authority.

Secondly, the Constitutional Council noted that the Director General of ARCEP is appointed by its President. He is under the President's authority and is present at ARCEP's deliberations.

The Constitutional Council inferred from a combined reading of these provisions that they fail to guarantee a separation within the Authority between the functions of prosecuting and investigating possible infringements and the function of judging those same infringements. The principle of impartiality is violated. This finding of unconstitutionality takes effect from the date of publication of the Council's decision. It is applicable to all proceedings pending before the Authority and to all cases that have not received final judgment by that date.

Languages:

French.

**Identification:** FRA-2013-2-006

a) France / **b)** Constitutional Council / **c)** / **d)** 01.08.2013 / **e)** 2013-674 DC / **f)** Law amending Law no. 2011-814 of 7 July 2011 on bioethics by authorising embryonic and embryonic stem cell research under certain conditions / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 07.08.2013, 13450 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

5.3.4.1 Fundamental Rights – Civil and political rights – Right to physical and psychological integrity – **Scientific and medical treatment and experiments.**

Keywords of the alphabetical index:

Embryo / Stem cell, research.

Headnotes:

The statutory conditions governing embryonic research, which are neither imprecise nor ambiguous, are not inconsistent with the constitutional goal of accessibility and intelligibility of the law.

The provisions allowing authorisation to be given for research on the human embryo and embryonic stem cells for purely medical purposes do not violate the principle of the preservation of human dignity as the issuing of research permits is accompanied by effective safeguards.

Summary:

I. In its decision no. 2013-674 DC of 1 August 2013, the Constitutional Council ruled on the Law amending Law no. 2011-814 of 7 July 2011 on bioethics by authorising embryonic and embryonic stem cell research under certain conditions, following an application by over 60 Members of Parliament.

The Constitutional Council held this law to be in conformity with the Constitution.

Where embryonic and embryonic stem cell research is concerned, the impugned law replaces rules prohibiting such research subject to exceptions with rules authorising such research subject to certain conditions.

According to the single article of the impugned law, no research may be undertaken on the human embryo or embryonic stem cells without authorisation. Such authorisation is subject to various conditions. Particularly, the research must have a medical purpose and it must be impossible, in the present state of scientific knowledge, to carry it out without the use of human embryos or embryonic stem cells. Furthermore, the research may only be carried out using embryos conceived in vitro in the context of medically assisted reproduction which are no longer

part of a parental project. It is subject to the prior written consent of the couple from whom the embryos were obtained or the surviving member of the couple. The Biomedicine Agency can only grant a research permit if all the statutory conditions are met.

The applicants argued that these new rules governing research violated the principle of the preservation of human dignity. They criticise the imprecision and unintelligibility of the impugned provisions.

II. The Constitutional Council found that the statutory conditions governing embryonic research, which are neither imprecise nor ambiguous, are not inconsistent with the constitutional goal of accessibility and intelligibility of the law.

The Constitutional Council held that while Parliament had modified some of the conditions governing the authorisation of research on human embryos and embryonic stem cells for purely medical purposes, in order to facilitate such research, it had put in place effective safeguards to ensure that research permits were issued properly. It held that these provisions do not violate the principle of the preservation of human dignity.

Languages:

French.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2013-2-011

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 07.05.2013 / **e)** 2 BvR 909/06, 2 BvR 1981/06, 2 BvR 288/07 / **f)** / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Deutsches Steuerrecht* 2013, 1228-1238; *Europäische Grundrechte-Zeitschrift* 2013, 316-335; *Höchstrichterliche Finanzrechtsprechung* 2013, 640-645; CODICES (German).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Registered civil partnership, income tax / Marriage and the family, protection / Tax law, legislator's authority to categorise / Tax law, income splitting for spouses.

Headnotes:

Unequal treatment of marriages and registered civil partnerships in the provisions of §§ 26, 26b, and 32a.5 of the Income Tax Act on income splitting for spouses is incompatible with the general right to equality before the law of Article 3.1 of the Basic Law.

Summary:

I. The Income Tax Act allows spouses joint assessment to income tax. This results in what is known as the “splitting rate”.

Having entered into registered (same-sex) civil partnerships, the applicants applied to have their income taxes for 2001 and 2002 assessed jointly with their respective partners. The fiscal authorities, however, assessed these taxes separately. Legal actions against these assessments were unsuccessful before both the Fiscal Courts (*Finanzgerichte*) and the

Federal Fiscal Court (*Bundesfinanzhof*). The applicants lodged constitutional complaints to challenge the decisions of these courts.

II. The unequal treatment of registered civil partnerships and marriages in terms of income splitting for spouses is unconstitutional. The Panel reversed the challenged decisions and remitted the proceedings to the Federal Fiscal Court for a new decision.

The decision is essentially based on the following considerations:

The unequal treatment of married spouses and registered civil partners in the provisions on income splitting for spouses constitutes indirect discrimination because of sexual orientation, which has to be measured against the right to equality before the law of Article 3.1 of the Basic Law. Though the provision itself refers to marital status, it is virtually impossible to separate the choice between marriage and a registered civil partnership from one's sexual orientation. For German law reserves marriage to partners of different sex, while a registered partnership is only possible for partners of the same sex.

In general, when groups of people are treated differently, the legislator is strictly bound by the requirements of the principle of proportionality. The requirements for justification are the stricter, the greater the danger that the unequal treatment leads to the discrimination of a minority. This is the case with a differentiation according to sexual orientation.

The specific protection of marriage and family in Article 6.1 of the Basic Law cannot itself justify the unequal treatment of marriage and registered civil partnerships. The values enshrined in Article 6.1 of the Basic Law constitute a factual reason for differentiation that first and foremost allows marriage to enjoy a privileged status by comparison with other ways of living together, which are characterised by a lesser measure of mutual commitment. If the privileged treatment of marriage includes that other ways of life that are structured in a similarly binding way are placed at a disadvantage, the mere reference to the requirement to protect the institution of marriage does not justify such differentiation.

From the outset, the legislator has structured the civil partnership in a way comparable to marriage as a community of extensively shared responsibility, and has continuously reduced existing differences to marriage. Therefore, in addition to the reference to Article 6.1 of the Basic Law, a sufficiently weighty factual reason is needed to justify the preferential treatment of marriage compared to civil partnerships.

This reason must be measured and weighed against the respective object and purpose of the regulation. In the case of the splitting method, neither the provision's aim, nor the legislator's authority to categorise in the field of tax law, provides such a reason.

The aim of the splitting method is to tax marriages with the same total income in the same way – independent of the distribution of income between the spouses. In doing so, the splitting method follows the underlying concept in the civil law of marriage as a union of economic production and consumption. The registered civil partnership, too, is structured as such a union. Since its introduction in 2001 it has been comparable to marriage regarding the fundamental taxation-related aspects: Both institutions include identical provisions which stipulate that either partner can act on behalf of the couple in transactions for everyday necessities, and that the partners' rights to make dispositions over their personal property are limited. Furthermore, if civil partners did not want to enter into a civil partnership contract, they were obliged since 2001 to conclude what is known as an *Ausgleichsgemeinschaft* (a community in which merely the accrued gains are shared), for which the provisions on the marital *Zugewinnngemeinschaft* applied accordingly. As of 1 January 2005, the *Zugewinnngemeinschaft* explicitly became the default property regime for registered civil partnerships. The adjustment of pension rights (*Versorgungsausgleich*) also applies to the dissolution of civil partnerships.

Family-related intentions cannot justify the unequal treatment of marriages and registered civil partnerships with regard to the splitting method. Granting the splitting advantage depends solely on the existence of a marriage in which the partners do not permanently live apart. It is irrelevant whether there are children.

The splitting method gives the spouses more leeway in the distribution of tasks within the marriage. However, both the Civil Partnership Act and marriage law recognise that the partners are free to choose their own personal and economic lifestyle, and they are based on the assumption that looking after the family and paid employment have equal value. There are no apparent differences in the situation of married spouses and civil partners that could justify such unequal treatment. First, not every marriage includes children. Furthermore, there are more and more civil partnerships in which children are raised.

The privileged status of marriage as compared to civil partnership cannot be justified by the legislator's right to categorise in the field of tax law. "Categorisation" means that one provision may regulate a number of

situations that are essentially alike. Categorisation requires that any ensuing hardships and injustices would be difficult to avoid, that they only apply to a relatively small number of people, and that the violation of the right to equality before the law is not very severe.

The fact that both registered civil partnerships and marriages form unions of economic production and consumption would require the same tax treatment under such categorisation.

Neither can support for raising children be an argument for a category-based better treatment of marriages than registered civil partnerships. Since the financial benefit from income splitting is the greater, the larger the difference in income between the two partners is, registered civil partnerships will – just like marriages – especially benefit from splitting if they raise children and, as a consequence, one of the partners has no, or only limited, paid employment. The fact that children tend to be far less common in civil partnerships than in marriages is not a sufficient reason to limit the category-based application of the splitting method to married couples. Discriminating civil partnerships with regard to income splitting can be avoided without major problems for the legislator and administration. To ignore that children are also raised in civil partnerships would constitute an indirect discrimination specifically based on the partners' sexual orientation.

The legislator is required to eliminate the established violation of the Constitution retroactively to the time the institute of "civil partnership" was introduced, 1 August 2001. Because this can be accomplished in different ways, the Court can only issue a declaration of incompatibility of the provisions with the Constitution. In order to avoid insecurity about the legal situation, the current regulation shall remain in force until a new regulation, which the legislator must issue without delay, enters into force.

III. In a separate opinion, two members of the Panel take the following view:

The registered civil partnership was not designed as a union of economic production and consumption comparable to marriage until the Act to Revise the Civil Partnership Act entered into force in 2005. Most constitutive aspects of a union of economic production and consumption have only been extended to registered civil partnerships by this Act.

In the assessment years 2001 and 2002, the applicants' civil partnerships were designed as communities of support and responsibility, but not as unions of economic production and consumption.

Regarding the legislator's authority to categorise, the Panel would have had to examine first whether a category-based privileged treatment of marriage was permissible. At the time the income splitting was introduced, the legislator could assume that the overwhelming majority of marriages were aimed at raising children. The legislator did not therefore need to let this method – in a categorising way – depend on the existence of children.

The fact that more and more children are raised in registered civil partnerships does not necessarily allow the conclusion that the splitting method had to be opened to all registered civil partnerships by way of categorisation as early as in the fiscal years 2001 and 2002. There is no proof that such fiscal benefits would also typically benefit civil partnerships with children. The decision mentions groups of hardship cases; the fact that such cases exist does not, however, make it necessary to extend the categorisation to the entire group of persons concerned.

In general, it must be possible for the legislator to carry out a comprehensive reform which entails high legislative effort step by step. Only if the legislator fails to differentiate later, even though sufficient experience-based material is available, will detrimental effects which go along with the reform give rise to objections under constitutional law. By extending the retroactive effect of its declaration of incompatibility to the time of the entry into force of the Act, the Panel ignores this margin of appreciation.

Furthermore, in the years 2001 and 2002, the legislator was faced with a situation which had yet to be resolved under constitutional law. In the following years, the supreme federal courts also assumed that the situation under constitutional law was different from the one advanced by the Panel in the case at hand. According to the Federal Constitutional Court's earlier case-law, the legislator does not have to retroactively rectify a situation that is contrary to the Basic Law if the constitutional situation had not been sufficiently resolved.

Languages:

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



Identification: GER-2013-2-012

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 08.05.2013 / **e)** 1 BvL 1/08 / **f)** to be published in the Court's Official Digest / **g)** / **h)** *Neue Juristische Wochenschrift* 2013, 2498-2502; *Europäische Grundrechte-Zeitschrift* 2013, 456-463; *Verwaltungsrundschau* 2013, 318-320; CODICES (German, English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Tuition fees, admissibility / Study Account Act, in-state residents, provision / Higher education, admission.

Headnotes:

General university tuition fees are compatible with the participatory right to access to higher education under Article 12.1 of the Basic Law in conjunction with the right to equality before the law of Article 3.1 of the Basic Law GG and the principle of the social state of Article 20.1 and sentence 1 of Article 28.1 of the Basic Law, provided that the fees are not prohibitive and are designed in a socially responsible way.

The provision of the Bremen *Land* (federal state) law on university tuition fees that distinguishes according to residence in favour of in-state residents is inconsistent with Article 12.1 of the Basic Law in conjunction with Article 3.1 of the Basic Law, because it interferes, without sufficient reasons to justify this disadvantage, with the right to free and equal access to higher education in a cohesive nationwide educational system.

Summary:

I. In Bremen, one of the federal states of the Federal Republic of Germany, a provision on university tuition was effective between the winter semester 2005/2006 and the summer semester 2010 which gave students a study account of 14 semesters free of charge, and subsequently charged them tuition. However, this only applied to "Landeskinder" (in-state residents) who actually resided in Bremen. Out-of-state students only received a two semester study account free of charge, and thus had to pay tuition from the third semester onwards.

The applicants in the initial proceedings challenged the fact that as out-of-state students, they had to pay general university tuition fees starting from the third semester. They were required to pay € 500 for the winter semester 2006/2007 because, unlike in-state residents, they had no study account left after studying for two semesters. The Bremen Administrative Court stayed the proceedings and asked the Federal Constitutional Court to decide, in specific judicial review proceedings, whether the relevant provisions of the Bremen Study Account Act were compatible with the Basic Law.

II. The Federal Constitutional Court decided that the provision which governed university tuition in Bremen between the winter semester 2005/2006 and the summer semester 2010 was unconstitutional. The decision is essentially based on the following considerations:

Charging general tuition fees is, in principle, compatible with the Basic Law, as long as the fees are not prohibitive and designed in a socially responsible way.

For those who meet the subjective admission criteria, a right to free and equal access to higher education at institutions created by the state derives from the freedom of occupation (Article 12.1 of the Basic Law) in conjunction with the right to equality before the law (Article 3.1 of the Basic Law) and the principle of the social state (*Sozialstaatsprinzip*, Article 20.1, first sentence of Article 28.1 of the Basic Law).

This participatory right does not result in an individual claim to free higher education. But tuition fees must not constitute an insurmountable social obstacle to accessing higher education. This does not mean that all hardships connected to charging for tuition have to be compensated completely by accompanying social measures. But the legislator must not entirely ignore these circumstances in so far as they lead to unequal educational opportunities.

When tuition is charged, the needs of people with low income have to be taken into account appropriately. This also applies to the specific challenges of people with handicaps, of students with children, or of those who take care of others in their family. It is largely left to the legislator how exactly the constitutional obligation to institute general tuition fees in a way that is socially responsible is taken into account.

According to these standards, tuition fees amounting to € 500 per semester are, in principle, not excluded by the Constitution.

However, from the students' point of view, who, depending on the source, need in between around € 530 and € 812 per month for general living expenses, a fee of € 500 per semester must be considered as clearly noticeable. But this does not necessarily mean that such a fee is generally prohibitive. At present, there is no indication of a "flight from the fees" from *Länder* with university tuition to *Länder* without tuition.

However, general tuition fees must be accompanied by measures which ensure that they are socially responsible, so that the right to the utmost degree of equal opportunities of access to higher education is guaranteed. In the absence of such measures, the existing disadvantages due to insufficient financial means or a family background without academic degrees are reinforced.

Providing adequately designed student loans is one of the central means of securing the social responsibility of tuition fees. Further instruments in the sphere of tuition provision such as exceptions, reductions, or waivers may also be considered. Whether the provisions in the Bremen Act submitted here meet these requirements in every aspect is not at issue in the present proceedings.

The provisions presented for review, which impose tuition fees only on out-of-state students from the third semester onwards, violate the participatory right under Article 12.1 of the Basic Law in conjunction with Article 3.1 of the Basic Law to free and equal access to higher education in a cohesive nationwide system.

The right to equality before the law of Article 3.1 of the Basic Law requires the legislator to treat essentially equal issues equally and essentially unequal issues differently. It follows from Article 12.1 of the Basic Law, which establishes a participatory right in the specific area of access to higher education, that in the case of unequal treatment, a stricter standard for justification applies.

The submitted provisions constitute an unequal treatment of equal matters, which requires justification.

Under the Constitution, different laws in different *Länder* are not only possible but desirable. The right to equality before the law is thus not applicable if different legislators treat issues differently. However, it is applicable if, as in this case, there is different treatment of in-state residents and others in the laws of one *Land*.

To justify such a provision, one cannot merely point to the place of residence and the ensuing affiliation with one state (such as Bremen in this case). This is because *Länder* laws in the field of higher education have a specific dimension that concerns the whole country and thus affect the participatory right of free and equal access to higher education that is recognised in all *Länder*. This requires specific consideration among the *Länder* towards each other. Higher education, although under the competence of the *Länder*, is a nationwide system in which not all study programmes are offered at all places, which requires a use of educational capacities across state borders. In such a situation, one-sided benefits for members of one state need to meet heightened requirements to justify the inequality.

There are no sound factual reasons related to higher education to be seen in the present case. Students from different states do not use the Bremen universities differently, so the differences in tuition fees established by the Bremen Act cannot be based on this argument. Nor can the legislator justify the distinction by claiming that it meant to motivate students to take up residence in Bremen, so that the state would receive a higher allocation of funds within the system of fiscal equalisation among the federal states (*Länderfinanzausgleich*). The argument lacks the necessary factual connection between the equalisation payments in the *Länderfinanzausgleich*, which are part of the general budget, and the financing of universities. The attempt to connect these issues would also raise the legitimate objection that the *Land* Bremen has, in effect, used out-of-state benefits to justify charging out-of-state students with tuition fees.

Languages:

German; abridged English version (translation by the Court) on the Court's website.



Identification: GER-2013-2-013

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 23.05.2013 / **e)** 2 BvR 2129/11 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

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:

Prisoner, granting privileges to prisoners / Prisoner, short leave with escort / Ruling on appeal, deviation from case-law of the Federal Constitutional Court.

Headnotes:

An insufficiently reasoned refusal to grant privileges to prisoners can violate prisoners' fundamental rights under Article 2.1 of the Basic Law (free development of their personality) in conjunction with Article 1.1 of the Basic Law (guarantee of human dignity).

Moreover, a ruling on appeal for which no reasons are provided, and which manifestly deviates from the case-law of the Federal Constitutional Court, can violate the guarantee of legal protection under Article 19.4 of the Basic Law.

Summary:

I. The constitutional complaint was lodged by a prisoner and addresses a refusal to grant him short leave with an assigned escort.

1. The applicant, who has been imprisoned since 1992, is a Turkish national. He was sentenced to life imprisonment.

He was held in W. prison from 1999 to 2009. From there, he was several times taken for short leave under escort to visit his son, in each case cuffed and accompanied by two armed prison officers. There were no complaints with regard to these short leaves.

The applicant has been refused short leaves under escort since being transferred to R. prison in 2009. In November 2010, the prison once more rejected an application by the applicant for such leave to visit his son, arguing as follows. According to the public prosecution office, it was anticipated that the applicant would be deported to Turkey in or after 2013. Granting him privileges in the form of short leaves under escort to maintain his ability to "cope with life" were thus not an option. These measures served to prepare for further privileges and a subsequent release, the latter of which, due to his legal status as a foreigner, was not an option in his

case. Because he was about to be deported, it was neither expedient nor necessary to grant him short leave under escort. The objective of such leave, namely to prepare for a subsequent release, could not be achieved. Such leave would thus only cause unjustified costs and tie up staff.

2. The applicant applied for a court ruling against this. The prison made a statement on this matter, submitting that it granted short leaves under escort not only to prepare for further privileges, but also as a privilege in its own right. However, the expectation of further privileges for a prisoner was a factual reason which could be relevant for deciding on an application for such a privilege. According to the prison authorities, this differentiation was necessary in light of the current staffing levels, so that they could cope with the large number of applications for short leave under escort. They further claimed that “because of his legal status as a foreigner and the related danger of him trying to escape, it could not be expected that [the applicant] would be considered for further privileges”. He could, however, “apply up to two times each month for a four-hour visit by his adult son”. Because he had no prospects of a future life in the Federal Republic of Germany, there was no need for him to be escorted to his son’s home on short leave.

With the challenged order, the Regional Court (*Landgericht*) rejected the applicant’s motion as unfounded. It held that the prison’s decision would have raised concerns had it been solely based on the fact that the applicant was not to be released in the foreseeable future. However, the ruling was clearly the result of balancing all aspects and legitimate interests, particularly the applicant’s social rehabilitation, and the completely different conditions of imprisonment in the W. and R. prisons. Balancing, in particular, the danger of an escape, the applicant’s legitimate interest in maintaining contacts with relatives, and the available staffing resources, the court could not object to the fact that the applicant was suggested to have extended visits instead of a short leave under escort using cuffing and firearms. According to the court, what was decisive for maintaining contact with relatives was primarily the time that family members were able to spend together without being disturbed.

3. The applicant appealed against this. This appeal was rejected as inadmissible by the Higher Regional Court (*Oberlandesgericht*) with the challenged order, arguing that a review of the challenged order was not necessary to refine the law or to ensure uniform case-law.

II. The constitutional complaint is well-founded. The rulings which the applicant challenged violate his

fundamental rights. They were therefore reversed and the case was remitted to the Regional Court.

1. The order of the Regional Court violates the applicant’s fundamental right under Article 2.1 of the Basic Law (free development of his personality) in conjunction with Article 1.1 of the Basic Law (guarantee of human dignity).

This fundamental right requires the State to make it the objective of the penal system to enable prisoners to live a future crime-free life in freedom. The legislator has even based the execution of life sentences on a concept of treatment and social rehabilitation. Privileges in the enforcement of sentences, among other things, serve the prisoners’ social rehabilitation. Even somebody who has been sentenced to life imprisonment cannot be denied all chances of obtaining privileges, just because there are no prospects as yet for their release. It is particularly important for persons who serve long sentences, to actively counter the harmful impact of the deprivation of liberty, and to maintain and strengthen their ability to cope with life outside of prison. Short leaves under escort also serve this aim.

Thus, it can be necessary with regard to long-term prisoners – even if there are no concrete prospects for their release and the danger of escape or abuse stands in the way of further privileges – to grant at least privileges in the form of short leaves under escort, and to accept the staffing consequences. If a person imprisoned for many years is refused short leave under escort, this cannot be justified by merely referring to the prison’s staffing situation. Fundamental rights do not exist solely in accordance with what is available in terms of administrative facilities in the specific case, or according to custom. While treatment options may be limited by the available space and the prison’s staffing situation, the State cannot restrict prisoners’ fundamental and statutory rights at will by failing to give prisons the requisite means to respect the prisoners’ rights. Rather, fundamental rights also set the standard for the necessary character and condition of state facilities. It is part of the State’s obligations to equip prisons in the manner necessary to respect fundamental rights. In general, this also applies to foreign prisoners who are to be deported from prison.

According to these standards, the Regional Court’s reasons for justifying its refusal to grant short leave under escort are not viable. The Regional Court has failed to address the question of whether the applicant, who had been imprisoned for many years, should have been granted short leave under escort in order to maintain his ability to cope with life outside of prison. For this reason, and because the Regional

Court seeks to justify the official decision using reasons which differ considerably from what the prison authorities stated, the court did not properly examine their decision.

The prison had mostly stated its arguments on a self-imposed rule on the granting of short leave under escort, which was based on its limited staffing capacities. According to this rule, it was mostly because of the applicant's legal status as a foreigner that he was excluded from obtaining short leave under escort to maintain his ability to cope with life outside of prison.

2. The challenged ruling of the Higher Regional Court violates the applicant's fundamental right under Article 19.4 of the Basic Law. This right guarantees effective judicial protection that is as comprehensive as possible against acts by public authorities. The appeal courts may not render an appeal ineffective for the applicant via the manner in which they implement and apply the statutory prerequisites for access to a decision on the merits.

According to this standard, the order of the Higher Regional Court is incompatible with Article 19.4 of the Basic Law. The Prison Act permits the court's Criminal Panel (*Strafsenat*) to refrain from providing reasoning for the ruling on the appeal if it considers the complaint to be inadmissible or manifestly unfounded. The Criminal Panel availed itself of this possibility. No reasons were therefore given for the decision that the Federal Constitutional Court could subject to a constitutional review, beyond the findings contained in the operative provisions of the order: that the requirements for the admissibility of an appeal – the control being necessary to refine the law or to ensure uniform case-law – were not satisfied. This, however, does not mean that the order itself could not be subject to constitutional review or that the standards applying to such a review were to be relaxed. Rather, the ruling is already to be reversed in such a case if there are serious doubts as to its compatibility with the applicant's fundamental rights. This is the case here, since the content of the Regional Court's order manifestly deviated from the case-law of the Federal Constitutional Court.

Languages:

German.



Identification: GER-2013-2-014

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 02.07.2013 / **e)** 2 BvR 2392/12 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Informational self-determination, right / Genetic characteristics, collection and storage.

Headnotes:

When ordering the collection of cell tissue and its molecular and genetic analysis for identity verification in future criminal proceedings, courts must take account of the significance and scope of the right to informational self-determination. The assumption that the authorities will again conduct criminal proceedings for major criminal offences against the person concerned has to be supported with arguments relating to the individual case at hand. This prognosis-based decision must be based on sufficient inquiry into the facts, as well as on a comprehensible balancing of interests.

Summary:

I. The applicant challenged the collection of cell tissue and its molecular and genetic analysis for identity verification in future criminal proceedings. This collection was ordered following a final criminal court conviction.

In its judgment, the *Arnstadt* Local Court (*Amtsgericht*) reprimanded him for sexual abuse of children and sentenced him to 60 hours of community work. According to the findings of the court, the applicant, who at the time of the offence was 14 years old, kissed an – at that time – 13-year-old classmate on the neck, leaving a clearly visible “love bite”, or “hickey”. He also touched her covered genitals several times with his hands. Based on this conviction, and “according to § 81g in conjunction with §§ 81 and 82 of the Code of Criminal Procedure in conjunction with § 2 of the Act on the Establishment of a Person's Identity via DNA Analysis”, the Erfurt Local Court ordered the collection and molecular biological analysis of the applicant's cell tissue so as to establish the DNA profile. The objective was to store the characteristics of the applicant's cell tissue in the DNA data base.

§ 81g of the Code of Criminal Procedure permits that under specific and narrow conditions, an accused person's cell tissue can be collected and undergo molecular genetic analysis for identity verification in future criminal proceedings without this person's consent.

The appeals which the applicant lodged against the order were unsuccessful.

II. The Federal Constitutional Court admitted the constitutional complaint for decision. The constitutional complaint is clearly well-founded. The rulings challenged by the applicant violate his fundamental rights and were reversed.

1. Creating and storing a DNA profile interferes with the right to informational self-determination guaranteed by Article 2.1 in conjunction with Article 1.1 of the Basic Law. It guarantees the right of individuals to generally decide for themselves when and to what extent to reveal aspects of their private lives – a right that derives from the idea of self-determination. This guarantee may only be restricted on the basis of a statute and if the restriction is in the overriding interest of the public and complies with the principle of proportionality. The interference may not exceed what is indispensable to protect the public interest.

The courts must adequately consider the significance and scope of the right to informational self-determination when interpreting and applying § 81g of the Code of Criminal Procedure. It is necessary to specify why, in the individual case at hand, there are reasons to expect that in the future, the authorities will again conduct criminal proceedings for major criminal offences against this person; such reasons may be the nature of the criminal offences of which he or she has been convicted, the way in which they were committed, the person's personality, or other information. This prognosis-based decision must be based on sufficient inquiry into the facts, as well as on a comprehensible balancing of all relevant aspects.

2. The challenged decisions fail to satisfy these requirements since neither the prognosis-based decision nor the proportionality test took significant aspects of the individual case into account.

It is true that the criminal offence that gave rise to the order according to § 81g.4 in conjunction with §81g.1.1 of the Code of Criminal Procedure, is an offence against sexual self-determination, and hence an initial offence that satisfies the statutory requirements. However, this does not release the court from its obligation to make, in the individual case at hand, a prognosis-based decision with regard

to future major criminal offences. The applicant, who had no previous criminal record, was only 14 years old at the time of the offence, and the victim was his 13-year-old classmate. The sexual acts of which the applicant was accused were not substantial. According to the applicant's statement, he thought that they were based on mutual affection. On the whole, the applicant's behaviour thus constitutes misconduct typically committed by young people. Absolutely no consideration was given to this fact in the challenged decisions. Clear recognition of this aspect would, however, have been necessary, because it could have significantly influenced the prognosis-based decision regarding future major criminal offences.

Furthermore, the challenged decisions do not reveal whether the courts considered during the balancing (which is also required under proportionality aspects) the potential impact that the order to collect and store the genetic characteristics could have on the future development of the juvenile applicant. The educational concept of juvenile law contains the goal of achieving social integration to the greatest possible extent. This goal has constitutional status. Because of their lingering unstableness and because they are more subjectively impressionable, the impact of executive measures is more severe on juveniles than on adults. Depending on the specific circumstances, the permanent storage of a juvenile's individual characteristics may entail the risk of "branding" the person. This may restrict the possibility of leading a permanently crime-free life – a fundamental prerequisite for social integration.

Languages:

German.



Identification: GER-2013-2-015

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 09.07.2013 / **e)** 2 BvC 7/10 / **f)** / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Juristische Schulung* 2013, 858-859; CODICES (German).

Keywords of the systematic thesaurus:

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

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

5.3.41.4 Fundamental Rights – Civil and political rights – Electoral rights – **Secret ballot.**

Keywords of the alphabetical index:

Postal voting, voting by absentee ballot / Election, public / European elections.

Headnotes:

Offering postal voting (voting by absentee ballot) without requiring reasons for this in European elections is constitutional.

Summary:

I. The applicant lodged a complaint requesting review of an election against the validity of the European elections held in 2009. He contended that it was no longer necessary to state reasons for participating in the postal ballot and complained of what he considered to be a lack of security against falsification and the heightened risk of inadvertently casting invalid votes in the postal ballot.

Under the previous law, a person could only receive the ballot paper necessary to cast a postal vote if he or she, on the day of the election, was outside his or her constituency for an important reason, had moved to another constituency and had not yet been entered in the electoral roll of the new constituency, or was unable to visit the polling station for professional reasons or because of illness, due to advanced age, physical disability or otherwise because of his or her physical state, or was unable to do so without considerable difficulties. The reasons for being issued a ballot paper had to be plausibly stated.

The law on European and federal elections was reformed in December 2008 so that a voter who is entered in the electoral roll now receives a ballot paper on application. It is no longer necessary to state reasons and to make a plausible case for them.

II. The application is unfounded.

Public control of balloting is reduced in the case of postal voting. Nor is the integrity of elections guaranteed to the same degree as in ballot box voting in a polling station. Granting a postal vote, however,

serves the purpose of achieving a voter turnout which is as high as possible, hence doing justice to the principle of general elections. The principle of general elections – at least in connection with the postal vote – constitutes a fundamental constitutional decision that may run counter to the principles of free, secret and public elections. This decision can, in principle, justify restrictions of other fundamental decisions taken in the Constitution. It is primarily up to the legislator to suitably bring the colliding fundamental decisions into balance when organising the right to vote. It must, however, ensure that none of the electoral principles is disproportionately restricted or might become considerably less effective. This is evidently not the case at present. The Panel has hence repeatedly decided that the postal vote is constitutionally justified.

This assessment does not change if it is no longer necessary to provide reasons (and make a plausible case for them) in order to be issued a ballot paper. Waiving this requirement is based on comprehensible considerations, and is still within the margin to which the legislator is constitutionally entitled.

When amending the law on European elections, the legislator – concurring with the legislator in the corresponding amendment to the law on elections to the German *Bundestag* – reacted to the increasing mobility in today's society, as well as to the greater interest in individual lifestyles. It was guided by the goal of achieving the highest possible electoral turnout.

According to the legislator, the obligation to make a plausible case for reasons preventing voters from voting in person had been practically useless. It was not possible to examine even a small sample of the reasons that were stated. Considering the decreasing willingness to cast votes in a polling station, it is comprehensible and unobjectionable under constitutional law to hold the view that any attempt to tighten the requirements to give reasons or to regulate access to participation in postal voting by other means would risk causing further decline in voter turnout.

The legislator also considered that a marked increase in the number of postal voters could conflict with the constitutional idea of personal balloting. Drawing in particular on experience from *Landtag* (state parliament) elections, the legislator for the *Bundestag* elections argued that one need not fear that waiving the obligation to make plausible one's reasons for applying would lead to a considerable increase in postal voting. There are no indications that this assessment is incorrect in a constitutionally relevant manner, or that it might not be transferable to elections to the European Parliament.

Contrary to the applicant's submission, there are currently no indications that the existing provisions of electoral law do not offer adequate protection against dangers which may be posed by implementing postal voting; namely dangers to the integrity of elections and to having secret and free elections. The legislator took account of the relevant constitutional requirements when reforming the law on European elections.

Languages:

German.



Identification: GER-2013-2-016

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 11.07.2013 / **e)** 2 BvR 2302/11, 2 BvR 1279/12 / **f)** Therapeutic Confinement Act / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Neue Juristische Wochenschrift-Spezial* 2013, 569; CODICES (German).

Keywords of the systematic thesaurus:

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

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

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

3.16 General Principles – **Proportionality.**

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

Keywords of the alphabetical index:

Law applicable to a single case, prohibition / Confinement, therapeutic, powers, legislative / Expectations, legitimate, protection.

Headnotes:

On the constitutionality of the Therapeutic Confinement Act. [Official Headnotes]

The Therapeutic Confinement Act is consistent with the Basic Law, but must be interpreted in conformity with the Constitution. Confinement may only be ordered if specific circumstances in the person or conduct of the confined person suggest a high degree of risk that the most serious crimes of violence or sexual offences will be committed.

Summary:

I. The applicant challenged his confinement under a court order and, indirectly, the Therapeutic Confinement Act (hereinafter, the "Act"), which came into force on 1 January 2011.

The legislative aim of this Act was to deal with "protection gaps" under the former arrangements on preventive detention; gaps that arose following the decision of the European Court of Human Rights of 17 December 2009. The intention was to create a legal basis for certain cases that allowed the authorities to securely confine the perpetrators in question without violating the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Section 1 of the Act defines both the area of application of the Therapeutic Confinement Act and the substantive requirements for such confinement:

"1. If a final and binding decision by a court has established that a person convicted of a crime of the kind mentioned in the first sentence of § 66.3 of the German Criminal Code (*Strafgesetzbuch*) can no longer be confined in preventive detention because the law on preventive detention must respect the prohibition of retrospective toughening [of a sentence], the competent court may order the confinement of this person in a suitable closed institution if:

1. the person suffers from a mental disorder and, taking into consideration his or her personality, prior life and life situation as a whole, there is a high probability that he or she will, as a consequence of this mental disorder, cause considerable harm to the life, physical integrity, personal freedom or sexual self-determination of another person, and

2. for the reasons stated in no. 1., confinement is necessary to protect the general public.

2. § 1 shall be applicable irrespective of whether the convicted person is still in preventive detention or has already been released."

The applicant committed several violent offences, mostly with a sexual component, and mainly under the influence of alcohol. In 1989, the Regional Court (*Landgericht*) ordered him to be confined in a psychiatric hospital because criminal incapacity could not be ruled out in his case. In 2005, the Regional Court declared that he need no longer be confined; although he was still a danger, there was no longer any significant impairment to his criminal capacity. Before he had completed his sentence, the Regional Court ordered the applicant's subsequent preventive detention.

In 2010, the Federal Court of Justice (*Bundesgerichtshof*) ordered the immediate release of the applicant in the light of the case-law of the European Court of Human Rights. The city of S. then applied for his therapeutic confinement.

In September 2011 the Regional Court, and in October 2011 the Higher Regional Court (*Oberlandesgericht*), ordered his provisional therapeutic confinement for three months. In February and May 2012 respectively, the Regional Court and the Higher Regional Court ordered his confinement in the principal proceedings with a time limit up to 1 March 2013.

II. The constitutional complaints are unfounded to the extent that they indirectly challenge the provisions of the Act.

The federal legislator has concurrent legislative powers. Historically, the competence for "criminal law" (Article 74.1 no. 1 of the Basic Law) covers not only retributive sanctions to make amends for the crime, but also specific preventive reactions to a criminal act. The purpose of therapeutic confinement, as of preventive detention, is to securely confine perpetrators who continue to threaten highly ranked legally protected interests after they have served their prison sentences, so as to protect the general public.

The fact that such confinement is specifically linked to an act punished under criminal law, and especially the function of the Act, which is to close a gap in the range of legal resources available, supports its inclusion under the same legislative competences. The law enacted to fill the legislative gap cannot, in terms of competences, be assessed differently from the law which contains the gap. Nor do the freedom-oriented therapy concept and its procedural provisions oppose its falling under the competences for criminal law.

Interpreted in conformity with the Constitution, confinement under the Act is consistent with the protection of legitimate expectations under the rule of

law under the second sentence of Article 2.2 in conjunction with Article 20.3 of the Basic Law.

Therapeutic confinement is a deprivation of liberty that was ordered retroactively. The intensity of this interference corresponds to that of preventive detention. § 1.1 of the Act allows for a potentially unlimited deprivation of liberty. § 2 prescribes confinement in a suitable therapeutic institution and a freedom-oriented therapeutic concept; clearly differing from prison sentences, preventive detention, too, must be freedom-oriented and have a clear therapeutic dimension.

Thus, the principle of proportionality, taking into consideration the requirements under the European Convention on Human Rights, demands that confinement only be ordered if specific circumstances in the person or conduct of the confined person suggest a high degree of risk that the most serious crimes of violence or sexual offences will be committed. While the wording of § 1.1 of the Act does not provide for such a narrow risk assessment, a restrictive interpretation in conformity with the Constitution is possible. The wording and purpose of the provision do not conflict with this.

Nor can it be argued that the Act is left without any area of application given this restrictive interpretation. Therapeutic confinement is a subsidiary arrangement to preventive detention, as is provided for in the Act itself. One should also take into consideration that the Therapeutic Confinement Act was passed at a time when the crucial questions involved had not yet been clarified in the case-law of the Federal Court of Justice, and the Federal Constitutional Court had not yet spoken on the matter. The legislator's concern at the time was to create a narrowly defined transitional arrangement until the new arrangements for preventive detention came into effect.

§ 2 of the Act contains the constitutionally mandated differentiation from the serving of a prison sentence. The Act sets qualitative criteria for the institutions and provides for their spatial and organisational separation from penal institutions. Moreover, as little strain as possible is to be put on the persons concerned by such confinement, taking into account their therapeutic needs and the safety interests of the general public. With these provisions, the Act ensures compliance with the requirement for clear differentiation between prison sentences and therapeutic confinement, and it creates a necessary condition to ensure that therapeutic confinement is not classified as punishment within the meaning of Article 7.1 ECHR.

The requirement of a “mental disorder” within the meaning of § 1.1 of the Act is not in conflict with the values of the European Convention on Human Rights. The Act does not provide a definition of this term. But the meaning of the words and the history of the Act’s genesis give a sufficiently clear indication of how it should be understood. According to the Act’s explanatory memorandum, the intention is to follow the case-law of the European Court of Human Rights of Article 5.1.2.e ECHR, which permits “persons of unsound mind” to be deprived of their liberty, and to follow the diagnostic classification systems of the ICD-10 and the DSM-IV. The disorder need not be of a kind that excludes criminal responsibility of the perpetrator or is assessed as a mental illness in psychiatric-forensic assessment practice; however, a clinically recognisable complex of such symptoms or disturbed behaviours must be apparent, accompanied by stress and impairment.

From the perspective of legal systematics, therapeutic confinement differs from the previous two-track system of confinement in a psychiatric hospital on the one hand, and preventive detention on the other. The legislator has installed a “third way”, which cannot be distinguished on the basis of criminal responsibility. Not requiring a lack of criminal responsibility does not conflict with the values under Article 5.1.2.e ECHR or the case-law of the European Court of Human Rights. To the extent that the European Court of Human Rights also places qualitative requirements on national law, the Therapeutic Confinement Act satisfies these, especially with regard to foreseeability.

The requirement of clarity of the law is satisfied. The Act’s explanatory memorandum refers to and follows the restrictive interpretation of the European Court of Human Rights of the indefinite legal term “mental disorder”. Moreover, it follows the classification systems ICD-10 and DSM-IV, which are recognised in psychiatry. Further limits on intervention are created by the requirement of a causal link between the mental disorder and the risk, and by the other constituent elements in § 1 of the Act.

In the version in question here, the Therapeutic Confinement Act does not violate the prohibition of laws applicable to merely a single case (*Verbot des Einzelfallgesetzes*) under the first sentence of Article 19.1 of the Basic Law.

The first sentence of Article 19.1 of the Basic Law prohibits laws that restrict fundamental rights, and which apply not generally but merely to a single case. A law is “general” if, due to its abstract constituent elements, one cannot tell to how many and which cases it applies. This does not, however, exclude the

possibility that it applies only to a single case, if the facts are such that there is just one case of this kind and there are objective reasons for regulating this single case.

In its wording, § 1.1 of the Act is phrased in an abstract way and thus complies with the requirement of generality. While the area of application of the Act covers a closely limited group of persons, this abstract limitation does not constitute an individualisation of the persons affected.

The decisions by the regular courts that are challenged in the constitutional complaints are not consistent with the requirements set by the Basic Law for the application of the Act. They violate the applicant’s fundamental right under the second sentence of Article 2.2 in conjunction with Article 20.3 of the Basic Law, because the regular courts did not base their decisions on the required proportionality criteria as warranted under constitutional law.

III. One member of the Panel submitted a concurring opinion. This member agrees with the findings of the majority of the Panel insofar as they affirm the competence of the Federal Government for enacting the Therapeutic Confinement Act. In his opinion, however, the legislative competence of the Federal Government cannot be derived directly from competence in the matter of “criminal law” (Article 74.1 no. 1 of the Basic Law), but merely from an objective connection to criminal law.

Cross-references:

European Court of Human Rights:

- *Mücke v. Germany*, no. 19359/04, 17.12.2009.

Languages:

German, to be published in an abridged English version (translation by the Court) on the Court’s website.



Identification: GER-2013-2-017

a) Germany / b) Federal Constitutional Court / c) First Panel / d) 16.07.2013 / e) 1 BvR 3057/11 / f) / g) to be published in the Federal Constitutional Court's Official Digest / h) CODICES (German).

Keywords of the systematic thesaurus:

1.4.4 Constitutional Justice – Procedure – **Exhaustion of remedies.**

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

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

Keywords of the alphabetical index:

Constitutional complaint, subsidiarity / Constitutional complaint, admissibility.

Headnotes:

If a violation of the right to a fair trial is neither expressly nor implicitly made the subject of the constitutional complaint, or if a violation of the right to a fair trial is initially claimed effectively in the constitutional complaint proceedings but then withdrawn, the admissibility of the constitutional complaint with regard to the exhaustion of legal remedies does not depend on whether complaint proceedings concerning a violation of the right to a fair trial have been conducted beforehand in the regular courts.

However, if the constitutional complaint is not about a violation of Article 103.1 of the Basic Law, the principle of subsidiarity can require that such a complaint is only admissible if the applicants lodge a complaint of violation of the right to a hearing in court (*Anhörungsrüge*) or other legal remedy available against the violation of the right to a fair trial.

This is the case if the regular courts seem to have violated the right to a fair trial and if, considering the respective grievance brought before the Court, a reasonable participant in court proceedings could be expected to have brought such remedy already in the course of the regular court proceedings.

Summary:

I. In their constitutional complaint, the applicants took particular issue with the fact that the Higher Administrative Court (*Oberverwaltungsgericht*) rejected

their application for admission of an appeal against a judgment by the Administrative Court (*Verwaltungsgericht*). They had raised a complaint in the Administrative Court against a planning decision regarding a dyke. That decision stipulated that a “green dyke” was to be constructed on one of their properties instead of the existing flood protection wall.

The Administrative Court rejected the applicants' complaint for the most part; it argued that they could not successfully claim a violation of the requirement to balance public and private interests. The Higher Administrative Court rejected the applicants' application for admission of their appeal. The reason given for this was that while the Administrative Court had clearly proceeded from the erroneous assumption that the applicants' property would not be requisitioned permanently, but only for the duration of the construction work and to the extent of a working strip, this was not relevant in terms of the correctness of the judgment. The balancing of interests in the planning procedure had, the Court found, taken due account of the permanent requisitioning of part of the property.

II. The Federal Constitutional Court decided that the decision by the Higher Administrative Court violated the applicants' fundamental right to effective remedy under the first sentence of Article 19.4 GG. The decision was reversed and the matter remitted to the Higher Administrative Court.

1. The fact that the applicants did not lodge an *Anhörungsrüge* against the Higher Administrative Court's decision does not affect the admissibility of the constitutional complaint. The *Anhörungsrüge* is a specific procedural remedy, with which violations of the right to a fair trial can be asserted where no other legal remedy is available.

Where the object of the constitutional complaint is to claim a violation of the right to a fair trial, an *Anhörungsrüge* addressed to the regular court is one of the remedies in the legal process, the exhaustion of which is normally a requirement for the admissibility of a constitutional complaint. If, on the other hand, the violation of the right to a fair trial is neither expressly nor implicitly made the subject of the constitutional complaint, the admissibility of the constitutional complaint does not depend on whether complaint proceedings concerning a violation of the right to a fair trial have been conducted beforehand in the regular courts.

In the present case, the applicants claim no violation of their right to a fair trial in their constitutional complaint – neither expressly nor implicitly.

The principle of the subsidiarity of the constitutional complaint means that applicants may, however, be required to challenge a violation of the right to a fair trial via an *Anhörungsrüge* in regular court proceedings even if they do not base their constitutional complaint on a violation of the right to a fair trial. This is the case if the regular courts seem to have violated the right to a fair trial and if, considering the respective grievance brought before the Court, a reasonable participant in court proceedings could be expected to have brought such remedy already in the course of the regular court proceedings.

In the present case, the principle of the subsidiarity of the constitutional complaint has not been violated. In particular, there is no reason to believe that the applicants merely wanted to circumvent a failure to lodge an *Anhörungsrüge*.

2. The constitutional complaint is well-founded. In its decision concerning the admissibility of the appeal, the Higher Administrative Court violated the requirement of an effective remedy in court: In the way it handled the criterion for appeal, namely “serious doubts as to the correctness of the judgment”, it restricted the access to the appeal instance in a manner that cannot be objectively justified.

As a rule, serious doubt as to the correctness of an administrative court judgment already exists if the appellant questions even a single essential legal provision or a single significant fact with conclusive arguments. The applicants have succeeded in this. They have shown that the Administrative Court was, in one essential point, proceeding from incorrect assumptions about the content of the planning decision.

When determining the admissibility of the appeal, the Higher Administrative Court had already undertaken its own examination of the planning authorities’ balancing of interests; this resulted in a finding that the judgment of the Administrative Court was correct. This exceeds the narrow purpose of the admissibility proceedings, which also grant the parties involved fewer opportunities to establish facts than do the main proceedings, in particular due to the absence of a formal procedure for gathering evidence. Changing the examination of the facts of the case to a prior procedural stage – the admissibility proceedings – constitutes a violation of the fundamental right to an effective judicial remedy.

Languages:

German.



Identification: GER-2013-2-018

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 24.07.2013 / **e)** 1 BvR 444/13, 1 BvR 527/13 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift-Spezial* 2013, 569; CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Public bodies, criticism / Abusive criticism / Defamation.

Headnotes:

The Federal Constitutional Court has reaffirmed the principles to be observed by criminal courts in assessing criticism of public authorities. In weighing the relevant factors, they must take into particular account the fact that the right to express even severe criticism of measures taken by public authorities without fearing State sanctions is fundamental to the freedom of expression and has to be given particular consideration in their deliberations.

Summary:

I. The applicants are employees of a refugee organisation. In 2010, for “Anti-Racism Day 2010”, this organisation “awarded” on the Legal Office (*Rechtsamt*) of the city of B. and a named official of the Legal Office an “Alert regarding structural and systemic racism” (“*Denkzettel für strukturellen und systeminternen Rassismus*”) which was published online. The applicants were part of the team responsible for its content. The reasons for awarding this “Alert” criticised the fact that the Office had, against its better knowledge, accused a refugee of simulating deafness, even though this deafness had been attested by a medical specialist. It was alleged that the statement given by the City in the course of legal proceedings in the Administrative Court deliberately and wilfully ignored existing facts in order to enable it to present grounds for refusing a residence permit. This, it was claimed, represented

inhumane and discriminatory treatment of the refugee and took no account of any facts whatsoever.

The competent Local Court (*Amtsgericht*) convicted the applicants of defamation (§186 of the German Criminal Code) of the official.

§ 186 of the German Criminal Code reads:

“Whosoever asserts or disseminates a fact related to another person which may defame him or negatively affect public opinion about him, shall, unless this fact can be proven to be true, be liable to imprisonment not exceeding one year or a fine and, if the offence was committed publicly or through the dissemination of written materials (...), to imprisonment not exceeding two years or a fine.”

In the opinion of the Local Court, the factual assertion presented in the “Alert” that the official had knowingly concealed facts in her statements to the Administrative Court is not demonstrably true. It states that, with careful research, the applicants could have ascertained that the medical opinions relating to the refugee’s deafness were not in the official’s possession and that she did not, therefore, deliberately and wilfully ignore facts.

The Regional Court (*Landgericht*) did not take up the appeal for decision on the grounds that it was clearly unfounded. The Regional Court proceeded in particular from the assumption that the primary aim of the statement in question was to defame the official concerned and that the defamatory statements were not capable of making a legitimate contribution to the formation of opinion.

II. The Federal Constitutional Court decided that these court decisions violate the applicants’ fundamental right to freedom of expression (first sentence of Article 5.1 of the Basic Law).

The decision is essentially based on the following considerations:

In assuming in a manner that is untenable under the Constitution that an assertion of facts is involved, the courts are curtailing the scope of protection guaranteed by the fundamental right with regard to the statements in question. The question whether a statement should be seen as predominantly a statement of opinion or as a statement of facts depends crucially upon the overall context of the statement in question. If, in a particular case, it is not possible to separate the factual and the evaluative elements of a statement, then, in the interests of effective protection under the fundamental right, the

statement as a whole must be regarded as an expression of opinion. Otherwise there is a risk of significant limitation of the protection afforded by the fundamental right. The statement that the Legal Office is deliberately and wilfully ignoring facts in order to be able to present grounds for refusing a residence permit is, in its purpose and systematic context, an evaluative statement of opinion, summarising the background events on which it is based.

Moreover, by clearly regarding the statements in question as abusive criticism and consequently failing to balance the protection of reputation on the one hand and the freedom of expression on the other hand, while giving full and due consideration to all aspects of the specific case, the Regional Court has curtailed the protection afforded by the right to freedom of expression. Abusive criticism has a narrow definition. Excessive or even aggressive criticism alone does not make a statement defamatory. In addition to this, the primary intention of the statement must be to defame the person in question not to bring about a discussion of the matter at hand. In the present case, however, it is not the official in her function who is the focus of the expressed criticism. Moreover, the statements which are here being considered as prosecutable – however scathing and excessive they may be – are not devoid of all objective relationship to the events being criticised.

Furthermore, even if it were the case, as the courts are assuming, that the statements in question are statements of fact, the courts are not according sufficient weight to the freedom of expression when balancing the interests. It must be taken into consideration that the right to express even severe criticism of measures taken by public authorities without fearing State sanctions is fundamental to the freedom of expression and has to be given particular consideration in the deliberations. Moreover, in view of the actual circumstances established by the courts, in particular regarding the background events, the degree to which the official has been defamed is not so great that it would prevail over the freedom of expression in the case in question. In particular, it would violate the freedom of expression to restrict the applicants in their criticism to what is deemed necessary for criticising a state under the rule of law, and thus deprive them of the right of polemical intensification.

Languages:

German; to be published in an abridged English version (translation by the Court) on the Court’s website.



Identification: GER-2013-2-019

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 13.08.2013 / **e)** 2 BvR 2660/06, 2 BvR 487/07 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

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:

International law, general rule / NATO air attack in the Kosovo War, civilian casualties / Humanitarian law, international.

Headnotes:

The Federal Republic of Germany has no obligation to pay compensation in connection with civilian casualties in a NATO air raid on the bridge in the Serbian town of Varvarin on 30 May 1999 in the Kosovo War.

Summary:

I. The Federal Constitutional Court decided on constitutional complaints relating to the killing and injuring of civilians in the destruction of a bridge in the Kosovo War.

On 30 May 1999, during the air operation “Allied Force”, two NATO combat aircraft attacked a bridge over the river Velika Morava in the Serbian town of Varvarin and destroyed it by firing a total of four missiles. As a result of this attack, ten persons were killed and thirty injured; seventeen of them seriously. All of them were civilians. Planes of the Federal Republic of Germany were not directly involved in destroying the bridge, but were in action on the day of the attack. Whether and to what extent the German reconnaissance aircraft deployed on that day also provided cover for the attack on the Varvarin bridge has remained disputed between the applicants and the Federal Republic of Germany in the proceedings before the regular courts.

The applicants seek compensation for damage and for the pain and suffering they experienced in connection with the killing of their family members and their own injuries. Their actions before the civil courts were unsuccessful at all instances. The applicants challenged this in their constitutional complaints.

II. The Federal Constitutional Court did not admit the constitutional complaints for decision. They are inadmissible in part and in any event unfounded.

1. The constitutional complaints are unfounded in so far as claims under international law are concerned.

It is true that a constitutional complaint can, in principle, assert that civil-court judgments are not part of the constitutional order within the meaning of Article 2.1 of the Basic Law because they disregard the rules of customary international law. There is, however, no general rule of international law stating that in case of breaches of international humanitarian law, an individual has a claim to compensation against the responsible state. In general, only the home state of the injured person is entitled to such claims or may assert them. Article 3 of the Hague Convention (IV) and Article 91 of Additional Protocol I do not create direct individual rights to compensation in connection with breaches of international humanitarian law. It may therefore be left undecided whether these provisions have acquired the status of customary international law.

Nor does a failure to submit the matter to the Federal Constitutional Court mean that the applicants’ right, equivalent to a fundamental right, to their lawful judge (second sentence of Article 101.1 of the Basic Law) is violated.

It is true that Article 100.2 of the Basic Law requires a submission to the Federal Constitutional Court if the deciding court encounters serious doubts when debating whether a rule of international law applies and if so, to what extent. In such cases, the Federal Constitutional Court is the lawful judge within the meaning of the second sentence of Article 101.1 of the Basic Law. However, in the present case no submission to the Federal Constitutional Court was required; indeed, it would even have been inadmissible.

Undoubtedly there is no general provision of international law that gives individuals a direct claim to compensation against the responsible state in the case of breaches of international humanitarian law.

2. In so far as the applicants assert violations of fundamental rights because their public liability claims were rejected, it is obvious that the applicants would be unsuccessful even if the matter were remitted to

the regular courts. Admittedly, there are constitutional objections against the decisions of the Higher Regional Court (*Oberlandesgericht*) and the Federal Court of Justice (*Bundesgerichtshof*) in so far as they give the Federal Government latitude of judgment in the selection of military targets and assume that the applicants have an unlimited burden of producing evidence and burden of proof with regard to the subjective liability criteria.

However, it must be taken into account that when the Varvarin bridge was included in the list of targets without objection by the Federal Republic of Germany – the act challenged as a breach of official liability – no final decision had yet been made as to whether the actual attack on the bridge was lawful, nor could such a decision be made. Consequently, generating the lists of targets was from the outset subject to a different standard of care than the actual operational decision. According to the facts of the case and the status of the dispute, everything suggests that this standard of care is ultimately no different from that developed by the Higher Regional Court and the Federal Court of Justice.

Languages:

German.



Identification: GER-2013-2-020

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 26.08.2013 / **e)** 2 BvR 371/12 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Forensic psychiatric committal / Psychiatric hospital, confinement / Hospital, confinement, order of continuation.

Headnotes:

An order for continuation of long-term confinement for residential psychiatric treatment needs to meet the strict standards that follow from the principle of proportionality.

Summary:

I. The constitutional complaint concerns an order of continuation of the applicant's confinement in a psychiatric hospital.

By judgment of the Nuremberg-Fuerth Regional Court (*Landgericht*) of 8 August 2006, the applicant was acquitted of charges of causing bodily harm by dangerous means, unlawful imprisonment, and criminal damage. At the same time he was ordered to be confined in a psychiatric hospital. According to the reasoning of the judgment, the Regional Court held that the objective elements of the criminal offences with which he had been charged were satisfied. But the Court was of the opinion that it could not be excluded that the applicant lacked criminal responsibility at the times of the offences because he displayed the symptoms of paranoid delusion. It was necessary for the applicant to be confined in a psychiatric hospital because he could be expected to commit further serious unlawful acts.

In an order of 9 June 2011, the Bayreuth Regional Court ordered that the confinement should continue. The Court stated that it was not to be expected that the applicant would not commit further unlawful acts outside hospital confinement. The applicant filed an immediate appeal against this decision, which the Bamberg Higher Regional Court (*Oberlandesgericht*) dismissed as unfounded in an order of 26 August 2011.

II. The Federal Constitutional Court granted the constitutional complaint against the orders of the Bayreuth Regional Court and the Bamberg Higher Regional Court. The matter was remitted to the Bamberg Higher Regional Court for a new decision.

1. The constitutional complaint is admissible. That the applicant has now been released from the psychiatric confinement does not prevent its admissibility. He still has a continuing interest, which warrants protection, in a subsequent constitutional review of the challenged decisions; these were the basis of far-reaching interference with his fundamental right to personal freedom.

2. The constitutional complaint is clearly well-founded. The orders of the Bayreuth Regional Court and the Bamberg Higher Regional Court violate the applicant's fundamental right to personal freedom (second sentence of Article 2.2 of the Basic Law) in conjunction with the principle of proportionality (Article 20.3 of the Basic Law). The reasons set out in the orders are not sufficient to justify the continuation of the confinement.

a. Decisions on the deprivation of personal freedom must be based on sufficient determination of the facts by the Court, and must have an adequate factual basis. In particular, the competent judge must not leave the prognosis to the expert but has to come to his or her own decision on the matter. In an overall assessment, the dangers emanating from the perpetrator must be set in relation to the seriousness of the interference by the envisaged treatment. For this, the danger emanating from the person confined must be sufficiently specified. Consideration must be given to the earlier conduct of the person confined and the offences committed by that person to date. However, attention must also be given to circumstances which have changed since the confinement for treatment was ordered, and which will determine the future development. The principle of proportionality also demands that the confinement be enforced only as long as it is absolutely required by the measure's purpose and where less onerous measures would be insufficient.

This is an evaluative prognosis-based decision. Consequently, the Federal Constitutional Court cannot examine it in all particulars but can only review whether a balancing of interests took place, and whether the standards for evaluation on which the balancing was based comply with the Constitution. In case of long-term confinements for treatment, the increasing weight of the right to freedom also affects the standards for justification. In such cases, the judge's scope in assessing the situation narrows, while the intensity of the Constitutional Court's review increases with the severity of the interference with freedom. This can be accommodated by the judge drafting the assessment in more detail. This means that the judge may not, for example, limit his or her assessment to short, general phrases, but must explain the assessment in a substantiated way with reference to the relevant legal criteria. Only in this way can a constitutional review determine whether the danger emanating from the perpetrator can, in a way, counterbalance his or her right to freedom. It is mainly necessary to specify the likelihood of further unlawful acts by the perpetrator, and the type of offence that is to be expected.

b. The challenged orders of the Bayreuth Regional Court and of the Bamberg Higher Regional Court are incompatible with these constitutional standards. The reasons set out in their orders are not sufficient to justify the continuation of the applicant's confinement.

aa. The danger that the applicant may commit unlawful acts in future is not put into sufficiently specific terms. The Regional Court did not critically consider the fact that the expert's submissions on the likelihood of future unlawful acts in the written opinion of 12 February 2011 and the oral hearing of 9 May 2011 differed from each other. Against this background, the Regional Court could not restrict itself to referring to the submissions of the expert in the oral hearing only. On the contrary, it should have balanced these assessments against each other, taking account of other remarks by the expert and other circumstances of the case, and come to its own independent prognosis-based decision. As part of such an independent assessment, the Court should have set out what specific offences the applicant is expected to commit, why the degree of probability of such offences is very high, and on what factors and findings this prognosis is based.

Ultimately, the same applies to the order of the Higher Regional Court. It largely refers to the written expert opinion, which actually shows no high probability of future unlawful acts. In so far as the Higher Regional Court also relies on the opinion of the Bayreuth district hospital, this does not justify a different assessment.

bb. Furthermore, there is no evidence that the required prognosis-based decision took factors into account that could exonerate the applicant. In addition, the challenged orders do not sufficiently show that the danger emanating from the applicant is capable of counterbalancing the – considering the length of his confinement – increasing weight of his right to freedom. Finally, there was also no consideration of the question whether the safety interests of the general public could not have been protected by the use of measures less onerous to the applicant.

Languages:

German.



Hungary

Constitutional Court

Important decisions

Identification: HUN-2013-2-005

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 24.05.2013 / **e)** 12/2013 / **f)** On the constitutionality of the Fourth Amendment to the Fundamental Law / **g)** *Magyar Közlöny* (Official Gazette), 2013/80 / **h)**

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
4.5.6 Institutions – Legislative bodies – **Law-making procedure.**

Keywords of the alphabetical index:

Constitutional amendment, review / Constitutional Court, competence.

Headnotes:

In terms of the Fourth Amendment to the Fundamental Law, the Court, as the principal organ for the protection of the Fundamental Law, will continue to interpret and apply the Fundamental Law as a coherent system and will consider and measure all provisions of relevance to the decision in a given matter.

Summary:

I. The Commissioner for Fundamental Rights filed a petition with the Court for a declaration of the unconstitutionality of certain provisions of the Fourth Amendment to the Fundamental Law, noting that it is unconventional for the Commissioner to turn to the Court with problems that might result in formal, procedural, and public law invalidity pertinent to the adoption of a constitutional amendment. It is primarily the duty of the President of the Republic to be the guardian of the democratic operation of the state organisation. However, the Head of State – due to his interpretation of this role – had decided not to initiate proceedings before the Court. The Commissioner, in the interests of safeguarding the rule of law, and “as an auxiliary duty”, decided to submit the petition.

The applicant explained that detailed debate on the Bill on the Fourth Amendment (“the Bill”) was held on 25 February 2013. Following the conclusion of the detailed debate and the closing remarks of the proponents of the Bill, the Committee for Constitutional Matters submitted a total of four committee amendment proposals. Two of them were intended to affect the wording of the Bill in a substantive manner, in terms of content. The proposals recommended including the wording “the provisions of a cardinal Act concerning the recognition of churches may be the subject of a constitutional complaint”, “and suitability for cooperation to promote community goals” (Article 4.1 and 4.2 establishing the wording of Article VII.4 of the Fundamental Law) and the incorporation of the wording “and social catching-up” into Article 21.1.e of the Fundamental Law.

Parliament placed the Bill back on the agenda. In the absence of any further proposals for amendment of the Bill, no closing debate was held, and Parliament adopted the Fourth Amendment at its next sitting.

The applicant argued that it was incompatible with the constitutional principles of the democratic exercise of power (such as free debate of public affairs in Parliament, thorough and all-encompassing examination of matters in debate, MPs’ right of speech) that the Parliament did not (or could not) debate in plenary session the proposals submitted by the Committee for Constitutional Matters.

The applicant also pointed out that Article 24.5 of the Fundamental Law does not allow for a review of the conformity of the Fundamental Law in terms of content. However, in his opinion, in addition to the narrow interpretation of invalidity under public law, in a broader sense it amounts to invalidity under public law if internal controversy is created within the Fundamental Law as a result of any amendment to it. Amendments which generate internal controversy or dissolve the unity of the Fundamental Law will not be deemed to have been incorporated within it.

In his opinion, the unity of the Fundamental Law was clearly broken where the Fourth Amendment was contrary to previous Court decisions. This was the situation in this case, in terms of Articles 3, 4, 5.1, 6 and 8 of the Fourth Amendment. The applicant requested the annulment of these provisions.

II. Under Article 24.5 of the Fundamental Law, the Court may only review the Fundamental Law and amendments to it for conformity with the procedural requirements laid down in the Fundamental Law with respect to its adoption and enactment (in the

case of procedural error). This wording obviously encompasses the proponents of the Bill, the legislative process, the two-thirds adoption, provisions with regard to the designation of the act and the rules of signature and enactment, i.e. observance of the provisions of Article S of the Fundamental Law.

The applicant had contended that those provisions of the Fourth Amendment which were adopted based on the proposals submitted by the Committee for Constitutional Matters following the conclusion of the closing debate were not debated by the Parliament in plenary session. The Court, found that MPs had in fact had the opportunity to express their opinions. They were not prevented from initiating the reopening of the detailed debate and could have submitted amendment proposals prior to the closing debate. There was no closing debate due to the absence of petitions to that effect, since the MPs did not find it necessary to have one. The adoption of the provisions of Articles 4.1, 4.2 and 21.1.e did not, in the Court's view, infringe the formal requirements laid down in the Fundamental Law for the adoption and enactment of the Fundamental Law.

Regarding the second part of the petition, the Court noted the limitations on its powers in terms of the structure of division of powers; it would not extend its powers to review the Constitution and new norms amending it without express and explicit authorisation to that effect. It resolved therefore only to allow limited judicial review of the Fundamental Law and amendments to it. The changes brought about by the Fourth Amendment to Article 24.5 of the Fundamental Law only actually allow the Court to review the Fundamental Law and any amendments to it for conformity with the procedural requirements laid down in the Fundamental Law in terms of its adoption and enactment.

The Commissioner had placed emphasis on the formal approach of invalidity under public law. In fact, the petition was aimed at having the Court compare the amendments – with regard to their content – to other provisions of the Fundamental Law and to reasoning and requirements defined in prior Court decisions. The Court has no power to do this and it rejected the petition.

It did, however, make the following points. The Court will decide on the constitutionality of statutory regulations to be adopted based on the constitutional authorisation mentioned above. In the exercise of its powers, the Court, as the principal organ for the protection of the Fundamental Law, shall continue to interpret and apply the Fundamental Law as a coherent system and will consider and measure

against one another, every provision of the Fundamental Law relevant to the decision of the given matter. The Court will also take into consideration the obligations Hungary has undertaken in its international treaties or those that follow from EU membership, along with the generally acknowledged rules of international law, and the basic principles and values reflected in them. These rules constitute a unified system of values which are not to be disregarded in the course of framing the Constitution or legislation or in the course of constitutional review.

Supplementary information:

The plenary debate on a bill begins with the general debate which is conducted on the concept of the whole bill. The second part of the parliamentary debate is the so called detailed debate. In this debate, MPs can profound their views on the proposed amendments and the parts of the bill affected by the amendments. The last stage of the plenary debate is the closing or final debate. An amending motion can be launched on any kind of previously accepted enactment in case it is considered to be inconsistent with the Constitution or with other laws. The Committee of Constitutional Affairs forms an opinion on it and Parliament holds a final debate which is based on the opinion of the Committee. Then comes the final vote on the whole bill.

Languages:

Hungarian.



Identification: HUN-2013-2-006

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 19.07.2013 / **e)** 19/2013 / **f)** On the suspension of the entry into force of certain provisions of the Act on National Security Services / **g)** *Magyar Közlöny* (Official Gazette), 2013/124 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Security legislation / Surveillance, continuous.

Headnotes:

Parts of an amended Act on the rules of national security surveillance which introduced continuous surveillance were likely to be in breach of the Fundamental Law and were suspended on a temporary basis due to insufficient time for thorough constitutional review prior to their scheduled entry into force.

Summary:

I. The Commissioner for Fundamental Rights turned to the Constitutional Court on 24 June 2013, seeking a constitutional review of the amendment which, if enforced, would allow constant surveillance of targets by national security agencies and secret information collection for thirty-day periods twice a year.

The amendments on national security surveillance in the Act on National Security Services were passed on 21 May 2013. They would allow national security checks to be carried out not only prior to the occurrence of the legal relationship, but continuously after it as well. There would be no need for new cause or suspicion for repetition of the screening. According to the law-maker, the amendments were triggered by a corruption scandal involving high-ranking police officers and were aimed at removing opportunities for “graft by legal means”, eliminating a five-year gap between the initial vetting procedure and a subsequent check.

The Commissioner contended that the mere fact that the person concerned has already undergone a national surveillance cannot be a sufficient reason for the use of intelligence tools for a relatively long-term period. The Commissioner also raised concerns over lack of external control over the planned surveillance and the fact that agencies would not be required to provide a concrete reason or aim for the monitoring activity, which would give the state an unfair power advantage over the individuals targeted in the surveillance.

Under the amendment, a ministerial decree and, in case of non-governmental agencies, the employer (with the consent of the minister in charge of the security services) would define the list of legal relations which require screening. The Commissioner argued that the amendment did not impose objective criteria on the ministerial decree and the employer's

measures and so the scope of those who fell under national security screening could be raised disproportionately. The Commissioner contended that, in line with international standards, the persons concerned must have the opportunity for recourse to the court or other legal bodies, if they considered their rights were ignored or violated without reason during the national security control.

II. The Constitutional Court decided on the suspension of the entry into force of certain provisions of the Act on National Security Services on 15 July 2013. The provisions in question allow those who fall under national security surveillance to be controlled during the whole time of their legal relationship. Secret information-gathering against them may be instigated twice a year for thirty days.

The Constitutional Court began to examine the petition but adjudication of the petition on its merits was not possible before the Act entered into force on 1 August 2013. According to the Act on the Constitutional Court, the Court may decide on temporary suspension of the entry into force of a legal regulation which has been enacted but has yet to enter into force – if it considers the regulation may be contrary to the Fundamental Law and if suspension would result in the avoidance of serious and irreparable damage or disadvantage, or the protection of the Fundamental Law or legal certainty.

The Constitutional Court found that the regulations in question posed a serious restriction on the right to inviolability of private life and were likely to be in breach of Article VI.1 of the Fundamental Law. It suspended their entry into force.

Languages:

Hungarian.

*Identification:* HUN-2013-2-007

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 19.07.2013 / **e)** 21/2013 / **f)** On the annulment of court decisions concerning the refusal of publication of the report on the Hungarian State Opera's economic audit / **g)** *Magyar Közlöny* (Official Gazette), 57/2012 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Public data, right to know / State Opera / Audit, report, preparatory.

Headnotes:

The right to access and disseminate data of public interest is violated when access is refused on the basis that the public data requested was to form the basis of a later decision and the examination of its content was not taken into consideration.

Summary:

I. The editor-in-chief of the transparency website www.atlatszo.hu asked the National Resources Ministry for access to a report by a ministerial commissioner on the audit of the Hungarian State Opera two years ago. Both the ministry and lower courts refused to comply with the request to provide data. The applicant then turned to the Constitutional Court, requesting annulment of the court decisions.

On the basis of the Act on protection of personal data and public access to data of public interest, a request for data was submitted to the Ministry of Human Resources. The applicant requested the publication of the report on the audit of the Hungarian State Opera. The Ministry concerned rejected the request, on the basis of the preparatory nature of the document and because decisions on the Hungarian State Opera had yet to be made.

The applicant took the case to court but it was dismissed. The ordinary courts declared lawful the refusal of a request for publication of the report made by the Ministerial Commissioner on the audit of the Hungarian State Opera.

II. The Constitutional Court reviewed the ordinary court decisions having regard to the right to have access to and to disseminate data of public interest. It noted the more robust protection afforded to these rights by the Fundamental Law, by contrast to the former Constitution. Under Article 39 data relating to public funds and national assets are considered to be data of public interest.

The Constitutional Court noted that the courts should not only have examined the legal title of the refusal of data service but also the content of the reasoning. It

held that the right to access and disseminate data of public interest is violated when access is refused for the reason that the public data requested was to form the basis of a later decision and the examination of its content was not taken into consideration.

The Constitutional Court also observed that when the lower courts passed their decisions they did not fulfil these constitutional requirements. It therefore annulled the decisions. It did not state an opinion regarding the final result of the case; the courts which had passed these decisions needed to draw conclusions from this decision in the concrete case.

III. The following Justices attached dissenting opinions to the decision: István Balsai, Egon Dienes-Oehm, Imre Juhász, Barnabás Lenkóvics, Béla Pokol, László Salamon, Mária Szívós.

Languages:

Hungarian.



Israel

Supreme Court

Important decisions

Identification: ISR-2013-2-001

a) Israel / **b)** Supreme Court (High Court of Justice) / **c)** Extended Panel / **d)** 18.03.2013 / **e)** AHCJ 10007/09 / **f)** Glotten v. National Labour Court / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

5.4 Fundamental Rights – **Economic, social and cultural rights.**

Keywords of the alphabetical index:

Employment, foreign worker, law application / Caregiver, working-time.

Headnotes:

On balance between the rights of two weakened groups in the Israeli society: the migrant caregivers and the elderly and ill in need for care-giving services, the Work and Rest Hours law does not entitle migrant live-in caregivers to payment for additional working hours (“overtime”).

Summary:

I. The applicant, Yolanda Glotten, a migrant worker from the Philippines, was employed in Israel as a live-in caregiver for an elderly woman. Glotten worked throughout all hours of the day. After the termination of her employment she sued her employer in the district labour court. One of her main demands was payment for additional hours (“overtime”) she worked, beyond the mandatory by law for a full time employment (a right that exists in Work and Rest Hours law). The district labour court decision, which was re-enforced in the majority opinion of the national labour court, denied this demand. The applicant turned to the High Court of Justice for a remedy (in HCJ 1678/07 (The first petition)). The first petition was rejected on 29 November 2009. The Court ruled that the Work and Rest Hours law was not meant to

address the working situation of live-in care givers, because it does not fit the special nature of their employment (“around the clock”). The Court addressed the legislator and asked for legislative action in the matter.

II. The petition for a Further Hearing was decided on 18 March 2013. A “Further Hearing” is a special procedure in which the Court rehears, in an extended panel of Justices, a petition formerly decided by a panel of three Justices. By a majority of 5 to 4, the Court rejected Glotten's petition. The majority opinion (President A. Grunis, and Justices E. Rubinstein, S. Joubran, H. Melcer and Y. Danziger) rested on the claim that the Work and Rest Hours law, enacted in 1951, does not fit the special nature of employment in the live-in care-giving field, which in many instances involves working “around the clock”. The Court found that it is impossible to apply the law directly to these situations, even in the absence of other legislative solutions. The majority opinion stated that it needs to balance between the rights of two weakened groups in the Israeli society: the migrant caregivers and the elderly and ill in need for care-giving services. The majority Justices ruled that it is the legislator who should intervene and fill the lacuna in the legislation, especially since the Court does not have the institutional tools to construct a solution that will answer the various problems that the caregivers' cases raise.

III. Justice N. Hendel concurred with the majority not to apply the law to the caregivers, but held that in the meantime, until a solution will be legislated, the caregivers should receive an additional 20% to their minimum wages as a compensation for the additional hours they work.

The main minority opinion was written by Justice E. Arbel (with Deputy-President M. Naor and Justice E. Hayut concurring in their minority opinions). It held that it is possible to apply the Work and Rest Hours law to live-in caregivers, and pay them for their additional working hours. The minority opinion also held that there was no need, therefore, to wait for a legislative solution while the live-in caregivers, one of society's weakest groups, were left unprotected. Justice E. Arbel elaborated about the basic moral responsibilities of the state towards migrant workers, based also on international agreements and treaties, to not discriminate them from the state's own residents. She concluded that labour laws were made to protect any worker and should be equally applied to Israelis and migrant workers.

Languages:

Hebrew.



Identification: ISR-2013-2-002

a) Israel / **b)** Supreme Court (High Court of Justice) / **c)** Panel / **d)** 02.04.2013 / **e)** HCJ 6971/11 / **f)** Eitanit Construction Products Ltd. v. The State of Israel / **g)** / **h)**.

Keywords of the systematic thesaurus:

2.1.1.2 Sources – Categories – Written rules – **National rules from other countries.**

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

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

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:

Environment, property, equality, civil liability / Polluter pays, principle / Liability, strict / Knowledge test / Benefit test / Control test / Manufacturer, liability / Environment, hazard / Biblical law, source / Law, personal application.

Headnotes:

The “Polluter Pays” principle justifies obliging a polluting company to finance the clean-up project for the pollution created several years before the law was enacted and to impose a strict liability standard retroactively.

Summary:

I. During almost 45 years, the applicant, Eitanit Construction Products Ltd, was the owner of an asbestos plant near the city of Nahariya, in northern Israel. During its production process vast amounts of asbestos waste were accumulated in the plant. For many years, the applicant used to sell some of the waste to the surrounding residents and to bury the rest in the soil surrounding the plant. This waste is a serious health hazard. This is the background for the legislation of Article 74 to the law of Asbestos and Damaging Dust Hazards Prevention. The article dictates the creation of a project to remove all the asbestos waste. The law also states that the polluter

(the applicant) will finance half of the project's cost, up to a ceiling of 150 million NIS.

The applicant claimed that Article 74 impairs her right to property and equality: property impairment, due to the steep financial burden the applicant was obligated to bear; an equality impairment, due to the exemption from responsibility of all other parties involved in the disposal of the asbestos waste. The applicant claimed that the impairment is not in accordance to the tests set in Article 8 of the Basic Law: Human Dignity and Liberty, a test set to assure that any impairment of rights by law would be benefiting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.

II. The petition was rejected. The High Court of Justice (in an opinion written by Justice N. Hendel, with President A. Grunis and Justice Z. Zilbertal concurring) held that the article does not discriminate the applicant. Although the Court stated that the article impaired the applicant's right to property, it found said impairment not necessarily discriminatory, and therefore constitutionally valid.

The applicant claimed that the article discriminated her in comparison to the residents of the area that used the asbestos waste but were not required to participate in the removal costs. This claim was rejected, due to relevant differences between the applicant – as an asbestos manufacturer – and the residents. Three tests were implemented to reach this conclusion: First, the Knowledge test – the applicant knew about the potential health hazard in the asbestos waste, while the residents were unaware of it; second, the Benefit test – the applicant, more than any other party, benefited from the actions producing the asbestos hazard; third, the Control test – the applicant had to bear the responsibility for the waste she manufactured, in the spirit of the Extended Producer Responsibility (EPR), commonly used in the European Union. This principle applies the manufacturer's responsibility over the entire life span of the product, even after the product is out of use.

Justice Hendel also elaborated about “The Polluter Pays” principle, which its essence is, that he who created the pollution – must finance its removal and be responsible for the damages. This is the principle behind the article that imposes the removal costs on the polluter – the applicant. Several reasons support this principle, from the point of view of economic efficiency as well as from the point of view of justice and fairness; this principle is well known in many democratic countries, in the Biblical Hebrew law, and connected to the current Israeli legal principles.

Another matter discussed in the opinion was the article's personal application. Although Article 74 does not mention the applicant by name, it was agreed by all parties the article applied only to her, because the applicant was the only relevant asbestos manufacturer. This posed a difficulty, because a law should be general and not personal. Justice Hendel explained that the unique nature of the matter and of the applicant itself is a reality and not a legal creation, and the narrow application was compulsory. The article was drawn to answer a specific situation: large piles of asbestos waste, in a known area, created by one dominant party.

Justice Hendel also dealt in his opinion with two major difficulties in Article 74. First, the article imposed a strict liability standard. The applicant had to pay for polluting actions that were not prohibited when preformed; second, the article applies quasi-retroactively. The applicant is liable only now for actions that accrued years ago. In that respect Justice Hendel differentiated between several categories of time application, and added that even if Article 74 was to be classified as clearly retroactive – that would be merely another consideration in the constitutional balance.

Despite said difficulties, Justice Hendel discussed many considerations that justify declaring the applicant liable: The asbestos waste is a “ticking time bomb” that threatens the health and well-being of many of the area residents. Another meaningful consideration in this context is the comparative law, discussed thoroughly in the opinion. This discussion shows that the solution chosen by the Israeli legislator is within the international consensus, and similar solutions are applied in the United States (CERCLA), European Union (ELD), Sweden, France, the Netherlands, Finland, United Kingdom, Switzerland, Canada and South Africa.

Languages:

Hebrew.



Kazakhstan Constitutional Council

Important decisions

Identification: KAZ-2013-2-001

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 16.05.2013 / **e)** 2 / **f)** / **g)** *Kazakhstanskaya pravda* (Official Gazette), 25.05.2013 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

4.6.3.1 Institutions – Executive bodies – Application of laws – **Autonomous rule-making powers.**

Keywords of the alphabetical index:

Government, prerogative / Legislation, promulgation, process.

Headnotes:

The foundations of the organisation and activity of state bodies, and the functions the realisation of which concerns important public relations specified in Article 61.3 of the Constitution are established in legislation. Other functions at sub-legislative level can be established.

Summary:

I. On 17 April 2013, the Chairman of the Senate of the Parliament asked the Constitutional Council to provide an additional official interpretation of the decision of the Constitutional Council of 15 October 2008 no. 8 “About official interpretation of Articles 54, 61.3.1 and 61.3.3, and also some other norms of the Constitution of the Republic of Kazakhstan concerning the organisation of public administration”.

The Chairman sought answers to the following questions:

1. What should be understood as “bases of the organisation and activity of state bodies” in Article 61.3.3 of the Constitution?
2. What functions of state bodies in the context of Article 61.3.3 of the Constitution can be made the subject of regulation of the law, and would this be done by legislative acts?

II. The Constitutional Council held as follows:

“Bases of the organisation and activity of state bodies” means ideas, purposes, tasks and principles of the Republic of Kazakhstan, provisions and norms of the Basic Law regulating legal status of state bodies as fixed in the Constitution, along with management spheres, mission, the main tasks, functions and the powers of state body which make up the content of its activity. Other important questions are included, connected with the creation, abolition and reorganisation, activity of state bodies, types of legal acts, their legal validity, order of acceptance, coming into effect, loss of force, other main forms of responsibility of official and other persons representing state bodies, and interaction of state bodies with non-state organisations and citizens.

The foundations of the organisation and activity of state bodies, and the functions the realisation of which concerns important public relations specified in Article 61.3 of the Constitution are established in legislation. This covers questions of legal capacity of individuals and legal entities, measures of a “right-restrictive” nature and the relationship of state bodies with non-state organisations and persons, including the establishment of law-enforcement and control-supervisory functions.

The functions the implementation of which do not concern the public relations listed in Article 61.3 of the Constitution are established at sub-legislative act level. Examples include the definition of the mechanism of realisation of the functions fixed in the law, the internal organisation and activity of state bodies, and acceptance of technical and technological norms. At this level the functions of state bodies are established only within the powers of the subject issuing the relevant sub-legislative act.

Languages:

Kazakh, Russian.



Latvia Constitutional Court

Important decisions

Identification: LAT-2013-2-002

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 10.05.2013/ **e)** 2012-16-01 / **f)** On the compliance of Section 86.3 of the Law on Judicial Power with Article 102 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 13.05.2013, no. 90(4896) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

4.7.4.1.6.1 Institutions – Judicial bodies – Organisation – Members – Status – **Incompatibilities.**

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

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

5.3.29.1 Fundamental Rights – Civil and political rights – Right to participate in public affairs – **Right to participate in political activity.**

Keywords of the alphabetical index:

Political party, membership, judge / Rights, infringement, continuous.

Headnotes:

The universal right to join political parties is a significant pre-condition for the existence of a democratic state order.

By joining a political party, an individual is participating in an organisation, the main aim of which is to gain political power.

Infringement of fundamental rights may be expected in the future or be potential. However, there must be a substantiated credible possibility that the application of the legal norm would create adverse consequences for the applicant in constitutional complaint proceedings.

A person's fundamental rights will usually have been infringed if a legal norm, which the person considers to be incompatible with a legal norm of higher legal force, has been applied. In this case, in order to identify an infringement of fundamental rights, an act of applying the legal norm with adverse consequences for the person concerned is needed.

The law requires that the contested norm should infringe upon the applicant's fundamental rights. It does not, however, require that this should have happened in all cases. An infringement of fundamental rights will usually be found, if a totality of circumstances exists, allowing the Constitutional Court to ascertain that the infringement exists.

To differentiate between cases where somebody submits a constitutional complaint to protect their own rights and those where somebody does so for the general good (to protect the rights of others, for instance, or to achieve political, scientific or other aims), it is not enough to establish that a person belongs to the group to which the contested provision applies. The applicant must provide credible substantiation that the adverse consequences caused by the contested provision infringed upon their fundamental rights.

The main purpose of time-limits is to ensure legal stability and protect the legal certainty of other persons. In time, the rights acquired by other persons may become more important than the adverse consequences that the contested provision has created for the applicant. Time-limits have also been set so that persons only turn to the Constitutional Court only in cases of actual infringement upon their fundamental rights.

Also, if somebody has not indicated objectively verifiable facts, which characterise the infringement and allow for identification of the point at which it occurred, their subjective opinion is not sufficient grounds for identifying an infringement upon fundamental rights.

If the law envisages significant adverse consequences for the applicant because of violation of the prohibition set out in the contested provision, then under certain conditions this situation may be recognised as a potential or future infringement of fundamental rights, to which the time-limit for submitting a constitutional complaint as stipulated in the law is not applicable.

Summary:

I. The applicant in this matter is a judge of the Supreme Court and was confirmed in this office on 13 December 2007. He has come to understand, over

the course of time, the importance of the appropriate voicing and representation of his political views on the processes in society and would like to join a political party. However, the provision under dispute restricts his right to join a political party.

Parliament noted that the provision safeguards judicial independence and also constitutes the canon of judges' professional ethics, which the legislator has included in the law. Amending or revoking the provision as such would not grant the applicant the right to join a political party.

Parliament was also of the view that the judicial proceedings should be terminated as there was a question over whether the applicant had abided by the term for submitting the constitutional complaint. The Constitutional Court continued the judicial proceedings and reviewed the case.

II. The Constitutional Court began by examining the restriction of the freedom of association. It noted that the restriction was set out by law and that it has a legitimate aim, safeguarding the democratic order of state and the rights of others. In effect, it ensures the proper functioning of a fair, independent and impartial judiciary.

The Court found the contested provision to be in conformity with the principle of proportionality because it creates certainty in society that a judge does not represent the opinion of a particular political party and this rules out the possibility of questions arising over his or her ability to administer justice impartially and independently. The Constitutional Court noted that the applicant can in fact participate in the work of the State and local government, and has a number of possibilities to voice his position regarding important issues in the work of the State and local government by, for instance, participating in and running for elections and addressing State and local government institutions.

The Constitutional Court noted the legislator's duty to monitor whether a legal norm meets its objective effectively, whether it continues to be effective, appropriate and necessary and whether improvements could be made. The contested norm does comply with the principle of proportionality but the legislator may in future need to assess whether the restrictions continues to be necessary in a democratic society.

The Constitutional Court recognised the contested provision as compliant with Article 102 of the Constitution.

Supplementary information:

Two justices submitted a dissenting opinion.

Cross-references:

Previous decisions of the Constitutional Court:

- no. 2000-03-01, 30.08.2000; *Bulletin* 2000/3 [LAT-2000-3-004];
- no. 2001-06-03, 22.02.2002; *Bulletin* 2002/1 [LAT-2002-1-002];
- no. 2002-01-03, 20.05.2002;
- no. 2002-09-01, 26.11.2002; *Bulletin* 2002/3 [LAT-2002-3-009];
- no. 2003-04-01, 27.06.2003; *Bulletin* 2003/2 [LAT-2003-2-009];
- no. 2003-05-01, 29.10.2003; *Bulletin* 2003/3 [LAT-2003-3-011];
- no. 2004-18-0106, 13.05.2005; *Bulletin* 2005/2 [LAT-2005-2-005];
- no. 2005-08-01, 11.11.2005;
- no. 2005-12-0103, 16.12.2005;
- no. 2005-13-0106, 15.06.2006; *Bulletin* 2006/2 [LAT-2006-2-003];
- no. 2005-16-01, 08.03.2006; *Bulletin* 2006/1 [LAT-2006-1-002];
- no. 2005-19-01, 22.12.2005;
- no. 2007-01-01, 08.06.2007; *Bulletin* 2007/3 [LAT-2007-3-004];
- no. 2008-34-01, 13.02.2009;
- no. 2006-03-0106, 23.11.2006; *Bulletin* 2006/3 [LAT-2006-3-005];
- no. 2008-36-01, 15.04.2009;
- no. 2009-45-01, 22.02.2010;
- no. 2009-74-01, 18.02.2010;
- no. 2010-60-01, 30.03.2011;
- no. 2010-71-01, 19.10.2011.

European Court of Human Rights:

- *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, 03.02.2005, para 44;
- *United Communist Party of Turkey and others v. Turkey*, 30.01.1998, para 25;
- *Sidiropoulos and Others v. Greece*, 10.07.1998, para 40;
- *Ždanoka v. Latvia*, 06.03.2003.

Languages:

Latvian, English (translation by the Court).



Liechtenstein State Council

Important decisions

Identification: LIE-2013-2-001

a) Liechtenstein / **b)** State Council / **c)** / **d)** 13.05.2013 / **e)** StGH 2012/163 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Child born out of wedlock, parental authority, condition of the parents' cohabitation / Child born out of wedlock, equal treatment / Child born out of wedlock, parental authority, joint / Child, best interests / Cohabitation, parental authority.

Headnotes:

§ 167 ABGB, which provides for the possibility of requesting the Court that parental authority be jointly exercised by both parents on condition that the parents of a child born out of wedlock have a permanent joint household, is not substantively justified.

Summary:

I. Article 167 ABGB permits the granting of joint parental authority over a child to unmarried parents, but makes it contingent on the parents' having a joint household. In the present case they did not, because of the father's status with regard to the right of residence. The guardianship court saw this as infringing the principle of equality under Article 31 of the Constitution (LV), as well as the principle of prohibition of discrimination which is founded on Article 14 ECHR in conjunction with Article 8 ECHR. In consequence, the Court suspended the proceedings and lodged with the State Council an application for the repeal of the passage in § 167 ABGB making the parents' joint household a

condition of joint parental authority. The State Council acceded to this request for review of constitutionality and repealed the corresponding passage in § 167 ABGB.

II. It is justified that parental authority over a child born out of wedlock should accrue as of right and in the first instance to the mother alone. Legal certainty and transparency are thereby upheld, and it is guaranteed in particular that upon the child's birth a person may properly take legal action on its behalf. The possibility established in § 167 ABGB (Civil Code) of requesting the Court that parental authority be jointly exercised by both parents has the outcome in principle, for cases where the parents are in agreement, that the parents of a child born out of wedlock are assimilated to those of a child born in wedlock. However, the fact that this assimilation should, according to § 167 ABGB, only be valid for parents of a child born out of wedlock who have a permanent joint household is not substantively justified. Considering in particular that joint parental authority may rest with married, separated or divorced parents even in the absence of a joint household, it is hard to see what reason could be adduced for treating the parents of a child born out of wedlock differently depending on whether or not they have a permanent joint household. It should also be noted that the European Court of Human Rights, the Austrian Constitutional Court and the Federal Constitutional Court in their most recent decisions have held contrary to the European Convention of Human Rights the failure of courts to consider the question whether parental authority over a child born out of wedlock should be granted in the child's best interests to non-cohabiting parents even without the mother's consent. Accordingly, the lack of this possibility of consideration by the courts is unjustified with stronger reason where, as in the case in point, the parents of a child born out of wedlock have jointly requested joint parental authority.

Languages:

German.



Lithuania Constitutional Court

Important decisions

Identification: LTU-2013-2-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 15.02.2013 / **e)** 28/2009 / **f)** On the adoption of the law on the 2009 state budget and related laws / **g)** *Valstybės žinios* (Official Gazette), 19-938, 20.02.2013 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.15 General Principles – **Publication of laws.**
4.5.6 Institutions – Legislative bodies – **Law-making procedure.**
4.10.2 Institutions – Public finances – **Budget.**

Keywords of the alphabetical index:

Vacatio legis / Law, speedy entry into force / Taxing laws / Economic crisis / Stability of public finances / State budget, adoption, process / Official publishing / Amendments, tax law.

Headnotes:

Law speedily entered into effect on the day of their official publishing without any term of *vacatio legis* may be due to an important public interest and / or pursuit of protection of other values consolidated in the Constitution, which outweigh a person's interest to have more time to adapt to the legal regulation establishing new duties or limitations. Still, the speedy entry into effect of laws establishing duties or limitations with respect to persons should be an exception, grounded and justified by special, objective circumstances, rather than the rule.

Summary:

I. A group of parliamentarians brought the case before the Constitutional Court, challenging the constitutionality of the Law on the 2009 State Budget, the Law on the 2009 Budget of the State Social Insurance Fund and the Law on the 2009 Budget of the Compulsory Health Insurance Fund, that of the amendments thereof, and that of other related legal acts. In total, the petitioner challenged almost 60 laws

adopted by Parliament while state institutions were responding to economic crisis overwhelming the biggest part of the world. The adoption of the new laws or amendments to the existing ones were made in a very short time, which departed from the procedure of adoption of tax laws.

By the date of the Constitutional Court's ruling, part of these laws already expired. Thus the Court did not review the constitutionality of these laws; instead, it formulated some important principles of constitutional doctrine concerning the adoption procedure of budget laws.

II. The Constitutional Court emphasised that laws and other legal acts must be adopted according to established procedure and comply with the Constitution. The procedure must not be altered after the process of adoption of those laws has started. It is allowed to deviate from this requirement only when it is necessary to secure the protection of other, more important constitutional values.

The Court noted that the newly adopted legal regulation prolonged the term of the beginning of the second consideration and interfered with the process of consideration of the state budget that had already started. However, the Court pointed out that the regulation included a constitutional requirement to react to an essential change in the economic and financial situation of the state due to an economic crisis. The requirement, moreover, created conditions for the *Seimas* of the new term of office to exercise their constitutional powers to consider and approve the draft state budget. The Government is responsible for the latter, namely to prepare the said draft state budget.

In this ruling, the Court also commented on the publication of the laws, especially some obligations and restrictions relevant to citizens. The official publication of laws is a necessary condition not only for the entry into force of laws, but also to inform subjects of legal relations what laws are valid, the legal content, and whether and when the laws apply to them. Moreover, legal security and protection of legitimate expectations means that persons have the right to reasonably expect that their rights acquired under valid legal acts will be retained for the established period of time and will be implemented. So, the changes in the legal regulation must be made in a manner so that the persons whose legal status is affected by those changes would have a real opportunity to adapt to the new legal situation.

Therefore, while seeking to create conditions for persons not only to familiarise themselves with the new legal regulation prior to its validity but also to

adequately prepare for the expected changes, the Court recognised that it might be necessary to establish a later date of the entry into force of the law (the beginning of the application thereof). In some situations, the legislator must provide for a sufficient *vacatio legis*, i.e. a time period from the official publishing of the law till its entry into force (the beginning of its application), so that interested persons might be able to prepare themselves to carry out the necessary requirements.

In the course of substantially amending the valid legal regulation, the Court noted there may be unfavourable consequences to the legal situation of persons. As such, one may have to provide not only for a sufficient *vacatio legis* but also a certain transitional legal regulation. In this context, the Court emphasised that a proper *vacatio legis* in the sphere of tax law is an important guarantee that persons (first of all, taxpayers) would be able not only to familiarise with new requirements of tax laws in advance, but also to adapt their proprietary interests and perspectives of economic activity to them.

All this implies that when an account is taken of the constitutional principle of responsible governance, the preparation of a draft state budget should be started as early as possible to enable people to adopt the necessary amendments of the aforesaid laws in time. Deviation from these requirements may be possible only in exceptional circumstances, provided there is a justifiable, important public interest.

While debating the state budget, the Government and the *Seimas* may not avoid reacting to a change in the economic and financial condition of the state due to special circumstances (e.g., economic crisis and natural calamity) that pose a particularly difficult challenge for the state. Upon emerging from such situation, there may be difficulties in collecting revenue provided for in the state budget, such that the required funds are not obtained for financing respective needs also established in the law.

The Court held that situations arise when it may be constitutionally justifiable to deviate from legal requirements related to the adoption and entry into force of laws affecting the state budget, and its revenue and expenditure. This may arise *inter alia* from the requirement to adopt amendments to such laws before the *Seimas* approves the state budget, and from the requirement to provide for a sufficient *vacatio legis*. The reasons for the exceptions include the public interest – guarantee the stability of public finances, not to allow the rise of an excessive budget deficit in the state due to an exceptionally difficult economic and financial situation because of the economic crisis – and the necessity of urgent and effective decisions.

Nevertheless, society must be presented with concrete criteria upon which the assessment of the economic and financial situation of the state is based. Criteria should also be presented regarding the determination of the planning of the state budget revenue and expenditure and a possible need respectively to amend the laws that affect the revenue and expenditure, especially laws establishing obligations of and limitations upon persons.

The Court stated that the *Seimas* adopted the Law on the 2009 State Budget but before it came into force, it had to respond to the economic crisis. In an attempt to guarantee the stability of public finances and not allow the rise of an excessive budget deficit, it had to adopt the laws that affected the amount of the 2009 state budget revenue and expenditure. Although it deviated from the constitutional requirement to adopt the amendments before it approved the state budget, the Court held that it did not violate the requirements for adopting the state budget.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2013-2-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 20.02.2013 / **e)** 41/2009 / **f)** On the dismissal of the Chancellor of the *Seimas* / **g)** *Valstybės Žinios* (Official Gazette), 20-975, 21.02.2013 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Chancellor, Parliament / Non-confidence / Term of offices / Dismissal, procedure / Requirement, candidate to the office of the Chancellor.

Headnotes:

Under Article 75 of the Constitution, officials appointed or elected by the *Seimas* with exception of persons specified in Article 74 of the Constitution (i.e., the President and justices of the Constitutional Court, the President and justices of the Supreme Court, the President and judges of the Court of Appeal) shall be dismissed from office when the *Seimas* expresses no-confidence by majority vote of all the Members of the *Seimas*. The parliamentary procedure of no-confidence under Article 75 of the Constitution must ensure a proper legal process. This means *inter alia* that an official against whom no-confidence is expressed should have a real opportunity to present to the *Seimas* his or her explanations and to answer, at the *Seimas* sitting, all the arguments upon which the no-confidence is grounded.

Summary:

I. The Vilnius Regional Administrative Court, the petitioner, requested to investigate whether the Resolution of *Seimas* whereby G. Vilkelis was dismissed from the office of the Chancellor of the *Seimas* is not in conflict with the Constitution, the Law on the State Service and the Statute of the *Seimas*.

II. The Constitutional Court emphasised that to dismiss the head of an institution appointed by the *Seimas* from office according Article 218.2 of the Statute of the *Seimas*, the procedure should not be overlooked. Here, the procedure requires that the official G. Vilkelis, the question of whose dismissal is considered, must have a real opportunity to participate in the discussion, namely provide the *Seimas* with his explanations and to answer questions of the Members of the *Seimas*. The Constitutional Court noted that although the Members of the *Seimas* were informed on 28 April 2009 that G. Vilkelis was temporarily incapable of work, the question of his dismissal from office was considered without his participation and without him being heard.

The Chancellor of the *Seimas*, an official appointed by the *Seimas*, is mentioned in Article 75 of the Constitution, which provides the grounds for dismissal from office. The ground of no confidence is among those specified in Article 75 of the Constitution. The regulation of the procedure of the parliamentary expression of no-confidence must ensure a proper legal process, which *inter alia* means that an official against whom no-confidence is expressed should have a real opportunity to present to the *Seimas* his explanations and to answer, at the *Seimas* sitting, all the arguments upon which the no-confidence is grounded.

Because such opportunity was not granted to G. Vilkelis, the Constitutional Court recognised that the Resolution of the *Seimas*, in light of the adopted procedure, conflicts with Article 75 of the Constitution.

While construing Article 69.1 of the Constitution, the Constitutional Court has held that sub-statutory legal acts adopted by the *Seimas* must be adopted while complying with the rules of adoption of legal acts determined in the Statute of the *Seimas*. Where the *Seimas* does not comply with the Constitution and the Statute of the *Seimas* in the course of the adoption of sub-statutory legal acts, the constitutional principle of a state under the rule of law, which implies a hierarchy of legal acts, is violated as well. Thus the Constitutional Court recognised that the Resolution of the *Seimas*, in view of the procedure of its adoption, conflicts with Article 69.1 of the Constitution and the constitutional principle of a state under the rule of law.

The Constitutional Court noted that the regulation of appointment and dismissal of the Chancellor of the *Seimas* is not clear and harmonious, i.e. the Statute of the *Seimas* does not establish any requirements for the candidate to the office of the Chancellor of the *Seimas*. Neither the Statute of the *Seimas* nor laws prescribe a clear procedure of dismissal of the Chancellor of the *Seimas* from office. Such a legal regulation creates preconditions to construe the status of the Chancellor of the *Seimas* and the procedure of his dismissal from office in a varied manner. Thus, it must be amended and specified so that clear requirements for the candidate to the Chancellor of the *Seimas* and clear procedure for his dismissal from office would be established.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2013-2-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 13.03.2013 / **e)** 40/03; 45/03-36/04 / **f)** On the construction of provisions of the Constitutional Court's rulings related to citizenship issues / **g)** *Valstybės Žinios* (Official Gazette), 28-1333, 16.03.2013 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

5.3.8 Fundamental Rights – Civil and political rights – **Right to citizenship or nationality.**

Keywords of the alphabetical index:

Dual citizenship, requirement / Nationality, grant, exception, merits / Permanent factual link / Society, integration.

Headnotes:

The Constitution generally prohibits dual citizenship, namely a person to hold citizenship of the Republic of Lithuania and citizenship of another state. This prohibition is not absolute. The law may and must provide for individual cases when a person may be a citizen of both states at the same time.

Under the Constitution, the President has an exceptional right to grant citizenship by way of exception for merits to the State of Lithuania. The discretion is bound by requirements deriving from the Constitution and is established by law. This includes constitutional imperatives that the merits must be special and undoubted to the State of Lithuania itself, such that the person who possesses the merits must be connected to the State of Lithuania by permanent factual links and has integrated into Lithuanian society.

Summary:

I. The President, the petitioner, asked the Constitutional Court to interpret the official constitutional doctrinal provisions related to Article 12.2 of the Constitution. The provisions in question establish that with exception of individual cases provided for by law, no one may be a citizen of both the Republic of Lithuania and another state at the same time. The petitioner also requested the Court to review other provisions related to the granting of citizenship by way of exception as well. Specifically, without making any amendments to the Constitution, the Court was requested to clarify whether it is possible to establish any such legal regulation by law so that citizens who left the country to reside in other states after the restoration of independence on 11 March 1990 and acquired citizenship of those states could be citizens of the Republic of Lithuania and of another state simultaneously.

The legislator may establish also other cases and conditions when citizenship may be granted by way of exception, and not only when such a person has

merits to the State of Lithuania, is linked with the State of Lithuania by permanent factual links and is integrated into the Lithuanian society.

II. The Constitutional Court emphasised that it is a legal, not a political institution. It decides the legal questions attributed to its competence under the Constitution only by invoking legal arguments, the already formulated (by itself) official constitutional doctrine and precedents. Thus the construction of final acts of the Constitutional Court may not be determined by, for example, a change in the composition of the Constitutional Court. The Constitutional Court may not construe its final acts by following the arguments of political expediency, political science or sociological research, and / or results of public opinion polls. Otherwise, presumptions to doubt the impartiality of the Constitutional Court might appear and there might arise a threat to its independence and the stability of the Constitution itself.

While construing the formula of Article 12.2 of the Constitution “with the exception of individual cases provided for by law”, the Constitutional Court noted that the law regulating the citizenship relations may establish only exceptional cases when a person may be a citizen of both the Republic of Lithuania and another state at the same time. That is, the legal regulation must be so that the cases of dual (multiple) citizenship would be an exception to the prohibition of such citizenship expressed by the formula “no one may” and not a rule denying this prohibition. The Constitutional Court also reminded that the provision of Article 12 of the Constitution, whereby a person may be a citizen of the Republic of Lithuania and, at the same time, a citizen of another state only in individual cases established by law, means that such cases established by law can be very rare (individual); that cases of dual citizenship must be extraordinarily rare, exceptional; and that under the Constitution it is not permitted to establish any such legal regulation under which cases of dual citizenship would be not extraordinarily rare exceptions, but a widespread phenomenon. Under the Constitution, the legislator may not follow the provision that the limitation of cases of dual (multiple) citizenship is unnecessary.

While construing the official constitutional doctrinal provisions related to the granting of citizenship by way of exception, the Constitutional Court held that it is the discretion of the legislator to establish such a way of granting of citizenship as its granting by way of exception for merits to the State of Lithuania. While enjoying this discretion, the legislator must heed the Constitution. He cannot deny the nature and meaning of the institute of citizenship and must pay heed to the constitutional requirement that a citizen of the

Republic of Lithuania may also be a citizen of another state only in individual cases established by law.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2013-2-004

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 12.04.2013 / **e)** 8/2010-132/2010 / **f)** On the duty to provide the information about a person, to whom a vehicle was entrusted / **g)** *Valstybės Žinios* (Official Gazette), 40-1950, 18.04.2013 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

5.3.13.23.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to testify against spouse/close family.**

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

Keywords of the alphabetical index:

Vehicle, owner / Information, duty to provide / Family members / Privilege not to testify / Criminal, administrative liability / Object, potential, hazardous.

Headnotes:

Upon a police official's request to determine a violation of law, the owner (holder) of the vehicle must provide that official with the information about a person (name, surname, and the place of residence) who at a certain time was in possession of or was using the vehicle that belongs to the holder of the vehicle. Non-compliance with that obligation would render the holder) liable in accordance with the administrative procedure. Administrative liability does not apply to the holder where the holder has lost his vehicle against his or her will.

This obligation of the holder of the vehicle to provide a police official with information about a person (name, surname, the place of residence) who at a certain time was in possession of or was using the vehicle that belongs to the holder has been established in order to ensure safe traffic, to safeguard traffic participants against accidents and ensuing harmful consequences, as well as to create legal preconditions for bringing to liability persons who have violated the traffic rules.

Summary:

I. This constitutional justice case was initiated by the Vilnius Regional Administrative Court, challenging the provision of Law on Road Traffic Safety insofar as there are no privileges that permit a person not to testify against his family members or close relatives. The challenged provision does not provide the vehicle owner (holder) the right to withhold from the police official, who is seeking to determine a violation of law, information about his family member (name, surname, and the place of residence) who at a certain time was in possession of or was using the vehicle that belongs to the owner of the vehicle.

II. The Constitutional Court noted that the guarantee of no testimony against his family members or close relatives means that a natural person may refuse to give evidence on the basis of which this person himself, his family member or close relative could be brought to criminal liability, as well as to another type of legal liability, if a possible sanction by its nature and size (strictness) amounted to a criminal punishment.

While construing the provisions of Article 23 of the Constitution ("Property shall be inviolable"), the Constitutional Court held that ownership includes obligations. Through these provisions, the social function of ownership is expressed and the obligations of the owner are determined by the specificity of the objects of ownership. Thus, the legislator may, taking into account the peculiarities of the objects of ownership, establish for the owners of these objects certain obligations as well as liability for non-compliance with the said obligations. Thus a human being, enjoying the aforementioned guarantee is not allowed not to comply with the duties established by law for him as the owner of an object of ownership.

A vehicle poses a potential hazard to surrounding persons. Therefore, its owner, who has the right to possess, use, and dispose of his vehicle, may not violate any laws and any rights of other persons. The legislator, in regulating the relations of the ownership of vehicles and road traffic safety, may, while taking

into account the specificity of vehicles as objects of ownership, lay down certain obligations of their owners (holders) as well as provide for liability for non-compliance with them.

Thus, the guarantee consolidated in Article 31.3 of the Constitution may not be construed so that, based on it, the vehicle owner could avoid obligations related to the vehicle belonging to him, *inter alia* refuse to provide a police official, who is seeking to determine a violation of law, with the information about a person who at a certain time was in possession of or was using the vehicle that belongs to the owner. In addition, the mere provision of a police official with such information is not, in itself, the submission of evidence against a certain person, *inter alia* a member of one's family.

In light of these arguments, the Constitutional Court recognised that the provision of Law on Road Traffic Safety insofar as it was challenged was not in conflict with the Constitution.

Cross-references:

European Court of Human Rights:

- *John Murray v. the United Kingdom*, no. 18731/91, 08.02.1996;
- *Weh v. Austria*, no. 38544/97, 08.07.2004;
- *O'Halloran and Francis v. the United Kingdom*, nos. 15809/02 and 25624/02, 29.06.2007.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2013-2-005

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 16.05.2013 / **e)** 47/2009-131/2010 / **f)** On the duty to pay the contributions of state social insurance and those of compulsory health insurance and on the reduction of the maternity (paternity) benefits / **g)** *Valstybės Žinios* (Official Gazette), 52-2604, 21.05.2013 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Medical aid, free of charges / Health protection, system / Healthcare establishments / Healthcare funding / Compulsory health insurance / Freedom of economic activity.

Headnotes:

The state's constitutional obligation to take care of people's health, including the duty to ensure medical aid and services in the event of sickness, is determined by the innate human right to obtain the best possible health, which is inseparable from human dignity and the right to life, and by the social right to healthcare.

In order to implement the constitutional obligation of the state to take care of people's health, an efficient system of health protection and proper conditions for its activity must be developed. The state has the duty to protect human beings from threats to health (e.g., reduce dangers to health and in certain cases, to the extent possible, prevent them), to improve the ability of a person and society to overcome dangers to health and to ensure access to medical services in the case of illness. As the Constitution consolidates the guarantee of medical aid to citizens free of charge at state medical establishments, the legislator may not disregard the fact that a certain part of healthcare services, namely the free-of-charge medical aid guaranteed to citizens, must be funded from the state budget funds.

Summary:

I. The case was initiated by two groups of parliamentarians, who challenged the legal regulation concerning compulsory social and health care insurance for certain groups of persons (e.g., persons who receive income under authors' agreements, from sports activities, or from performing activities), which were not covered by the aforesaid insurance before. The petitioner also argued that the legal regulation, through which the awarded maternity (paternity) benefits were reduced because of the economic crisis, is not in compliance with the Constitution.

This case is significant more for the constitutional jurisprudence developed while construing the provisions of Constitution related to the state's duty to care for people's health and to provide the guarantees of medical aid and services for citizens in the event of sickness.

II. Concerning the reduction of awarded maternity benefits and respectively, legal expectations of parents to receive them, the Court emphasised that the legislator, while taking into account various factors such as the capabilities of society and the state, can amend the legal regulation. As such, financial support rendered during leave granted for raising and bringing up children at home and the amount of support thereof can be changed. While doing so, the legislator must heed the Constitution, as well as the constitutional requirement of providing a sufficient *vacatio legis*.

While construing the constitutional provisions concerning healthcare, the Court explained that to implement the constitutional obligation of the state to care for people's health, where the state must ensure the medical aid and services for the human being in the event of sickness, it must develop an efficient system of health protection and proper conditions for its activity. The state must create legal and organisational preconditions for the activity of the system of health protection that would ensure the quality healthcare accessible to everyone. This includes not only the *expressis verbis* guaranteed medical aid and services for the human being in the event of sickness, *inter alia* the medical aid to citizens free of charge at state medical establishments but also other healthcare services for persons and the public. The state must also develop other health resources (e.g., pharmaceutical activity) necessary to implement in reality and efficiently, the innate human right to the best possible health.

The guarantee of medical aid to citizens free of charge at state medical establishments obligates the state not only to create the required network of state healthcare establishments, but also to cover the costs of rendering of such medical aid by state funds. Thus, the legislator may not disregard the fact that a certain part of healthcare services (e.g., free-of-charge medical aid guaranteed to citizens) must be funded from the state budget funds. This does not mean that all medical aid (let alone other healthcare services) rendered to citizens in those establishments should be paid for with state budget funds unconditionally and without paying heed to the state's financial capabilities.

Having assessed the state's financial capabilities and paying heed to the balance between constitutional values, the legislator must establish the amount of the medical aid rendered free of charge to citizens, which should be covered by state budget funds. However, while doing so, the legislator may not deny the substance of this constitutional guarantee: the medical aid free of charge for all citizens must be ensured insofar as it is necessary to save and preserve the life of a human being.

The strive to ensure the best possible accessibility to vitally important medical aid is also determined by the fact that in the situations where, due to some circumstances, such aid cannot be rendered in a timely and quality manner and at state medical establishments. Medical aid may also be rendered at other healthcare establishments able to render such aid in a quality and safe manner. The costs incurred by the latter establishments in the course of the rendering of such aid must be covered by state budget funds.

The state duty to create a system of healthcare funding by public funds based on social solidarity, where such a system would allow one to ensure the sufficient accessibility to healthcare, may not be construed so that, purportedly, the society should bear the burden of funding all possible healthcare services. In this sphere, it is necessary to ensure the balance between the interests of the person as a consumer of healthcare services (patient) and those of the whole society. Incentives should be created for everyone to take care of his health, to assume the obligation to contribute, as much as possible, to the health funding and to use the healthcare services responsibly and rationally.

After the legislator has chosen the model of healthcare funding based *inter alia* upon compulsory health insurance, the funds of this insurance may only be used for the financing of the healthcare services for insured persons not covered by the free-of-charge medical aid. This must be provided from state budget funds for all citizens, regardless of whether they are insured by the compulsory health insurance.

The activity of healthcare establishments is related to the implementation of one of the most important innate humane rights; therefore, it must be regulated and supervised by the state.

According to the Constitution, the state must regulate the economic activity in this sphere. It cannot deny the constitutional values upon which the national economy is based. This includes a private ownership right, a person's freedom of economic activity and a person's initiative. Regulation of such activity must

entail appropriate execution of its constitutional function of caring for people's health and the proper implementation of the innate human right to the best possible health and the right to healthcare.

Languages:

Lithuanian, English (translation by the Court).



Mexico

Supreme Court of Justice of the Nation

Important decisions

Identification: MEX-2013-2-002

a) Mexico / **b)** Supreme Court of Justice of the Nation / **c)** *En banc* / **d)** 10.02.2011 / **e)** Appeal for *Amparo* Proceedings 1082/2007 and 130/2008 / **f)** Farmers of Tamaulipas / **g)** Registration no. 22786, Ninth Period, *Semanario Judicial de la Federación y su Gaceta*, Tome XXXIII, March 2011, p. 918; (Appeal for *Amparo* Proceedings 130/2008), Record no. 22785, Ninth Period, *Semanario Judicial de la Federación y su Gaceta*, Tome XXXIII, March 2011, p. 893 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

International agreement, directly applicable / International law, enforcement, domestic / Appeal, court, right, refusal / Water, allocation / Treaty, international, application.

Headnotes:

Article 73.V of the *Amparo* Act holds that *amparo* as a review mechanism is inadmissible against acts that do not affect the legal interests of the petitioners. As such, the petitioners' case against government action allocating water resources under a Mexico-United States bilateral treaty was inadmissible as they had failed to prove that they suffered a personal, direct impact on their concession titles, given that the water allocation challenged relates to the hydrological system in another part of the state.

Summary:

I. Various farmers associations in the state of Tamaulipas filed an *amparo* motion before district and federal courts, against the President of Mexico and other federal authorities as the government defendants, alleging misapplication of the Treaty on

Distribution of International Waters between the United Mexican States and the United States of America. The contested government action was the subscription and signing of Minutes 309 of 3 July 2003, by the International Boundary and Water Commission between Mexico and the United States of America.

During irrigation cycles nos. 25 and 26, the relevant region had been affected by a severe drought. As this is an area near Mexico's northern border, the water collected throughout the hydrological system (which includes both countries) must be shared according to the terms of bilateral agreements (such as the aforementioned Minutes 309 being challenged), relating to part of flows to users established in the United States.

The petitioners contended that the determination, contained in the said Minutes, had ordered the delivery during cycle 27 (2002-2007) of a larger volume of water than they believed was due to the United States of America, in spite of the fact that this was intended to compensate for shortfalls of the neighbouring country, related to cycle 26 (1997-2002). They argued that, as a consequence, they had suffered a direct impact owing to the decrease in the amounts which, according to the concession titles issued to them, they were supposed to receive for use in irrigation.

The Judges of the Eleventh and Seventh District Courts in the State of Tamaulipas, respectively, dismissed the suit on the ground of inadmissibility under Article 73.V of the *Amparo* Act (*Ley de Amparo*), namely, that the writ of is inadmissible against acts that do not affect the legal interest of the petitioners.

The petitioners had submitted evidence that they hold a concession pertaining to an allocation of national waters to be used in the Irrigation District no. 25, in accordance with this title and with the National Waters Act (*Ley de Aguas Nacionales*), given that also any allocation is subject to the availability of the water. In the title of concession it was stated that the respective allocation of the water would be extracted from the Anzaldúas Dam. Therefore, the right of the petitioners was linked directly to the reservoir of this dam in particular.

In their argument, the petitioners asserted that in the higher dams of the hydrological system, during the previous rainy season, a considerable stockpile of water resources was captured. Therefore, based on the increased availability that there would be throughout the system, they should have been delivered a greater amount of liquid.

Accordingly, against the determination of the Eleventh and Seventh District Courts, the petitioners filed a motion for review, which the National Water Commission joined as party to the *Amparo* proceeding. The Supreme Court of Justice of the Nation decided to exercise the power to hear both cases and to merge the cause into a single case.

II. Analysing the matter, the Supreme Court of Justice of the Nation (hereinafter, "SCJN") *en banc* found that the use and application of national waters is subject to specific policies, as well as international commitments. The availability criterion is calculated based on the various vessels where capture of the water takes place. However, the fact that other dams have been overflowing does not justify the increased availability in the water system asserted by the petitioners.

In addition to the foregoing, in the concession title it was unequivocally established that the allocation of water to the concession holders was supposed to be drawn from the Anzaldúas Dam, which is situated in the state of Tamaulipas, and does not form part of the higher system of dams located in the state of Chihuahua. Although the petitioners are challenging the Minutes number 309 signed by the International Boundary and Water Commission, this document does not refer to the payment of waters by the Mexican government to the U.S. government; instead, it merely establishes the terms and conditions of a programme of improvements in the water suppression systems for subsequent use. In addition, it contains stipulations about deliveries regarding this specific objective.

It should also be mentioned that a considerable cash investment was made by both governments to provide common resources for the construction of these dams located in Mexico. These infrastructure works certainly provided clear benefits, such as increased availability of water in the state of Chihuahua. Hence, water was supposed to be sent north as payment to the U.S. government (which would have been taken from the Rio Grande).

Accordingly, the Court *en banc* determined that the petitioners failed to prove that they had suffered a personal, direct impact on their concession titles, since the water allocation they challenged corresponds to the hydrological system elsewhere, far from where they are located. The Court held that the petitioners' assertions failed to support the claim that instead of having delivered water to the U.S. government, the authorities of the Mexican government should have supported drawing off water flows to feed the reservoir of the dam that supplies their irrigation district. The Court accordingly decided

that the petitioners' claim did not correspond to a specific impact on the legal interest related with their concessions.

Since the existence of direct personal grievances to the detriment of the petitioners, derived from actions by the authorities identified as the defendants, was not proven, the alleged actions do not imply a direct impact on that legal interest. Accordingly, the *amparo* motion in question was dismissed.

Languages:

Spanish.



Identification: MEX-2013-2-003

a) Mexico / **b)** Supreme Court of Justice of the Nation / **c)** *En banc* / **d)** 14.04.2011 / **e)** Unconstitutionality Action 48/2009 / **f)** Discrimination of naturalised persons, right to work and regulation of covert activities / **g)** Registration no. 22998, Ninth Period, *Semanario Judicial de la Federación y su Gaceta*, Tome XXXIV, July 2011, p. 1207; Official Gazette of Mexico, 24 June 2011, Morning Edition, Third Section, Judiciary / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

4.6.9.2 Institutions – Executive bodies – The civil service – **Reasons for exclusion.**

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

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

Keywords of the alphabetical index:

Foreign worker, freedom to choose place of work / Police, power, exercise / Profession, freedom to exercise, regulation / Covert operation, regulation.

Headnotes:

When establishing nationality restrictions on certain public offices, the legislature does not have complete discretion, as human rights, including the right to equality and non-discrimination on the basis of national origin, must be respected.

The possibility of career promotion in law-enforcement relates to a system that aims to ensure the professionalisation of the officers of such police force, as professionalisation is one of the elements of the law-enforcement career service that make it possible to evaluate the quality of the performance of members of the federal police. The freedom to work is not violated by regulations concerning dismissal aimed at professionalisation of the police force; therefore, even at the expense of an individual officer's personal interest, the interest and welfare of society must be paramount.

Finally, the establishment, through regulations, of minimum guidelines for the police to conduct covert operations and act as undercover users for the prevention of crimes in no way undermines legal certainty and security, since nowhere is it stipulated that such guidelines are a matter reserved for the law.

Summary:

I. On 29 June 2009, the President of the National Human Rights Commission (hereinafter, "CNDH"), an autonomous administrative body of the federal government, brought an unconstitutionality action seeking to invalidate various provisions of the Federal Police Act (*Ley de Policía Federal*) (hereinafter, "LPF"), the Law on Auditing and Accountability of the Federation (*Ley de Fiscalización y Rendición de Cuentas de la Federación*) (hereinafter, "LFRCF"), and the Organic Law of the Federal Attorney General's Office (*Ley Orgánica de la Procuraduría General de la República*) (hereinafter, "LOPGR").

Article 32 of the Federal Constitution allows the law to determine, in addition to those expressly set forth in the Constitution, the positions of office that require Mexican citizenship to be held and to exclude those who acquire another nationality. This consideration relates to the fact that these positions of office relate to the interests or political fate of the nation, or else, to national security and defence. However, the legislature does not have full discretion in imposing such restrictions because, when establishing a legal restriction on positions of office, human rights, including the right to equality and non-discrimination on the basis of national origin, enshrined in Article 1 of our Constitution, must be respected.

The Congress of the Union therefore has the authority to establish legal reservations relating to nationality for access to certain positions of public office, although these reservations must be circumscribed based on the conditions of equality and non-discrimination established by Article 1 of the Constitution. Unless they are positions and duties such as those envisaged in Article 32 of the

Constitution, it would be considered discrimination on the basis of national origin; the law would recognise the existence of suspicious categories.

II. The Supreme Court of Justice of the Nation (hereinafter, "SCJN") first analysed the restrictions based on nationality.

Mexican law establishes two recognised manners for the acquisition of Mexican nationality: by birth or by naturalisation process.

The SCJN, acting *en banc*, declared it unconstitutional for Article 17.I of the Federal Police Act to require Mexican nationality by birth and not having acquired another nationality as requirements for admission to the police force, since the foregoing breaches Article 1 of the Constitution, by discriminating against those naturalised Mexicans who have acquired Mexican citizenship under the Nationality Act (*Ley de Nacionalidad*), by fulfilling a series of requirements which are not negligible, since they imply, to begin with, renouncing the nationality they used to hold; any submission, obedience or fidelity to a foreign state, particularly the one associated with the other nationality; any foreign protection from Mexican laws and authorities, and any right which international treaties or conventions afford to foreign nationals. In addition, they must prove that they are able to speak Spanish, know the history of the country and have integrated with the national culture, among other requirements. Moreover, in some cases, they are people who have married a Mexican national or who have had children that are of Mexican nationality by birth, and they have formed a family in the country.

Although such persons have acquired Mexican nationality, with all that this implies – citizenship, rights, duties and obligations – nevertheless, in spite of this, since they are not Mexican nationals by birth, they are excluded from access to positions of office related with public security. This constitutes discrimination on the basis of national origin since the consideration cannot be reached that law enforcement or state prosecution are inappropriate or unsuitable professions to be held by those who are Mexican by naturalisation. If this were the case, access by naturalised Mexicans to positions of public office would be subject to a presumption of untrustworthiness or disloyalty.

Therefore, the establishment of a reservation of this kind must not exclude those who have the status of Mexican nationals and who have acquired it through a route other than by birth, i.e. by naturalisation, since both those who are Mexican by birth and those who are Mexican by naturalisation have the status of Mexican nationals.

However, the Court held that, the principles of equality, non-discrimination and freedom of work are not undermined by excluding from certain positions of public office those Mexican nationals who have acquired another nationality.

A provision requiring that in order to be a Commissioner General of the Federal Police, a person must be a Mexican citizen by birth with no other nationality, is not unconstitutional. Legal restriction conceived against naturalised Mexicans or to dual nationality subjects, was considered constitutional by the Court, since such a restriction aims to avoid conflicts arising from dual or multiple nationalities, and their negative impact on holding a particularly delicate position of public office or employment.

As regards the impugned provisions of the other laws (the Law on Auditing and Accountability of the Federation (hereinafter, "LFRCF") and the Organic Law of the Federal Attorney General's Office (hereinafter, "LOPGR")), the restriction on any foreign nationals acquiring the status of career expert (Articles 36.1.a LOPGR and 87 LFRCF) was considered constitutional. Such restriction does not violate the right to work; nor does it discriminate against foreign nationals on the basis of their nationality, since the restriction of access to such a restriction is not absolute. Although this restriction does not conform to the prohibition contained in Article 32, which specifically refers to the restriction of forming part of the force of the police or public security, the contested articles were determined to be valid by majority vote. One must be a Mexican citizen by birth to hold the position of a career expert. The foregoing is constitutional, since such a position entails a high level of trustworthiness. Foreign nationals may only be occasional experts; we turn to them when there are no Mexican experts in a given area.

Therefore, with respect to the challenged provisions (Articles 7.I and 17.a.I LPF; 18.I, 23.a, 34.I.a, 35.I.a and 36.I.a LOPGR, and Article 87 LFRCF), the conformity of the articles was declared, with the exception of Article 18.I of the Organic Law of the Federal Attorney General's Office, which states that a person must hold Mexican citizenship by birth in order to be an Assistant Attorney General or an Inspector General.

By contrast, as a third category of federal security agents, it was found to be unconstitutional to require Mexican citizenship by birth (thereby excluding a category of people who hold other qualities, as naturalised citizens) for, and prohibiting anyone with a second nationality from, aspiring to be a career Federal Public Prosecutor, a career law-enforcement

officer, or a career expert (Article 17.a.I of the Federal Police Act, Articles 23.2.a, 34.I.a, 35.I.a and 36.I.a of the Organic Law of the Federal Attorney General's Office). The SCJN, acting *en banc*, determined that these provisions undermine the third category of agents' rights, violating the principle of equality, the principle of non-discrimination and freedom of work, by setting an excessive distinction based on national origin, with respect to those who are Mexicans by naturalisation.

The SCJN then considered the restrictions on remaining in service and on covert activities.

First, the SCJN held that no right to work is violated by establishing that there may be grounds for dismissal of a member of the police force who has applied for three consecutive promotions without having obtained the rank immediately above that would correspond thereto for reasons attributable to that person (Article 22.I.a LPF).

Freedom of work is not absolute. In the case of members of the police forces, regulated by the LPF, these fall under a special regime because of the services they provide, which are administrative in nature, and subject to various requirements that must be met for them to remain in service. It is also unacceptable for them to attempt to avail themselves of labour rights that are incompatible with the duties performed, because although there is an employment relationship between the government and its employees, it is also true that this relationship does not conform to the elements of an employment contract *per se*. The purpose of an employment contract is economic compensation, whereas the duties entrusted to the State, far from pursuing a monetary interest, are primarily intended to protect social welfare. Indeed, by virtue of that difference of objectives, the exigencies of these two types of activities are also different, since they find themselves, accordingly, subject to a law-enforcement career system which, to achieve its objectives, places certain demands on members of the police forces that are required for them to remain in service.

The possibility of career promotion in law-enforcement relates to a system that aims to ensure the professionalisation of the officers of such police force, as professionalisation is one of the elements of the law-enforcement career service that make it possible to evaluate the quality of the performance of members of the federal police. A person who fits such a description can hardly be considered a suitable officer; therefore, even at the expense of his personal interest, the interest and welfare of society must be paramount.

Second, the SCJN declared constitutional that the minimum guidelines for the police to conduct covert operations and act as undercover users for the prevention of crimes shall be established as regulations.

In no way does this undermine legal certainty and security, since nowhere is it stipulated that such guidelines are a matter reserved for the law. Secondly, the regulations shall govern that policing, and anyone who is a police officer shall be subject to such policing. Finally, the role of the federal police is governed by the provisions of Article 21 of the Federal Constitution, which expressly provides: "The performance of public security institutions shall be governed by the principles of legality, objectivity, efficiency, professionalism, honesty and respect for the human rights recognised in this Constitution."

Similarly, the power of Commissioner General of the Police to authorise such covert operations is in accordance with the Constitution (Article 10.XII LPF). The use of the power vested in such Commissioner, insofar as deciding when to authorise covert operations, by arrangement with the Secretary of Public Security, has no bearing on the constitutionality of such power. Under Article 21 of the Constitution, the authorities who are responsible for the national system of public security are the Federal Executive, the Secretariat of Public Security, the Office of the Public Prosecutor, and the Federal Police. Given the state of affairs at any given time, these are the authorities with knowledge of everything relating to crime and its prevention, as well as the social effects that are occurring as a consequence. This is useful in deciding upon the measures, policies and operations that have to be drawn up or carried out. Therefore, such power is vested in the head of the Federal Police, by arrangement with the Secretary of Public Security, the regulation of which may be validly delimited in other kinds of statutes, such as regulations, protocols, and circulars, among others, which will govern policing.

Languages:

Spanish.



Identification: MEX-2013-2-004

a) Mexico / **b)** Supreme Court of Justice of the Nation / **c)** *En banc* / **d)** 03.05.2011 / **e)** Contradiction of Criteria 268/2010 / **f)** Interconnection Rates / **g)** Registration no. 23060, Tenth Period, Pleno, *Semanario Judicial de la Federación y su Gaceta*, Tome XXXIV, August 2011, p. 537 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

4.6.3.1 Institutions – Executive bodies – Application of laws – **Autonomous rule-making powers.**
 5.3.13.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Suspensive effect of appeal.**
 5.4.7 Fundamental Rights – Economic, social and cultural rights – **Consumer protection.**

Keywords of the alphabetical index:

Administrative proceedings / Telecommunication.

Headnotes:

A suspension of resolutions issued by the Federal Telecommunications Commission, which had ordered the imposition of interconnection fees applicable between concessionaires of public telephone networks, or determining the rate conditions that must rule between telephone concessionaires, admitted, would affect the social interest and contradict the provisions of public order.

Summary:

I. This case arose as a result of a contradiction in criteria of interpretation issued by two federal courts, concerning the suspension of resolutions issued by the Federal Telecommunications Commission (hereinafter, "COFETEL"), in which COFETEL had ordered the imposition of interconnection fees applicable between concessionaires of public telephone networks.

In prior trials, two Collegiate Courts had applied contradictory criteria regarding this matter. The Thirteenth Collegiate Administrative Court of the First Circuit affirmed that the suspension against these actions could not proceed because it involves provisions related to public order and the social interest.

On the contrary, the Ninth Collegiate Administrative Court of the First Circuit stated that the determination of fees among concessionaires of public communications networks only relates to such parties as private individuals, and therefore, the granting of the suspension does not harm the social interest, or contradict any provisions of the public order.

Regarding these contradictory positions, the plenary session of the Supreme Court of Justice of the Nation (hereinafter, "SCJN") was required to resolve two main points:

- i. Will the possible suspension of the COFETEL resolution ordering the interconnection between concessionaires of public communications networks affect the social interest, or not? Does the resolution contradict provisions of the public order?
- ii. If the suspension against the administrative determinations adopted by COFETEL, which determine the rate conditions that rule between concessionaires arising out of an interconnection are permitted, would this affect the social interest and contradict provisions of the public order?

II. By a majority six votes, the Plenary session of the SCJN determined that when COFETEL orders a rate to ensure the interconnection of telecommunications networks, because the parties did not reach an agreement, it is safeguarding the establishment, continuity and efficiency of the rendering of a public service (in this case, mobile telephone services).

The suspension against the resolutions of COFETEL ordering interconnection, or determining the rate conditions that must rule between telephone concessionaires is inadmissible because if it is admitted, it would affect the social interest and contradict the provisions of public order.

The suspension of a resolution of this type would translate into depriving the collective of users of mobile telephones from a benefit granted under law. This is so because it would cause a harm that otherwise would not be felt, since it would imply that one or more operators on the market would not be able to act, or that they would do so under disadvantageous circumstances. This situation would cause harm to the users because they would not be able to communicate to telephones that are served by other service providers (which interconnection was ordered by COFETEL) or because when they attempt to communicate, they would have to contract the services of an operator, thereby affecting the conditions of free competition on the telecommunications market, which is a priority.

The SCJN accordingly issued a decision affirming the interpretation of the Thirteenth Collegiate Administrative Court of the First Circuit, stating that it is inadmissible to grant the suspension against interconnection as ordered by COFETEL.

Languages:

Spanish.



Identification: MEX-2013-2-005

a) Mexico / **b)** Supreme Court of Justice of the Nation / **c)** *En banc* / **d)** 12.05.2011 / **e)** Constitutional Action 72/2008 / **f)** Tulum Park, nature reserve / **g)** Record no. 23269, Ninth Period, *Semanario Judicial de la Federación y su Gaceta*, Tome III, December 2011, p. 15; Official Gazette of Mexico, 18 July 2011, Morning Edition, Fourth Section, Judiciary / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

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

5.4.20 Fundamental Rights – Economic, social and cultural rights – **Right to culture**.

Keywords of the alphabetical index:

Conflict of powers / *Ultra vires* / Environment, zoning / Federal jurisdiction / Territory, ordering / Cultural goods, protection.

Headnotes:

A municipality overstepped its constitutional powers by attempting to exercise jurisdiction over properties that included an archaeological zone, given that these fall within the purview of federal legislation as property over which the Federation has exclusive jurisdiction. This exclusive jurisdiction had been accorded by Article 73.XXIX-G of the Federal Constitution, introduced in 1987, which enhanced the centralisation of environmental matters, concerning the regulation of actions aimed at the preservation

and restoration of ecological balance and environmental protection that are carried out on properties and zones of federal jurisdiction. In such cases, the Federation exercises jurisdiction even though the affected properties are physically situated in municipal territory.

Summary:

I. On 26 May 2008, the incumbent of the Secretariat of the Environment and Natural Resources (SEMARNAT) filed a constitutional action on behalf of the Federal Executive Branch against the decision of the Municipal Council of Solidaridad, state of Quintana Roo, related with the approval of the 2006-2030 Urban Development Program and its upgrade relating to the Population Centre of Tulum, of 5 April 2008. The petitioner argued that this municipality overstepped the powers vested in it under Article 115.V of the Constitution with regard to territorial administration.

The petitioner contended that the municipal council was attempting to exercise jurisdiction over properties that included the archaeological zone of Tulum, which might fall within the purview of federal legislation as property over which the Federation has exclusive jurisdiction. The petitioner argued that, as a consequence, such assignation of competence interferes with the Federation.

II. By unanimous vote, the Supreme Court of Justice of the Nation (hereinafter, "SCJN") held that such arguments are well founded in the following terms.

The Court observed that the Federation has exclusive power or jurisdiction in respect of the Tulum-Tancah Zone of Archaeological Monuments of Tulum National Park. It has the power to establish a constitutional and legal regime of coordination between the different levels of government (Federation, states and municipalities). Such regime would be construed according to provisions laid down by the Federation.

The contested programme continues to exist in the terms approved by the Municipal Council of Solidaridad. However, the inclusion of the aforementioned national park within the contested program was declared unconstitutional.

In addition to the exclusion of Tulum National Park and the Zone of Archaeological Monuments Tulum-Tancah from the Upgrade of the Urban Development Program, the Court held that the Federation shall exercise its exclusive power in the matter and determine the coordination, if any, that will have to exist with the state and the municipalities.

The Court held that the constitutional action in question is admissible and well founded. Therefore, the contested Agreement is declared invalid, solely with respect to the inclusion of Tulum National Park and the Zone of Archaeological Monuments in the contested programme.

The Court noted that there is a constitutional and legal regime of concurrence between the various levels of government (Federation, states and municipalities) in ecological and environmental protection issues. In matters of human settlements, the addition of Article 73.XXIX-G of the Federal Constitution, in 1987, enhanced the centralisation of environmental matters, by making it a federal issue. The purpose of the foregoing is to regulate actions aimed at the preservation and restoration of ecological balance and environmental protection that are carried out on properties and zones of federal jurisdiction.

The powers vested in the municipalities in this matter are not absolute or unrestricted, as there are national properties that are subject to the regime of public domain of the Federation, i.e., properties over which the Federation exercises jurisdiction even though they are physically situated in municipal territory.

The aforementioned Upgrade of the Urban Development Program included "areas of federal property" within its jurisdiction. However, even though the Municipality of Solidaridad is authorised to issue the upgrade to the aforementioned program, since it concerns its own territory, the Court deemed that the Municipality had overstepped its constitutional powers.

The SCJN recognised that it was the Federal Executive's intention to create, from 1981 onwards, a National Park and to declare a Zone of Archaeological Monuments inside the continental part and not the coast of Quintana Roo.

The inclusion of national properties such as "Tulum National Park" and the "Tulum-Tancah Zone of Archaeological Monuments" in the aforementioned municipal programme implies an invasion into the sphere of competence of the Federal Executive Branch. These properties are subject to the regime of public domain of the Federation, to reduce the possibility of serious damage or destruction of natural and cultural elements of national importance that exist in such areas.

The Court stated that this does not mean that the municipalities cannot exercise powers with respect to zoning, urban development and territorial management, but that, in doing so, they shall be

subject to the provisions of the relative federal – and state – laws, as provided in Article 115.V of the Federal Constitution. In this regard, the Municipality of Solidaridad should have adhered to the applicable provisions of the General Law on National Assets (*Ley General de Bienes Nacionales*), the General Law on Ecological Equilibrium and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*), the General Law on Human Settlements (*Ley General de Asentamientos Humanos*) and the Federal Law on Archeological, Artistic and Historic Monuments and Zones (*Ley Federal sobre Monumentos y Zonas Arqueológicas, Artísticas e Históricas*).

That they are national assets subject to the regime of public domain of the Federation does not mean that the existence of private property and human settlements within them cannot be authorised; however, this must be authorised by the competent federal authorities, in accordance with the general laws mentioned above.

Pursuant to Article 41.IV of the Regulatory Law of Article 105.I and 105.II of the Federal Constitution, the Court accordingly ordered that the Federation, the State of Quintana Roo and the Municipalities of Solidaridad and Tulum shall coordinate with each other according to their respective spheres of competence, in order to regularise the anomalous situation and thus resolve the fate of the constructions – residential and tourist – and the human settlements located within the area comprising the aforementioned national properties under federal jurisdiction.

Languages:

Spanish.



Identification: MEX-2013-2-006

a) Mexico / **b)** Supreme Court of Justice of the Nation / **c)** *En banc* / **d)** 19.09.2011 / **e)** Appeal for *Amparo* Proceedings 2237/2009, 24/2010, 121/2010, 204/2010, 507/2010 / **f)** Right to an adequate standard of living / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

4.10.7.1 Institutions – Public finances – Taxation – **Principles.**

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

Keywords of the alphabetical index:

Dignified minimum existence, fundamental right to guarantee / Economic and financial situation, extremely difficult.

Headnotes:

The right to an adequate standard of living, which serves as a threshold limit on the legislature when enacting laws on taxation, must not be construed as only the minimum sum for financial survival (Article 31.IV of the Mexican Constitution), but also as the requisite condition for a free and dignified existence and for the effective participation of every citizen in the political, economic, cultural and social organisation of Mexico (Article 25 of the Mexican Constitution). This is consistent with provisions established by international agreements, which include the provision that a State must have to guarantee that its citizens attain the requisite elements to have a quality of life that is dignified and decent, such as the American Declaration of the Rights and Duties of Man and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. However, the right does not have to be construed as applying in an identical manner to every tax subject, nor does it necessarily preclude the taxation of minimum wage earnings.

Summary:

I. Several individuals filed a motion for *amparo* proceedings against the Decree dated 1 October 2007 that amended, added and repealed various tax provisions. In particular, the petitioners challenged Articles 177 and 178 of the Income Tax Law.

II. The First Chamber of the Supreme Court of Justice of the Nation (hereinafter, “SCJN”) had previously held that the right to an adequate standard of living existed and served as the limit for legislators in terms of taxation (appeals for *Amparo* proceedings 1780/2006 and 811/2008). Moreover, the Second Chamber had previously ruled that the ordinary legislator cannot impose taxation on persons earning minimum wage because their remuneration is barely enough to cover their basic needs (appeal for *Amparo* proceedings 1301/2006).

The plenary session of the SCJN denied the *Amparo* proceeding because it ruled that the right to an adequate standard of living must not be construed as only the minimum sum for financial survival (Article 31.IV of the Mexican Constitution), but also as the requisite condition for a free and dignified existence and for the effective participation of every citizen in the political, economic, cultural and social organisation of Mexico (Article 25 of the Mexican Constitution). The foregoing shall apply without forgetting that the minimum wage is exempted from seizure, offset or discounts (Article 123.VIII.A).

The foregoing is consistent with the provisions established by international agreements, which include the provision that a State must have to guarantee that its citizens attain the requisite elements to have a quality of life that is dignified and decent, such as the American Declaration of the Rights and Duties of Man and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.

According to the principle of tax proportionality, the adequate standard of living refers to a legal right by virtue of which tax legislators when drafting the purpose of a contributions and identifying the correct capacity to contribute, must respect an exempted or lessened taxation threshold, as the case may be, which corresponds to the requisite resources for the subsistence of persons. Pursuant to this principle, the legislator is constitutionally barred from encumbering the adequate standard of living.

First, to define whether the right to an adequate standard of living has a “homogeneous” content—in other words, enforceable in identical terms for every beneficiary regardless of the manner of earning their wages, the SCJN ruled with respect to the following issues.

The SCJN in plenary session dismissed the fact that legislation should have contemplated a positive or negative factor applicable to the tax calculation. According to the arguments made by the plaintiffs, the rate should be used to determine the tax base, so that the resulting rate is not disproportionate. Taking into account the various tax systems for persons in terms of income tax (hereinafter, “ISR”), the right to an adequate standard of living (as an expression of the guarantee of tax proportionality) would not need to manifest in the same terms, without considering the specific conditions according to which the income of the persons is generated.

This argument was declared invalid because ISR is a tax levied upon different economic activities wherein a common denominator is present, consisting in

obtaining from the revenue, precisely from certain activities. In itself, the right to an adequate standard of living is not drafted homogeneously for all individuals.

Second, the plenary session asked itself whether the recognition of this right must be reserved under a single formula; in other words, if the legislator must establish or not an exemption, deduction or any generalised method in order to guarantee the right to an adequate standard of living.

The petitioners argued that the rate established by Article 177, which was being challenged, must be declared unconstitutional because it taxes the income of the persons from the first cent of their earned wages, but there is no exception to said tax in terms of minimum wages used for food, clothing, housing, medical care, entertainment for said persons as well as their families.

The SCJN dismissed the argument. It is true that the principle of tax proportionality demands that benefits earned that are not ideal for taxation must not be affected by the tax system. However, the recognition of the adequate standard of living does not imply that the principle of the taxation capacity justifies the establishment of generalised exemptions of a tax. It is also impossible to recognise the validity of the generalised deductions because the tax legislator is obligated to define the legal system for taxation and to establish in the law whether certain method is more appropriate for the purposes of the tax system or more in keeping with the financial reality at a given time.

Similarly, it must be assessed whether the right to an adequate standard of living includes the possibility of a person not having his property reduced, but to the extent that said person has an actual taxation capacity and, therefore, evidences having resources in excess of the minimum threshold to cover the basic needs. It may be argued that the right to an adequate standard of living also includes positive actions taken by the State.

Third, the methods established by the tax legislation take into account the type of income that is earned (in other words, in terms of individuals who earn income from salaries, business activities or for providing subordinated personal services). The foregoing shall apply regardless to the type of income that is earned (personal deductions).

Since these procedures exist, the general taxation system of Title IV of the Income Tax Law must be considered to be in agreement with the right to an adequate standard of living, which is related to the guarantee of tax proportionality.

Languages:

Spanish.

*Identification:* MEX-2013-2-007

a) Mexico / **b)** Supreme Court of Justice of the Nation / **c)** *En banc* / **d)** 29.09.2011 / **e)** Action of Unconstitutionality 62/2009 / **f)** Prenatal Human Life, Women and Human Rights / **g)** Registration no. 23349, Tenth Period, Pleno, *Semanario Judicial de la Federación y su Gaceta*, Tome IV, January 2012, p. 789 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

5.1.1 Fundamental Rights – General questions – **Entitlement to rights.**

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

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

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

Keywords of the alphabetical index:

Right to life, scope / Embryo and foetus, human, donation and use / Constitution, amendment, validity / Constitution, federal, prevalence.

Headnotes:

An article of the constitution of the State of San Luis Potosi, which had been amended by decree, equating for all legal purposes an “unborn” with a person who has already been born, is clearly contradictory in light of the supremacy of the Federal Constitution. Neither the Federal Constitution nor the relevant international treaties consider a foetus as an “individual” so a State Constitution cannot equate the two because it would be tantamount to conferring rights to a group of “subjects” who are not recognised by the supreme law of the land. As the supreme law, the Mexican Constitution prevails over any state constitution, which must adhere to the provisions of the latter.

Summary:

I. On 5 October 2009, 12 members of the LIX Congress of the State of San Luis filed an action for unconstitutionality claiming the invalidity of Decree 833 dated 3 September 2009, which amended Article 16 of the Constitution of the State of San Luis Potosi. The provision that was challenged stated:

“The State of San Luis Potosi recognises human life as the foundation of every other right afforded to human beings; therefore, it is respected and protected from the moment of conception. Capital punishment is strictly forbidden and may not be applied in any case. The death of a foetus shall not be punishable when caused by a negligent action of the mother; a pregnancy resulting from rape or an improper insemination; or in the case that life of the mother is placed at risk if an abortion is not practiced.”

According to the plaintiff, the merits of the claim are grounded in the amendment to Article 16 of the Constitution of the State of San Luis Potosi because it establishes that life begins at conception. This recognition entails legal consequences consisting in equating a foetus with an individual or person, which is clear from the intention that was expressly stated by the state legislator in the congressional declaration of purpose for said constitutional amendment.

Specifically, the amendment being challenged establishes that human life is “the foundation of every other right afforded to human beings”, which is contrary to the Federal Constitution because pre-eminence cannot be given to any right—not even the right to life – over other constitutional rights.

II. The majority of the plenary session of the Supreme Court of Justice of the Nation (hereinafter, “SCJN”) declared unconstitutional the portion of the constitutional provision that states: “as the foundation of every other right afforded to human beings”; and “from the moment of conception”.

By analysing the terms “conception” and “fertilisation” and after recognising that the Federal Constitution does not allude to these specific terms, the SCJN determined that from the congressional statement of purpose of the constitutional amendment that is challenged, clearly the intention of the permanent legislator of San Luis Potosi is to equate the terms “conception” and “fertilisation” because it always refers to the fact that life begins after fertilisation and, since then, it must be protected.

Thereafter, the SCJN analysed the meaning given by the Federal Constitution to the terms “person”, “individual” and “human being”, concluding that for the Federal Constitution these terms are synonymous.

Therefore, human beings may be defined in terms of belonging to the *homo sapiens* species and, from this point of view, the formation of the human being begins from the moment of fertilisation of the ovum by a spermatozoid. However, in the Constitution, the term “human being” not only means belonging to this species, but also refers to the members of this group that have certain characteristics or attributes that are granted or recognised by the legal system itself.

In this sense, even if a zygote qualifies as a human organism, it is unreasonable to consider it a person or individual (in other words, as a legal or statutory subject), according to the Mexican Constitution or international treaties. These do not establish that the unborn are persons, individuals or legal or statutory subjects; on the other hand, they are only recognised as legally protected, even if these qualify as belonging to the human species.

Therefore, the foetus, regardless of its current gestational stage, cannot be considered a legal person or individual in terms of being subject to constitutional rights or having legal standing.

By legal fiction, Article 16 that is being challenged inaccurately equates for all legal purposes an “unborn” with a person who has already been born. However, neither the Federal Constitution nor the relevant international treaties consider a foetus as an “individual” so a State Constitution cannot equate the two because it would be tantamount to conferring rights to a group of “subjects” who are not recognised by the supreme law of the land. This is clearly contradictory in light of the supremacy of the Federal Constitution. As the supreme law, the Mexican Constitution prevails over any state constitution, which must adhere to the provisions of the latter.

The foregoing would not deny the value of the unborn human life. But according to the federal constitution, such a protection would not be intended to acquire a preeminent position in light of individual rights and goods, constitutionally protected for the born person.

Moreover, based on precedents of this Supreme Court regarding the principle of equality, the plenary session determined that Article 16 that is being challenged is contrary to the Federal Constitution because it attempts to equate those who are unequal. Unborn life cannot be given the same weight to those who are born because a foetus cannot be subject to legal consequences, rights and obligations.

The SCJN stated that, due to its improperly granting legal standing to an unborn life, the provision that is being challenged must be invalidated because despite the fact that the amendment in question seeks to protect the unborn life, it infringes upon the dignity of women and their basic rights; specifically, reproduction rights. The provision being challenged violates the right to decide the number and spacing of children established by Article 4 of the Federal Constitution because it restricts the options to decide the number of children. Said provision being objected also breaches the right to intimacy and self-determination of a person’s body, as established by Article 16 of the Federal Constitution.

According to its terms approved, Article 16 of the Constitution of San Luis Potosi absolutely and unconditionally protects the life of the foetus from conception. From the text that was approved as well as the congressional declaration of purpose, as evidenced from the documents of the legislative process, this unconditional protection violates the dignity and fundamental rights of women because it is established in detriment to their rights. Since this provision breaches the dignity of women by equating them to a reproductive instrument and this correspond to a negative gender stereotype that degrades women to a certain role, thereby imposing a disproportionate burden.

Based on an analysis of proportionality with respect to the provision being challenged, the majority of the plenary session recognised that the protection of life in general is an objective that is constitutionally valid; however, this does not constitutionally justify that a foetus may be afforded the same standing as a legal person. Additionally, this measure is not suitable to reach the purpose that is being suggested because in light of the relevant constitutional rules and principles, such as the dignity of persons and the fundamental rights of women, the provision has a significant adverse effect. Finally, it is also considered that the legislative measure, pretending the recognition of the unborn child rights in such a state constitution was unnecessarily established because it not only affects the fundamental rights of women but also the goal of protecting the unborn life because alternatives exist that are less restrictive than these rights. Finally, the provision being challenged is not proportional because it clearly affects the fundamental rights of women; far from optimising the rights and goods in question, such a state constitutional regulation exclude women from exercising their basic rights (specifically, their dignity and reproductive rights) at the expense of an inexistent federal right to life of the unborn.

The fact that local legislation must be hierarchically subordinate to the State Constitution, according to the principle of supreme law, also implies that the local legal system must also be subject to the provisions of the Federal Constitution and the international human rights treaties to which Mexico is a party.

The definition of person established by the provisions being challenged has an immediate impact on the interpretation of the secondary legislation and, specifically in terms of criminal law. In light of this new definition of person that was attempted by this amendment, "abortion" could be interpreted in various ways by the Penal Code of the State. If the validity of the provision being challenged is recognised, it could be construed that this criminal classification is cancelled because the death of the foetus is the same as "the taking of a life by another". Similarly, it may be construed that abortion falls under the classification or special type of homicide in general, which is different from other special types since the foetus is a passive subject.

In the same way, in noting the methods of contraception, specifying what these are and how these act, the SCJN recognises that although the majority of them aim at avoiding the spermatozoid and the ovum from encountering, certain methods exist such as the intrauterine device and postcoital hormonal method (also known as the morning after pill) that can prevent the zygote from implanting and developing.

According to Article 16 that is being challenged, if the contraceptive method hinders the process of implantation of the ovum in the uterus, then it is tantamount to taking a person's life. Consequently, the use of postcoital hormonal contraception and the intrauterine device would have to be penalised. This penalisation must be recognised as unconstitutional because there is no valid justification, thereby breaching Articles 1 and 4 of the Federal Constitution.

The Court held that analysis of the constitutional provision of the local legislation that is being challenged cannot ignore that the local legislator had already approved several provisions with respect to assisted human reproduction in the Family Code for the State of San Luis Potosi. However, this legislation must be understood for the purposes of this Code; in other words, in terms of filiation. In addition, even though there is no federal legislation with respect to assisted reproduction, any statutory references must be issued by the federal authority. Consequently, the official Mexican standards issued by the federal authorities with respect to technical issues regarding assisted reproduction shall be mandatory for the State of San Luis Potosi.

In vitro fertilisation lacks any specific regulation in any federal law; therefore, it is not forbidden. Moreover, the General Health Law establishes, in broad terms, the treatment that must be given to organs, tissues and their components and cells, such as germ cells (masculine and feminine reproduction cells) and the embryo.

This regulation of the General Health Law cannot be amended by a state because it is a law governing all of Mexico and concurrent in nature; therefore, a state cannot elude its application.

Regarding a potential transgression of the principle of the secular State, the plaintiffs argued that the state constitutional provision being challenged implies the dogmatic imposition of an individual belief as if it were a general rule; this breaches the principle of secularism, the right to freedom of belief and the multi-cultural nature of the State.

The SCJN decided that although the Federal Constitution establishes the principle of secularism in several articles, the petitioners failed to prove their claim that the amendment constituted a dogmatic imposition of an individual belief as if it were a general rule because from the legislative documents of the constitutional amendment, it cannot be inferred that a religious belief was taken into consideration as the grounds for the amendment.

Supplementary information:

It is important to clarify a point about the legal validity of this decision. According to Article 72 of the regulatory law of Article 105.I and 105.II of the Federal Constitution, the action that was filed was dismissed because it did not reach the tie-breaking eight votes required for said article to be declared invalid.

Since it did not obtain the eight vote majority in favour of the invalidity (unconstitutionality) of the provision being challenged, and as a consequence of how the Mexican laws are configured, this resolution lacks any consequence. The SCJN cannot issue any resolution regarding the constitutionality or unconstitutionality of the provision. This action is disregarded.

It has been included here because its merits are surely to be reviewed in cases to be resolved shortly. Presently, the resolutions are pending with respect to amendments to state constitutions that were filed by 17 other state legislations (of the 31 comprising the Federation) that approved amendments that, with various interpretations, establish that life is protected since conception.

Languages:

Spanish.



Mexico

Electoral Court

Important decisions

Identification: MEX-2013-2-008

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 29.06.2009 / **e)** SUP- RAP- 210/2009 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

3.3 General Principles – **Democracy**.

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

Keywords of the alphabetical index:

Media, right of access, political parties.

Headnotes:

The State shall not deny political parties, registered nationally or locally, the right of access to radio and television airtime during the time period between elections.

Summary:

I. The case was brought before the Electoral Tribunal of the Federal Judiciary (hereinafter, “TEPJF”) by the Democratic Unity Party of Coahuila (hereinafter, the “Party”) through Roberto Carlos Villa Delgado, an alternate representative of the Party at the Electoral Institute of Citizen Participation of Coahuila. The applicant challenged an act relating to political parties’ right to access radio and television airtime, which is administered by the State. The contested act was an appeal within the file CG306/2009 issued by the General Counsel of the Federal Electoral Institute (hereinafter, “IFE”). The Party claimed that the IFE had failed to assign airtime to the political parties during the time between elections. The Party also claimed for damages.

II. The TEPJF reviewed the contested acts and the arguments. Based on provisions set forth in Article 41, Base III, paragraph A, subparagraph g), and paragraph B, paragraphs a), b) and c) of the Political Constitution of the United Mexican States, the TEPJF agreed with the Party, concluding that the reasons for dissent against the contested act were substantially founded.

The TEPJF emphasised that the Federal Electoral authorities, the states and the political parties, with national or local registration shall have access to airtime between the pre-campaign and campaign periods.

The IFE, however, misinterpreted the legislation, concluding wrongly that political parties with local registration had lacked the constitutional prerogative to access radio and television airtime in the periods between elections.

The TEPJE added that in the federal system, local political parties that legally obtain their registration with the support and participation of many citizens would not be capable of ensuring their permanence in the political arena without having presence in the social media during the period between two elections. As such, the TEPJE held that the interpretation and conclusion reached by the IFE were improper.

Consequently, the TEPJE revoked the agreement claimed, ordering IFE to issue a new one that correspond to the request made by the Party, following the guidelines established by the TEPJF's ruling. The High Chamber should be kept informed.

Supplementary information:

Chief justice: José Alejandro Luna Ramos.

Languages:

Spanish.



Identification: MEX-2013-2-009

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 24.04.2012 / **e)** SUP-JDC-475 and accumulated/2012 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.21 General Principles – **Equality**.

3.23 General Principles – **Equity**.

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

5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities**.

Keywords of the alphabetical index:

Candidates, equal opportunities, equity, balance, equality, gender.

Headnotes:

Article 219 of the Federal Electoral Code sets forth a gender quota for nominations for federal representatives in an attempt to promote the principles of parity and political participation of both genders in popular elections. As such, a decision to cancel or substitute official nominations for federal representatives and senators, despite the nominations being consistent with internal party procedures, may be justified to comply with the Article 219.

Summary:

I. The 2012 citizen suit was brought before the Electoral Court of the Federal Judiciary (hereinafter, "TEPJE"). The challenged acts involved the National Action Party's decision to cancel several nominations for federal representatives and senators, on the principle of relative majority in compliance with the gender quota set forth in Article 219 of the Federal Electoral Code. The General Council of the Federal Electoral Institute (hereinafter, "IFE") approved the replacement of the nominations mentioned.

II. After hearing the case, the TEPJF confirmed the contested acts. In light of principles guaranteeing equality and non-discrimination, the TEPJF reasoned that the purpose of Article 219 of the Federal Electoral Code is to ensure equal opportunities and gender parity in political life and to promote political participation of both genders, providing them the possibility of equal access to official positions in popular elections.

Specifically, the regulation forces both political parties and coalitions to incorporate in their registration of candidates for deputies and senators with at least 40% of regular candidates of the same gender. The establishment (or at least the attempt) of parity in the democratic process promotes a balanced gender participation of women and men in obtaining nominations.

The TEPJF held that the grievances of the plaintiffs were unfounded. The reason is that although they won the internal nominations according to party procedures, the substitution made by the nominating party was still justified based on the principles of the democratic rule of law, which includes gender equality in the integration of nominations. This principle must be considered regardless of intra-party selection method.

Moreover, according to statutes observed by the National Action Party, the Executive Committee of the party has the authority to directly designate candidates to elected positions when necessary to comply with provisions on gender equality.

Given the above, the TEPJF confirmed the National Action Party's decision to replace the nominations of federal representatives and senators on the principle of relative majority. The decision was deemed necessary to meet the gender quota set forth in Article 219 of the Federal Electoral Code and agreements issued by the General Council of the IFE that approved such substitutions.

Supplementary information:

Project presented by: Electoral Justice Pedro Esteban Penagos Lopez.

Languages:

Spanish.



Identification: MEX-2013-2-010

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 13.03.2013 / **e)** SUP-JDC-1740/2012 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

2.1.2 Sources – Categories – **Unwritten rules.**

2.1.2.1 Sources – Categories – Unwritten rules – **Constitutional custom.**

4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system.**

4.9.3.1 Institutions – Elections and instruments of direct democracy – Electoral system – **Method of voting.**

4.9.6 Institutions – Elections and instruments of direct democracy – **Representation of minorities.**

5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities.**

Keywords of the alphabetical index:

Community, indigenous, self-government, practices, customs, protection.

Headnotes:

Indigenous communities possess a human right and constitutional right of self-governance, which includes asserting their ethnic identity and determining their own municipal authorities by means of a “customs and practice” model, whereby their representatives are chosen through the communities’ rules, procedures and traditional practices. Responsible authorities must take positive steps to enable the communities to exercise their identity in the political, social and legal fields and not impede such exercise by failing to enact necessary procedures for them to assert their right of self-governance.

Summary:

I. The 2012 citizen suit was filed by Bruno Plácido Valerio, who challenged the response issued on 31 May 2012 by the General Council of the Electoral Institute of the State of Guerrero within the file IEEG/CG/01/2012. The concern related to the petition of the plaintiff to elect authorities in several municipalities of the state of Guerrero by means of the “customs and practice” model.

The case was heard before the Electoral Court of the Federal Judiciary (hereinafter, “TEPJF”), which adopted a progressive and guarantor position to safeguard the political and electoral rights of the indigenous community of San Luis Acatlán, Guerrero. The TEPJF also took relevant, necessary measures to achieve such purpose.

II. The TEPJF held, first, that under Article 1 of the Constitution, all authorities (judiciary or not) are required to:

1. Promote, respect, protect and guarantee human rights;
2. Interpret the rules which the applicable legal framework with an extensive approach; and
3. Apply such rules in accordance with the principles of universality, indivisibility, interdependence and progressiveness.

The TEPJF noted that the responsible authority neither carried out nor sought the broadest protection of the community's right to self-governance. In addition, the authority did not comply with its duties to respect, protect, ensure and promote such right.

The responsible authority simply justified its action on the basis of the absence of a specific and concrete procedure to attend the petition.

In this regard, the TEPJF, following the provisions set forth in Article 5 of Law 701 (Recognition, Rights and Culture of the indigenous peoples and communities of the State of Guerrero), emphasised, firstly, that the local legislator recognises the Community as an indigenous peoples sitting in the State of Guerrero. Such status entitles citizens to assert their right to apply their method of electing officers.

Secondly, it was determined that the applicable law underlies not only the fundamental right of self-determination but also encompasses various concrete manifestations of autonomy of indigenous peoples and communities, as recognised in Article 2.5 of the Constitution. This is understood as the basis to exercise specific rights related to political, economic, social and legal fields within communities that are part of the indigenous peoples. The government must respect this to ensure the expression of identity of these peoples and members of their indigenous community.

In this regard, the TEPJF held that these indigenous peoples have the right to elect officials or representatives in their own form of governance, as their rules, procedures and practices reinforce the participation and political representation of these ethnic groups.

Based on the forgoing, the TEPJF considered that the lack of a procedure to comply with the applicants' request could underlie or be a motive to ignore and impede the legitimate exercise of a human right enshrined in the Constitution.

Consequently, it was determined that the members of the indigenous community in the municipality of San Luis Acatlán, Guerrero, are entitled to select their own authorities, according to their rules, procedures and traditional practices. In light this fundamental human right, the responsible authority shall carry out the necessary acts (broadly explained in the judgment) to formulate queries in the municipality relating to the adoption of the "customs and practice" model to enable the community to determine their municipal authorities.

Supplementary information:

Project presented by: Chief Justice José Alejandro Luna Ramos.

Languages:

Spanish.



Identification: MEX-2013-2-011

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 22.04.2013 / **e)** SUP-JRC-53/2013 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system.**

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

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

Keywords of the alphabetical index:

Election, local / Candidate, registration, birth certificate.

Headnotes:

The local electoral administrative authority must not deprive independent candidates from registration information and must provide it in a timely manner. Moreover, local requirements to verify a candidate's place of birth and citizenship are not inconsistent with the Constitution or the local election law.

Citizens possess a right to be voted in an election. A member of a political party who registers as an independent candidate and belong a political party meet the eligibility requirements mandatory by the Constitution of the State of Quintana Roo and by the local election law.

Summary:

I. This 2013 constitutional review process was filed by two political parties: the Democratic Revolution Party (PRD) and the National Action Party (PAN). The contested act concerned the ruling of the General Council of the Electoral Institute of Quintana Roo regarding the registration request form of independent candidate aspirants to the municipality of Solidaridad.

The claimants of the political parties mainly argued that:

1. on the one hand, the local electoral administrative authority failed to provide information about the registration process for independent candidates in a timely manner;
2. on the other hand, the participation of party members as aspiring independent candidates contravenes the law; and
3. one of the aspirants (Juan Bautista Espinoza Palma) failed to comply with the requirement to submit his birth certificate, verifying that he is Mexican by birth and a citizen of Quintana Roo.

II. The Electoral Court of the Federal Judicial Power (hereinafter, "TEPJF") declared that the claimants' reasoning in opposition to numbers (1) and (3) were groundless. The TEPJF found the records certified that the authority provided the political parties information relating to the registration of aspiring independent candidates, and that the citizen Juan Bautista Espinoza Palma did in fact present a certified copy of his birth certificate.

Regarding the (2) grievance, the TEPJF held that it was unfounded. The TEPJE reasoned that the right to be voted protects all citizens without distinction. Therefore, the participation of a member of a political party as a candidate for an independent candidacy

must be analysed in accordance with a *pro-persona* interpretation that maximises human rights, in accordance with Article 1 of the Constitution. As such, citizens registered as independent candidates and belong to a political party meet the eligibility requirements mandatory by the Constitution of the State of Quintana Roo and by the local election law. This is not inconsistent with requirements of a participant.

However, this contrasts with the case of those who claim to be party leaders because they are prevented from opting as independent candidates. Such conclusion is based on the fact that the status of party leaders puts them in a unique position that offers them the structure and organisation of the political party to register as an independent candidate. This defeats the purpose of providing citizens with the possibility to nominate themselves as candidates without the support of the political institutions.

Finally, the TEPJF modified the agreement at issue for the purpose of gathering the responsible authority that would require applicants to one of the independent candidates, and to verify whether they have any leadership status in the political party.

Supplementary information:

Project presented by: Chief Justice José Alejandro Luna Ramos.

Languages:

Spanish.

*Identification:* MEX-2013-2-012

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 24.04.2013 / **e)** SUP-JDC-273/2013 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

4.8.5 Institutions – Federalism, regionalism and local self-government – **Definition of geographical boundaries.**

4.9.4 Institutions – Elections and instruments of direct democracy – **Constituencies.**

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

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

Keywords of the alphabetical index:

Election, constituency, boundary, demarcation / Election, electoral barrier / Election, electoral district / Election, electoral map, territory, exclusion.

Headnotes:

The right of citizens to vote and to stand for office in elections must be guaranteed, and this right prevails over geographical disputes between states affecting electoral districts.

Summary:

I. The applicants, María del Carmen Avendaño Santiago and other citizens, challenged a ruling regarding appeal procedure IEQROO/CG/A-39-13, issued on 8 March 2013 by the General Council of the Electoral Institute of Quintana Roo, in compliance with the judgments on file SUP-JDC-3152/2012, and all accumulated decisions, which determined not to include in the new territorial boundaries of the State of Quintana Roo three territorial sections corresponding to Electoral District II, with the city of Bacalar as head town of the district.

The fundamental claim of the plaintiffs was a request that the Electoral Tribunal issue a declaratory action to define their legal status as regards their political and electoral rights to vote and to stand for office, during the elections that took place in the State of Quintana Roo, given that the communities where they lived were excluded from the electoral map of the state.

II. On the basis of a project presented by Electoral Justice Manuel González Oropeza, the Electoral Tribunal held that the declaratory action proposed by the plaintiffs would be admissible, given that there was a factual situation (i.e., the exclusion of the communities in which they lived from the state electoral map) producing uncertainty or lack of security concerning a right; namely, regarding whether they could vote or stand for election in the electoral process in that state.

The exclusion of the electoral map of Quintana Roo of the communities in question was made on the

basis that these communities are in dispute between the State of Quintana Roo and Campeche, in a territorial boundary dispute before the Supreme Court of Justice of the Nation.

The statements and agreements that led to the exclusion of communities were not intended to restrict the plaintiffs' right to vote and to stand for office, thus it was contended that they should keep and maintain their effective right to vote, in the terms of their registration details in the electoral roll in the list of voters and their voter's registration card with a photograph, since their rights prevail over districting geographical issues.

The High Chamber held that under such circumstances, it was necessary to specifically state that citizens with a valid voting registration card, issued by the Federal Register of Electors of the Federal Electoral Institute, which prove their voting address in sections and constituencies in the state of Quintana Roo, despite the territorial conflict with the State of Campeche, had the right, *inter alia*, to vote and to stand for office. The Chamber held that such citizens could exercise such rights in popular elections that were held in the state of Quintana Roo, and requested the Electoral Institute of Quintana Roo and the Federal Electoral Institute to guarantee the implementation of those political and electoral rights.

On the other hand, it was considered that citizens who, according to the report submitted by the holder of the Federal Register of Electors, had a valid voter's registration card in Campeche, had guaranteed rights to vote and stand for office in the federal entity where they were registered, namely, in the state of Campeche.

Languages:

Spanish.



Identification: MEX-2013-2-013

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 18.07.2013 / **e)** SUP-REC-69/2013 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Election, electoral barrier / Election, ineligibility / Election, re-election, exclusion, absolute / Election, honorary office, re-election, prohibition.

Headnotes:

A resolution which establishes an absolute prohibition on re-election for persons who have served in honorary office on Citizens Committees and People's Councils is unconstitutional, as the constitutional norm on which the prohibition is based refers to certain types of public office, not honorary positions, and, by placing a permanent, absolute and disproportionate restriction on the right to stand for office, is incompatible with a protective system for the fundamental rights of citizens, such as that existing in Mexico.

Summary:

I. The applicant, Blanca Patricia Gándara Pech, challenged a resolution of the Federal District Regional Chamber of 1 July 2013 rendered in the proceedings for the protection of the citizen's political and electoral rights of SDF-JDC-213/2013, which confirmed the decision of the Electoral Tribunal of the Federal District on the record TEPJF-JLDC-029/2013, holding that the plaintiff was not affected in a certain and direct manner by the restriction in the notice issued by the Electoral Institute of the Federal District to participate in the election procedure of the members of the "Citizens Committees and People's Councils 2013", which provides that those who have been part of a steering committee or council in the period 2010-2013, are not eligible for a new period, based on the provisions of Article 92 of the "Citizen Participation Act" in the Federal District. In light of the above, the plaintiff's application to not apply for such office was equally dismissed, as to accept such application would recognise the legitimacy of a power to claim an expectation of a right that eventually might be exercised or not, combined with the recognition that persons have standing to challenge, on behalf of third parties, acts which do not directly affect their political and electoral rights to stand for office.

The refusal was based on the prohibition of those who have been part of a Citizens Committee or a People's Council in the period 2010-2013, from participating in the current process, which is foreseen in the mentioned resolution supported by Article 92 of the "Citizen Participation Act" of the Federal District, which is not incompatible with the fundamental right to stand for office, protected in Article 35.II of the Constitution. Given that the establishment of requirements that guarantee accuracy in the electoral contest is also aimed at protecting the right to vote of all contestants and the general public, as it complements the substantive law to stand for office with constitutional parameters that should be implemented, ensuring a mixed and equal participation, to the extent that requires all candidates not to have conditions that allow them to obtain an undue advantage.

II. On the basis of a project presented by Electoral Justice Flavio Galván Rivera, the Electoral Tribunal considered the case and held, first, that the provisions of Article 92.3 of the Citizen Participation Act of the Federal District, should have been rendered inapplicable to this case due to its obvious unconstitutionality, as it not only restricts the right of all citizens to participate in their community through an honorary position, as in the case of Citizens Committees or People's Councils, but also because it establishes a temporary ineligibility for re-election.

Second, the Federal District legislator restricts the right of citizens to participate in Citizens Committees and People's Councils, based on a norm that the Constitution is specially intended for certain public offices and not honorary offices, as occurs in this case.

Third, the provision in question establishes an absolute prohibition on re-election; it does not consider the standard of temporality. Therefore, it constitutes a permanent and disproportionate restriction on the right to stand for office, which can in no way be part of a protective system of fundamental rights of citizens as the one governing the country.

Consequently, the Electoral Tribunal, taking a guaranteed stand on political and electoral rights to vote and stand for office, decided to declare unconstitutional the final part of Article 92.3 of the Citizen Participation Act of the Federal District, which states "... without possibility of re-election" hence, removing the prohibition on re-election insofar as it relates to the election procedure for members of the Citizens Committees and People's Councils.

Supplementary information:

“Citizens Committees and People’s Councils” are instances that represent neighbourhoods before municipal authorities (in Mexico City, the equivalent for municipalities or counties are called “*Delegaciones*”). Representatives to the Citizens Committees and People’s Councils are honorary and the main difference between committees and councils are that the latter relate to neighbourhoods where authorities are elected according to traditional rules and indigenous practices.

Languages:

Spanish.

*Identification:* MEX-2013-2-014

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 29.05.2013 / **e)** SUP-JDC-892/2013 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

5.3.29.1 Fundamental Rights – Civil and political rights – Right to participate in public affairs – **Right to participate in political activity.**

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

Keywords of the alphabetical index:

Political party, internal regulation / Political party, member, right to work, restriction / Public office, access, limitation / Public official, appointment, political party, member, limitation.

Headnotes:

Internal rules of the National Action Party, requiring active party members to acquire prior permission and approval from the Executive Board of the Party before accepting certain types of public office in a

government not emanating from the National Action Party, constitute an obstacle to the full exercise of human rights, particularly the political and electoral right to membership, as well as the fundamental right of freedom to work, because the citizen’s right cannot depend on the will of a third party.

Summary:

I. The applicant, Felipe Carlos Moreno Márquez, contested the refusal by the Municipal Executive Committee of the National Action Party in Cuautitlán Izcalli, State of Mexico, which denied the applicant permission to hold a position in the public administration of the municipality concerned, arguing that the ruling administration and the plaintiff’s membership related to two different political parties.

The refusal was based on Article 27 of the “Rules of Active Members of the National Action Party” which states that each time an active member or an adherent of the party is invited to hold office as a public official by designation with equivalent responsibility to be Head of Department or higher in a government not emanated from the National Action Party, the position must be approved by the Executive Board of the party before acceptance.

In turn, Article 33.IV of the “Regulations on Sanctions” of the same political institution, provides that any member of the party who holds office as public official by designation without having the requisite approval, will be considered expelled.

II. The Electoral Court of the Federal Judiciary (TEPJF) heard the matter and on the basis of its progressive and guarantor position, held for the applicant on the basis of a project presented by Chief Justice José Alejandro Luna Ramos.

Based on the Constitution and the applicable national legislation, compared to the respective international instruments, it has been concluded that the principle of self-organisation and self-determination of the political parties empowers them to govern their institutions under the terms that better suit their ideology, as well as their own political interests. In complying with the principles of the democratic order, self-organisation cannot prevail over the fundamental rights of its members.

On the other hand, pursuant to the internal regulations of the National Action Party, specifically Article 27 of the “Rules of Active Members” and Article 33.IV of the “Regulation on Sanctions”, the right to join the party precludes another constitutional right, namely the right of freedom to work.

The member is therefore obliged to choose between two recognised constitutional rights: the right to join and the right to hold office. By making this choice, the fundamental right which has not been chosen is cancelled.

The right to hold office can be established subject to specific requirements and qualities of the individual described in legal systems, but not subject to precedent conditions that depend entirely on the will of others.

Furthermore, the aforementioned cancellation of the fundamental right is also linked to aspects of indirect discrimination, since the provisions set forth in Article 1 of the Constitution prohibits any differential treatment that violates the rights and freedoms of individuals.

Although the contested legislation contemplates active party members acquiring prior permission to hold public office, this constitutes an obstacle to the full exercise of human rights, because the citizen's right cannot depend on the will of a third party.

Based on the foregoing, the Court held that the contested legislation exceeded the core of the right of membership, and violated fundamental rights of citizens enshrined in the Constitution. Hence, the Court guaranteed the political and electoral right to membership, as well as the fundamental right of freedom to work of the plaintiff, and confirmed as unconstitutional the internal National Action Party's rules. Moreover, the Court decided to revoke the refusal and determined that Felipe Carlos Moreno Márquez did not require authorisation from the National Action Party to hold office in the municipality of Cuautitlán Izcalli, State of Mexico.

Languages:

Spanish.



Identification: MEX-2013-2-015

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 28.08.2013 / **e)** SUP-RAP 477 and accumulated 2012 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

4.9.7.3 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Ballot papers.**

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

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

Keywords of the alphabetical index:

Document, access, right, exception / Election, ballot, access, limitation / Election, ballot, destruction / Election, file, sealed / Transparency, principle.

Headnotes:

A refusal by the Federal Electoral Institute (hereinafter, "IFE") to provide access to certain material relating to a general election, in particular used and unused ballots, valid and invalid votes, as well as lists of voters from all polling stations, is not unconstitutional. In the electoral process set down by law, on no occasion can this documentation be considered as being in the public domain, and it is not set forth by the law that this documentation should be sheltered in archives or as historical information; rather, the law expressly provides that such documentation must be destroyed. This cannot be construed as limiting the right of access to information, as this is guaranteed by various measures of transparency and publicity, particularly the dissemination of minutes concerning the election process, provided at the conclusion of the electoral process.

Summary:

I. Three bodies, the Democratic Revolution Party, the Labour Party and the Citizen Movement, challenged the following regulatory arrangement, involving three separate decisions.

The first decision was Agreement within file CG660/2012, approved on 3 October 2012 in a special meeting of the General Council of the IFE, in which the "Guidelines for the destruction of the valid votes, spoiled ballots, the remaining ballots and the list of the nominal Federal Electoral Process 2005-2006" was issued.

Second, the official communication within the file SCG/9250/2012 issued on 2 October 2012 by the Secretary of the General Council of the IFE, whereby *in situ* access to the 2005-2006 federal electoral

process ballots was denied, on the basis that IFE "(...) has no legal powers to transcend the guarantee of the inviolability of election records, and therefore, to provide access to physical ballots contained therein".

Third, the Resolution within the file CI885/2012 issued on 23 October 2012 by the Information Committee of the IFE, which confirmed state retention of the ballots of the 2005-2006 federal electoral process, conducted by the Electoral Organisation's executive Committee, in response to a request submitted by the Democratic Revolution Party, identified within the file UE/12/04756.

The appellants contended that the agreement (within the file CG660/2012) infringes the principles of lawfulness, fairness, equality, legal certainty, maximum publicity, transparency and access to public information, because, although all stages of the information and documentation request regarding *in situ* access were still ongoing, all documentation was being ordered to be destroyed.

They further argued that the official communication appealed (within the file SCG/9250/2012) was issued by authority with no jurisdiction, and that the request for access to information should have been submitted for consideration of the IFE General's Council, as the body authorised to issue a response.

Finally, it was claimed that the resolution (within the file CI885/2012) lacks motivation and justification, as it refuses access to information on the false grounds that it is confidential information, even though the challenging period of this electoral process has been completed.

II. The High Chamber, which is the competent body to hear and decide the appeal procedure within the file SUP/RAP-477/2012 and accumulated decisions, heard the arguments and ruled to confirm the decisions on the basis of a project presented by Chief Justice José Alejandro Luna Ramos.

The High Chamber found that the claimants' primary purpose was to access the unused remaining ballots, the valid and invalid votes, as well as lists of voters, of all polling stations on election day from 2 July 2006 in order to preserve the historical electoral memory of the country.

The High Chamber declared inoperative the claims raised concerning the legal concept titled "reflected efficacy of the claim preclusion (*res judicata*)".

Indeed, in the case of reference, the elements of this legal figure are the following:

1. The High Chamber heard the matter and ruled in the lawsuit for the protection of the citizen's political and electoral rights (SUP-JDC-88/2007 and accumulated SUP-JDC-95/2010) which concerns the same issues as the appeal at hand.
2. The objects of the claims are related.
3. The parties to this case were bound with enforceable judgments delivered in the citizens trial mentioned.
4. The means of appeal presents a logical presupposition to support the sense of the decision.
5. The final judgment was based on a specific criterion, clear and indubitable about the aforementioned logical presupposition.
6. The solution of the second trial requires the adoption of a similar approach to the first.

The statements of this appeal had been ruled by the High Chamber in issuing respective judgments in the aforementioned citizen's trial, in the following sense:

The constitutional right of access to public information at the federal level is regulated by the Federal Law of Transparency and Access to Public Information.

Pursuant to applicable regulations, constitutional and legal provisions should not be interpreted and applied in isolation. What is required is a correlative application, depending on the type of documentation requested for access.

The right of access to information is the prerogative of the individual to access data, records, and all types of information held by public bodies, subject solely to exceptions provided by law.

The claimant's request was to have access to documents containing information to which public access is restricted, without thereby restricting the knowledge of its content, since the material for the casting of votes, both used and unused, are verified in circumstances of temporary and specific gravity. For example, once the reception of the votes is closed, they shall be verified and the result will be reflected in the corresponding minutes.

These results are verified by officials of the polling stations, and are made public through a notice fixed in a visible place outside of the station. Subsequently, the district councils make a full count of all the counting votes and collate them.

During the election, all electoral documentation is subject to strict controls and security measures designed to protect and ensure the effectiveness and authenticity of the vote, so that, based on the relevant provisions of the Federal Electoral Code, once the process is concluded and according to the principles of certainty and definitiveness, the remaining ballots and vote casts integrated in the ballot, should be destroyed. This process reveals that these documents at no time lose the character of inviolability.

On no occasion can this documentation be considered as being in the public domain, as it is not set forth by the law that this documentation should be sheltered in archives or as historical information. Once the process is concluded, there is no legal provision requiring the IFE to keep the documentation. On the contrary, there is express provision mandating their destruction.

This unavailability of physical access to the ballots cannot be construed as limiting the right of access to information, as this is guaranteed by various measures of transparency and publicity. This process begins with the closing of the polls on Election Day, and continues with the diffusion in electronics, the production of minutes, as well as the means of dissemination.

Once the minutes that result from the electoral process are available to the citizens, it is then said that the process is completed.

Subsequently, the High Chamber emphasised the fact that this same controversy was held at various national and international instances, which arrived at the same resolution as the Chamber, in the sense of declaring access to the electoral material used in the 2005-2006 federal electoral process to be improper.

Finally, with regard to the alleged lack of competence of the IFE's Executive Secretary to issue the contested official decision, the High Chamber considered this claim to be unfounded, given that, as demonstrated in the sentence, the Executive Secretary has the legal authority to exercise such powers.

Languages:

Spanish.



Moldova Constitutional Court

Important decisions

Identification: MDA-2013-2-002

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 16.05.2013 / **e)** 6 / **f)** Constitutional review of Article 23.4 of Law no. 317-XIII of 13 December 1994 on the Constitutional Court / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

1.1.1.1.1 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Sources – **Constitution.**

1.1.2.4 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointment of members.**

1.1.3 Constitutional Justice – Constitutional jurisdiction – **Status of the members of the court.**

1.1.4.1 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Head of State.**

Keywords of the alphabetical index:

Constitutional Court, judge, independence / Constitution, direct application.

Headnotes:

The Constitutional Court is the sole body of constitutional jurisdiction in the Republic of Moldova, independent of any other public authority and shall obey only the Constitution.

It consists of 6 judges appointed for a 6-year term of office who, for the tenure of their mandate, are irremovable, independent and shall obey only the Constitution.

Summary:

I. On 16 May 2013 the Constitutional Court handed down judgment on the constitutional review of Article 23.4 of Law no. 317-XIII of 13 December 1994 on the Constitutional Court (Complaint no. 17a/2013).

The complaint was lodged at the Constitutional Court on 14 May 2013 by the MP Mr Serghei Sirbu. In it, he contended that the rule to the effect that the plenum of the Constitutional Court shall be convoked after all the competent authorities have appointed at least four judges was in breach of the principles of independence of the Constitutional Court and its judges, and therefore contrary to Articles 20, 26, 134, 135 and 137 of the Constitution.

II. The Court noted that on 25 March 2013, the President of the Republic of Moldova had presented a bill to Parliament, as a legislative initiative, with the aim of repealing Article 23.4 of the law, on the basis that the technical nature of this rule created “artificial blockage in the activity of the Constitutional Court”. The President explained that it was necessary to exclude future occurrence of situations which could prevent an authority from appointing judges to the Constitutional Court.

The Court noted that the essence of the complaint was the functioning and independence of the Constitutional Court and its judges.

It held that both the Constitution and the Law on the Constitutional Court regulate important principles and guarantees of independence and neutrality of judges of the Constitutional Court, which allow them to exercise objective judgment. The Court itself is, according to Article 134.2 of the Constitution, “independent of any other public authority” and only obeys the Constitution. In conjunction with this provision, Article 137 of the Constitution expressly states that Constitutional Court judges shall be independent in the exercise of their office and irremovable during their term of office (Article 14.1 of the Law and Article 9.1 of the Constitutional Jurisdiction Code).

The Court held that this principle protects judges from external influences on the performance of their judicial duties. Constitutional judges are not employees of the authorities that have appointed them. Immediately they take the oath, they are independent, irremovable and shall obey only the Constitution.

The Court noted that these constitutional provisions do not have a declarative nature. They are compulsory constitutional norms for Parliament, which has a duty to regulate the establishment of appropriate mechanisms to secure real judicial independence, without which the rule of law cannot operate, in accordance with Article 1.3 of the Constitution.

The Court held that, pursuant to Article 23.1 of the Law, the Constitutional Court exercises jurisdiction in plenary session. The provisions of the law clearly show that, regardless of the appointing authority, judges are equal in the decision making process of the Court.

The Court held that there are no objective and reasonable arguments to justify conditioning the functionality of the Court with appointment by all authorities. The challenged norm could result in the Court’s activity being blocked due to inactivity on the part of other authorities. The Court had in fact encountered such a situation between 23 February and 5 April 2013, the period during which Parliament did not appoint judges. This blocked the activity of the Court in ensuring the supremacy of the Constitution.

The Court held that, under the applicable rules in a state governed by the rule of law, the authority that ensures the supremacy of the Constitution, ensures the principle of separation of the legislative, executive and judicial powers and guarantees the responsibility of the state towards its citizens and that of citizens towards the state, cannot be inoperative.

Without disputing the right of the legislative, executive and judicial powers to appoint judges, the Court held that establishing conditions for the appointment of judges by all authorities to convene plenary, where the Court decision quorum is required by law, prejudices the functionality of the Court and violates the principle of its independence and that of its judges (Articles 134.2, 135 and 137 of the Constitution). Consequently, the provisions of Article 23.4 of the Law on the Constitutional Court are unconstitutional.

In the same context, the Court noted that Article 6.2 of the Law, which states that two judges are appointed by Parliament, two by the President of the Republic of Moldova and two by the Supreme Council of Magistracy”, is contrary to the provision of Article 136.2 of the Constitution, which states that two judges are appointed by Parliament, two by the Government and two by the Supreme Council of Magistracy.

It noted that Article 136.2 of the Constitution was amended in the constitutional revision introduced by Law no.1115-XIV of 5 July 2000 but hitherto Parliament has not adjusted the legal norm to the Constitution. Consequently, the provisions of Article 6.2 of the Law on the Constitutional Court are unconstitutional in respect of the appointment of two of the judges of the Court by the President of the Republic. Therefore, Article 136.2 of the Constitution must be applied directly to the appointment of Constitutional Court judges.

The Constitutional Court unanimously declared unconstitutional Article 23.4 of Law no. 317-XIII of 13 December 1994 on the Constitutional Court. It also declared unconstitutional the phrase "President of the Republic of Moldova" in Article 6.2 of Law no. 317-XIII of 13 December 1994 on the Constitutional Court.

Languages:

Romanian, Russian.



Identification: MDA-2013-2-003

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 18.05.2013 / **e)** 7 / **f)** Constitutional review of certain provisions of Law no. 64-XII of 31 May 1990 on Government, amended by Laws nos. 107 and 110 of 3 May 2013, and Presidential Decrees nos. 634-VII and 635-VII of 16 May 2013 and Government Decision no. 364 of 16 May 2013 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
3.9 General Principles – **Rule of law**.
4.6.2 Institutions – Executive bodies – **Powers**.
4.6.4.3 Institutions – Executive bodies – Composition – **End of office of members**.

Keywords of the alphabetical index:

Prime Minister, *ad interim*, power / Government, action, review of constitutionality / Government, member / Government, *ad interim*, power / Government, caretaker, power.

Headnotes:

The Preamble and Article 1.3 of the Constitution set out the defining elements of the Republic of Moldova, which are supreme values.

Separation and cooperation between the state powers is of particular importance for the proper functioning of the rule of law.

Under Article 5.1 of the Constitution, democracy in Moldova is to be exercised under the conditions of political pluralism, which is incompatible with dictatorship or totalitarianism.

Under Article 98.1 and 98.2 of the Constitution, having heard the parliamentary factions, the President of the Republic of Moldova will designate a candidate for the office of Prime Minister. Within 15 days of the designation, a vote of confidence of Parliament over the programme of activity and the list of Government members will be requested. The programme and list will be discussed at this parliamentary session, and a vote of confidence will be passed by a majority vote of elected Members of Parliament (Article 98.3 of the Constitution). On the basis of this vote, the President will appoint the Government (Article 98.4 of the Constitution).

Under Article 98.5 of the Constitution, Government will enter into the exercise of its powers on the date its members take the oath before the President of the Republic. The Prime Minister's mandate therefore runs from the date of taking the oath, after the procedure for appointing the Government, as stipulated by Article 98.1-98.4 of the Constitution.

The mandate of the Prime Minister shall be exercised as a result of the will of Parliament, the supreme representative body of the people; the interim will be ensured under the constitutional provisions of Article 101.2 of the Constitution correlated to Article 103.

Summary:

I. On 18 May 2013 the Constitutional Court handed down judgment on the constitutionality of certain provisions regarding the competences of the outgoing Government and of the *ad interim* Prime Minister (Complaint no. 17a/2013).

The complaint, which had been filed by MPS Mihai Ghimpu and Valeriu Munteanu, sought a review of the constitutionality of Laws nos. 107 and 110 of 3 May 2013 which had modified the part of the Law on the Government which related to the competences of the outgoing Government and of the *ad interim* Prime Minister.

At the public plenary meeting, under Article 31.3 of the Code of Constitutional Jurisdiction, the applicants supplemented the reasoning and the matter of the complaint, asking the Court to examine the constitutionality of the Decrees of the President of the Republic of Moldova nos. 634-VII and 635-VII of 16 May 2013 and on the Government's Decision no. 364 of 16 May 2013.

They contended that when Parliament passed the challenged laws, on 3 May 2013, it assimilated the *ad interim* Prime Minister to the titular Prime Minister. The outgoing Government was also assimilated to the plenipotentiary Government. This was contrary to the provisions of Articles 98 and 103 of the Constitution.

II. The Court noted that the status of the *ad interim* Prime Minister differs from that of the titular Prime Minister. The *ad interim* Prime Minister has a provisional status, and is there to ensure continuity in the exercise of the competences of a Prime Minister, which, due to their nature, do not permit intermittences. He has not been granted the mandate of Parliament and does not follow the procedure of appointment in office inherent to the titular Prime Minister. The relevant constitutional provisions ensure continuity in the exercise of the competence of the Prime Minister but do not give the interim office-holder a full mandate as Prime Minister.

The Court also noted that the Supreme Law provides for prolongation of the Government's mandate only in the part which refers to "the administration of public affairs". Therefore, in the case of an outgoing Government, the mandate of the *ad interim* Prime Minister is included within the limited mandate of the outgoing Government to which he belongs.

On the basis of these findings, the *ad interim* Prime Minister cannot be granted identical powers to those of a Prime Minister when there is a governmental reshuffle.

The Court noted that, unlike the titular Prime Minister, who holds responsibility before Parliament for the entire governmental team he actually formed, the *ad interim* Prime Minister of a dismissed Government does not hold this responsibility.

The Court held that assigning the *ad interim* Prime Minister, appointed from the members of the dismissed Government, with identical competences to the titular Prime Minister, excepting him from any parliamentary control, is contrary to the spirit of the Constitution and poses a danger for the parliamentary democracy. Within a state governed by the rule of law, it is inadmissible to pass provisions that could admit the permanency of interim governance.

It therefore declared the provisions regarding the competences of the *ad interim* Prime Minister to be unconstitutional in their entirety.

In relation to the provisions pertaining to the competences of the outgoing Government, the Court noted that an outgoing Government continues to

administer public affairs pending a new plenipotentiary Government. A dismissed Government exerts only part of the limited power; it "administers" but does not "govern".

The Government cannot assume obligations regarding significant political initiatives in cases that have created difficulties before its dismissal. Decisions which could tie the political lines of the next Government up for a lengthy period are excluded. In the same vein, and in line with the practice of other states in similar situations, an outgoing Government can prepare the bill of the annual budget, but this should not be submitted to Parliament for enactment by a plenipotentiary Government that will have the responsibility to implement it.

One of the reasons for the limited range of action of a dismissed Government is that an outgoing Government will not be susceptible to sanctions from Parliament. Obviously, a dismissed Government cannot be repeatedly brought down. Granting a dismissed Government such significant competences could pose a risk to parliamentarism.

An outgoing Government also has limited scope in terms of the appointment of public servants, reforms and other important actions which have been suspended since it was relieved of its full mandate. A limit accordingly needs to be placed on the maximum length of the interim period.

Assigning certain competences on submitting and signing off legislative initiatives, submitting the budget (not including its preparation) and staff reshuffles were found to be unconstitutional in the context of an outgoing Government. Other competences on performing foreign affairs and general governance of state administration were found to be constitutional.

The Court noted that, as a result, a reshuffle can only occur in cases where it is objectively impossible for individuals to exercise their mandate, to enable the *status quo* of the state administration to be upheld. It therefore declared unconstitutional the Decrees of the President of Moldova nos. 634-VII and 635-VII of 16 May 2013 and Government Decision no. 364 of 16 May 2013.

Languages:

Romanian, Russian.



Identification: MDA-2013-2-004

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 20.05.2013 / **e)** 8 / **f)** Constitutional review of Parliament Decisions no. 103 of 03.05.2013, no. 104 of 03.05.2013, no. 98 of 25.04.2013 on the appointment and removal from office of the Prosecutor General / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

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

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

3.13 General Principles – **Legality.**

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

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

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

4.7.4.3.5 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **End of office.**

Keywords of the alphabetical index:

Parliament, vote, exhausted matter / Prosecutor General, dismissal from office, procedure.

Headnotes:

Article 135.1.a of the Constitution empowers the Constitutional Court with the competence of constitutional review on all acts passed by Parliament, without distinguishing between normative and individual acts.

Article 1.3 of the Constitution establishes the rule of law. No law or any other legal act which contravenes the provisions of the Constitution shall have legal force (Article 7 of the Constitution).

In line with the provisions of Article 125 of the Constitution, the Prosecutor General is appointed by Parliament, following a proposal submitted by the Speaker, for a term of 5 years. The office of Prosecutor General is a public one; the Prosecutor General is an official, a representative of public concern.

Summary:

I. The MP Serghei Sirbu lodged a complaint with the Constitutional Court, in which he sought a constitutional review of Parliament Decisions

nos. 103 and 104 of 3 May 2013 and no. 98 of 25 April 2013 on the appointment and removal from office of the Prosecutor General, and of Parliament Decision no. 81 of 18 April 2013 on the appointment of the Prosecutor General.

The applicant was of the opinion that Decisions nos. 103 and 104 of 3 May 2013 and no. 98 of 25 April 2013, which resulted in the abrogation of Decision no. 81 of 18 April 2013 regarding the appointment of the Prosecutor General were in breach of Articles 1, 2, 6, 7, 39, 64, 65.1.c, 65.j, 74.2, 76, 124.3, 125.1 and 125.3 of the Constitution.

On 18 April 2013, Parliament, at the initiative of its President, passed Decision no. 81, by which Mr Corneliu Gurin was appointed as Prosecutor General for a term of 5 years.

The lawfulness of Mr Gurin's appointment, and its compliance with the requirements established by law, were verified by the Juridical Committee on Appointment and Immunity of the Parliament, which presented a Report in parliamentary session, drawing the conclusion that the candidate met all the necessary requirements for appointment in office.

On 18 April 2013 Parliament passed, with 51 votes in favour from the MPs present at the session, Decision no. 81, appointing Mr Corneliu Gurin as Prosecutor General of the Republic of Moldova.

II. The Constitutional Court found that the challenged act, which was passed as a decision by Parliament upon the proposal of the President of the Parliament, was in line with the requirements set out in Articles 66.j and 125.1 of the Constitution.

The Court noted from statements by a number of MPs, who did not vote to pass Decision no. 81 that by Decision no. 98 of 25 April 2013 a special Commission had been set up, to examine the circumstances of Parliament's passing of Decision no. 81.

The Court noted that, regardless of the violation of certain provisions of legislative technique (the initiative of the members of the special Committee to abrogate Decision no. 81 was registered a day earlier before adopting Decision no. 103, in which Parliament proposed the abrogation of Parliament Decision no. 81 of 18 April 2013 on the appointment of Prosecutor General), the decisions on establishing the special Committee and the approval of its Report, did not produce legal effects in this case and could not be declared unconstitutional.

The Court accordingly resolved to cease the process of constitutional review of Parliament Decisions nos. 98 and 103, regarding the establishment of the special Commission and its Report.

As regards Decision no. 104, by which Decision no. 81 was abrogated, the Court noted that a vote which has already taken effect cannot be revised. A review of the voting procedures is not and cannot be envisaged; it would block the legislative process and compromise the legislative authority of the state. It would also affect the security of the legal relationship and national security, if it was possible, after a period of time, to go back over votes expressed in passing certain decisions or laws, emerging from momentary political or personal interests.

The Court noted that Decisions on the appointment of the Prosecutor General must be passed with the majority vote of the Members of Parliament present at the sitting. The verbatim report shows that at this session, the presence of 95 MPs was registered and so the majority of the members present at the session constituted 48 MPs. If two votes of the 51 in favour were annulled, 49 votes in favour would still remain, representing more than the majority of the Members of Parliament members present at the session.

The Court noted that the abrogation of the appointment resulted in the termination of the mandate of the Prosecutor General. The constitutional and legal norms impose respect for the term of the mandate, in order to safeguard the independence of the holder of public office. The procedure for dismissal tends to be more complex than that of appointment. The procedure for dismissal is expressly stipulated in the Law on the Prosecutor General.

The Court noted that Mr Corneliu Gurin was sworn into office before Parliament, a fact registered in the shorthand report of the parliamentary session of 18 April 2013. Once he was sworn in, Mr Corneliu Gurin officially entered office as Prosecutor General and his appointment as such (Parliament Decision no. 81 of 18 April 2013) was deemed an exhausted act.

The Court found that the removal from office of the Prosecutor General took place in breach of the relevant legal norms. The removal was adopted in the absence of a proposal by the Speaker of the Parliament. Other legal requirements were not followed.

It accordingly ceased the process of constitutional review of Parliament Decision no. 98 of 25 April 2013 regarding the establishment of a special Committee

to examine the circumstances of the passing by Parliament of Decision no. 81 of 18 April 2013 on the appointment of the Prosecutor General and Decision no. 103 of 3 May 2013 on the special Committee's Report for examining the circumstances of the passing by Parliament of Decision no. 81 on 18 April 2013 on the Prosecutor General's appointment.

At the same time, it pronounced unconstitutional Parliament Decision no. 104 of 3 May 2013 regarding the abrogation of Decision no. 81 of 18 April 2013 on the appointment of the Prosecutor General. At the same time, it pronounced Parliament Decision no. 81 of 18 April 2013 to be constitutionally compliant.

Languages:

Romanian, Russian.



Montenegro

Constitutional Court

Important decisions

Identification: MNE-2013-2-001

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 18.07.2013 / **e)** Reg. no. 90-08, 96-08 / **f)** / **g)** *Službeni list Crne Gore* (Official Gazette), no. 43/13 / **h)** CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Communication, interception / Communication, surveillance / Communication, telephone, evidence / Telephone conversation, confidentiality / Telephone, tapping, necessary safeguards.

Headnotes:

Following the case-law of the European Court, the identity check of telecommunication addresses and the time of the connection being established (information related to the dialled numbers and the length of a telephone conversation) constitute an “integral part of a telephone conversation”, which enjoys constitutional protection under the inviolability of the confidentiality of telephone communications, as well as in relation to the content and the data on published electronic communications.

In order for secret surveillance measures to have a legitimate goal, for the above constitutional reason, the same can be applied solely to a person for whom, prior to the application of secret surveillance measures, there exist specific “grounds for suspicion” of his/her having committed a criminal act (i.e., both objective and subjective elements of a criminal act).

Summary:

I. Six members of Parliament (MPs) and the Network for the promotion of the NGO sector (MANS) submitted to the Constitutional Court a motion and initiative for review of the constitutionality of Article 230.2 of the Criminal Procedure Code and the Action Plan for the implementation of the programme for the fight against corruption and organised crime (page 19), which had been passed by the Government.

In the motion and initiative the MPs contended that the part of Article 230.2 of the Criminal Procedure Code by which the police are authorised to obtain information related to the identity of telecommunication addresses which managed to establish a connection at a given time (so called itemised billing statements) without any review by a court or another independent body, is contrary to the provisions of the Article 42 of the Constitution and the provisions of Article 8 ECHR.

The provisions of Article 42 of the Constitution guarantee the inviolability of the confidentiality of correspondence, telephone conversations and other means of communication, which may be deviated from solely on the basis of a judicial decision for the purpose of conducting criminal investigations or for reasons of national security. The guarantee of the right to confidentiality is not directed towards total prohibition of any possibility of secret data gathering, but to finding a balance between the interests of security and the need for the protection of individuals from illicit interference with their privacy.

In this way, the challenged part of the provision of Article 230.2 of the Code gives the police the discretionary power to collect data, without restrictions, from the operators of electronic communication networks and services that keep official records on the identity of subscribers and registered users of fixed and mobile telephony, and to acquire data on the date, beginning and end of communication and the length of the same, where there are grounds for suspecting that a person has committed a criminal act.

II. The Constitutional Court held that the challenged part of the provision of the Article 230.2 of the Code breaches the inviolability of the right to the secrecy of telephone conversation (without the inspection of their content), or the secrecy of communication of the users of communication networks, guaranteed by Article 42.1 of the Constitution and allows “arbitrary interference of public authorities” with the right to privacy, contrary to the Article 8.2 ECHR.

The Court noted that international law and the constitutions of most countries in the world proclaim the protection of individuals from illicit interference with his/her privacy as a fundamental human right which enjoys legal protection.

In the concrete case this is the right to the inviolability of the confidentiality of correspondence, telephone conversations and other means of communication, which can be deviated from solely on the basis of a judicial decision, if this is necessary for a criminal investigation or for reasons of national security.

The European Court of Human Rights, in its case-law on Article 8 ECHR (right to respect for private and family life, home and correspondence), holds that it is desirable for the review of secret surveillance measures to be entrusted to courts, since judicial review offers the best guarantees to independence, impartiality and respect for procedure.

The Constitutional Court deemed that the challenged provision violates the inviolability of the right to confidentiality of telephone conversations, not only of the person against whom there exist "grounds of suspicion", but also, indirectly, of every third person (who is not subject to any secret surveillance measures), with whom the suspect establishes telephone connection.

For that reason, the Court established that the police, without an appropriate court decision, have no right to obtain data from the sphere of private communications, from telecommunication operators about the users of their services – who are not subject to any secret surveillance measures ("third persons"), about the communication performed and the time of connection being established, since even these data constitute integral elements of protected telephone communication. The Court accordingly held that the challenged provision of the Law is not in harmony with the provisions of Article 42 of the Constitution.

Having considered the content, the subject matter being regulated and the legal nature of the Action Plan, the Constitutional Court established that in the specific case it was not the matter of a general act, which regulated certain legal relations or questions in a general way, but of a strategic act for the implementation of the policy of the Government in the area of the fight against corruption and organised crime, which did not have normative character and the meaning of a general act or another regulation and that it was not suitable for the assessment of the Constitutional Court, in the sense of the provision of the Article 149.2 of the Constitution.

Since the issue of competence is a procedural one, which is deliberated upon by the Court in the preliminary procedure, the Constitutional Court held that, pursuant to Article 8.1 of the Law on the Constitutional Court, there was no procedural basis for the procedure to be conducted and for deliberation, or for the evaluation of the measures (page 19) of the Action Plan of the Government, which, among other things, had been requested in the motion and the initiative.

The Constitutional Court therefore established that the part of Article 230.2 of the Criminal Procedure Code, which states, "to request from the legal entity which provides telecommunication services that the identity check be performed of telecommunication addresses that managed to establish connection at a given time", at the time of validity, was not in conformity with the Constitution of Montenegro. In addition, the Court dismissed the proposal and the initiative for the review of constitutionality and legality of the Action Plan for the implementation of the programme for the fight against corruption and organised crime (page 19), which was passed by the Government of Montenegro.

Cross-references:

European Court of Human Rights:

- *Van Oosterwijck v. Belgium*, 06.11.1980, Series A, no. 40;
- *Rotaru v. Romania* [GC], no. 28341/95, 04.05.2000, *Reports of Judgments and Decisions 2000-V*;
- *Malone v. United Kingdom*, no. 8691/79, 02.08.1984, Series A, no. 82;
- *Copland v. United Kingdom*, no. 62617/00, 03.04.2007, *Reports of Judgments and Decisions 2007-I*;
- *Klass and others v. Germany*, 06.09.1978, Series A, no. 28.

Languages:

Montenegrin, English.



Netherlands

Council of State

Important decisions

Identification: NED-2013-2-006

a) Netherlands / **b)** Council of State / **c)** General Chamber / **d)** 24.07.2013 / **e)** 201204274/1/A3 / **f)** X (an American citizen) v. Minister of Foreign Affairs / **g)** *Landelijk Jurisprudentienummer*, BY8012 / **h)** CODICES (Dutch).

Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**

3.1 General Principles – **Sovereignty.**

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

Keywords of the alphabetical index:

Passport, confiscation / Passport, right to obtain.

Headnotes:

Travel documents are only issued to foreigners in the most exceptional circumstances, as issuing such a document could often be construed as a hostile act towards a sovereign state.

Summary:

I. X, an American citizen and highly skilled immigrant, lived in The Hague and had a valid residence permit. His American passport had been withdrawn due to outstanding maintenance obligations. The Dutch Minister for Foreign Affairs (hereinafter, the “Minister”) refused to issue him with a travel document for foreigners, as it was X’s own responsibility that he did not hold an American passport. X claimed that the Minister’s refusal was unlawful, arguing *inter alia* that the decision violated his right to liberty of movement (including his freedom to leave the country) under Article 12 of the International Covenant on Civil and Political Rights and Article 2.1 and 2.2 of the Fourth

Protocol to the European Convention on Human Rights. The District Court found for the Minister. X then lodged an appeal to the Administrative Jurisdiction Division of the Council of State.

II. The Administrative Jurisdiction Division of the Council of State began by recalling the parliamentary history of the Passport Act, from which it derives that travel documents are only issued to foreigners in the most exceptional circumstances, as issuing such a document could often be construed as a hostile act towards a sovereign state. The Administrative Jurisdiction Division of the Council of State held that X was free to move within the country. Besides, there was no evidence that X could not leave the Netherlands, as the American authorities had informed him that they were prepared to issue an American travel document so that X could travel back to the United States of America. Leaving aside whether the Minister’s refusal amounted to an interference with X’s right to leave the Netherlands, such an interference was necessary in a democratic society for the maintenance of ordre public (issuing the travel document required should not enable X to evade his duties under American law) and in the interest of the protection of the rights and freedoms of others (the beneficiaries of the maintenance payments).

Supplementary information:

Article 2.4 of the Constitution stipulates that everyone shall have the right to leave the country, except in the cases laid down by Act of Parliament. This provision, an equivalent to the international clauses relied on in this case, was not invoked, as the Administrative Jurisdiction Division, as any other Dutch court, cannot review the constitutionality of Acts of Parliament (Article 120 of the Constitution). However, an Act of Parliament in force within the Kingdom will not be applied if such application is in conflict with self-executing treaty provisions (Article 94 of the Constitution).

Languages:

Dutch.



Poland

Constitutional Tribunal

Statistical data

1 May 2013 – 31 August 2013

Number of decisions taken:

Judgments (decisions on the merits): 30

- Rulings:
 - in 14 judgments the Tribunal found some or all of the challenged provisions to be contrary to the Constitution (or other act of higher rank)
 - in 16 judgments the Tribunal did not find the challenged provisions to be contrary to the Constitution (or other act of higher rank)
- Initiators of proceedings:
 - 2 judgments were issued upon the request of the President of the Republic (*ex post facto* review)
 - 2 judgments were issued upon the request of Members of Parliament
 - 3 judgments were issued upon the request of the Commissioner for Citizens' Rights (i.e. Ombudsman)
 - 1 judgment was issued upon a joint request of three Municipal Councils
 - 1 judgment was issued upon the request of the National Council of Notaries
 - 1 judgment was issued upon the request of a Trade Union
 - 11 judgments were issued upon the request of courts – the question of legal procedure (in two cases two requests by courts were examined jointly)
 - 1 judgment was issued upon the request of a legal person – the constitutional complaint procedure
- Other:
 - 5 judgments were issued by the Tribunal in plenary session
 - 7 judgments were issued with at least one dissenting opinion

Important decisions

Identification: POL-2013-2-003

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 12.04.2011 / **e)** SK 62/08 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2011, no. 87, item 492; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2011, no. 3A, item 22 / **h)** CODICES (English, Polish).

Keywords of the systematic thesaurus:

4.10.7.1 Institutions – Public finances – Taxation – **Principles.**

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

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.**

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

Keywords of the alphabetical index:

Family, definition / Family, traditional, interpretation, compatibility with constitutional values / Family, protection, social and economic / Family, tax, concession / Family, burden, equalisation / Tax, burden, equality / Tax, personal income tax / Tax, preferential treatment / Taxation, progressive system / Child support, taxation / Child, care, cost / Child, parents, separation / Child, welfare.

Headnotes:

The parental obligation to support children financially may not constitute a basis for automatic derivation of the right to exemptions from the principle of universal taxation in the context of personal income tax.

The bringing up of a child is not simply to be perceived as tantamount to the fulfilment of the obligation to pay child support, which constitutes the basic obligation of a parent (and at times also the obligation of other persons toward the child).

The state's involvement in the realm of social welfare should not lead to the atrophy of parental obligations. At the same time, such perception of personal obligations between family members and public authorities guarantees the proper interpretation of the meaning of and the idea behind the principle of subsidiarity.

The protection of the family implemented by public authorities must take into account the model of the family presented in the Constitution, i.e. a lasting union between a man and a woman, aimed at motherhood and responsible parenthood.

Summary:

I. The applicant in this matter was a lawyer who supported his child financially but did not take care of the child on a day-to-day basis, since the child lived and was brought up by the other parent. The applicant had been continuing to pay Personal Income Tax (hereinafter, "PIT") on preferential terms, reserved for single parents.

The administrative courts upheld the administrative decisions determining the amount of tax arrears due to his allegedly incorrect application of the preferential PIT taxation provisions.

According to the applicant, the statutory regulations relating to preferential PIT taxation for single parents were inconsistent, *inter alia*, with Article 2 of the Constitution (principle of proper legislation), Article 18 of the Constitution (constitutional protection of the family), Article 32.1 of the Constitution (principle of equality) and Article 33 of the Constitution (equality of men and women).

II. Equality before the law implies the necessity to guarantee equal treatment of subjects sharing the same relevant characteristics. Married persons and single parents belong to two different categories; their legal and actual situations differ considerably. There is no infringement of the principle of equality and no discrimination against a parent whose child is brought up outside marriage and who fulfils his or her obligation to pay child support, but does not look after the child by comparison with parents who care for their children on a day-to-day basis, and by comparison with married couples.

The legislator's choice of criteria within the scope of which the principle of fair taxation will be implemented, due to the family situation of the taxpayer and thus his or her ability to pay personal income tax, may not be isolated from other constitutional values afforded special protection by the legislator.

Solutions which provide for various tax reliefs, even if they result from the principle of fair taxation, may not create an opportunity for faking the breakdown of family ties or constitute a reason for not getting married solely because of potential financial gain for taxpayers. This is of particular relevance to situations where parents earning high salaries will gain no

measurable profits from marriage, but the payment of personal income tax will allow at least one of them to pay a lower amount of tax. This may lead to the creation of fictional single-parent families solely for tax reasons.

The provisions of the Constitution do not define the notion of 'the family'; its status is, however, set by a number of provisions of the Constitution. In this ruling the Tribunal defined the family twice; firstly as a lasting union of a man and a woman, aimed at motherhood and responsible parenthood and secondly as a lasting union of two or more persons, comprising at least one adult and a child, based on emotional and legal ties and frequently based on blood relations.

Cross-references:

- Decision K 15/97, 29.09.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 3-4, item 37, *Special Bulletin Leading Cases 1* [POL-1997-S-002]; *Bulletin* 1997/3 [POL-1997-3-020];
- Judgment K 8/97, 16.12.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 5-6, item 70;
- Judgment K 18/98, 07.06.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 5, item 95, *Bulletin* 1999/2 [POL-1999-2-020];
- Judgment SK 22/99, 08.05.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 4, item 107;
- Judgment P 4/99, 31.01.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 1, item 5, *Bulletin* 2001/1 [POL-2001-1-006];
- Procedural decision SK 10/01, 24.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 225;
- Judgment K 6/02, 22.05.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 3A, item 33, *Bulletin* 2002/3 [POL-2002-3-028];
- Judgment P 3/03, 28.10.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 8A, item 82;
- Procedural decision P 16/03, 27.08.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 4A, item 36;
- Judgment K 8/03, 04.05.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 5A, item 37, *Bulletin* 2004/2 [POL-2004-2-014];
- Judgment SK 14/04, 09.05.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 5A, item 47;

- Judgment K 16/04, 18.05.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 5A, item 51;
- Judgment P 3/05, 15.11.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 10A, item 115;
- Judgment P 18/06, 23.06.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 5A, item 83;
- Procedural decision SK 15/07, 30.06.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 5A, item 98;
- Procedural decision SK 29/08, 01.03.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), no. 3A, item 29.

Languages:

Polish, English (translation by the Tribunal).



Identification: POL-2013-2-004

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 18.01.2012 / **e)** Kp 5/09 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2012, no. 39, item 879; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2012, no. 1A, item 5 / **h)** CODICES (English, Polish).

Keywords of the systematic thesaurus:

- 4.4.3.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**
- 4.4.3.2 Institutions – Head of State – Powers – **Relations with the executive bodies.**
- 5.1.1.1 Fundamental Rights – General questions – Entitlement to rights – **Nationals.**
- 5.1.1.2 Fundamental Rights – General questions – Entitlement to rights – **Citizens of the European Union and non-citizens with similar status.**
- 5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners.**
- 5.1.1.4 Fundamental Rights – General questions – Entitlement to rights – **Natural persons.**
- 5.3.8 Fundamental Rights – Civil and political rights – **Right to citizenship or nationality.**

Keywords of the alphabetical index:

Presidential acts / Citizenship, *jus sanguinis* / Citizenship, acquisition, condition / Nationality, principles / Act, administrative, requirement / Act, administrative, judicial review.

Headnotes:

The acquisition of citizenship, in accordance with the principle of *jus sanguinis* and also in the cases specified by statute, constitutes an ordinary way of obtaining Polish citizenship; by contrast, the granting of citizenship by the President constitutes an extraordinary way of its acquisition. The provisions of the Constitution do not assign either method with privileged status.

The legislator's freedom to set out additional ways of acquiring citizenship corresponds to the President's freedom to grant citizenship at his or discretion, regardless of premises specified in legal provisions in the context of other ways of obtaining citizenship.

The legislator must not, when indicating such additional ways of acquiring citizenship, shape the powers of other organs of the state so that they would emulate the above presidential power.

When regulating issues related to citizenship, the Constitution does not refer to the term 'nation', which evokes ethnic connotations.

Summary:

I. In preventive constitutional review, the President of the Republic questioned the conformity of Article 30 of the Polish Citizenship Act of 2 April 2009 (hereinafter, the "Act") with Article 137 of the Constitution, to the extent that this provision expands the scope of premises determining the recognition of a foreigner as a Polish citizen.

Article 137 of the Constitution allows the President of the Republic to grant Polish citizenship and to give consent for renunciation of Polish citizenship. Article 144.3.19 of the Constitution stipulates that the power to grant Polish citizenship and to give consent to its renunciation are the President's prerogatives; they do not require the countersignature of the Prime Minister and the Head of State is not accountable to Parliament for them. Finally, under Article 34.1 of the Constitution, Polish citizenship shall be acquired by birth to parents who are Polish citizens; other methods of acquiring Polish citizenship are to be specified by statute.

II. Having examined the President's application, the Tribunal reviewed the constitutionality of Article 30 of the Act in its entirety.

In Article 34.1 of the Constitution, the constitution draftsman used the phrase 'to acquire Polish citizenship' twice; in Article 137, however, he used the phrase 'to grant Polish citizenship'. Within the meaning of the Constitution, these terms are not interrelated in a sense that they refer to two diverse ways of obtaining Polish citizenship, set out in the Constitution.

Because Article 34 of the Constitution has been included in the chapter regulating the rights, freedoms and obligations of persons and citizens, next to such principles as the inherent and inalienable dignity of the person as well as his or her freedom and equality, it indirectly manifests the contemporary intention of particular states to adopt legal solutions that implement the policy of avoiding statelessness, and by means of obtained citizenship, guaranteeing state protection to the individual. With regard to specifying "other methods of acquiring Polish citizenship", the Constitution does not impose any direct restrictions on the legislator, and in particular does not require that they should be linked with the constitutional principle of *ius sanguinis*. This provision does not require that the President's participation be ensured as regards obtaining citizenship in the ways provided by statute.

The Act does not provide for any legal impact of an appeal against the President's decisions concerning citizenship, although – in accordance with a well-established view – it is admissible to re-apply for citizenship. The Act does not require the President to justify his or her decisions in that regard. Furthermore, it provides for the primacy of the legal institution of granting citizenship over the statutory ways of acquiring citizenship: the recognition of a foreigner as a Polish citizen or the restoration of citizenship. Indeed, Article 23 of the Act stipulates that filing an application for Polish citizenship to be granted to a foreigner results in the discontinuation of pending proceedings to recognise him or her as a Polish citizen or to restore his or her citizenship.

By contrast, the recognition of a foreigner as a Polish citizen is an act which is non-discretionary in character. The leader's power to recognise a foreigner as a Polish citizen is exercised solely when all requirements indicated by statute are fulfilled. A decision concerning the granting of citizenship does not have to take into account actual ties binding a foreigner with his or her new homeland, whereas the recognition of a foreigner as a Polish citizen is admissible only when such ties exist and are

manifested, for instance, in Polish descent, marital relations or family ties with Polish citizens, continuous residence in the territory of Poland, or an officially certified command of Polish. The act of recognising a foreigner as a Polish citizen only confirms the existence of such ties. It should also be noted that a final decision on the recognition of a foreigner as a Polish citizen is subject to review by an independent court.

Consequently, Article 30 of the Act is in line with Article 137 of the Constitution.

The intention to make the premises of recognising a foreigner as a Polish citizen as verifiable as possible has led to the situation where there are no premises which would, in every single case, allow for assessing the degree of integration of a foreigner with the Polish community and culture and the degree to which he or she has internalised the constitutional values, which is usually provided for in the legislation of contemporary states. However, these are issues the resolution of which is primarily linked with the adoption of such a concept of the recognition of a foreigner as a Polish citizen, and the choice of this concept falls within the scope of the legislator's freedom which is restricted by general constitutional principles and values.

The Tribunal issued this judgment *en banc*. Six dissenting opinions were raised.

Cross-references:

- Judgment K 41/02, 20.11.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 6A, item 83, *Bulletin* 2003/1 [POL-2003-1-006];
- Judgment Kp 4/08, 16.07.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 7A, item 112.

Languages:

Polish, English (translation by the Tribunal).



Portugal

Constitutional Court

Important decisions

Identification: POR-2013-2-008

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 10.05.2013 / **e)** 243/13 / **f)** / **g)** *Diário da República* (Official Gazette), 108 (Series II), 05.06.2013, 18220 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**

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

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

Keywords of the alphabetical index:

Adoption / Appeal procedure / Appeal, right, time-limit / Fair procedures, right.

Headnotes:

A person's ability to effectively exercise his or her right to take an appeal against a judicial decision depends on his or her understanding of the nature of that decision. A law which starts the clock for the time limit within which an appeal can be taken from the date the court's decision is read out constitutes an unjustified and unconstitutional limitation on the right of appeal, inasmuch as it implies that the time limit would already be ticking at a point when the interested parties do not yet know whether they want to appeal (whether they have the grounds to do so), precisely because they are as yet unable (for a reason for which they cannot be held responsible) to analyse the text of the decision that affects them.

Summary:

I. The appellants in this concrete review case, a couple with eight children, challenged a denial by the Lisbon Court of a request to lodge an appeal against a decision of a Family Court at first instance. Under the terms of the Law governing the Protection of Children and Young Persons in Danger (hereinafter, "LPCJP"), the Family Court had decided to remove seven of the appellants' eight underage children from their care and to entrust them to an institution with a view to their future adoption. The Family Court had also ordered a number of ensuing measures, particularly preventing the appellants from exercising their parental responsibilities in relation to the seven minors, and prohibiting the children's biological family from visiting them.

This first-instance ruling was read out in court on the day it was signed, in the presence of the two appellants. They appealed against that initial decision, but their appeals were denied on the grounds that they were lodged outside the legal time limit. This denial was subsequently confirmed by the Lisbon Court of Appeal. The time limit was counted under the terms of a norm which stated that the limit for appealing against a court order applying a measure involving the promotion of adoption and the entrusting of a minor either to the care of a person or persons selected as adoptive parents, or to an institution with a view to adoption in the future, starts to run on the day the decision is read out, on condition that the interested parties are present at the reading, even if they are not represented by a lawyer and a copy of the decision is not given to them on the day of the reading, and regardless of the fact that they asked for one at the time. It should also be noted that, contrary to the provisions of the civil law in general, in this particular jurisdiction it is only obligatory for parents to be represented by a lawyer in the appeal phase.

Given the importance of the constitutional-law matters at stake, both the representatives of the Public Prosecutor's Office at the Constitutional Court and the appellant parents argued that guarantees similar to those applicable in criminal procedure should apply in such cases.

II. The Constitutional Court noted that in all its jurisprudence it has considered that, although the Constitution does not expressly provide guidance concerning the infra-constitutional shaping of civil procedural norms which are as precise as those it imposes on criminal procedure, there can be no doubt whatsoever that procedural rules in general must bear constitutional values in mind. One of the key structural elements of a democratic state based

on the rule of law is observance of just and fair proceedings for resolving disputes. This is the constitutional principle that most strongly binds the ordinary legislator's choices when it decides how to shape legal procedure.

Inasmuch as it is through legal procedure and proceedings that the courts perform their jurisdictional function and through which citizens gain access to state protection of their legally-protected rights and interests, every norm which shapes that procedure and those proceedings must reflect the key structural principles of the constitutional system. They must be shaped in such a way that they are materially informed by the material principles of justice. The effective nature of the right to a defence, the adversarial principle and the principle of equality of arms must all be guaranteed. Portuguese constitutional jurisprudence and the case-law of the European Court of Human Rights on Article 6 ECHR both play an especially important part in rendering the principle of fair process operable.

Given that the rights in question must be present in any form of jurisdictional procedure and proceedings, reference can be made to Constitutional Court decisions on norms in any procedural branch of the law in order to ensure this operability, on condition that their underlying parameters are not principles that are specific to a different form of procedure to the one before the Court.

Even though the right of appeal is not unlimited, it is included in the constitutional guarantee of the right of access to the courts in order to defend rights and interests that are protected by the law; and the right of appeal must itself include protection against jurisdictional acts. When more significant matters – matters that possess greater legal dignity – are at stake, cases must be considered by more than one instance, so that the probability of reaching a fair decision is enhanced.

The right to appeal in criminal proceedings is expressly set out in the text of the Constitution. However, the Court's jurisprudence is that, even outside the criminal field, when the actions of a court directly affect any of a citizen's fundamental rights, he/she must be recognised to possess the right to have the situation considered by another judicial instance. On the other hand, when the origin of the effect on his/her fundamental right lies in a decision taken by the Administration, the Constitution does not always require such a judicial reassessment. The Constitutional Court has always taken the stance that the constitutional guarantee of the right to appeal is not limited to the dimension in which the ordinary legislator is required to provide for at least one level of appeal. Taken in conjunction with other constitutional

parameters, this guarantee presupposes that the legislator will not adopt arbitrary, disproportionate solutions that restrict the possibilities of appeal, even when the appeal in question is only provided for by the ordinary law and not imposed by the Constitution.

Although, unlike the requirement regarding administrative acts, the Constitution does not expressly provide for a right to be notified of judicial decisions, the duty to notify interested parties of decisions that they can challenge a decision if they wish to do so is an integral element of the very principle of a democratic state based on the rule of law. Otherwise it would not be possible to satisfactorily ensure that persons at whom judicial decisions are directed are made aware of their content; namely, so that they can use the appropriate procedural means to address decisions affecting them.

The dual requirement that a decision must be cognisable and that the Court must be diligent in ensuring that that decision is made known is valid in relation to both the interested party and his/her lawyer. In its jurisprudence the Constitutional Court has stated that in order for the right to appeal to be effective, the potential appellant must be placed in a position in which he/she can make an informed choice, with the possibility of either accepting the decision or challenging it. Only knowledge of the content of the decision and its underlying reasoning permits conscious formation of an intention to appeal. This in turn means that a peremptory time limit for lodging an appeal can only begin at the moment when the parties can be said to be required to possess that knowledge.

In the present constitutional review case, the issue concerned the entrusting of minors to third parties with a view to their future adoption, which is the most serious of the promotion and protection measures provided for in the LPCJP. The measure implies the dissolution in the long run of the legal bonds derived from biological parenthood, and requires immediate physical separation of the parents from their children, with no visitation rights. A constitutional norm expressly requires both that such a measure must be preceded by verification of the fact that the parents have failed in their fundamental duties to the children, and that the measure can only be decided by a court. The LPCJP provides for an appeal against that decision – again a constitutional imposition, given the significance of the rights at stake. All this also implies that it is even more important for infra-constitutional legislation to respect the appellants' rights; and there is in particular no reason why the guarantees pertaining to those rights should be less than the ones that exist in the criminal procedural field.

In promotion and protection proceedings brought before the courts under the LPCJP, the parents are free to choose whether or not they are represented by a lawyer, except in the appeal phase, when it is obligatory. It is thus possible for a final decision to be read out by the presiding judge at the end of the pleadings, and for the parents to hear that reading of a decision that orders promotion and protection measures without ever having appointed a lawyer to represent them in the case. In such circumstances, and given that any appeal against the decision must be brought in the form of a request signed by a lawyer, it is necessary to provide a party who was not thus far legally represented with a reliable means of communicating the content of the decision to a lawyer, thereby ensuring that a decision on any appeal can be based on objective information. A simple description by the interested party of what happened during the pleadings and of the reading of the decision at which he/she was present is not sufficient.

The Court emphasised that decisions in promotion and protection cases are complex and must fulfil rigorous procedural steps that are imposed by law. For someone who is not a legal professional to merely be present when a decision is read out does not ensure that he/she fully understands what was decided and why. Moreover, even if the parent is already accompanied by a lawyer when the decision is read, the Court's jurisprudence is that the ability to bring an appeal presupposes detailed analysis of the decision one wants to challenge – an analysis that cannot be made by simply calling on one's memory of the reading of the sentence. The Court thus held the norms before it to be unconstitutional.

Cross-references:

- Rulings nos. 81/12 of 09.02.2012, 545/06 of 27.09.2006 and 186/04 of 23.03.2004.

Languages:

Portuguese.



Identification: POR-2013-2-009

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 12.06.2013 / **e)** 327/13 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

4.7 Institutions – **Judicial bodies.**

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

5.3.13.14 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:

Administrative courts, jurisdiction / Court, authority and impartiality / Proceedings, disciplinary, judge / Proceedings, disciplinary, procedural guarantee / Courts, independence / Impartiality, institutional.

Headnotes:

The competence to hear appeals against decisions of the Supreme Judicial Council (namely in disciplinary matters) pertains to the Supreme Court of Justice. In such cases the STJ sits in a chamber composed of its longest-serving Vice-President, who has a casting vote, and a Justice from each of the Court's regular chambers, whose appointment is also based on seniority.

Summary:

I. The appellant, who is a judge, alleged that various norms contained in, and normative interpretations of, the Statute governing Judicial Magistrates (hereinafter, "EMJ") and the Disciplinary Statute governing Workers who Exercise Public Functions, which is subsidiarily applicable to disciplinary proceedings involving judges (hereinafter, "EDTFP"), were unconstitutional.

The norm at the heart of this appeal on the grounds of unconstitutionality states that the competence to hear appeals against decisions of the Supreme Judicial Council (namely in disciplinary matters) pertains to the Supreme Court of Justice (hereinafter, "STJ"). In such cases the STJ sits in a chamber composed of its longest-serving Vice-President, who has a casting vote, and a Justice

from each of the Court's regular chambers, whose appointment is also based on seniority.

The appellant argued that this constitutes an insufficient differentiation between the entity *ad quem* and the entity *a quo*, that there would be practically no possibility of an effective re-examination and ensuing alteration of a judgement, and claimed multiple violations of the Constitution: the constitutional principle that the competences to judge disputes arising out of administrative legal relations pertain to the Administrative and Fiscal Courts; the constitutional rights regarding the guarantees applicable to criminal proceedings; the right to effective jurisdictional protection; and her right to see her case examined fairly by an impartial entity – a right that is enshrined in both the Constitution of the Portuguese Republic and the European Convention on Human Rights.

II. The Court recalled its own jurisprudence on the exclusivity of the competence of the administrative courts, in which it has held that the constitutional norm does not preclude the ordinary legislator from pragmatically weighing up the areas in which matters of different natures intersect and distributing competences accordingly.

The Court noted that the 1989 constitutional revision had made the organisation of the exercise of the administrative jurisdiction autonomous. There were various reasons for this move: Administrative Law is technically complex and its theory stands apart from that of the other branches of the law; case-law is particularly important to the definition of its general principles; and there is a generic advantage to be gained from entrusting administrative cases to judges who are especially aware of the limits on the control of acts undertaken as part of the administration's exercise of the freedom to take decisions within its sphere of action. The constitutional norm which says that the administrative courts have the competence to try contested actions and appeals whose object is to settle disputes arising from administrative and fiscal legal relations, thereby making those courts the common jurisdiction in administrative matters, does not absolutely reserve competence to them. When justified, the ordinary legislator can give other courts the competence to decide such appeals in one-off situations. What is necessary is for the essential core of the material organisation of the different jurisdictions to be respected in a way that does not disfigure the areas of autonomy enshrined in the Constitution, and for any exceptional solutions that deviate from the constitutional clause which defines the area of competence of the administrative courts to be sufficiently justified.

When the exercise of the administrative jurisdiction was made autonomous, the Supreme Administrative Court (hereinafter, "STA") could have been an alternative entity charged with the competence to judge appeals against decisions of the Supreme Judicial Council (which had thus far been attributed to the Plenary of the Supreme Court of Justice). Indeed, at first sight the STA would have been a natural choice, given the subject matter of such appeals.

However, the legislator decided to retain the initial solution. It did this both for historical reasons, and because the Justices of the STJ are very familiar with the realities which come before the Council and which then lead to appeals.

The Constitutional Court accepted that this very proximity might raise questions as to the appeal court's impartiality. However, while in principle the Justices of the STA possess a more detailed knowledge of the applicable law, the specificity of the matters raised in this kind of appeal nevertheless means that the Justices of the STJ are likely to be in a privileged position to control the acts in question. This may well be why it can be said that the legislator had sufficient legitimacy to maintain the solution under which it is the STJ that is competent to hear appeals against decisions taken by the Supreme Judicial Council, particularly in disciplinary matters involving judges.

On the question of the impartiality of the judges to whom it falls to rule on this kind of appeal, the ordinary legislator is required to create a legal framework that guarantees and promotes that impartiality as a means of fulfilling both the principle of the independence of the courts and the citizen's right to fair process when he/she turns to them. The legislator cannot attribute the competence to decide a case to an entity that is objectively not in a position to maintain an adequate distance from the parties affected by its decision.

The Court stated that the fact that the Justices who make up the STJ Chamber with the competence to hear appeals against Supreme Judicial Council decisions are themselves subject to management by, and the disciplinary power of, the latter, cannot be objectively seen as a factor that is capable of influencing their verdict in such cases. The relationship between the Council and these Justices is not a hierarchical one. The Justices are not only independent from the other seats of state power; they also possess an internal independence within the judiciary, under which the Council manages and disciplines them in accordance with rules that are set abstractly and in advance. Nor is the fact that, with the exception of the STJ's longest-serving Vice-

President, the members of this particular chamber are chosen by the President of the STJ, who is also *ex officio* President of the organ against whose decision the appeal is being brought, likely to undermine their impartiality. This choice is not a free one – it is determined by the strict criterion that the choice must fall on one Justice from each of the Court's four regular chambers, and that those Justices must be the longest serving in each chamber.

On the subject of the EMJ statutory norm concerning the correct functioning of the STJ, as seen from the perspective of the European Convention on Human Rights provisions regarding the right to fair process, the Court took the view that the European Convention norms invoked by the appellant do not constitute autonomous parameters, because these rights are expressly enshrined in the Constitution. Under the constitutional norm which requires that an accused person in proceedings that can lead to sanctions be guaranteed the rights to be heard and to a defence, the guarantees applicable to criminal proceedings also apply here. The Court found that none of these rights had been violated in the present case.

The Court also considered the question of whether the EMJ constitutes a breach of the constitutional principle of the presumption of innocence in criminal proceedings. It upheld its existing jurisprudence, under which it is firmly established that the principle that accused persons must be presumed to be innocent, which the Constitution expressly requires in the criminal procedural domain, is also essentially valid in the other domains in which sanctions can be imposed in general, and here in the disciplinary domain in particular. However, the Court also pointed out that it has never held that all the guarantees which the Constitution imposes in criminal proceedings are fully applicable in the disciplinary field.

The scope of the constitutional guarantee that sanctions-related proceedings must provide for the accused's rights to a hearing and a defence simply means that it is unconstitutional to apply any type of administrative, fiscal, labour, disciplinary or other sanction unless the accused has previously been heard (right to a hearing) and can defend him/herself from the accusations that are made against him/her (right to a defence).

The appellant also alleged that the regime governing Constitutional Court costs was unconstitutional due to its specificity.

The Court observed that this regime follows the general model applicable to court costs, which is then adapted in the light of the specificities of proceedings

before the Constitutional Court. These specificities justify, for example, the rules whereby there is no initial fee and the Court's own secretariat draws up the final account. The origins of the different cost regime applicable to the Constitutional Court lie in the latter's specific autonomous constitutional status; and the power to approve the regime falls within the scope for shaping rules that is inherent in the exercise of the legislative competence which, in this field, the Constitution entrusts exclusively to the Assembly of the Republic.

For all these reasons, the Court declined to find the norms before it unconstitutional and denied the appeal.

III. The original rapporteur dissented from the majority opinion and was thus replaced in that role. In this Justice's view, the norms before the Court remove the judgement of a matter that is essentially administrative from the jurisdiction of the administrative courts. She said that by excluding the review of decisions of the Supreme Judicial Council from the scope of the administrative jurisdiction, these norms are in violation of the constitutional norm that places the resolution of disputes arising out of administrative and fiscal legal relations within the competence of the administrative and fiscal courts.

The dissenting Justice interpreted the text of the Constitution as doing more than merely prohibiting the decharacterisation of the administrative jurisdiction, and that this means that the legislator is obliged to do more than just safeguard an essential core of the material organisation of the various jurisdictions.

Cross-references:

- Rulings nos. 277/11 of 06.06.2011 and 33/02 of 22.01.2002.

Languages:

Portuguese.



Identification: POR-2013-2-010

a) Portugal / b) Constitutional Court / c) Second Chamber / d) 15.07.2013 / e) 404/13 / f) / g) / h) CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

4.6.7 Institutions – Executive bodies – **Administrative decentralisation.**

4.13 Institutions – **Independent administrative authorities.**

Keywords of the alphabetical index:

Impartiality, institutional / Authority, judicial, principle of exclusive jurisdiction / Penalty, administrative, concept / Penalty, application by administration / Power, administrative / Sanction, administrative.

Headnotes:

The competence, under the law, of a private-law entity charged with the management of gaming and betting activities, to decide administrative-offence cases that fall within the scope of its responsibilities, and to impose fines or other accessory sanctions on the one hand, with a norm that entrusts the same Department with the authority to decide administrative-offence cases regarding the unlawful operation of lotteries, betting and similar activities with a view to imposing penalties provided for by law on the other hand, is not unconstitutional. The principle that the imposition of security measures and penalties is the exclusive preserve of the courts does not apply to the imposition of non-penal sanctions that do not restrict people's freedom, because such impositions do not constitute the administration of justice.

Summary:

I. This case entailed a mandatory appeal by the Public Prosecutor's Office against a ruling in which the Porto Court of Appeal refused the application of a norm that gives the Gaming Department of the *Santa Casa da Misericórdia de Lisboa*; an institutional charity funded in part by gaming revenues (hereinafter, the "SCML") the competence to hear administrative-offence cases regarding unlawful gaming activities, because that Court considered the norm unconstitutional.

II. The Constitutional Court rejected the Court of Appeal's reference to the effective enjoyment of the right to fair process, "in the sole sense derived from

Article 47 of the European Charter of Fundamental Rights", which it said was not relevant here. The norms enshrining fundamental rights contained in the European Union Charter of Fundamental Rights (hereinafter, "EUCFR") "are addressed to the institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law" (Article 51.1 EUCFR). In the case before the Court, the only issue was the application of norms derived from internal legislative acts and not from sources involving European Union Law.

SCML is a private-law legal person that has been granted administrative public interest status. It is thus a private institution that acts in the public interest. It undertakes activities which belong to the administrative sphere and which the legislator recognises to be of importance to the public interest. These include the management of games of chance. The legislator has reserved the right to organise betting and lottery games to the Portuguese State, and has awarded SCML the concession to operate the gaming system.

SCML is thus part of a broad functional concept of a public administration. Its Gaming Department is an organisational division of the private legal person SCML, and a unit to which powers are attributed, especially those regarding the gaming operations for which that legal person holds the concession. It is therefore not appropriate to invoke the right of access to the courts, in the sense of a right to fair process, because this is to call on a constitutional norm when what is at stake is a typically administrative form of action.

The norm under review in the concrete case before the Court refers to an administrative power of a type used to impose sanctions, which is circumscribed to an administrative phase of an administrative-offence procedure. It would only be possible to invoke the right to fair process if the issue were the exercise of subjective rights in the jurisdictional phase of that same administrative-offence procedure.

Inasmuch as sanctions for administrative offences are designed to both generally and especially prevent the commission of acts which, albeit illegal, do not entail enough legal detriment to justify their criminalisation, the legislator has given the public administration the powers to itself verify compliance with the norms and sanction unlawful acts in the case of infractions. This punitive function exercised by the public administration does not undermine the principle of the separation of powers, because it does not encroach on the core of the jurisdictional function. It is to the courts that the Constitution entrusts the defence of legally protected citizens' rights and interests, the repression of

violations of democratic legality, and the function of deciding conflicts between public and private interests. However, this constitutional command does not exclude the exercise by a variety of administrative entities of punitive powers intended to repress violations of democratic legality, which some authors describe as “para-jurisdictional powers”.

Non-penal sanctions can be ordered by the administrative authorities, on condition that the ability to effectively resort to the courts is guaranteed and the accused person is ensured the guarantees applicable to his/her defence. The essence of the principle that accused persons are entitled to a defence is valid in every domain in which sanctions can be imposed. Without prejudice to the fact that accused persons in administrative-offence proceedings enjoy various guarantees with regard to their defence in terms of both administrative and jurisdictional procedure, an omission of those guarantees during the administrative phase of an administrative-offence case does not imply a breach of the right to fair process, because that right must only obligatorily be observed as part of the procedure involved in jurisdictional proceedings.

In the present case it was clear from both the failure to concretely invoke any facts that would have demonstrated it, and from the facts in the case file that were deemed proven, that during the administrative phase of the administrative-offence proceedings there was no deprivation of any rights to participate in those proceedings or of any rights to a defence. The Court whose decision was contested in the present case limited itself to holding that the simple circumstance that SCML simultaneously holds the public concession for state-approved gaming and is the entity charged with the exercise of powers to impose sanctions in administrative-offence proceedings regarding unlawful gaming is capable of endangering the impartiality needed to find accused persons guilty of administrative offences and impose sanctions on them accordingly, and that the applicable norm was thus unconstitutional. The Constitutional Court, however, concluded that there was no violation of the constitutional norm that enshrines the rights to a defence in administrative-offence proceedings, and that there was therefore no unconstitutionality in this respect.

The Constitutional Court is limited to reviewing the norm(s) that the decision before it has applied or refused to apply. However, it can also conduct that review on the basis of any breach of constitutional norms or principles other than those whose violation was invoked in the Court *a quo*. As such, in the present case the Court analysed the norm to see whether it contradicted any other constitutional norms.

The Court held that although the principle of a state based on the rule of law means that there must be fair process in every stage of administrative-offence proceedings, and that this includes the requirement that the structural organisation and normative configuration of the procedure enable whoever investigates and decides in the administrative phase to fulfil requisites of disinterestedness and impartiality, unlike judicial impartiality, the impartiality which the Administration must possess does not imply that the decision-maker has to be neutral. The administrative authorities pursue the public interest(s) for which the law makes them responsible, even when they impose sanctions for mere social administrative offences. They do not decide conflicts between public and private interests. The decision in the first phase of mere social administrative cases is in principle taken by the Administration, and the legislator did not subject this process to the accusatory principle.

As the holder of a concession for a public service and the entity entrusted with the exercise of functions involving the imposition of sanctions of the type applicable to administrative offences, SCML is automatically required to respect the general principles of Administrative Law that are expressly derived from the so-called “constitutional corpus”.

It would only be possible to conclude that SCML’s decision to find an accused person guilty and impose sanctions was illegal if it were jurisdictionally alleged and proven that the decision was in concrete violation of this principle.

Cross-references:

- Rulings nos. 49/13 of 22.01.2013 and 278/11 of 07.06.2011.

Languages:

Portuguese.



Identification: POR-2013-2-011

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 15.07.2013 / **e)** 418/13 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

5.3.13.23 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to remain silent.**

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.**

Keywords of the alphabetical index:

Evidence, lawfulness / Human dignity / Personal integrity / Road safety, offence.

Headnotes:

Taking a blood sample from a driver who is unable or unwilling to consent to it, in order to determine his/her blood alcohol level, does not imply a violation of the right against self-incrimination. It is a mere basis for an expert examination whose result is not known in advance, and it does not contain any declaration or active behaviour by the examinee that would suggest that he/she acknowledges facts that would render him/her liable. Nor does the sample represent a breach of the right to physical and moral integrity, both because it barely affects those rights and because the legislator must take account of the need to respect the preservation of rights pertaining to other interested parties.

The normative interpretation under which a driver who has been involved in a road accident and is physically incapable of blowing into a breathalyser tube to test his/her alcohol level must be subjected to a blood test conducted by a doctor from an official health establishment, which is then used to diagnose the extent to which the driver was or was not influenced by alcohol, namely for the purpose of determining his/her criminal liability, even if his/her state does not allow him/her to give or refuse consent for such a sample, is not unconstitutional.

Summary:

I. This was a mandatory appeal by the Public Prosecutor's Office against a decision in which the Court *a quo* denied application of a norm contained in the Regulations governing the Inspection of Driving under the Influence of Alcohol or Psychotropic

Substances (hereinafter, "RFCIASP"), on the grounds that it considered the norm unconstitutional. The norm in question states that when a person who is to be examined for the purpose of detecting alcohol in his/her blood is not in a physical condition that would enable him/her to blow into a breathalyser, the latter test must be replaced by a blood test, even if the subject is not in a state to be able to give consent.

At issue was evidence brought against a person accused of the crime of driving a vehicle in a state of drunkenness. The Court *a quo* considered that in the light of the Constitution, the examination was null and void as evidence, because the blood sample was taken when the accused was unconscious and unable to consent to or refuse it. This conclusion was reached as a result of the interpretation of the RFCIASP norm such that when a person who is in a road accident is rendered unconscious, it is lawful to take a blood sample without any consent on his/her part, in order to bring criminal proceedings against him/her.

II. The Constitutional Court gauged the norm's constitutionality in the light of various parameters.

The Court considered that the principle *nemo tenetur se ipsum accusare* had to be considered, regardless of the fact that it is not expressly stated in the Constitution. This principle is associated with the right to silence as an option that pertains to accused persons, who can choose not to make self-incriminatory statements, and protects them from the improper exercise of coercive powers with a view to forcing them to collaborate in their own incrimination. Even though the right not to incriminate oneself is not expressly recognised in the Constitution, it does possess constitutional authority, because it is a corollary of the protection of fundamental values or rights like human dignity and the presumption of innocence.

The European Court of Human Rights has held that the right against self-incrimination does not cover the use in criminal proceedings of evidence that can be obtained from an accused and exists independently of his/her will. Examples include the taking of blood samples (*Saunders v. The United Kingdom*, decision of 17 December 1996, Application no. 19187/91, *Reports* 1996-VI).

Upholding its own earlier jurisprudence, the Constitutional Court took the view that taking a blood sample in order to determine the blood-alcohol level of a driver who is unable to give or refuse consent does not imply a violation of the right not to incriminate oneself.

Nor did it consider that there was any breach of the right to the inviolability of personal integrity, which encompasses physical and moral integrity. This inviolability does not mean that this right absolutely prevails over other constitutionally protected rights and interests. What it does entail is an absolute prohibition on the more intense forms of violation, such as torture and cruel, degrading or inhuman treatment. Given the characteristics of the intervention it entails and the reversibility of the damage the latter causes, taking a blood sample constitutes a very low level breach of the subject's right to physical integrity. An exception would be a situation in which medical reasons linked to the examinee's special health status mean that collecting such biological material might be inadvisable, because it involves a special danger or risk. In such cases, a blood test cannot be imposed, even if no alternative form of medical exam is possible. However, the fact is that exceptional situations of this kind are safeguarded in the relevant norms.

Where moral or psychological integrity is concerned, in its position as a legal value linked to self-determination and the manifestation of each person's free will, the possible violation in the present case would not result from the direct contradiction of the examinee's will – something that would be the case if one were to permit taking a sample from a subject who refused it – but from the impossibility of taking that will into consideration when the subject is unconscious.

It is also possible to consider that taking a blood sample affects the examinee's right to the privacy of his/her personal life. However, the extent to which such an intervention intrudes into that life is small, all the more so in that it only involves extracting a sample of a given biological material with a view to obtaining a very circumscribed form of information intended for purposes determined by law, and takes place in a hospital and is done by health professionals who are bound by a code of confidentiality.

The Court noted that driving on the public highway is an activity that is simultaneously of manifest use to society and brings with it substantial risks of damage to fundamental legal assets, such as life, personal integrity and private property. It is thus essential to ensure the adoption of legislative measures designed to guarantee road safety, namely and when necessary, by requiring people not to drive.

The high accident rates on our roads are largely due to circumstances linked to drivers. The way in which alcohol consumption interferes with drivers' behaviour has led the legislator to intensify the protection of the legal assets affected by the increased risk derived from driving under the influence of such substances.

The protection available in the penal field now includes a legal type of crime in the 'abstract danger' category – a danger which in this case is created by driving a vehicle in a state of drunkenness or under the influence of narcotics or psychotropic substances.

The Constitutional Court has already held that this legal type of crime does not configure a violation of the principle of minimum intervention by the Criminal Law, which is based on the idea of proportionality when the right to personal freedom is restricted, so that the restriction must be that which is needed in order to protect other legal assets to which the Constitution affords its protection, must be appropriate in terms of reducing the risks that such assets will be damaged, and must be proportional in the strict sense, in that it must be based on widely accepted medical and scientific criteria that make it possible to gauge the degree to which the behaviour of persons who drive under the influence is distorted.

The creation of legal types of crime must be accompanied by legal means that make it viable and operable to provide evidence of the respective facts and then sanction them.

In the case of driving while drunk, any prohibition on taking blood samples from drivers who are incapable of giving, or unwilling to give, their consent would mean that it would be impossible to secure evidence of the objective elements of the legal type, and consequently that crimes committed by such drivers would go unpunished.

Examination in order to determine alcohol levels is necessary and appropriate to the need to safeguard the legal assets involved and to discover the truth which criminal procedure is designed to reveal.

The Court went on to look at the rights to one's good name and reputation, and to the intimacy of one's private life. It said that the assets the norm seeks to protect and the dangerous nature of the forms of behaviour it seeks to prevent, justify and legitimate the normative measure in question, while the personal loss to the subject who is obliged to undergo the alcohol test does not attain the essential core of fundamental rights that cannot be waived.

The effect on the fundamental rights that may be at stake here is intended to safeguard the efficacy of the state's desire to punish, using sanctioning norms that are created in order to guarantee the effective material protection of other fundamental rights – life, physical integrity, private property – that are encompassed in the protection afforded to safety on the roads. Here too the restriction complies with the principle of proportionality, in that it is appropriate (it

is an acceptable means of pursuing the objective of protecting the fundamental rights in question), necessary (because, given the perishable nature of the evidence, it is the only means that makes it possible to fulfil the state's will to punish), and proportional in the strict sense of the term, in that it is a measure that is a balanced and fair response to the need to protect rights that must be protected.

III. One Justice concurred with the Court's decision, but on different grounds. In her opinion the problem posed by the norm *sub judicio* cannot be resolved by looking at it from the perspective of restrictions on fundamental rights, whatever they may be. She saw the norm as a means by which the ordinary legislator has sought to harmonise the fulfilment of its duty not to affect the fundamental rights of certain persons (here, drivers of vehicles) with that of another duty to which it is also bound – that of issuing norms which efficiently protect the rights of others (other people's rights to physical integrity and safety). The consequences of this distinction include the fact that it is not necessary to subject the norm to the test of its proportionality in order to assess its conformity with the Constitution.

Cross-references:

- Rulings nos. 95/11 of 16.02.2011, 155/07 of 02.03.2007, 319/95 of 20.06.1995 and 128/92 of 01.04.1992.

Languages:

Portuguese.



Identification: POR-2013-2-012

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 29.08.2013 / **e)** 474/13 / **f)** / **g)** *Diário da República* (Official Gazette), 179 (Series I), 17.09.2013, 5864 / **h)** A more extensive version of this précis is available in CODICES (English, Portuguese).

Keywords of the systematic thesaurus:

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

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

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**.

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

Keywords of the alphabetical index:

Civil service, contract, work, system / Public servant, status / Employment, contract, termination, condition / Employment, dismissal / Employment, public-sector / Employment, worker, protection / Expectation, legitimate / Worker, public, private, difference / Worker, fundamental right.

Headnotes:

The public legal employment relationship is encompassed by both the protection which the Constitution affords to the right to job security and the prohibition on dismissal without just cause, both of which also cover dismissal for objective reasons, which is also admissible in this field of action. Although, when compared to its private counterpart, the public employment relationship is especially stable and lasting, there are no constitutional grounds for saying that the public labour bond should be a lifelong one. Like other fundamental rights, the right to security of public employment is open to limits and restrictions in the light of other constitutionally-protected rights and values.

Summary:

I. Prior review proceedings were requested by the President and involved norms contained in a Decree of the Assembly (the Parliament).

The first question of constitutionality addressed a norm that added three new reasons of an objective nature for terminating the public legal employment relationship to the regime governing workers with a public employment relationship.

The second question was directed at the scope of the subjective application of the new regime, which the legislator also sought to apply to the workers encompassed by a norm contained in the 2008 “Law establishing the regimes governing the labour bond, careers and remunerations of workers who exercise public functions”. This 2008 norm safeguarded subjects in a public employment relationship whose

status was derived from the fact that, at the moment when the 2008 Law entered into force, they possessed a bond produced by an earlier definitive appointment, but now passed *ope legis* to a contractual bond. In other words, in 2013 the legislator wanted to do away with the safeguard clause created in 2008.

The safeguard took the shape of the maintenance of two essential component elements of the workers' earlier status: the regime governing the termination of the labour relationship; and the regime governing reorganisations and the placement of workers in a "special mobility" situation.

The 2008 Law did away with the notions of public "functionary" or servant and "administrative agent" (which became mere conceptual definitions), and with "appointment" as the standard regime governing the formation of the public employment relationship, which it replaced with a labour contract. This represented a step forward in the movement toward turning the public employment relationship into a labour relationship.

The current legislation states that the procedure for rationalising staff rosters and placing workers in a special mobility situation can only occur as the result of a decision taken on the basis of a prior evaluation and for specific reasons, and it must be shown that the existing staff do not match the department or service's needs. This reasoning can also be based on conclusions and recommendations in audit reports or organisational assessment studies. For departments or services to be merged or restructured, a legislative act must set general, abstract criteria for selecting the staff needed for the organisational unit to pursue its responsibilities or exercise its competences.

2008 saw the publication of the Regime governing the Labour Contract for Public Functions (RCTFP), which moved even more evidently closer to the Labour Code regime.

This Regime admitted the generalised use of the open-ended labour contract for activities that do not imply the exercise of powers of authority or of functions which pertain to sovereignty. It reserved the formation of an appointment-based bond to workers whose career is directly linked to the exercise of public authority or sovereign powers – i.e., to those which have been called "hard core" public functions. Outside these domains, public employers can now use the labour contract to form a labour relationship.

This means that the Public Administration now uses labour bonds that until 2008 had been specifically reserved to private labour contracts – bonds that do not turn the respective workers into public servants or administrative agents of the state. The new legislation opened the way to replacing the figure of the "public functionary" (afforded by the appointment regime) and accentuated the tendency to bring the public employment relationship and the private labour regime into closer alignment – a dynamic in which it had been clear for some time that the two regimes were intersecting with one another. Provision was made for objective reasons for terminating a labour contract, in a move that had been suggested for some time as necessary in order to combat an exaggerated sense of stability.

The Decree of the Assembly containing the norms that were brought to the attention of the Constitutional Court in the present case covered all the organs, departments and services belonging to the state's direct and indirect administration, public higher education institutions, local authority departments and services, and the organs, departments and services of the administration of the autonomous regions (the rules were adapted to the latter by a specific piece of legislation).

The subjective scope of the Decree's applicability encompasses all workers who exercise public functions, regardless of the format in which the public employment bond under which they perform them was constituted, including workers covered by regimes contained in special laws. The list of possible grounds for the decision to initiate a requalification process was expanded to include three new ones:

- i. a reduction in the organ, department or service's budget as a result of a decrease in the transfers it receives from the State Budget, and/or in its own income;
- ii. the need to requalify its workers, in order to bring them into line with its responsibilities or objectives; and
- iii. in order to comply with the strategy defined for it.

In the case of workers with a contractual status, 12 months after a person has been placed in a requalification situation and if he/she has not restarted work under an indefinite contract in any organ, department or service in the meantime, the requalification process ends and the final act takes the form of the termination of the person's labour contract for public functions.

As soon as he/she is placed in the requalification situation, the worker's pay is cut to 66.7% of his/her base remuneration for the first six months, and then to 50% after that.

On the level of the worker's duties, besides those that are inherent in the condition of any worker performing public functions, the Decree would have made it obligatory to take part in competitive appointment processes for open positions whose category is at least that of his/her original one and comply with the pertinent functional mobility rules, to attend vocational training actions, and to agree to begin working again, subject to certain conditions.

The Decree also established a number of serious offences punishable by dismissal, including unjustified failure to attend training actions, and refusal to start working again without due grounds for doing so.

II. The Court pointed out that it was already possible for the public employment relationship to be terminated for objective reasons in the case of workers whose labour bond was formed under a contract for an indefinite period of time, particularly as a consequence of the reorganisation of the respective department or service and as part of a collective dismissal process or dismissal on the grounds that the worker's position has been eliminated.

In his request to the Court, the President did not ask whether the termination of a public-labour-law relationship for objective reasons that cannot be attributed to either of the subjects is compatible with the Constitution. Existing constitutional jurisprudence in the field of employability in public functions already accepts that it is.

The question of constitutionality here is instead centred on the three new substantial grounds for dismissal for objective reasons. The Constitution enshrines the right to job security, which includes a negative right in the form of the prohibition on dismissal without just cause or for political or ideological reasons. For the requirement of just cause to be fulfilled, constitutional jurisprudence accepts that a labour relationship can be terminated for objective causes, as well as for those for which the subjects themselves can be said to be responsible, on condition that they make it impossible in practical terms for the labour bond to continue.

The constitutional prohibition on dismissal without just cause is designed to defend employment and to prevent arbitrary dismissal. The requisites for the cause of the end of a labour relationship for objective

reasons to be valid are equally as demanding as those applicable to dismissals for subjective just cause. The guarantee applicable to employment makes the admissibility of dismissals for objective reasons conditional, insofar as the state is required to ensure the fulfilment of two preconditions:

- a. there must be one or more situations for which the employer itself is not responsible and whose nature means that it cannot be required to continue the labour relationship; and
- b. the worker must be adequately compensated for the end of the labour relationship as the result of a fact for which he/she is not responsible.

The issue that is at stake in the present ruling – that of the degree of compression of the public legal employment relationship in the statute in question – arises in relation to the dimension 'loss of employment as a result of dismissal'.

The Court took the view that the principle that laws must be precise is not a constitutional parameter *a se* – i.e. when taken in isolation from the nature of the subject matter in question or without being conjugated with other constitutional principles that are relevant to the concrete case. Portuguese constitutional law does not include a general prohibition on the issue of laws that contain indeterminate concepts. However, there are areas in which the Constitution expressly requires laws not to be indeterminate, such as the requirements for 'typicity' (that laws must adequately typify crimes) in penal and fiscal matters. The Court stated that the question here is whether the legislator respected the need for the accuracy and clarity which the Constitution requires the causes of dismissals for objective reasons to possess. In analysing this question, one must assess whether the substantial compression of the right to job security, seen as a restriction on restrictions, remains within the bounds of the need for proportionality demanded by the Constitution – i.e. whether it limits itself to that which is necessary in order to safeguard other constitutionally protected rights or interests.

The Constitutional Court was of the opinion that, as they stood, the norms before it did not allow the courts tasked with deciding ensuing conflicts to control whether the Public Administration acted legally when it ordered the beginning of a requalification process. The norms did not contain safe criteria for taking decisions. The decision to restrict an entity's budget was especially removed from judicial control, because it was of a political nature, and yet conditioned and determined the whole downstream decision-making chain, which would thus have been bound by a pre-existing fact.

The Court said that the budgetary factor that already exists in current legislation must certainly be the object of specific consideration, but making it one of the valuation criteria that must be weighed up is not the same thing as adopting it as an entirely open criterion for rationalising staff numbers and subsequently terminating public legal employment relationships.

The norms attached additional weight to budget-based reasons for decisions, but did not simultaneously provide criteria that would make it possible to understand and control whether those reasons are being adequately balanced against the affected workers' right to job security.

Another norm whose constitutionality was under review in the present case concerned the application of the new requalification regime to public servants who, when the law on the regimes governing the labour bond, careers and remunerations of workers who exercise public functions came into force, saw their public-employment relationship converted into a contractual one. As we have already seen, however, these workers were attributed a mixed status, because the legislator wanted to safeguard their specific labour-law status, the main distinguishing element of which is the regime governing termination of their employment relationship. This safeguard norm would have been eliminated by the new norms before the Court.

The Constitutional Court restated its position that the legislator possesses the freedom to shape the public service regime in such a way as to adapt it to the public-interest needs that are experienced at any given moment in time.

However, although there is a movement to bring the public service bond and the employment bond pertaining to private workers closer to one another, this trend has maintained the specificity of the public service bond with regard to the termination, for objective reasons not linked to their behaviour, of the labour relationship of workers who had acquired that bond based on their definitive appointment in the past.

All the legislation that preceded the norm that was analysed in this case has contained a norm safeguarding workers whose public labour bond was originally derived from a definitive appointment, but was changed to a contractual one *ope legis*, from the possible causes of a termination of their public employment relationship applicable in the latter situation (and the minutes of the preparatory work for the earlier legislation confirm that this was always the intention). It is safe to say that the workers who were

the object of the safeguard norm formed expectations based on a behaviour that was positively demonstrated by the state, such that they thought they could count on the continuity of their status with regard to the possible objective causes of termination of the public employment relationship, and that they could only be dismissed under the terms permitted by the status corresponding to the bond created by a definitive appointment.

This framework of a solid expectation which, as we have already seen, was based on a positive behaviour on the part of the state, was confronted by a combination of a worsening of the state's economic/financial difficulties and the commitments made as a result of the Economic Adjustment Programme for Portugal. The state subjected these workers, along with virtually all the others who were paid from public funds, to pay-cutting measures in 2011, 2012, and 2013. The justification given for these pay cuts was the greater job stability enjoyed by these workers, compared to their counterparts who were subject to the Labour Code, and, above all, that the causes that would have permitted the termination of their labour relationship for objective reasons were not applicable to them, so their pay was cut instead.

Taken together, all these factors created an especially strong expectation that the exceptional regime would continue to exist.

There is no contradiction between the need to weigh up the efficiency and efficacy of the Public Administration on the one hand and the requirement to respect private individuals' rights and guarantees on the other. Both the principle that the state must pursue the public interest and that derived from the principle of good administration also call on values and parameters that lie outside the legal sphere and include the principles of good management and economic/financial rationality, none of which does away with the primacy of legality.

The Court held that the legislator had to demonstrate on the levels of adequacy, necessity and just measure that its far-reaching and non-transitional intervention responded to needs of the Public Administration, especially in the light of the command derived from the constitutional norm that requires the Administration to pursue the public interest while respecting citizens' legally protected rights and interests.

The Court was unable to find grounds that would have enabled it to consider that there were public-interest reasons whose importance made them prevail over the trust generated by the legitimate and

positively reinforced expectation that the workers in question here would be protected from the possibility of dismissal without subjective just cause.

Nor did it see any justification for harming the expectation, which the legislator itself had greatly enhanced, that there would be formal equality between the workers affected by this norm and those who, since 1 January 2009, have been subject to the regime governing labour contracts for public functions.

III. There was one concurring and one dissenting opinion.

Cross-references:

- Rulings nos. 154/10 of 20.04.2010, 4/03 of 07.01.2003, 683/99 of 21.12.1999, 233/97 of 12.03.1997, 340/92 of 28.10.1992, 285/92 of 22.07.1992; 64/91 of 04.04.1991 and 154/86 of 06.05.1986.

Languages:

Portuguese.



Russia

Constitutional Court

Important decisions

Identification: RUS-2013-2-003

a) Russia / **b)** Constitutional Court / **c)** / **d)** 25.06.2013 / **e)** 14 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 141, 02.07.2013 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Compensation / Trial within reasonable time / Victim, justice, right.

Headnotes:

Legal provisions which do not allow injured parties to apply to the courts for compensation in the absence of any accused or suspects are unconstitutional.

Summary:

I. The applicant was a woman who became disabled following an operation in 1986. She had since filed several complaints with the courts. The case-file was opened in 1999. Proceedings were discontinued in 2010 when the limitation period expired.

The Court dismissed the applicant's claim for compensation, citing the absence of accused or suspects.

The applicant argued that the legal provisions which do not allow injured parties to apply to the courts for compensation in the absence of any accused or suspects are unconstitutional. She contended that they violate the right to legal protection of rights and

freedoms and the right of victims to access to the courts and compensation for damage suffered.

II. The Constitutional Court observed that the Constitution guarantees the right to legal protection of rights and freedoms and the right to have one's case heard fairly and within a reasonable time by an independent and impartial tribunal. The interests of victims of offences are protected by law. Violation of the right to a judgment within a reasonable time and to full execution thereof leads to a restriction of the right of access to the courts.

The protection of rights is not confined to compensation for damage caused. Victims must be able to file a complaint against the offender.

Persons not officially recognised as injured parties (parties claiming damages) cannot be deprived of their right to legal protection of their rights and freedoms. Moreover, citizens must not be deprived of their right of access to the courts owing to the absence of accused or suspects.

The claim for compensation must mention the circumstances which influenced the length of the investigation (for example, investigator's failure to act, setting aside of a decision, suspension of the investigation). The Court must check for any procedural violations and assess their importance. If the Court finds a violation, it may award the victim compensation for violation of the right to a judgment within a reasonable time.

The Court accordingly held that the provisions in question are unconstitutional because they do not allow victims to apply to the courts for compensation in the absence of accused or suspects, even if there is proof of procedural violations.

The Court declared that the federal legislature must specify the procedure and conditions for bringing claims of this type before the courts. The courts may not refuse to consider these claims.

The decisions delivered by the courts in this matter must therefore be revised.

Languages:

Russian.



Identification: RUS-2013-2-004

a) Russia / **b)** Constitutional Court / **c) / d)** 02.07.2013 / **e)** 17 / **f) / g)** *Rossiyskaya Gazeta* (Official Gazette), 151, 12.07.2013 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.7.1 Institutions – Judicial bodies – **Jurisdiction**.
5.3.15 Fundamental Rights – Civil and political rights – **Rights of victims of crime**.

Keywords of the alphabetical index:

Criminal procedure / Crime, misclassification.

Headnotes:

Having found that an offence was wrongly classified, a court has the right to refer the case back to the public prosecutor for reclassification.

Summary:

I. Under the impugned provision, a court may refer a case back to the public prosecutor, on its own initiative or at the parties' request, to eliminate obstacles to the proper conduct of proceedings.

In the case at issue, the civil party's request was refused by the court. The Court held that, for the request to be deemed justified, there must have been a violation of procedural rules and that the question of the classification of the offence was not subject to appeal. It then ruled on the merits of the case. The Court of Appeal reviewed the judgment and decided to apply to the Constitutional Court for a ruling on the constitutionality of the relevant provision of the Code of Criminal Procedure.

The applicant argued that the provision violates the constitutional rights of the civil party.

II. The Constitutional Court held that the trial court in such circumstances is authorised to make a final legal assessment in the circumstances of the case. Unconditional adherence to the position of the prosecution or the defence would impede the court's independence.

The Constitutional Court noted that a violation of criminal law or criminal procedure at the pre-trial stage may result in an unlawful, arbitrary and unfair decision. A court's inability to reclassify an offence could constitute a hindrance to the exercise of judicial authority. The Constitutional Court therefore held that

the provisions preventing the Court from reclassifying an offence are unconstitutional.

Languages:

Russian.



Identification: RUS-2013-2-005

a) Russia / **b)** Constitutional Court / **c)** / **d)** 09.07.2013 / **e)** 18 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 157, 19.07.2013 / **h)** CODICES (Russian).

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.**

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

Keywords of the alphabetical index:

Defamation, via internet / Legal protection.

Headnotes:

Internet sites must remove information judged to be an attack on the honour of citizens.

Summary:

I. The legal provisions in question determine the legal procedure regarding issues of honour and reputation, even where the person responsible for disseminating the defamatory information is unknown.

In 2009, an unknown person posted photos of the applicant on an Internet forum along with comments. Internet users subsequently discussed these photos and added insulting remarks.

The Court recognised that this information was false and defamatory. The applicant applied to the Court to have the defamatory information removed, but his application was dismissed. The Court ruled that responsibility must be borne by the authors of these remarks.

The applicant argued that the legal interpretation applied to his case denies him the possibility of restoring his rights. In his opinion, this is a violation of the constitutional provisions on legal protection of honour and reputation.

II. The Constitutional Court observed that the Constitution declares human dignity to be a supreme value. Freedom of speech is accordingly accompanied by certain obligations and responsibilities to ensure respect for the rights and reputation of third parties. The same principles apply to information posted on the Internet. The right to legal protection is an inalienable right. It is also necessary to guarantee the possibility of restoring violated rights and freedoms in accordance with statutory procedures.

The Court noted that the provisions in question do not require false and defamatory information to be removed from sites not classified as media. Nor do they provide for liability for failure to execute requests for removal of information. The practice relating to application of these provisions does not sufficiently guarantee the protection of individuals' constitutional rights. This is a violation of constitutional provisions.

The Constitutional Court held that it was necessary to introduce additional safeguards for the protection of honour, human dignity and reputation.

The decisions delivered by the courts in this matter must therefore be revised.

Languages:

Russian.



Serbia

Constitutional Court

Important decisions

Identification: SRB-2013-2-002

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 31.01.2013 / **e)** UŽ-4527/2011 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), 18/2013 / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Investigation, effective, requirement.

Headnotes:

The right to life falls within “the core” of human rights guaranteed to everyone in all circumstances and places, and may not be the subject of any limitation or derogation. It implies the state’s positive obligation to take all necessary measures in order to protect the life of people under its jurisdiction. This positive obligation implies both substantive and procedural aspects.

Summary:

I. On 5 October 2004, two young men, who were soldiers of the Army of the State Union of Serbia and Montenegro and the sons of the appellants, lost their lives while performing patrol service.

The appellants lodged the constitutional appeal with the Constitutional Court (hereinafter, the “Court”) against the former District Court for acts of omission and failure to take action upon the investigation request made on 10 October 2005. The appeal was based on two grounds: violations of the right to a fair trial and the right to life based on the competent state

bodies’ failure to clarify circumstances regarding the death, discovery and prosecution of the perpetrators.

The appellants, dissatisfied with the former Military Court’s handling of their sons’ deaths, filed on 10 October 2005 a request to the District Court to investigate several figures. This included the commander of the Guards Brigade for the criminal act of omission to take measures to protect the military unit, the judge of the Military Department of the District Court for the criminal act of violation of the law by a judge, and the two court experts for the crime of giving false testimony. The criminal charges were dismissed following an investigation before the Military Court. Subsequently, the preliminary criminal proceedings were conducted under the motion to conduct an investigation of the former District Prosecution – Military Department of 13 June 2005 (now Higher Public Prosecutor’s Office) against N.N. person for the criminal act of assault against military personnel while performing their duties before the Higher Court (the former District Court). This is the precondition to decide on the submitted request to conduct the examination of the injured parties.

According to the European Court of Human Rights, the right to life falls within “the core” of human rights. The state possesses the positive obligation to take all necessary measures to protect the life of people under its jurisdiction. This positive obligation implies both substantive and procedural aspects. From the substantive aspect, the state obligation implies undertaking all necessary measures to avoid violent death. From the procedural aspect, when a person is deprived of life, the state is obligated to conduct an independent and efficient investigation.

II. The Constitutional Court deems that the government authority’s obligation (Public Prosecutor’s Office and court) is to efficiently investigate within the preliminary criminal proceedings the circumstances of the incident and determine the possible liability of certain persons.

The Court notes that the positive obligation of the state to protect the right to life should be estimated within the procedural aspect of the right to life, in the relation to the preliminary criminal proceedings conducted before the Higher Court in Belgrade.

The Court points out that the obligation to protect life under Article 24 of the Constitution, interpreted according to Article 19, suggests the implementation of the standings of the European Court of Human Rights reflected in the Judgment *Mladenovic v. Serbia*, Application no. 1099/08 of 22 May 2012. In the case, the obligation to protect human life in accordance with Article 2 ECHR requires the

existence of some form of efficient official investigation in case individuals have been killed under suspicion of use of force. The investigation must be efficient in the sense that it may lead to identification and punishment of responsible persons. It is not the obligation of the aim but the means. That is, any deficiency in the investigation that undermines its ability to establish the cause of death or the person responsible may be a risk that this standard will not be met.

There is an implicit request of emergency and reasonable expediency. A rapid response of the authorities in situations involving the use of lethal force may generally be regarded as essential in maintaining public confidence in the rule of laws. There must be a sufficient element of public scrutiny of the investigation or its results. The close relatives of the victim must participate in the proceedings.

The Court notes the subject preliminary criminal proceedings were initiated in 2004 and the date of lodging the constitutional appeal. The preliminary criminal proceedings were initiated immediately after the death of the appellants' sons, within the period from 29 September 2009 (when the investigating judge, after conducting investigating activities, submitted the case files for the second time to the District Public Prosecutor's Office) to 30 May 2011 (when at the attorneys of the appellants' initiative, the Higher Public Prosecutor's Office filed the new motion for undertaking investigating activities).

No actions whatsoever were taken, however. The Court accepts that it took the Public Prosecutor's Office a certain period of time to become familiar with the evidence obtained. However, the one year and six months when there was complete inactivity regarding the progress of the preliminary criminal proceedings seems unreasonable. This delay, together with the total duration of the preliminary criminal proceedings of over seven years or more than five years from the Constitution coming into effect, casts doubt into the effectiveness of the conducted investigating activities. Consequently it had an adverse impact on the prospects of determining the truth.

The Court establishes that procedural aspects of the right to life under Article 24.1 of the Constitution have been violated.

The Court stipulates that the emergency request under Article 32.1 of the Constitution is an integral part of Article 24.1 of the Constitution in procedural terms. Therefore, it is not necessary to separately consider the constitutional appeal under Article 32.1 of the Constitution.

The Court determines the just satisfaction for violation of the appellants' right shall be achieved by compensation of non-pecuniary damage in the amount of EUR 5.000.

The Court directs the Higher Public Prosecutor's Office and Higher Court to take all measures in order to complete the preliminary criminal proceedings as soon as possible.

Languages:

English, Serbian.



Identification: SRB-2013-2-003

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 21.02.2013 / **e)** IUz-147/2012 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), 74/2013 / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

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

5.3.13.1.2 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.**

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

Keywords of the alphabetical index:

Extraordinary remedy / European Court of Human Rights, appeal, effects.

Headnotes:

Prescribing the time period of five years for filing the motion for a retrial when a party acquires the possibility to use the decision of the European Court of Human Rights or the Constitutional Court, which might lead to a more favourable decision in these

proceedings, is inconsistent with the Constitution and the ratified international agreement.

Summary:

The Constitutional Court (hereinafter, the "Court") initiated the procedure to determine the unconstitutionality and inconsistency of Article 428.3 of the Law on Civil Procedure (hereinafter, the "Law") with the ratified international agreement. This provision defines an objective time period of five years to submit a petition for retrial. This occurs in two situations. The first situation occurs when the decision of the European Court of Human Rights establishes the violation of a human right, which could be of significance to the passing of a more favourable decision in the particular proceedings. The second situation occurs during a constitutional appeal when the Court establishes the violation or the denial of a human or minority right guaranteed under the Constitution in the civil proceedings, which could be of significance to the passing of a more favourable decision in the particular proceedings.

The Court considered the state's constitutional obligation to ensure the exercise of human rights, including the right to a fair trial and the right to legal remedy. Both are guaranteed under the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the "Convention"), as a ratified international agreement. The Court finds that prescribing an objective period for filing a motion to reopen a legally binding and final civil procedure counted from the date of irrevocability of the court judgment when the reopening is proposed and upon expiry of which this legal remedy is impossible to use. The time limit seriously threatens the guaranteed rights in case when the motion is filed for the reasons envisaged by provisions of Article 426.11 and 426.12 of the Law.

Namely, for the purpose of efficient protection of human rights and freedoms, the legislator envisioned that the legally binding final proceedings may be reopened when a decision of the European Court of Human Rights or of the Court establishes that the party in question has been violated or denied any of the guaranteed human rights in the proceedings. However, provisions of Article 428.3 of the Law prescribe the time period of five years for filing the motion for retrial also when a party acquires the possibility to use the decision of the European Court of human rights, which established the violation of a human right that might be important to passing a more favourable decision in these proceedings. Or rather, when the Court in the proceedings under the constitutional appeal establishes a violation or denial

of a human or minority right guaranteed under the Constitution in civil proceedings, which might be significant to the passing of a more favourable decision in those proceedings. The commencement of that time period is related to the date the civil proceedings were legally completed.

The Court finds that the mentioned legal solution is inconsistent with the constitutional principle that each person has the right to judicial protection in case of violation or denial of a human or minority right guaranteed under the Constitution. It is also inconsistent with the right to remedy the consequences incurred by that violation (Article 22.1 of the Constitution). The reason is that in those cases, the envisaged legal remedy may not be considered efficient from the perspective of Article 13 ECHR. It is undisputable that the party may not in any way influence the completion of the procedure of protection of their guaranteed rights before the Court and the European Court of Human Rights before the expiry of the time period envisaged by the provision of Article 428.3 of the Law.

From the point of view of the European Court of Human Rights, the constitutional appeal is an efficient legal instrument to protect freedoms and rights of the citizens. It is also a condition for addressing the European Court to conduct the proceedings before the Court, in accordance with the right guaranteed under Article 22.2 of the Constitution, or rather the citizen as a party has previously attempted to realise its rights before the Court. The Court established that the provisions of Article 428.3, in relation to the reasons for retrial envisaged by Article 426.1, 426.11 and 426.12 of the Law, compromise the exercise of other rights guaranteed under the Constitution. Specifically, this includes the exercise of the right to a fair trial and the right to legal remedy under Articles 32 and 36 of the Constitution.

This is for the reason that, within the period of six months after the enacted decision of the Court under the constitutional appeal, a party has the right to address the European Court of Human Rights. A party's inability to affect the time limit of the proceedings (the objective time period of five years for retrial from the date when the decision became final) compromises the constitutional guarantee under Article 22.1 of the Constitution. It may also compromise the possibility to remedy the consequences incurred by the violation if the European Court of Human Rights or the Court established the violation of the human right, which may be significant for passing a more favourable decision.

Languages:

English, Serbian.

*Identification:* SRB-2013-2-004

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 18.04.2013 / **e)** UŽ-5284/2011 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), 40/2013 / **h)** CODICES (English, Serbian).

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.**

5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly.**

Keywords of the alphabetical index:

Assembly, freedom / Pride parade.

Headnotes:

The inability to request a decision that limits freedom of assembly be reviewed constitutes a violation of the right to judicial protection and the right to remedy, and consequently freedom of assembly.

Summary:

I. The appellant, the Association “*Parada ponosa Beograd*” (“Belgrade Pride Parade”, hereinafter the “Association”), lodged the constitutional complaint to the Constitutional Court (hereinafter, the “Court”). The complaint was directed against, among others, the decision of the Ministry of Internal Affairs of 30 September 2011 to prohibit the Association from holding a public assembly and setting a public assembly in motion. The complaint also alleged the state authority’s act of omission to provide the Association judicial protection and an effective legal remedy against the violation of human rights.

The Association submitted the application on 26 August 2011 to the Ministry of Internal Affairs (hereinafter, the “Ministry”) to organise and hold the “Belgrade Pride parade 2011” on 2 October 2011.

The Ministry’s disputed decision in the first paragraph denied the application. The second paragraph reads that an appeal to the prohibition mentioned in the first paragraph does not postpone the enforcement. The decision was based on the provision of Article 11.1 of the Law on Public Assembly (hereinafter, the “Law”). That is, the notified public assembly may disrupt public transport, cause threat to public health and morals or endanger the safety of persons and property. The disputed act suggests a legal remedy, which reads that an appeal may be lodged against the decision within 15 days to the Ministry.

II. The Court determined that when a public assembly is prohibited under Article 11, the Law formally envisages an appeal as a legal remedy to protection the organiser’s freedom of assembly. It noted, however, that such freedom is undermined by the prescribed period when the competent authority must inform the organiser of the prohibition, the provision that the appeal does not postpone the prohibition and the permission to lodge an appeal and hearing the appeal in accordance with the rules of the general administrative procedure. It is undisputed that the appeal decision lodged against the decision passed on Friday 30 September 2011, regarding the prohibition of public assembly registered for Sunday, 2 October 2011, would have a *post-hoc* protective effect. As such, the Court determined such protection objectively could not be timely provided and thus could not be effective.

Therefore, the Court found that the constitutional appeal is allowed, even though the appellant had not exhausted all other legal remedies to protect their rights before addressing the Court. The merits of the Court’s assessment are further confirmed by the European Court of Human Rights in Judgment *Baczkowski and others v. Poland*, Application no. 1543/06 of 3 May 2007. In this decision, which dealt with freedom of assembly, the European Court of Human Rights stipulated that an effective legal remedy has to consider the obligation of the competent body of authority to pass a decision in the manner that the final decision is passed before the date for which the particular assembly had been scheduled. (The Court expressed this attitude in Decision UŽ-1918/2009, regarding Belgrade Pride Parade 2009.)

When assessing the merits of the constitutional appeal, the Court considered whether the collected data facilitated a reliable basis to conclude that the competent body of authority passed the disputed decision arbitrarily without assessing relevant circumstances to protect the guaranteed rights on physical integrity. This includes the freedom of movement and property of citizens who happen to find themselves in the the public assembly and the public assembly in motion at the time of the assembly, and to protect the right on physical and mental integrity of the participants of the registered assembly.

The Court also considered the authority's obligation specified in the provisions of the effective law, namely whether it passed the disputed decision and served it upon the organiser. The very impossibility of the applicant to seek an effective legal remedy in the procedure where they would be given judicial protection (require the review of the decision limiting one of the freedoms guaranteed under the Constitution) violates the right to judicial protection under Article 22.1 of the Constitution. It is also violates the right to legal remedy under Article 36.2 of the Constitution, and consequently violates freedom of assembly under Article 54 of the Constitution.

Languages:

English, Serbian.



Slovenia Constitutional Court

Statistical data

1 May 2013 – 31 August 2013

In this period, the Constitutional Court held 14 sessions – 9 plenary and 5 in panels: 2 in the civil panel, 1 in the criminal panel and 2 in the administrative panel. It received 82 new requests and petitions for the review of constitutionality/legality (U-I cases) and 293 constitutional complaints (Up cases).

In the same period, the Constitutional Court decided 83 cases in the field of the protection of constitutionality and legality, as well as 215 cases in the field of the protection of human rights and fundamental freedoms. It also decided 1 case on the review of the admissibility of a referendum.

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas the orders of the Constitutional Court are not generally published in an official bulletin, but are notified to the participants in the proceedings.

However, the judgments and decisions are published and submitted to users:

- In an official annual collection (Slovene fulltext versions, including dissenting/concurring opinions, and English abstracts);
- In the *Pravna Praksa* (Legal Practice Journal) (Slovene abstracts of decisions issued in the field of the protection of constitutionality and legality, with the fulltext version of the dissenting/concurring opinions);
- On the website of the Constitutional Court (fulltext in Slovene, English abstracts and a selection of fulltexts): <http://www.us-rs.si>;
- In the IUS-INFO legal information system on the Internet, fulltext 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-2013-2-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 17.12.2012 / **e)** U-II-1/12, U-II-2/12 / **f)** / **g)** *Uradni list RS* (Official Gazette), 102/2012 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Stability, economic / Referendum, legislative / Referendum, right to request a call for a referendum, restriction.

Headnotes:

Certain statutory measures were to be decided upon in the legislative referendum. They were necessary, at a time of economic crisis, to prevent inadmissible restrictions of important constitutionally protected values. Their rejection or the suspension of their implementation would have unconstitutional consequences.

Summary:

I. The Constitutional Court had to decide whether the suspension of the implementation or the rejection in the referenda of the Slovene National Holding Company Act (hereinafter, the “SNHCA”) and the Measures of the Republic of Slovenia to Strengthen the Stability of Banks Act (hereinafter, the “MSSBA”) would have unconstitutional consequences.

II. The Court emphasised the significance of the constitutional right to request a call for a referendum (Article 90.2 of the Constitution) which enables individual issues regulated by a law to be decided on by voters in a referendum. It recalled, however, that this constitutional right is not absolute; other values may exist which enjoy equal constitutional protection and which need to be safeguarded. Therefore, in a situation where the right to request a call for a referendum is in collision with other constitutional values, in terms of weighing the constitutional values at issue, the Constitutional Court must determine which of them should be given priority in order to maintain their constitutional balance.

Constitutional case-law regarding the admissibility of a legislative referendum has, until now, focused on whether the law presently in force contains unconstitutionality and whether the newly adopted law to be decided on in the referendum will bring this situation into line with the Constitution. In these particular proceedings, the situation under review did not concern the remedying of an existing unconstitutionality within a law. Therefore, the important constitutional values that the legislature intended to protect with the newly adopted law were in the foreground. The Constitutional Court accordingly adjusted its position in terms of the focus of its review and expanded its understanding of the concept of unconstitutional consequences of referenda. If the constitutional values opposing the right to request a call for a legislative referendum have sufficient constitutional weight to require the urgent implementation of a newly adopted law, such values must be given priority over the right to request a call for a referendum. Unconstitutional consequences would then occur due to the suspension of the implementation or the rejection of the law in question.

In the light of the above, the Constitutional Court decided that priority must be given to the constitutional values that, due to the calling of referenda and the possible rejection of the SNHCA and MSSBA, would remain unprotected to such an extent that the balance between different constitutional values would be jeopardised. The values the National Assembly had emphasised and which the Court felt should take priority over the right to request a call for a referendum in the present circumstances of severe economic crisis, were the exercise of human rights, particularly the rights to social security, security of employment, and free enterprise; respect for the binding international law obligations of the state; and ensuring the effectiveness of the legal order of the European Union in the territory of the Republic of Slovenia.

The National Assembly had shown the need for immediate implementation of the statutory measures in order to protect the above values in the present circumstances of economic crisis. Submitting the adopted laws for decision-making in referenda and the potential for their rejection would have unconstitutional consequences. The Constitutional Court therefore concluded that the referenda regarding the SNHCA and MSSBA were not constitutionally admissible.

III. The decision was reached by eight votes against one. Judge Korpič – Horvat voted against and submitted a dissenting opinion. Judge Petrič submitted a concurring opinion.

Languages:

Slovenian, English (translation by the Court).

*Identification:* SLO-2013-2-004

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 10.01.2013 / **e)** Up-695/11 / **f)** / **g)** *Uradni list RS* (Official Gazette), 9/2013 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Delay, undue, compensation / State, responsibility.

Headnotes:

In terms of the liability of the state for damages resulting from lengthy court proceedings, the relevant constitutional provision cannot be interpreted so narrowly that the state may be held liable only for those forms of unlawful conduct that can be attributed to a particular person or authority in connection with the performance of the function of a state authority.

Summary:

I. The applicant purchased a worker's home in bankruptcy proceedings in 1996 and then, in 1997, filed legal actions for eviction against tenants of individual rooms. Decisions were only reached after six and a half years. She filed a lawsuit against the Republic of Slovenia for compensation for the pecuniary damage incurred because she had been unable to use her property. The Higher Court dismissed her lawsuit, holding that she had failed to substantiate unlawful conduct and thus the liability of

the State for damage determined by Article 26 of the Constitution. The applicant lodged a constitutional complaint against the Supreme Court decision which upheld this dismissal.

II. The Constitutional Court noted that Article 26 of the Constitution covers, in general terms, all forms of unlawful conduct of the state by which the state causes damage to an individual. Article 26.1 cannot be given such a narrow interpretation that the state may be held liable only for those forms of unlawful conduct that can be attributed to a particular person or to a particular authority in connection with the performance of the function of a state authority, a local community authority, or a bearer of public authority. This would mean the state would not be held liable for unlawful conduct that cannot be attributed to a particular person or to a particular authority, but only to the state or its apparatus, such as in cases where there is no individual relationship between the bearer of power and the individual concerned. An example is the guarantee of trial without undue delay, for which all three branches of power (not only the court) are responsible, including the executive, through the organisation of the judicial administration, and the legislative, through the adoption of appropriate legislation.

The Constitutional Court also held that the challenged court decision, that on the basis of Article 26 of the Constitution the state cannot be held liable for the backlog of cases conditioned by the system, because this only refers to an omission with regard to the community and not to an omission with regard to a defined or definable person, is in breach of the right determined by Article 26.

Languages:

Slovenian, English (translation by the Court).



South Africa

Constitutional Court

Important decisions

Identification: RSA-2013-2-012

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 23.05.2013 / **e)** CCT 91/12 / **f)** Association of Regional Magistrates of Southern Africa v. President of the Republic of South Africa and Others / **g)** www.constitutionalcourt.org.za/Archimages/20804.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.5.13 Constitutional Justice – Jurisdiction – The subject of review – **Administrative acts.**

1.3.5.14 Constitutional Justice – Jurisdiction – The subject of review – **Government acts.**

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

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

3.13 General Principles – **Legality.**

4.4.3.3 Institutions – Head of State – Powers – **Relations with judicial bodies.**

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

4.7.8 Institutions – Judicial bodies – **Ordinary courts.**

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

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

Keywords of the alphabetical index:

Judiciary, independence / Judiciary, budget, necessary amount / Judge, independence, remuneration, adequate / Executive act / Executive power / Fairness, procedural, principle / Rationality, principle / Judge, independence, guarantees / Presidential power / Judge, financial security / Legality, lawfulness, element / Legality, nationality, element / Judge, salary, negotiations / President, conduct, review.

Headnotes:

An order of court concerning the constitutional validity of any conduct of the President must be confirmed by the Constitutional Court. The exercise by the

President of a statutory public power is constrained by the principle of legality, which forms part of the rule of law under the Constitution.

Executive action, in contrast with administrative action, may be reviewed only on narrow grounds within the ambit of the principle of legality. These grounds include lawfulness and rationality. Procedural fairness is not a requirement for the exercise of executive powers and therefore executive action cannot be challenged on the ground that the affected party was not given a hearing, unless a hearing is specifically required by legislation.

Rationality review entails an evaluation of the rationality of both the process by which a particular decision is made and the rationality of the ultimate decision. It is concerned with evaluating whether the means employed by the decision-maker are rationally related to the purpose for which the decision-maker's power was conferred.

Adequate remuneration is an aspect of judicial independence, which may be compromised when judicial officers lack financial security. The constitutional separation of powers means that judicial officers should not be forced to engage in salary negotiations with the Executive.

Summary:

I. The Independent Commission for the Remuneration of Public Office-bearers (hereinafter, the "Commission"), on 27 March 2010, made recommendations for a 7% annual remuneration increase for public office-bearers, including Regional Magistrates and Regional Court Presidents. After the Commission presented its recommendation to the President, in accordance with the statutory scheme, the President consulted with the Minister of Finance who informed him that the recommended 7% was not affordable. The President thereafter announced his intention to set the salary increase of all public office-bearers at only 5% and, following approval by Parliament, published his decision.

In the North Gauteng High Court, Pretoria (hereinafter, the "High Court") the Association of Regional Magistrates of Southern Africa (hereinafter, "ARMSA") challenged the President's decision to increase the annual remuneration of Regional Magistrates and Regional Court Presidents by only 5%. The challenge was based on various procedural and substantive grounds under the Promotion of Administrative Justice Act 3 of 2000 (hereinafter, the "Act"), as well as on the basis of the alleged irrationality of the President's decision. The High Court rejected three of ARMSA's grounds of review,

but upheld the argument that the remuneration decision involved a uniform adjustment that was impermissible in terms of the legislation. The High Court reasoned that the President was obliged to consider the particular circumstances of individual categories of public office-bearers and their particular claims when determining remuneration increases. Because the High Court was of the opinion that the President had not done so with regard to Regional Magistrates and Regional Court Presidents, it concluded that his decision was irrational and thus failed the test of legality. It therefore set aside the decision and remitted it to the President to be taken afresh.

In terms of Section 172.2.a of the Constitution, an order that the President's conduct is constitutionally invalid has no force unless it is confirmed by the Constitutional Court. ARMSA therefore applied for confirmation of the High Court order. The Commission opposed.

II. ARMSA reiterated the argument, advanced in the High Court, that the decision was procedurally unfair and irrational. In response the Commission contended that the application of the uniform increase to all public office-bearers was rational because their remuneration levels were already staggered and therefore already differentiated between the different roles, duties, functions and responsibilities of each particular class of public office-bearer.

The Court, in a unanimous judgment by Justice Nkabinde, held that the remuneration determination by the President amounted to "conduct" under Section 172.2.a of the Constitution susceptible to confirmation by the Constitutional Court. The Court held that the President's conduct was not administrative action reviewable under the Act. The decision involved input from different functionaries at different levels of the process on an issue that goes to the heart of judicial independence. It found that the applicable statutory scheme for the determination of the remuneration of public office-bearers (through mandatory consultations, recommendations and approvals) represents a carefully balanced interplay between various functionaries – executive, legislative, judicial and independent specialists – involved in formulating the ultimate determination. The Court held that the legislative scheme ensures that judicial officers do not have to engage in direct negotiations with the Executive over conditions of employment, in order to safeguard the independence of the judiciary.

Justice Nkabinde found that the decision was executive in nature, rather than an administrative decision taken by the bureaucracy carrying out the daily functions of the state. The Court rejected

ARMSA's challenge that the decision was procedurally unfair, finding it failed to show its representations were not taken into account by the Commission when it made the recommendation to the President. The Court further held that the President's decision was rational as there was no indication that the Commission did not consider the different roles and responsibilities of Magistrates in its recommendation. It concluded that the remuneration determination was based on expert advice about inflation and affordability and that the President was required under the legislation only to consider the recommendation of the Commission. He was not bound by it.

The application was therefore dismissed and the order of the High Court set aside.

Supplementary information:

Legal norms referred to:

- Sections 33, 172.2 and 219 of the Constitution of the Republic of South Africa, 1996;
- Sections 1, 3, 4 and 6 of the Promotion of Administrative Justice Act 3 of 2000;
- Section 12 of the Magistrates Act 90 of 1993;
- Section 8 of the Independent Commission for the Remuneration of Public Office-bearers Act 92 of 1997.

Cross-references:

- *Democratic Alliance v. President of the Republic of South Africa and Others*, Bulletin 2012/3 [RSA-2012-3-016];
- *Albutt v. Centre for the Study of Violence and Reconciliation and Others*, Bulletin 2010/1 [RSA-2010-1-002];
- *Poverty Alleviation Network and Others v. President of the Republic of South Africa and Others* [2010] ZACC 5; 2010 (6) *Butterworths Constitutional Law Reports* 520 (CC);
- *Sokhela and Others v. MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) and Others* 2010 (5) *South African Law Reports* 574 (KZP);
- *Von Abo v. President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) *South African Law Reports* 345 (CC); 2009 (10) *Butterworths Constitutional Law Reports* 1052 (CC);
- *Minister of Health and Another NO v. New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)*, Bulletin 2005/3 [RSA-2005-3-009];
- *Van Rooyen and Others v. The State and Others (General Council of the Bar of South Africa*

- *Intervening*), *Bulletin* 2002/2 [RSA-2002-2-010];
- *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, *Bulletin* 1999/3 [RSA-1999-3-008];
- *De Lange v. Smuts NO and Others*, *Bulletin* 1998/2 [RSA-1998-2-004].

Languages:

English.



Identification: RSA-2013-2-013

a) South Africa / b) Constitutional Court / c) / d) 30.05.2013 / e) CCT 57/12 / f) Modjadji Florah Mayelane v. Mphephu Maria Ngwenyama and Another / g) www.constitutionalcourt.org.za/Archimages/20904.pdf / h) CODICES (English).

Keywords of the systematic thesaurus:

2.1.2 Sources – Categories – **Unwritten rules**.
 2.2.2.2 Sources – Hierarchy – Hierarchy as between national sources – **The Constitution and other sources of domestic law**.
 5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.

Keywords of the alphabetical index:

Civil litigation, evidence, collection / Evidence, assessment / Evidence, new, introduction on appeal / Marriage, equality / Marriage, polygynous / Marriage, right / Customary law, evidence / Customary law, development / Marriage, customary consent to further marriages.

Headnotes:

Courts have an obligation to ensure that living customary law is developed in accordance with the Constitution. An institution of polygynous marriage that allows a husband to marry a second wife without the first wife's consent violates the first wife's rights to human dignity and equality. The Court therefore developed the customary law of the Tsonga people to include a requirement that, if a man who is party to a

customary marriage wishes to take a second wife, he must obtain his first wife's consent for the second marriage to be valid.

Summary:

I. Ms Mayelane married her late husband, Mr Moyana, in 1984 in terms of the customary law of the Tsonga people. Their marriage was not registered. After Mr Moyana's death, Ms Mayelane was informed that her late husband had purported to conclude a further customary marriage with Ms Ngwenyama. Ms Mayelane successfully applied to the High Court for an order declaring her customary marriage valid and Ms Ngwenyama's purported customary marriage invalid. On appeal, the Supreme Court of Appeal confirmed the validity of Ms Mayelane's customary marriage, but ruled that Ms Ngwenyama had also concluded a valid customary marriage with the late Mr Moyana. Both the High Court and the Supreme Court of Appeal decided the matter on the basis of statutory law (the Recognition of Customary Marriages Act), and neither Court had regard to the requirements of Tsonga customary law.

On appeal to the Constitutional Court, Ms Mayelane argued that the purported second marriage was invalid in terms of Tsonga customary law because she had not consented to it. Ms Ngwenyama submitted that it would be inappropriate to determine the consent issue raised by Ms Mayelane as there was no proper evidence on the applicable customary-law regime before the Court, and further because that issue had not properly been traversed in the courts below.

II. After the hearing, the Constitutional Court called for further evidence on Tsonga customary law.

In a majority judgment penned by Froneman, Khampepe and Skweyiya JJ, with whom three further judges concurred, the Constitutional Court upheld the appeal. The majority held that, at the time of the conclusion of the purported marriage between Ms Ngwenyama and Mr Moyana, Tsonga customary law required that the first wife be informed if her husband intended to undertake a subsequent customary marriage. Ms Ngwenyama's marriage was therefore found to be invalid because Ms Mayelane had not been appropriately informed.

The Court went further and found that, in accordance with the obligation to develop living customary law in a manner that is consistent with the Constitution, Tsonga customary law had to be developed to include a requirement (to the extent that it does not yet do so) not merely to inform the first wife, but that the consent of the first wife is necessary for the

validity of her husband's subsequent customary marriage. The necessity of this development stems from the fundamental demands of human dignity and equality under the Constitution.

III. In a separate judgment, Justice Zondo agreed that the appeal should be upheld, but for different reasons. He held that Ms Mayelane's evidence before the High Court was sufficient to show that Tsonga custom required a first wife's consent for the validity of her husband's subsequent customary marriages.

In a further separate judgment, Jafta J (with whom two judges concurred) agreed that the appeal should be upheld, but concluded that there was no need to develop Tsonga customary law in the circumstances of this case. He held that the development was both unnecessary because there was sufficient evidence on record to support the applicant's case, and undesirable because development of the law should be undertaken by courts of their own accord only in exceptional circumstances.

Supplementary information:

This judgment represents an important contribution to the ongoing debate on the interaction between the fundamental rights in the Bill of Rights and the institutions of customary law, which are given full recognition subject to their compliance with the constraints imposed by the Constitution.

Legal norms referred to:

- Sections 9, 10, 39.2 and 211 of the Constitution of the Republic of South Africa, 1996;
- Sections 3, 6 and 7 of the Recognition of Customary Marriages Act 120 of 1998.

Languages:

English.



Identification: RSA-2013-2-014

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 06.06.2013 / **e)** CCT104/12 / **f)** Jacobus Johannes Liebenberg N.O. and 84 Others v. Bergrivier Municipality / **g)** www.constitutionalcourt.org.za

/Archimages/20910.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.3.7 Sources – Techniques of review – **Literal interpretation.**

2.3.8 Sources – Techniques of review – **Systematic interpretation.**

2.3.9 Sources – Techniques of review – **Teleological interpretation.**

2.3.10 Sources – Techniques of review – **Contextual interpretation.**

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

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

Keywords of the alphabetical index:

Local government, competence / Local government, finances / Local government, functions, access / Municipality, ordinance, *ultra vires*, effects / Municipality, ordinance, legal basis / Municipality, responsibility / Municipality, statute, procedure for enactment.

Headnotes:

The ordinary meaning of the words of a statute must be determined with regard to context and purpose. In considering the purpose regard must be had to the broader context within which it is passed and the relationship between the various enactments that regulate a particular area.

A failure by a municipality to comply with statutory provisions that regulate its conduct does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance with its obligations so that the purpose of the statute has been achieved, notwithstanding an otherwise defective performance.

Summary:

I. The applicants, a group of landowners in the jurisdiction of the Bergrivier Municipality (hereinafter, the "Municipality"), refused to pay certain municipal rates and levies for eight years (from the 2001/2002 financial year to the 2008/2009 financial year). When the Municipality sought to enforce payment, they contended that the Municipality had relied on the wrong statutory framework when imposing the rates years and had not complied with the requirements of the Local Government Transition Act 209 of 1993 (hereinafter, "Transition Act"), the Local Government: Municipal Finance Management Act 56 of 2003 (hereinafter, "Finance Act") and the Local

Government: Property Rates Act 6 of 2004 (Rates Act).

The Municipality sought an order (declaratory) that the impugned rates were valid. In the Western Cape High Court, Cape Town (High Court) the applicants were partially successful. The High Court ruled that the rates imposed for five of the years were invalid and therefore not recoverable. On appeal the Supreme Court of Appeal reversed this finding, rejecting all of the applicants' challenges, concluding that none of the attacks could be sustained.

The Municipality imposed the impugned rates pursuant to Section 10G.7 of the Transition Act. The applicants contended that it was not competent to do so from the 2006/2007 financial year onwards, because by then Section 10G.7 had been repealed by the Finance Act. The applicants raised various other challenges, contending that the Municipality had failed to comply with procedural requirements when imposing the rates.

II. Acting Justice Mhlantla, with whom six other judges concurred, held that the Municipality had properly imposed the rates in terms of Section 10G.7 of the Transition Act for the 2006/2007 to 2008/2009 financial years. This was because the repeal of Section 10G.7 was provided for not only through the Finance Act, but also through the coming into force of the Rates Act. The Court rejected a narrow reading of the Finance Act and reasoned that, understood in their proper context, the transitional provisions of the Rates Act continued the life of Section 10G.7 after the 2006/2007 financial year. The Court held that this interpretation best gives effect to municipalities' abilities to provide consistent and facilitated rating mechanisms.

In respect of the other challenges, the Court held that the Municipality had substantially complied with the requirements, and accordingly that there was no basis for declaring those rates invalid.

The Constitutional Court accordingly dismissed the appeal.

III. In a dissenting judgment, Justice Jafta would have upheld the appeal on the basis that Section 10G.7 was repealed on 11 May 2004 and therefore could not have empowered the Municipality to impose rates between 2004 and 2009. He concluded that the rates imposed for the 2002/2003 financial year were invalid because the Municipality had failed to give proper notice of two amendments to those rates.

Justice Khampepe wrote a separate judgment in which she agreed with Acting Justice Mhlantla that

the challenges to the imposts for the years 2004/2005 and 2005/2006 should fail, but agreed with Justice Jafta that the 2002/2003 rates were invalidly imposed because the Municipality had failed to issue notices inviting public participation in relation to the imposition of those rates. Justice Khampepe further held that because the rates for the years 2006/2007 to 2008/2009 were not published in the Provincial Gazette, those rates were invalidly imposed as they infringed the fundamental constitutional principle that legislative acts must be properly promulgated if they are to have legal effect.

Supplementary information:

Legal norms referred to:

- Sections 152.1, 153 and 229 of the Constitution of the Republic of South Africa, 1996;
- Section 10G.7 of the Local Government Transition Act 209 of 1993;
- Section 179 of the Local Government: Municipal Finance Management Act 56 of 2003;
- Sections 14.2, 88, 89 and 95 of the Local Government: Property Rates Act 6 of 2004.

Cross-references:

- *African Christian Democratic Party v. Electoral Commission and Others*, *Bulletin* 2005/3 [RSA-2005-3-016];
- *African National Congress and Another v. Minister of Local Government and Housing KwaZulu-Natal and Others*, *Bulletin* 1998/1 [RSA-1998-1-002];
- *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Others*, *Bulletin* 2004/1 [RSA-2004-1-004];
- *Chief Lesapo v. North West Agricultural Bank and Another*, *Bulletin* 2000/3 [RSA-2000-3-016];
- *City of Cape Town and Another v. Robertson and Another* [2004] ZACC 21; 2005 (2) *South African Law Reports* 323 (CC);
- *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);
- *Gerber and Others v. Member of the Executive Council for Development Planning and Local Government, Gauteng, and Another* 2003 (2) *South African Law Reports* 344 (SCA);
- *Liebenberg NO and Others v. Berggrivier Municipality* [2012] ZASCA 153; [2012] 4 *All South African Law Reports* 626 (SCA);
- *Johannesburg Metropolitan Municipality v. Gauteng Development Tribunal and Others*, *Bulletin* 2010/2 [RSA-2010-2-005];

- *Kungwini Local Municipality v. Silver Lakes Home Owners Association and Another* 2008 (6) *South African Law Reports* (SCA);
- *Nkisimane and Others v. Santam Insurance Co Ltd* 1978 (2) *South African Law Reports* 430 (A);
- *Nokeng Tsa Taemane Local Municipality v. Dinokeng Property Owners Association and Others* [2010] ZASCA 128; [2011] 2 *All South African Law Reports* 46 (SCA);
- *Pretoria City Council v. Walker*, *Bulletin* 1998/1 [RSA-1998-1-001];
- *Rates Action Group v. City of Cape Town* 2004 (5) *South African Law Reports* 545 (CPD);
- *Unlawful Occupiers, School Site v. City of Johannesburg* 2005 (4) *South African Law Reports* 199 (SCA);
- *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).

Languages:

English.



Identification: RSA-2013-2-015

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 06.06.2013 / **e)** CCT 124/11 / **f)** Mandla Trust Mpofu v. Minister for Justice and Constitutional Development and Others / **g)** www.constitutionalcourt.org.za/Archimages/20913.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.4.3.3 Constitutional Justice – Procedure – Time-limits for instituting proceedings – **Leave to appeal out of time.**

1.4.8.7.1 Constitutional Justice – Procedure – Preparation of the case for trial – Evidence – **Inquiries into the facts by the Court.**

4.7.8.2 Institutions – Judicial bodies – Ordinary courts – **Criminal courts.**

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.**

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

Keywords of the alphabetical index:

Appeal, filing late / Appeal, evidence / Child, best interests / Child, sentence, less severe / *Res judicata* / Sentencing, discretion.

Headnotes:

The mere assertion by a convicted person that he or she was a child at the time of the offence is insufficient to engage the right of children to special sentencing consideration.

Summary:

I. In 2001 Mr Mpofu, along with several others, was convicted of murder and other serious offences in the High Court and was sentenced to life imprisonment. Applications by Mr Mpofu for leave to appeal against his sentence to the High Court and the Supreme Court of Appeal were both dismissed. Subsequently, Mr Mpofu applied twice to the Constitutional Court for leave to appeal against his sentence, in 2008 and 2009. Both applications were dismissed. Mr Mpofu now made a third application to the Constitutional Court for leave to appeal against his sentence.

In this third application, Mr Mpofu alleged that he was a child at the time of his offence. He argued that the High Court failed to take his youth into account when sentencing him, as required by Section 28 of the Constitution, which guarantees that the best interests of the child will be of paramount importance in any matter involving that child and which further contains specific provisions regarding the detention of children. The application was opposed by the Director of Public Prosecutions (hereinafter, the “DPP”). The DPP disputed Mr Mpofu’s claim about his age, and argued that the High Court had correctly exercised its sentencing discretion.

II. The majority of the Court, in a judgment penned by Justice Skweyiya, refused Mr Mpofu’s application for leave to appeal. The majority found that while a constitutional issue was raised, the interests of justice did not favour the grant of leave to appeal. It held that Mr Mpofu failed to establish that the right under Section 28 of the Constitution was engaged at all, because he had not shown that he was under the age of 18 at the time of the offences. The fact that the application for leave to appeal was made ten years after the High Court sentence, and that Mr Mpofu had failed to explain this delay, further weakened the interests of justice in granting leave to appeal. In

addition, Mr Mpofu did not adequately explain why he brought two previous applications to the Constitutional Court for leave to appeal against his sentence in which the issue of his alleged youthfulness was not raised.

III. The dissenting judgment, written by Justice van der Westhuizen, reasoned that leave to appeal should be granted and that, based on the wording of the High Court's judgment on sentencing, Mr Mpofu was a child at the time of the offence. The dissenting judgment found that the High Court misdirected itself in failing to consider Mr Mpofu's rights as a child when it imposed its sentence. In the light of the misdirection, the dissenting judgment would have set aside the sentence and substituted it with a sentence of 20 years' imprisonment.

Supplementary information:

Legal norms referred to:

- Sections 12.1, 28, 35.3 and 167.7 of the Constitution of the Republic of South Africa, 1996;
- Section 77.4 of the Child Justice Act 75 of 2008;
- Section 136.1 of the Correctional Services Act 111 of 1998.

Cross-references:

- *eThekweni Municipality v. Ingonyama Trust*, *Bulletin* 2013/1 [RSA-2013-1-007];
- *Bogaards v. S*, *Bulletin* 2012/3 [RSA-2012-3-015];
- *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);
- *Kotze v. Kotze* 2003 (3) *South African Law Reports* 628 (T);
- *Evins v. Shield Insurance Co Ltd* 1980 (2) *South African Law Reports* 814 (AD);
- *S v. Pillay* 1977 (4) *South African Law Reports* 531 (A).

Languages:

English.



Identification: RSA-2013-2-016

a) South Africa / b) Constitutional Court / c) / d) 12.06.2013 / e) CCT 105/12 / f) S v. Nabolisa / g) www.constitutionalcourt.org.za/Archimages/20924.pdf / h) CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Sentencing, increase, cross-appeal, requirement / Sentence, criminal, appeal / Cross-appeal, requirement.

Headnotes:

The Criminal Procedure Act 51 of 1977, which regulates the right of appeal in criminal matters, imposes an obligation on the State, when appealing against the sentence of a convicted person, to apply formally for leave within the prescribed time periods. A failure by the State to seek leave may result in the appellate court having no jurisdiction to consider a possible increase in sentence.

Summary:

I. Mr Nabolisa was charged with and convicted of contravening Section 5.b of the Drugs and Drug Trafficking Act 140 of 1992 in the KwaZulu-Natal High Court, Pietermaritzburg (hereinafter, the "High Court"). In sentencing, the High Court found compelling circumstances to deviate from the prescribed minimum sentence of 15 years with a reduction of three years. Mr Nabolisa obtained leave to appeal against his sentence and conviction. The State did not formally apply for leave to cross-appeal against the sentence, indicating only in its written argument before the appellate court that the sentence should be increased. The Supreme Court of Appeal dismissed the appeals against conviction but increased Mr Nabolisa's sentence. The Court set aside and replaced his sentence with a sentence of 20 years' imprisonment. Mr Nabolisa applied for, and was granted, leave to appeal against the increased sentence to the Constitutional Court.

Mr Nabolisa argued that the State failed to meet the peremptory requirement of cross-appeal created by Section 316B of the Criminal Procedure Act 51 of

1977 (hereinafter, the “Act”) when it sought to have his sentence increased. Hence, his constitutional right to a fair appeal process was infringed. The State argued that Section 316B merely filled a gap that existed in the law by adding a mechanism for the State to appeal at its own initiative when a convicted person elected not to do so. There was accordingly no need for the State formally to cross-appeal against sentence.

II. Justice Jafta, with whom six judges concurred, wrote the majority judgment. He found that Section 316B of the Act implicates the constitutional right to a fair appeal. That the State did not place the question of the increase of the sentence before the Supreme Court of Appeal, in accordance with the peremptory provisions of Section 316 of the Act, constituted an irregularity. Further, the State’s failure to obtain leave did not constitute a breach of form only, but also amounted to a substantive issue relating to the competence of the Supreme Court of Appeal to adjudicate the question of sentence under these circumstances. That Court therefore did not have jurisdiction to consider an increase in Mr Nabolisa’s sentence.

The Constitutional Court upheld the appeal and set aside the sentence of the Supreme Court of Appeal.

III. Justice Skweyiya, with whom two judges concurred, dissented. He was of the opinion that Section 316B of the Act did not, absent an explicit statement to the contrary, require the State to launch a separate cross-appeal where the accused had already appealed, because the State would be before the court of appeal already.

Supplementary information:

Legal norms referred to:

- Section 35.3.o of the Constitution of the Republic of South Africa, 1996;
- Sections 316, 316B and 322 of the Criminal Procedure Act 51 of 1977.

Cross-references:

- *National Director of Public Prosecutions v. Elran*, *Bulletin* 2013/1 [RSA-2013-1-002];
- *Bogaards v. S*, *Bulletin* 2012/3 [RSA-2012-3-15];
- *Cwele and Another v. S* [2012] ZASCA 155; 2013 (1) *South African Criminal Law Reports* 478 (SCA); [2012] 4 *All South African Law Reports* 497 (SCA);
- *Keyser v. S* [2012] ZASCA 70; 2012 (2) *South African Criminal Law Reports* 437 (SCA);

- *Mokela v. S* [2011] ZASCA 166; 2012 (1) *South African Criminal Law Reports* 431 (SCA);
- *S v. Egglestone* 2009 (1) *South African Criminal Law Reports* 244 (SCA);
- *S v. Shaik and Others* [2007] ZACC 19; 2008 (2) *South African Law Reports* 208 (CC); 2007 (12) *Butterworths Constitutional Law Reports* 1360 (CC);
- *Director of Public Prosecutions v. Olivier* 2006 (1) *South African Criminal Law Reports* 380 (SCA);
- *Jaipal v. S* [2005] ZACC 1; 2005 (4) *South African Law Reports* 581 (CC); 2005 (5) *Butterworths Constitutional Law Reports* 423 (CC);
- *Director of Public Prosecutions v. Olivier* [2005] ZASCA 121; 2006 (1) *South African Criminal Law Reports* 380 (SCA);
- *Legoa v. S* [2002] ZASCA 122; [2002] 4 *All South African Law Reports* 373 (SCA);
- *S v. Dzukuda and Others*; *S v. Tshilo* [2000] ZACC 16; 2000 (4) *South African Law Reports* 1078 (CC); 2000 (11) *Butterworths Constitutional Law Reports* 1252 (CC);
- *Kgosimore v. S* [1999] ZASCA 63; 1999 (2) *South African Criminal Law Reports* 238 (SCA);
- *Kellerman v. S* [1996] ZASCA 139; 1997 (1) *South African Criminal Law Reports* 1 (A); [1997] 1 *All South African Law Reports* 127 (A);
- *S v. Mmboi and Another* 1997 (1) *South African Criminal Law Reports* 1 (A);
- *S v. Zuma and Others* [1995] ZACC 1; 1995 (2) *South African Law Reports* 642 (CC); 1995 (4) *Butterworths Constitutional Law Reports* 401 (CC);
- *S v. Ntuli* [1995] ZACC 14; 1996 (1) *South African Law Reports* 1207 (CC); 1996 (1) *Butterworths Constitutional Law Reports* 141 (CC);
- *S v. Mkhise*; *S v. Mosia*; *S v. Jones*; *S v. Le Roux* 1988 (2) *South African Law Reports* 868 (A);
- *S v. Naidoo* 1962 (4) *South African Law Reports* 348 (A);
- *S v. Moodie* 1961 (4) *South African Law Reports* 752 (A);
- *R v. Grundlingh* 1955 (2) *South African Law Reports* 269 (A).

Languages:

English.



Identification: RSA-2013-2-017

a) South Africa / b) Constitutional Court / c) / d) 13.06.2013 / e) CCT 84/12 / f) Sigcau v. President of the Republic of South Africa and Others / g) www.constitutionalcourt.org.za/Archimages/20929.pdf / h) CODICES (English).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
 4.4.3 Institutions – Head of State – **Powers.**
 5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law.**
 5.5.5 Fundamental Rights – Collective rights – **Rights of aboriginal peoples, ancestral rights.**

Keywords of the alphabetical index:

Amendment, legislative, effect retroactive / Traditional leadership, recognition / Traditional leadership, paramourcy, recognition.

Headnotes:

The Traditional Leadership and Governance Framework Act enables the Commission on Traditional Leadership Disputes and Claims to recommend whether paramourcies in traditional leadership hierarchies under pre-constitutional legislation be recognised as kingships or queenships. There are material differences between the unamended and the amended Act. Therefore it cannot be said that a notice issued under the amended Act can be understood as having been issued under the unamended Act.

Summary:

I. The applicant, Justice Mpondombini Sigcau, succeeded his father as Paramount Chief of the AmaMpondo AseQawukeni in 1978. The Traditional Leadership and Governance Framework Act (hereinafter, the “Act”) was enacted after these events and provided that the Commission on Traditional Leadership Disputes and Claims (Commission) could investigate whether paramourcies under pre-constitutional legislation should be recognised as kingships or queenships. The fourth respondent, Zanozuko Tyelovuyo Sigcau, referred a dispute to the Commission claiming that he and not the applicant was the rightful king of the AmaMpondo AseQawukeni. After conducting an investigation, the Commission concluded that the fourth respondent’s claim was valid and recommended that the President of the Republic of South Africa confirm the claim. The President then issued a notice confirming the decision in terms of the Act as amended.

Application for leave to appeal concerning the president’s notice confirming the determination by the Commission on Traditional Leadership Disputes and Claims contended that the fourth respondent was the rightful king of the AmaMpondo aseQawukeni. The Commission made the determination under the Traditional Leadership and Governance Act. The applicant contended that the President had erred in issuing notice of confirmation under the amended Act and that the Commission has erred in making the recommendation under the amended Act.

II. In a unanimous judgment, the Court held that because of the material differences between the unamended and the amended Act, it could not be said that a notice issued under the amended statute can be taken to have been issued under the unamended Act. It held that the President purported to exercise powers not conferred on him by the provisions of the amended Act. The Court set aside the notice issued by the President recognising the fourth respondent as king of AmaMpondo AseQawukeni insofar as it relates to the applicant and the fourth respondent.

Supplementary information:

Legal norms referred to:

- Sections 172.2.a and 179 of the Constitution of the Republic of South Africa, 1996;
- Sections 9, 10, 32 and 33 of the National Prosecuting Authority Act 32 of 1998.

Cross-references:

- *Albutt v. Centre for the Study of Violence and Reconciliation and Others*, *Bulletin* 2010/1 [RSA-2010-1-002];
- *Poverty Alleviation Network and Others v. President of the Republic of South Africa and Others* [2010] ZACC 5; 2010 (6) *Butterworths Constitutional Law Reports* 520 (CC);
- *Minister for Justice and Constitutional Development v. Chonco and Others*, *Bulletin* 2009/3 [RSA-2009-3-013];
- *Merafong Demarcation Forum and Others v. President of the Republic of South African and Others*, *Bulletin* 2008/2 [RSA-2008-2-009];
- *Affordable Medicines Trust and Others v. Minister of Health and Another*, *Bulletin* 2005/1 [RSA-2005-1-002];
- *Minister of Defence v. Potsane and Another; Legal Soldier (Pty) Ltd and Others v. Minister of Defence and Others*, *Bulletin* 2001/3 [RSA-2001-3-015];

- *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, *Bulletin* 1999/3 [RSA-1999-3-008];
- *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996, *Bulletin* 1996/3 [RSA-1996-3-016];
- *Brink v. Kitshoff NO*, *Bulletin* 1996/1 [RSA-1996-1-009].

Languages:

English.



Identification: RSA-2013-2-018

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 27.06.2013 / **e)** CCT 101/12 / **f)** The Government of the Republic of Zimbabwe v. Fick and Others / **g)** www.constitutionalcourt.org.za/Archimages/21059.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**

1.3.5.1 Constitutional Justice – Jurisdiction – The subject of review – **International treaties.**

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

3.1 General Principles – **Sovereignty.**

4.7.6 Institutions – Judicial bodies – **Relations with bodies of international jurisdiction.**

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

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

Keywords of the alphabetical index:

Common law, application, constitutional / Common law, development / Compensation, property / Expropriation, compensation, right to appeal to court / State, foreign, immunity from jurisdiction / International tribunal, jurisdiction / Jurisdiction, immunity / Land, expropriation, compensation / Land,

state, property rights / Treaty, international, application / Treaty, international, fundamental rights.

Headnotes:

The common law should be developed to recognise tribunal judgments from regional or international bodies of which South Africa is a member, so that they can be enforced in South African courts. This development is mandated by two sources. Article 32 of the Southern African Development Community Tribunal Protocol makes the development a duty for member states. Sections 8.3 and 39.2 of the South African Constitution enjoin courts to develop the common law to give effect to a right in the Bill of Rights, in line with the spirit, purport and objects of the Bill of Rights. Thus, where the judgment of an international tribunal such as the SADC Tribunal concerns fundamental rights like access to courts and compensation for land expropriation, South African courts must recognise and enforce it.

Summary:

I. In 2005, the Zimbabwean government amended the country's Constitution to facilitate land reform. The new amendment provided for the compulsory acquisition, without compensation, of all agricultural land identified by the State's acquiring authority. Persons whose land was expropriated were barred from approaching any domestic court in Zimbabwe to challenge the acquisition.

In 2007, a group of farmers approached the Tribunal of the Southern African Development Community (hereinafter, the "Tribunal") to challenge the implementation of Zimbabwe's land-reform policy. The Southern African Development Community (hereinafter, "SADC") is a regional body, formed to enhance development and to promote human rights, democracy and the rule of law in the region; Zimbabwe and South Africa are members. The Tribunal found in the farmers' favour. It ordered Zimbabwe to protect the ownership of farms from which farmers had not yet been evicted and to pay compensation for those that had.

Zimbabwe refused to comply with the Tribunal's decision. The farmers returned to the Tribunal for relief. The Tribunal again found in the farmers' favour, and granted a costs order against Zimbabwe. Again, Zimbabwe failed to comply.

The farmers then approached the North Gauteng High Court, Pretoria (hereinafter, "High Court") to have the Tribunal's costs order enforced in South Africa. The High Court ordered the registration and execution of

the costs order against property owned by the Government of Zimbabwe in South Africa. Zimbabwe applied to the High Court for rescission of the order, which was refused.

Zimbabwe then appealed to the Supreme Court of Appeal (hereinafter, "SCA"), claiming it was immune from suits in South African courts. The SCA concluded that Zimbabwe had waived its immunity by "expressly submitting itself to the SADC Treaty and the (SADC Tribunal) Protocol" and dismissed the appeal. Aggrieved by that outcome, Zimbabwe applied for leave to appeal to the Constitutional Court.

II. In a majority judgment, written by Mogoeng CJ with whom eight judges concurred, the Constitutional Court developed the common law on the enforcement of foreign judgments to apply to the Tribunal. It therefore upheld the High Court's order enforcing the costs award against Zimbabwe in South Africa. Previously, South African common law recognized only foreign civil judgments by domestic courts of a foreign country. The majority found that SADC legal instruments and the South African Constitution enjoined the Court to develop the common law to recognise tribunal judgments from regional or international bodies of which South Africa was a member. Specifically, Article 32 of the Tribunal Protocol imposes a duty on member states to take measures to "ensure execution of decisions of the Tribunal." Additionally, Sections 8.3 and 39.2 of the South African Constitution enjoins courts to develop the common law to give effect to rights in the Bill of Rights, in line with the spirit, purport and objects of the Bill of Rights.

Among the objects of both the SADC Treaty and the Constitution is the promotion of the rule of law, which includes fundamental rights of access to courts and compensation for expropriated land – both of which were denied the farmers under the amendment to the Zimbabwean Constitution. The Court found that Section 34 of the South African Constitution, which provides access by right to a fair public hearing before a court, should be interpreted generously in human rights cases. For these reasons, the Court held that the Tribunal's order should be enforced, and the appeal was dismissed.

III. In a separate concurrence, Zondo J agreed with the majority's reasons for dismissing the appeal. However, he disagreed with the reasoning that where a litigant has chosen specific grounds for impugning the jurisdiction of a court, it may not in later proceedings attack the jurisdiction of the first court on new or fresh grounds, which he considered too widely stated in the main judgment.

In a separate judgment, Jafta J would have dismissed the application for leave to appeal altogether on the basis that it was not in the interests of justice to grant leave. Jafta J opined that the SCA had already developed the common law by extending the application of the rule under which foreign judgments are enforced to orders of international tribunals.

Supplementary information:

Legal norms referred to:

- Sections 8.3 and 39.2 of the Constitution of the Republic of South Africa, 1996;
- Treaty of the Southern African Development Community (1993) 32 ILM 116;
- Protocol on Tribunal in the Southern African Development Community (www.sadc.int/documents-publications/show/814);
- Agreement Amending the Treaty of the Southern African Development Community (www.sadc.int/documents-publications/show/1181).

Cross-references:

- *Mike Campbell (Pvt) Ltd. and Others v. The Republic of Zimbabwe* [2008] SADCT 2;
- *President of the Republic of South Africa and Another v. Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)*, *Bulletin* 2005/1 [RSA-2005-1-003];
- *Geuking v. President of the Republic of South Africa and Others*, *Bulletin* 2002/3 [RSA-2002-3-020];
- *Chief Lesapo v. North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) *Butterworths Constitutional Law Reports* 1420 (CC);
- *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, *Bulletin* 1999/2 [RSA-1999-2-005].

Languages:

English.



Identification: RSA-2013-2-019

a) South Africa / b) Constitutional Court / c) / d) 10.07.2013 / e) CCT 103/12 / f) Head of department, Department of Education, Free State Province v. Welkom High School and Another / g) <http://41.208.61.234/uhtbin/cgiisirs/20130909165850/SIRSI/0/520/J-CCT103-12> / h) CODICES (English).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law.**
 3.13 General Principles – **Legality.**
 4.6.2 Institutions – Executive bodies – **Powers.**
 5.2.2 Fundamental Rights – Equality – **Criteria of distinction.**
 5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education.**

Keywords of the alphabetical index:

Education, learner, best interest / Education, pregnant, learning, exclusion / Education, policy / Education, respect for fundamental rights / Self-help, legality / Legal process, adherence / Illegal act, unconstitutionality of the law as justification.

Headnotes:

The powers and supervisory authority a head of department has over the policies of a school governing body must be exercised lawfully in accordance with the Schools Act 84 of 1996.

Determining the requirements of legality entails assessing the legislation regulating the process in which the decision was made and whether the decision maker was properly authorised. Legality rejects the notion of self-help and dictates that proper legal process is adhered to. Where the proper process is not followed, subsequent actions are unlawful even where they admittedly attempted to address an issue of unconstitutionality.

The Head of the Provincial Department of Education (hereinafter, the “HOD”) exercises executive control over public schools whereas the school governing body exercises defined autonomy over some of the domestic affairs of the school. The HOD cannot interfere excessively in the policies of the school governing body, and when exercising powers must comply with procedures set out in the Schools Act.

Summary:

I. In 2008 and 2009 the governing bodies of two high schools adopted pregnancy policies providing for automatic exclusion of pregnant learners. The HOD issued instructions to the principals to readmit learners who had been excluded in terms of the policies.

In the Free State High Court, Bloemfontein (hereinafter, the “High Court”) the schools sought to interdict the HOD from interfering with the implementation of their policies. The High Court granted the interdict, which was confirmed by the Supreme Court of Appeal. The High Court and the Supreme Court of Appeal reasoned that the HOD did not have authority to instruct the principals to contravene duly adopted school policies.

The Supreme Court of Appeal found that powers of a school governing body are set out in the Schools Act. The governance of a public school is the responsibility of the governing body of the particular school. The HOD exercises executive control and is not entitled to order a governing body to disregard its own policies.

The HOD argued that his actions were justified in terms of the tripartite relationship between the Department, principals (who are its employees) and the governing bodies of the schools at which those principals are employed.

The HOD also sought to challenge the constitutionality of the pregnancy policies. The HOD further argued that the courts must protect fundamental rights, and not grant interdictory relief when it permits the violation of fundamental rights (in this case, the rights of pregnant learners).

The high schools submitted that they have authority to determine the code of conduct at their schools and equally to stipulate the content of the pregnancy policies. They urged that teenage pregnancy was a pressing concern and this was an attempt to remedy it. They are unable to determine the national government policy on pregnant learners and hence resorted to a school pregnancy policy.

II. Khampepe J, with whom two judges concurred, dismissed the appeal. First, in terms of the South African Schools Act, a public school governing body is subject to the supervisory authority of the relevant Head of Provincial Department of Education. However, as a matter of legality, such supervisory authority must be exercised in accordance with the prescripts of the relevant legislation i.e. the Schools Act. Without following the relevant procedures set out in the Schools Act the HOD had purported to override

policies adopted by the schools governing bodies. This was unlawful and the interdict granted by the High Court and upheld by the Supreme Court of Appeal was correct.

The schools were instructed to review the pregnancy policies in light of the requirements of the Constitution, the prescripts of the Schools Act and the considerations in the judgment. The schools were also ordered to engage meaningfully with the HOD in reviewing their policies, in accordance with the principles of cooperative governance contained in the Schools Act.

III. A separate concurring judgment by Froneman J and Skweyiya J, with whom two further judges agreed, noted that although this is a matter between school governing bodies and the HOD, their respective functions are to serve the needs of children. Accordingly, the learners' best interests are the starting point. Where a crisis requiring immediate redress arises, the duty to engage, cooperate and communicate in good faith remains. Any short-term remedial action to secure learners' rights must be lawfully taken.

Zondo J wrote a dissenting judgment in which three judges concurred. It found that the school governing bodies' pregnancy policies were unconstitutional in that they resulted in the exclusion of pregnant learners from school. However in terms of Section 7.2 of the Constitution, the HOD was obligated to respect and protect a learner's rights to a basic education and not to unfairly discriminate against that learner. Therefore his directions to the principal attempted to vindicate the rights of the learners.

Supplementary information:

Legal norms referred to:

- Sections 7.2, 9, 12.2, 14 and 29 of the Constitution of the Republic of South Africa, 1996;
- Sections 16 and 20 of the Schools Act 84 of 1996.

Cross-references:

- *Glenister v. President of the Republic of South Africa and Others*, *Bulletin* 2011/1 [RSA-2011-1-004];
- *Head of department, Mpumalanga Department of Education and Another v. Hoërskool Ermelo and Another*, *Bulletin* 2009/3 [RSA-2009-3-020];
- *Director of Public Prosecutions, Transvaal v. Minister of Justice and Constitutional Development and Others*, *Bulletin* 2009/1 [RSA-2009-1-004];

- *MEC for Education, KwaZulu-Natal and Others v. Pillay*, *Bulletin* 2007/3 [RSA-2007-3-014];
- *Doctors for Life International v. Speaker of the National Assembly and Others*, *Bulletin* 2006/2 [RSA-2006-2-008];
- *Minister of Education, Western Cape and Others v. Governing Body, Mikro Primary School and Another* [2005] ZASCA 66; 2006 (1) SA 1 (SCA);
- *Akani Garden Route (Pty) Ltd v. Pinnacle Point Casino (Pty) Ltd* [2001] ZASCA 59; 2001 (4) SA 501 (SCA);
- *Chief Lesapo v. North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) *Butterworths Constitutional Law Reports* 1420 (CC).

Languages:

English.



Identification: RSA-2013-2-020

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 11.07.2013 / **e)** CCT 120/12 / **f)** National Society for the Prevention of Cruelty to Animals ('NSPCA') v. Minister of Agriculture, Forestry and Fisheries and Others / **g)** www.constitutionalcourt.org.za/Archimages/21155.pdf / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.4.2 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between State authorities**.
 3.4 General Principles – **Separation of powers**.
 5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence**.

Keywords of the alphabetical index:

Accountability, principle / Judiciary, independence / Judicial authority, concept / Judicial function / Magistrate, power / Power, separation and interdependence principle / Judge, administrative role.

Headnotes:

The Constitution of South Africa requires a separation of powers between the legislative, executive and judicial arms of government. It is accepted that there is no universal model of separation of powers and that no separation is absolute.

The mere performance of an administrative function by a member of the judiciary does not offend the separation of powers. There will be instances where judicial officers are required to carry out administrative tasks. However, certain functions are so far removed from the judicial function that to permit judges to perform them would blur the separation that must be maintained between the judiciary and other branches of government.

Magistrates were previously part of the civil service and performed both judicial and administrative functions. This has changed under the new constitutional dispensation. Although there may be legitimate reasons why existing legislation requires that certain administrative functions be performed by judicial officers, magistrates should not be required to perform administrative duties unrelated to their judicial functions where there is no justification for doing so.

Summary:

I. The National Society for the Prevention of Cruelty to Animals (hereinafter, "NSPCA") applied to the High Court for an order declaring Sections 2 and 3 of the Performing Animals Protection Act unconstitutional to the extent that they require a magistrate to issue animal training and exhibition licences. NSPCA contended that issuing animal training and exhibition licences is an administrative function that should not be performed by members of the judiciary and that assigning it to magistrates offends the separation of powers. It also argued that magistrates do not have the expertise required to perform this function.

The High Court upheld the NSPCA's contention and declared the impugned sections unconstitutional. The High Court also made an order suspending the order of constitutional invalidity pending confirmation by the Constitutional Court. The High Court gave the Minister of Agriculture, Forestry and Fisheries (hereinafter, "Minister") six months within which to cure the defect. The Court established a temporary committee, comprising two representatives of the NSPCA, two representatives appointed by the Minister, and a representative appointed by the South African Veterinary Council, to perform the licensing function pending confirmation of the decision by the Constitutional Court.

The NSPCA applied to this Court for confirmation of the High Court order. The Licensed Animal Trainers Association, admitted as an intervening party, opposed the confirmation. The Commercial Producers Association and the South African Association of Stills Producers were admitted as amici curiae. The amici also opposed confirmation.

II. Zondo J, writing for a unanimous Court, pointed out that there may be cases where the performance of administrative functions by a magistrate is justified. In such a case there would be no breach of the principle of the separation of powers. However, the Court held that the performance by a magistrate of administrative duties which were unrelated to his or her judicial functions in circumstances where there is no justification does offend the separation of powers. Zondo J found that there was no justification for assigning the function of issuing animal training and exhibition licences to magistrates. Accordingly, performance of this function by magistrates offends the separation of powers. He confirmed the order of constitutional invalidity and suspended the operation of the order for 18 months to allow Parliament to cure the defect.

Although Zondo J criticised the portions of the High Court order relating to the temporary committee as unjustified and lacking a proper basis, he declined to set the order aside since it would fall away automatically once this Court's order was handed down.

Supplementary information:

Legal norms referred to:

- Sections 167.5 and 172.2.d of the Constitution of the Republic of South Africa, 1996;
- Sections 2 and 3 of the Performing Animals Protection Act 24 of 1935.

Cross-references:

- *Van Rooyen and Others v. The State and Others* (General Council of the Bar of South Africa Intervening), *Bulletin* 2002/2 [RSA-2002-2-010];
- *South African Association of Personal Injury Lawyers v. Heath and Others*, *Bulletin* 2000/3 [RSA-2000-3-017];
- *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, *Bulletin* 1999/2 [RSA-1999-2-005];
- *De Lange v. Smuts NO and Others*, *Bulletin* 1998/2 [RSA-1998-2-004];

- *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996, *Bulletin* 1996/3 [RSA-1996-3-016].

Languages:

English.



Identification: RSA-2013-2-021

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 27.08.2013 / **e)** CCT 115/12 / **f)** Lindiwe Mazibuko v. Max Vuyisile Sisulu and Another / **g)** <http://41.208.61.234/uhtbin/cgiirsi/20130911073402/SIRSI/0/520/J-CCT115-12> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.2.1.2 Constitutional Justice – Types of claim – Claim by a public body – **Legislative bodies**.
 1.3.5.9 Constitutional Justice – Jurisdiction – The subject of review – **Parliamentary rules**.
 3.3 General Principles – **Democracy**.
 3.4 General Principles – **Separation of powers**.
 4.5.7.2 Institutions – Legislative bodies – Relations with the executive bodies – **Questions of confidence**.

Keywords of the alphabetical index:

Accountability, political / No confidence, president, individual motion / Parliament, rules of procedure / Parliament, speaker, power.

Headnotes:

The Constitution confers on a member of the National Assembly the entitlement to give notice of and have a motion of no confidence in the President tabled and voted on in the Assembly within a reasonable time. The Rules of the Assembly must permit a motion of no confidence in the President to be formulated, discussed and voted on in the Assembly within a reasonable time.

Summary:

I. On 8 November 2012, Ms Lindiwe Mazibuko (the applicant) gave notice in the National Assembly (hereinafter, the “Assembly”) of a motion of no confidence in the President in terms of Section 102.2 of the Constitution. The Speaker (first respondent) referred the notice to the Chief Whips’ Forum and the Programme Committee for the purpose of determining whether and when the motion should be debated and voted on in the Assembly. Neither of these committees reached consensus and the motion was not tabled.

The applicant instituted urgent proceedings in the Western Cape High Court (High Court). She sought an order directing the Speaker to take necessary steps to ensure that the motion of no confidence was debated and voted on in the Assembly by 22 November 2012. The High Court dismissed the application. The applicant sought to appeal against this ruling to the Constitutional Court, and also sought direct access to the Court to challenge the Rules of the Assembly.

The applicant contended that the High Court was incorrect to find that the Speaker did not have the power in terms of the Rules to schedule the motion in the event of a deadlock within the Programme Committee. In the direct access application, the applicant argued that the Rules are inconsistent with the Constitution to the extent that they do not allow a member of the Assembly to have a motion of no confidence debated and voted on as a matter of urgency.

II. In a majority judgment by Moseneke DCJ (with whom five judges concurred) the Court held that Section 102.2 of the Constitution confers on a member of the Assembly the entitlement to give notice of and have a motion of no confidence in the President tabled and voted on in the Assembly within a reasonable time. The primary purpose of a motion of no confidence is to ensure that the President and the National Executive are accountable to the Assembly, which is made up of democratically elected representatives of the people. The Rules of the Assembly must permit a motion of no confidence in the President to be formulated, discussed and voted on in the Assembly within a reasonable time. Therefore, to the extent that the Rules regulating the Assembly do not vindicate the rights of members of the Assembly in this respect, they are inconsistent with Section 102.2 of the Constitution and invalid. The declaration of invalidity was suspended for six months to allow the National Assembly to correct the defect.

In relation to the appeal the majority held that on a proper reading of the Rules, the Speaker acting alone has no residual power to schedule a motion of no confidence in the President to be debated and voted on in the Assembly, and that, in any event, the relief sought in the appeal had become moot.

III. A minority judgment written by Jafta J (with whom three judges concurred) held that the applicant had not made out a case for direct access to this Court because the Assembly had already begun amending its Rules. The separation of powers doctrine precludes the judiciary from intervening in matters that fall within the domain of Parliament except where the intervention is mandated by the Constitution.

Supplementary information:

Legal norms referred to:

- Sections 42, 57, 102 and 167 of the Constitution of the Republic of South Africa, 1996.

Cross-references:

- *Oriani-Ambrosini, MP v. Sisulu, Speaker of the National Assembly*, *Bulletin* 2012/3 [RSA-2012-3-017];
- *Doctors for Life International v. Speaker of the National Assembly and Others*, *Bulletin* 2006/2 [RSA-2006-2-008];
- *Bruce and Another v. Fleecytex Johannesburg CC and Others* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC).

Languages:

English.



Switzerland

Federal Court

Important decisions

Identification: SUI-2013-2-004

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 25.01.2013 / **e)** 2C_714/2012 / **f)** X. SA v. Lawyers' Supervisory Board of the Canton of Zug / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 139 II 173 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

2.3.8 Sources – Techniques of review – **Systematic interpretation.**

2.3.9 Sources – Techniques of review – **Teleological interpretation.**

3.18 General Principles – **General interest.**

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

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

Keywords of the alphabetical index:

Lawyer, ethics / Lawyer, advertising / Advertising / Advertising, lawyer, regulation.

Headnotes:

Article 12.d of the Federal Law on Free Movement of Lawyers (LLCA); admissibility and limits of advertising for a lawyer.

Interpretation of Article 12.d LLCA (recital 2-6): text of the provision (recital 2) and definition of advertising (recital 3). Decision on the limits on advertising by a lawyer (recital 6), bearing in mind the origin of the rule (recital 4) and its place in the legal system (recital 5).

In view of the interpretation of the Constitution as translated into practice by the law, it is not advertising by lawyers that must be justified but its restriction (recital 6.1). It is in the public interest that the profession is carried out in accordance with the rules and with high quality standards (recitals 5 and 6.2.1).

Discreet advertising confined to objective facts meets the public's need for information and is admissible; the requirement for discretion relates both to the content and to the forms and methods of the advertising (recital 6.2.2). Discretionary powers of cantonal authorities (recital 6.3.2).

External advertising (on the front of a building) was unacceptable in the instant case because of a lack of restraint in the execution (recital 7).

Summary:

The appellant law firm, X. SA, wished to place an illuminated sign with the words "X lawyers and solicitors" on it on the front of the building containing its offices, located on a very busy street. The sign was 9.4 metres long and 70 cm high for the part with the name of the lawyers and 32 cm high for the words "lawyers and solicitors"; it was to have been lit up using white LED lamps, with the front in blue, the sides white and the back silver. The Lawyers' Supervisory Board of the Canton of Zug declared that this sign was in breach of the professional rules in Article 12.d LLCA. Following the rejection of an appeal to the cantonal court, the law firm asked the Federal Court to set aside this judgment and find that the planned sign did not constitute unlawful advertising within the meaning of Article 12.d LLCA. The appellant firm claimed that its economic freedom had been breached, but the Federal Court dismissed the appeal.

The Federal Court began by interpreting the provision of Article 12.d LLCA, according to which a lawyer "may engage in advertising provided that it is confined to objective facts and meets a public need" (according to the German and Italian version of the relevant law).

Laws are interpreted according to their letter, their spirit, their purpose and the values on which they are based. Decisions must be taken in accordance with the legal system and consistent with the analysis of the *ratio legis*, meaning that the Federal Court applies several pragmatic methods in no order of priority.

Advertising within the meaning of Article 12.d LLCA includes all communications especially intended to prompt the public to call on the services of a lawyer. A simple name plaque on the door cannot be regarded as advertising. However, the sign planned for in this case was rightly viewed as advertising by the relevant authority, given its size, its design, its position on the front of the building and the fact that it was clearly a communication tool designed to influence the public.

Before the entry into force of the LLCA in 2002, the Federal Court had declared that lawyers' advertising activities should be authorised by virtue of freedom of trade and industry but they should also be subject to particular restrictions: "commercial advertising methods may be prohibited in the interests of preserving the independence and trust which lawyers must enjoy; however, limited, objective advertising may satisfy the public's need for information and may not therefore be forbidden for a lawyer". However, the preparatory work for this legislation does not make it at all clear how, as the law stands, the limits of admissible advertising can be convincingly set.

Article 12.d LLCA must be incorporated into the Swiss legal system, which also comprises the Federal Constitution and the economic freedom and freedom of expression it guarantees. Account should also be taken of the fact that the rule of law requires public trust in the freedom of the profession of lawyers, which must be exercised with care and diligence (see Article 12.a LLCA). To protect the public and good faith in business, the state must lay down rules to ensure that the profession of lawyer will be performed in a manner that is in accordance with the relevant rules and high quality standards and also acknowledged at European level (Article 95.1 of the Constitution). Compliance with such rules implies that advertising by lawyers also serves ideal interests or the proper functioning of justice by enabling clients to choose their lawyer properly. State regulation is not sufficient, however, and it is also for lawyers themselves to contribute to the trust in and reputation of their profession among the public because the state can protect their dignity but it cannot proclaim it.

Restrictions on advertising were also provided for by recent federal laws in other liberal professions, including those of doctor and psychologist (Law on University Medical Professions and Law on Professions related to Psychology). Advertising here is permitted if it is "objective, serves the public interest and is not misleading or intrusive".

The significance of Article 12.d LLCA can be clarified as follows: it is not advertising but its restriction, which must be justified in accordance with the values of the Constitution as translated into practice by the law. Advertising by lawyers must have an instructive purpose and refrain from sensationalist, intrusive or dishonest methods. There is an obligation to exercise restraint which applies to the content, form and methods of advertising by lawyers. For external advertising, it is not just the content but also the design, size and appearance which must be reviewed.

While it is difficult to draw the dividing line between lawful and unlawful advertising, the flexible nature of the legal criteria makes it easier to apply the law, as it can be geared to the local and practical characteristics of the situation and changes in concepts over time. The cantonal authorities therefore are granted considerable discretion when interpreting and applying the indeterminate legal notions contained in Article 12.d LLCA, provided that they duly examine the main items and the facts are recorded carefully and fully.

The supervisory authority had good reason to prohibit the planned sign. Although the content was objective (name of the firm and the words “lawyers and solicitors”) and it was lawful for it to be installed on the front of the building, its design using bright lights, its large dimensions and its location on a very busy street did not meet the required standards of restraint, even if advertisements for other companies were already displayed on the building. It was the appearance of the sign rather than its advertising impact which was incompatible with the legislation on the profession of lawyer.

Languages:

German.



Identification: SUI-2013-2-005

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 05.02.2013 / **e)** 1B_788/2012 / **f)** A. v. the Public Prosecutor’s Office of the district of Lausanne / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 139 IV 41 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality.**

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

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

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.**

Keywords of the alphabetical index:

Detention pending trial, conditions / Detention, procedure.

Headnotes:

Article 3 ECHR, Articles 234.1 and 235.1 of the Swiss Code of Criminal Procedure; conditions of pre-trial detention.

An irregularity in pre-trial detention procedure (in this case, detention for a period of fourteen days in a cell designed for a maximum period of 48 hours) does not in principle entail the release of the accused (recital 2). The accused does however have the right for his/her allegations of ill-treatment to be verified and, where appropriate, immediately recognised.

Summary:

A. was arrested in Lausanne on 20 October 2012 and charged with theft and damage to property. By order of 23 October 2012, the Court for Coercive Measures of the Canton of Vaud ordered his pre-trial detention for three months. The accused applied to the criminal appeals division of the cantonal court, complaining that he had been detained for fourteen days in the police station whereas the cells were intended for periods of detention of no more than 48 hours. The cantonal court rejected the appeal, noting that while the conditions for pre-trial detention had been met, it had not been possible to transfer the accused to a prison before fourteen days, probably because of lack of space. This excessive length of detention in the police cells was not regarded, however, as grounds for the accused’s release.

On 27 December 2012, the accused lodged a criminal appeal, submitting that he should be released immediately or, alternatively, that the impugned judgment should be set aside and the case should be referred back to the cantonal court for a new decision.

The appellant complained that the facts had been inaccurately described and that his right to be heard had been breached. On the merits, he referred to Articles 3 and 9 ECHR and the Law of the Canton of Vaud on the enforcement of pre-trial detention. The cantonal court recognised that the 14-day detention in the police station was a blatant violation of the provision of the cantonal law on the Swiss Criminal

Code limiting detention in police cells to 48 hours. However, the appellant was now detained in a prison pending trial. The detention was justified and the appellant had not claimed that his health had been so badly affected by his detention in the police station that his pre-trial detention should be suspended. The authority's assessment was moreover consistent with the case-law according to which irregularities affecting the pre-trial detention procedure did not entail the immediate release of the accused provided that the conditions for pre-trial detention had been met. The appellant had stated expressly that these conditions for detention had been fulfilled. In so far as the contested detention had come to an end and that since 2 November 2012, the appellant had been held in an establishment that was suited to pre-trial detention, the fact that the validity of his complaint had been accepted should not result in his release.

When an irregularity that amounts to a breach of a constitutional guarantee has vitiated the pre-trial detention procedure, in principle it must be repaired by a recognition decision. The same applies when an accused considers that, as a result of his/her pre-trial detention, he/she has undergone treatment prohibited by Article 3 ECHR. In such cases the person concerned has a direct right for the impugned acts to be investigated promptly and impartially. If the alleged violations relate to the conditions in which the appellant was detained and not to the validity of the decision to detain him/her, it is for the judicial body in charge of supervising detention to intervene if credible allegations of prohibited treatment are made.

Article 3 ECHR requires in particular that minimum standards for detention are implemented, as recommended in the European Prison Rules adopted by the Committee of Ministers of the Council of Europe. The Swiss Code of Criminal Procedure also establishes the principle of respect for dignity. It provides that, as a rule, pre-trial detention should be carried out in establishments reserved for the purpose and used only for the execution of short custodial sentences. It lays down the general principle of proportionality and states that it is for the cantons to manage the rights and obligations of accused persons in detention. Cantonal law lays down detailed rules on the conditions of pre-trial detention, including the rule that a person under provisional arrest may only be detained on police premises for a maximum of 48 hours.

The cantonal court recognised that the cantonal legislation restricting detention in a police station to 48 hours had quite obviously been violated. An order for the transfer of the accused to a pre-trial detention establishment was issued by the public prosecutor, but it was not carried out, probably because of lack of

space. All of the appellant's statements (particularly those concerning the dimensions of the cell and the fact that the lights were constantly on, walks outside were restricted to 15 minutes a day and he had no access to the media) makes it at least credible that there was a violation of the applicable conventions, legislation and regulations. Police cells are not suitable for periods of detention of more than two days.

It was for the authority to which the request for detention was addressed to check that this would be taking place under acceptable conditions in the light of the provisions which require that pre-trial detention is carried out in appropriate establishments and in accordance with the principle of proportionality. It was this authority's duty to elucidate the facts and ascertain the existence of the alleged irregularities; if they were confirmed, this could not, however, have the consequence that the accused would be released. Nonetheless, the appellant did have the right to a prompt and serious investigation, meaning that his complaints should be examined immediately. The case was accordingly referred back to the cantonal court so that it could examine the appellant's allegations.

Languages:

French.



Identification: SUI-2013-2-006

a) Suisse / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 26.03.2013 / **e)** 1C_390/2012 / **f)** X. v. Federal Migration Office / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 139 I 129 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 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.**
 5.3.13.11 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Public judgments.**

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

Keywords of the alphabetical index:

Anonymity / Archive, document, access / Asylum, procedure / Court, bench, composition, disclosure / Document, disclosure / Document, right of access, limit / Publicity of proceedings.

Headnotes:

Right to consult a judgment of the Asylum Appeals Board and to be informed of its composition, principle of publicity of judicial proceedings; Article 30.3 of the Federal Constitution, the Federal Law on Archiving (LAR), Regulation on Archiving at the Federal Administrative Court (ReglArchiv).

Right to consult archives during the protection period according to the law on archiving (recitals 3.2 and 3.4).

Effect of the principle of publicity of judicial proceedings, in general and as it applies to the delivery of judgments (recital 3.3).

The law on archiving does not preclude disclosure of judgments (recital 3.5).

Scope and limitations of the right to consult judgments: this right extends to the membership of the court but allows for anonymisation and censorship (recital 3.6).

In the instant case, the archived judgment was to be disclosed in anonymised form together with information on the composition of the board (recital 3.6).

Summary:

A., a journalist, published an article entitled “Integration is difficult” on Switzerland’s asylum policy with regard to Eritreans who relied as grounds for fleeing their country on the danger of being sentenced in their country for desertion and then subjected to inhuman treatment. The report talks of the large number of Eritrean refugees in Switzerland, which it attributes to a decision on principle taken in 2005 by the former Asylum Appeals Board (hereinafter, “CRA”). Shortly afterwards, this theme was taken up again in an article in a rival newspaper entitled “The focus of all discussions in Eritrea”. This report raised the question of which judges were

responsible for the CRA’s judgment. A. applied to the Federal Administrative Court (hereinafter, “TAF”) and asked, without giving any other reason, to consult the above-mentioned judgment by the CRA. After some discussion, A. received the CRA’s judgment of 20 December 2005 in its official, published version. A. then specified that what he was interested in was the original version of the judgment and information on the composition of the board. The Secretary General of the TAF rejected A.’s request by means of a formal decision. A. lodged an appeal in matters of public law against this decision with the Federal Court. He asked for the impugned decision to be set aside and to be given the right to consult the entire judgment of the CRA or, alternatively, to be informed of the composition of the board. The Federal Court admitted the appeal and referred the case back to the TAF.

The Secretary General based his decision on the Regulation on Archiving at the Federal Administrative Court (hereinafter, “ReglArchiv”), which provides that, as a rule, the 30-year protection period laid down in Article 9 of the Federal Law on Archiving (hereinafter, “LAR”) is applicable. Procedural documents are covered by a 50-year protection period established by Article 11 LAR. Documents that could be consulted by the public before they were archived could still be consulted subsequently (Article 6 ReglArchiv). The Secretary General inferred from this that the protection period applied to the disputed request. Article 30.3 of the Federal Constitution and Article 29.1 of the Law on the Federal Administrative Court require courts to provide information on their case-law. The CRA met this requirement by publishing a selection of important judgments at the time.

The principle of publicity of judicial proceedings is anchored in Article 30.3 of the Federal Constitution and Article 6.1 ECHR and Article 14 of UN Covenant II. It guarantees the transparency of judicial proceedings and enables third persons who are not parties to the proceedings to understand how they are conducted. Democratic supervision by the legal community must avoid giving the public the impression that the judicial system unduly disadvantages or favours some parties to the proceedings or that investigations are carried out in a biased or suspect manner.

As part of the means of guaranteeing public proceedings, the records of the hearing and the judgment are publicly accessible sources in keeping with the freedom of information guaranteed by Article 16.3 of the Federal Constitution. Article 30.3 of the Federal Constitution provides that court hearings and verdicts must be public, subject to exceptions provided for by the law. The public delivery of

judgments guarantees that at the end of proceedings the public can consult the judgment, prevents judicial secrecy, fosters the transparency of judicial activities in a state governed by the rule of law and instils confidence in the administration of justice. It is most important for third parties who are not directly involved in the proceedings. It covers both major, highly publicised proceedings involving famous protagonists and more modest trials; an equally important aspect is democratic supervision, ascertaining that the parties have been correctly dealt with, that the judgment is compatible with the law and that trials are fair. It means above all that at the end of judicial proceedings, judgments are delivered in the presence of the parties, the public and press representatives. Other forms of public disclosure, such as publication in official reports or posting on the Internet also contribute to compliance with the publicity rule. Under Article 30 of the Federal Constitution, the principle that the judgment must be delivered in public applies to all judicial proceedings. There is no doubt that the former CRA was a special court which was covered by this constitutional rule.

The rules on archiving are based on the Federal Law on Archiving. The latter establishes the protection period and the rules on consultation while this period is still running. In principle, consultation by the public during the protection period is prohibited (Article 9 LAr). However, the departments submitting material may, on request to the Federal Archives, authorise consultation of their archives if no other legal provision provides otherwise and no public or private interest stands in the way (Article 13 LAr). In principle this rule also applies to the TAF. The regulation on archiving stipulates that entitlement to consult material may be granted when the persons concerned agree or have been dead for over three years and provided that the rights of the parties and third parties involved are respected (Article 9.1 and 9.2 ReglArchiv). Consultation may be restricted to some of the documents if this is necessary to protect a person or specific secrets. Documents which it is permitted to consult may be anonymised or censored (Article 9 ReglArchiv). In the instant case, it was not established if the appellant in the original case before the CRA gave his/her consent or withheld it or if he/she had been dead for over three years within the meaning of Article 9 ReglArchiv. Nor did the impugned judgment refer to the rights of the parties or third parties involved. Lastly, it is not stated that the principles of the protection of personality rights and confidentiality within the meaning of Article 9.3 ReglArchiv also apply to judges involved in the judicial proceedings. The question of the relationship between these principles and the interpretation of the regulation may nonetheless remain open.

Public judicial proceedings are a particular means of guaranteeing transparency in case-law and are not connected with the law on archiving. It is possible to make judgments known without at the same time guaranteeing that the records of proceedings can be consulted. The possibility of consulting judgments is determined in terms of its content and limits by Article 30.3 of the Federal Constitution. A distinction should therefore be made between consultation of the records of proceedings and consulting judgments. It follows that the instant case should be examined exclusively in the light of the aforementioned constitutional rule.

The constitutional right to consult judgments is not absolute. It is limited by the protection of public and private interests which are also enshrined in the Constitution. Its substance must be determined on a case-by-case basis by weighing up the conflicting interests. The CRA's disputed judgment falls within the ambit of Article 30.3 of the Federal Constitution. It must therefore be assumed that there is a right to consult the CRA's judgment. This right generally covers the entire judgment, including the statement of the facts, the legal recitals, the findings, and information on the authority giving judgment. The supervisory function of the legal community tied up with the principle of public proceedings would be seriously undermined if the members of the court involved could remain anonymous. Judges perform a public function and must account for the verdicts they have delivered and tolerate any criticism – all, of course, within the framework of due regard for the independence of the judiciary established by Article 191.c of the Federal Constitution. Furthermore, it is only conceivable that the authority required to rule in accordance with the law will be composed within the meaning of Article 30.1 of the Federal Constitution if the names of the members are given. According to internal instructions, details of the composition of the authority must be sent together with judgments of the Federal Court which are not published in the official reports or on the Internet and hence sent out to third parties. It may be inferred from this that there was a similar right of notification in the instant case. The privacy of the parties to the proceedings of the time had to be respected. There is no doubt that, as a deserter and now a recognised refugee, the appellant in the original case before the CRA had good reason to want his privacy to be protected. In accordance with well-established practice, judgments are anonymised when published and partly censored. It follows that the communication of the judgment in the instant case was subject from the outset to the proviso of anonymisation. Because the applicant had asked to be sent a full non-anonymised version of the judgment, his appeal was unfounded. He did not argue that an anonymised

version of the CRA's judgment would be incomprehensible and, for this reason, would fail to meet the requirements of Article 30.3 of the Federal Constitution. The contested judgment was based on the confidence of the former judges of the CRA that, as was the practice at the time, their names would not be disclosed. This confidence was not a decisive factor in the instant case. The constitutional rule in Article 30.3 of the Federal Constitution had been in force for a long time when the impugned judgment was delivered in 2005. The judgment of 2005 found that the Eritrean deserters had a justified claim to asylum and amounted to a leading judgment. There is no apparent reason why the members of the CRA would no longer endorse this judgment and their anonymity should be preserved. The right to consult the judgment therefore also covers details of the members of the CRA. Lastly, the Secretary General stated in the contested judgment that the appellant had failed to demonstrate that he had a particular legitimate interest in obtaining the information he had requested and that, for that reason alone, he could not claim any right to notification. In so doing, the Secretary General disregarded the fact that the appellant's legitimate interest in obtaining information derived automatically from the supervisory function of the media. This was all the more the case in view of the fact that it was the applicant's aim to learn which judges had been involved in preparing the leading judgment. The Federal Court held that, on the basis of Article 30.3 of the Federal Constitution, the appellant had the right to be sent an anonymised version of the CRA's contested judgment including information on the membership of the board.

Languages:

German.



Ukraine Constitutional Court

Important decisions

Identification: UKR-2013-2-002

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 29.05.2013 / **e)** 2-rp/2013 / **f)** Official interpretation of Articles 136.2, 141.3 of the Constitution and Article 14.2.1 of the Law on Elections of Deputies of the *Verkhovna Rada* of the Autonomous Republic of Crimea, Local Councils and Heads of Village, Settlement and City / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 44/2013 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system**.

Keywords of the alphabetical index:

Elections, frequency of holding / Electoral mandate.

Headnotes:

The frequency of holding elections to representative bodies of local self-government is a legal principle recognised by national and international law.

The legislation pertaining to the holding of regular Elections of People's Deputies, the President, Deputies of the *Verkhovna Rada* of the Autonomous Republic of Crimea, Local Councils and Heads of Village, Settlement, City should now be interpreted as requiring all regular elections of deputies of the *Verkhovna Rada* of the Autonomous Republic of Crimea, village, settlement, city, district and oblast councils and heads of village, town, city elected at regular or special election to be held simultaneously on the entire territory on the last Sunday of October of the fifth year of authority of councils or heads elected in regular elections on 31 October 2010.

Summary:

The Constitutional Court started from the premise that the frequency of holding elections to bodies of state power and bodies of local self-government should be reasonable, in order to ensure optimality, continuity and stability in the formation of representative bodies.

The application of the principle of frequency of holding elections in accordance with international regulations is an important part of democracy.

The frequency of holding elections to representative bodies of local self-government is a legal principle recognised by national and international law.

The Constitutional Court considered that, in terms of the constitutional petition the term “period” as a legal category of setting the frequency of holding elections means the restriction of legally significant actions and legal relations in time in order to maintain the balance between the state public interests, the interests of territorial communities and human and citizens’ constitutional rights and freedoms.

Following the entry into force of the Law on Introducing Amendments to the Constitution on Holding Regular Elections of People’s Deputies, the President, Deputies of the *Verkhovna Rada* of the Autonomous Republic of Crimea, Local Councils and Heads of Village, Settlement, City no. 2952-VI, 1 February 2011 (hereinafter, “Law no. 2952”) the provisions of Article 141.1, 141.2 of the Constitution are stated in a new wording which determines a five-year term of authority for deputies of relevant local councils and heads of village, settlement and city who have been elected in regular elections.

Under Article 141.3 of the Constitution, regular elections of local councils, heads of village, settlement and city are held on the last Sunday of October of the fifth year of the term of authority of a relevant council or a relevant head elected in regular elections.

The amendments introduced to the Constitution by Law no. 2952 establish unified requirements concerning consistency in time for all regular elections of deputies of local councils and heads of village, town and city.

In accordance with Section XIV.5 “Final and Transitional Provisions” of the Law on Elections of Deputies of the *Verkhovna Rada* of the Autonomous Republic of Crimea, Local Councils and Heads of Village, Settlement, City no. 2487-VI, 10 July 2010 (hereinafter, “Law no. 2487”) and the decision of the

Verkhovna Rada of the Autonomous Republic of Crimea, no. 1833-5/10, 4 August 2010, all regular elections of deputies of the *Verkhovna Rada* of the Autonomous Republic of Crimea, local councils, heads of village, town and city, except for elections of head of Kyiv, Kyiv city council and Ternopil oblast council, were held in 31 October 2010.

The deputies of Ternopil oblast council were elected by special election on 15 March 2009. The deputies of Kyiv city council and the head of Kyiv, whose authority was terminated early, were elected on special elections on 25 May 2008.

The regular elections of the head of Kyiv, Kyiv city council and Ternopil oblast council were held on 26 March 2006, along with all other regular elections of deputies of local councils, heads of village, town and city.

The Constitutional Court noted that all regular elections of deputies of local councils and heads of village, town, city should be held on the last Sunday of October of the fifth year of the term of authority of councils or heads elected on regular elections on 31 October 2010, i.e. on the last Sunday of October 2015 for the unification of terms of holding all regular elections of deputies of the *Verkhovna Rada* of the Autonomous Republic of Crimea, local councils and heads of village, town and city and to allow for the possibility of implementing the mechanism of their simultaneous holding. Elections of deputies of local councils, heads of village, town, city elected at special election should also be held during this period.

The extension or shortening of the term of authority of bodies of local self-government elected at special election is a temporary measure aimed at implementing a mechanism whereby regular elections of deputies of local councils and heads of village, town, city are held simultaneously. It does not prevent the exercise of the constitutional right of citizens to participate in public affairs.

Judges Yu.Baulin, P. Stetsiuk, V. Shyshkin and V. Kampo attached dissenting opinions.

Languages:

Ukrainian, Russian (translation by the Court).



Identification: UKR-2013-2-003

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 03.06.2013 / **e)** 3-rp/2013 / **f)** Conformity with the Constitution (constitutionality) of separate provisions of Article 2, Chapter II.2.2 “Final and Transitional Provisions” of the Law on Measures Concerning Legislative Provision of the Reformation of the Pension System”, Article 138 of the Law on Judicial System and Status of Judges” (case on changing conditions of pension payment and lifelong monthly monetary allowance of retired judges) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 44/2013 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status.**

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

Keywords of the alphabetical index:

Judge, independence, guarantees / Judge, pension, amount, calculation.

Headnotes:

Various legislative provisions concerning the reformation of the pension system have resulted in deterioration in the pension benefits and lifelong monetary allowances for retired judges. They are in violation of the principle of the independence of judges.

Summary:

I. According to the applicant, amendments to Article 138.1, 138.2 of the Law on the Judicial System and Status of Judges no. 2453-VI, 7 July 2010 in the wording of the Law on Measures Concerning Legislative Provision of the Reformation of the Pension System no. 3668-VI, 8 July 2011 (hereinafter, “Law no. 2453”) have resulted in deteriorations to pension benefits and a lifelong monthly monetary allowance for retired judges. The age at which the right to choose material support after retirement (i.e. to receive a pension in accordance with the conditions set out in Article 37 of the Law on Civil Service) could be exercised had been increased from 60 to 62 years for men and from 55 to 60 for women. This substantively violated the legislatively defined guarantees of the independence of judges.

II. The Law establishes a lifelong monthly monetary allowance exclusively for retired judges or a pension for public servants (at their choice) which is a guarantee of judicial independence. A judge will be entitled to receive this allowance if he or she has had at least twenty years of professional experience as a judge. It does not depend on approaching of judge retirement age provided by Article 138.1 of Law no. 2453, including transitional age, defined in the second sentence of this part for male judges born before 31 December 1955.

By changing the age at which judges may exercise their right to choose material support, i.e. to receive the civil servants’ pension or a lifelong monthly monetary allowance, the *Verkhovna Rada* realised its constitutional authority without violating the provisions of Article 126 of the Constitution on the age limit of a working judge and guarantees of judicial independence.

The provisions of Article 138.1 and 138.2 of Law no. 2453 do not, therefore, violate the Constitution.

Questions arose in the constitutional petition over the constitutionality of Article 138.3 of Law no. 2453, according to which “a lifelong monthly monetary allowance is paid to a judge in the amount of 80 percent of the monetary allowance of a judge who occupies the relevant position from which was paid a single contribution on compulsory state social insurance, and till 1 January 2011 – insurance deposits on compulsory state pension insurance”.

Article 138.3 of Law no. 2453, before the amendments introduced by the Law on Measures Concerning Legislative Provision of the Reformation of the Pension System no. 3668-VI, 8 July 2011 (hereinafter, “Law no. 3668”) stated that:

“A lifelong monthly monetary allowance is paid to a judge in an amount of 80% of monetary allowance of a judge who occupies the relevant position. For each full year of work as a judge for more than 20 years the amount of a lifelong monthly monetary allowance is increased by two percent of earnings, but not more than 90% of the salary of a judge, without limiting the maximum amount of a lifelong monthly monetary allowance”.

The procedure for calculating the lifelong monthly monetary allowance defined by Law no. 2453 was modified by Law no. 3668. As a result the amount of the allowance was reduced. Although Law no. 3668 preserved the content of the right to a lifelong monthly monetary allowance, it narrowed the scope of this right by setting a limited basis for calculating the

allowance and abolished the right of judges to receive a lifelong allowance without limitation of the maximum amount, thereby reducing the achieved level of guarantees of judicial independence.

Article 138.3 of Law no. 2453 is therefore inconsistent with the constitutional provision on the inadmissibility of narrowing the content or scope of guarantees of judicial independence and is contrary to Article 126 of the Basic Law.

The applicant also queried the constitutionality of the provisions of the first, second and third sentences of Article 138.5 of Law no. 2453 and Article 2 of Law no. 3668 concerning termination of payments of a lifelong monthly monetary allowance for retired judges for a period of their work at some positions and setting a cap on the amount of the allowance. One of the guarantees of judicial independence is a prohibition on narrowing the content and scope of the guarantees defined by Constitution when adopting new laws or amendments to existing laws. The Constitutional Court found the provisions of the third sentence of Article 138.5 of Law no. 2453, Article 2 of Law no. 3668 on establishing the maximum amount of pension or lifelong monthly monetary allowance for judges to be contrary to Article 126.1 of the Fundamental Law.

The legislator has discretion to determine the conditions, procedures and amount of material support. Legal regulation may not, however, be introduced in such a way that somebody realising one constitutional right is deprived of the opportunity to realise another. Judges availing themselves of a constitutional right to work after retirement or resignation, as defined in Article 43 of the Fundamental Law, may not be deprived of the guarantees of judicial independence, including measures of legal protection, material and social security.

The legislator may not, therefore, single out a particular category of retired judges as not entitled to receive a lifelong monthly monetary allowance on grounds which are unrelated to the status of a judge and his or her professional work. Such a legislative regulation is contrary to the aim of establishing constitutional guarantee of material support of judges as part of their independence, does not meet the principle of common status for all judges and violates the principle of equality among retired judges who are not working and those working in other positions than that of judge.

The provisions of the first and second sentences of Article 138.5 of Law no. 2453 concerning the termination of payments to retired judges of a lifelong

monthly monetary allowance for the period of their work are inconsistent with the constitutional provisions on the inadmissibility of narrowing the content or scope of the existing guarantees of judges independence when adopting new laws or introducing amendments to existing laws. They are thus out of line with Article 126.1 of the Fundamental Law.

Languages:

Ukrainian, Russian (translation by the Court).



Identification: UKR-2013-2-004

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 12.06.2013 / **e)** 4-rp/2013 / **f)** Official interpretation of the provisions of Article 127.5 of the Constitution in conjunction with Articles 127.3 and 65 of the Law on Judicial System and Status of Judges / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 49/2013 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Judges, selection, requirements / Personal and moral values.

Headnotes:

The Constitution and the legislation provide an exhaustive list of requirements for those wishing to be part of the selection process for appointment as judges. The legal mechanism for selecting judges includes an assessment not only of their theoretical knowledge of the law and readiness to administer justice, but also of their personal and moral characteristics.

Summary:

I. The process of the appointment of a professional judge in courts of general jurisdiction and grounds for dismissal from this position is set out in the Basic Law

(Articles 85.1.27, 126.4, 126.5, 127.3, 128.1). The content of those provisions concerning procedure, appointment and election for a judicial position are specified in the Law on Judicial System and Status of Judges no. 2453, 7 July 2010 (hereinafter, the “Law”) which, *inter alia*, establishes requirements for those persons wishing to apply to the High Qualifications Commission of Judges (hereinafter, the “Commission”) for participation in the selection of candidates and for candidates already involved in a relevant selection process.

Under Article 127.3 of the Constitution a citizen of Ukraine, of at least twenty-five years old, who has a higher legal education and has work experience in the sphere of law for a minimum of three years, has resided in Ukraine for at least ten years and has command of the state language, may be recommended for the office of judge by the Qualification Commission of Judges.

Article 64.1 of the Law contains similar requirements for candidates concerning citizenship, age, length of service, duration of residence in Ukraine and command of the state language. Article 64.2 states that citizens shall not be eligible for recommendation for a position of a judge if they have been found by a court to have limited legal capacity or legal incapacity; are suffering from chronic mental or other diseases which prevent them from performing judicial duties or have an outstanding or unquashed conviction.

The provisions of Article 65 of the Law, in conjunction with Article 68.4 (according to which those persons meeting the established requirements for candidacy shall be admitted to take the examination) should be understood in such a way that the list of requirements specified in Article 127.3 of the Constitution and Article 64.1 and 64.2 is exhaustive. Anyone meeting the requirements established by the legislative and constitutional provisions above is therefore entitled to apply to the Commission to take part in the selection process.

The Law requires candidates to take an examination to reveal the level of their general theoretical knowledge, undergo special checks (Article 68.1) and special training (Article 69) and pass a qualifying examination (set for those who have taken special training and wish to be recommended for appointment for a judicial position). This is designed to identify the extent of candidates’ theoretical knowledge and level of professional training, and their degree of readiness to administer justice as well as personal and moral qualities (Article 70).

Analysis of Article 70.2 of the Law in conjunction with Articles 66, 68, 71 and 91 of the Law provides grounds for concluding that the law associates the revealing of candidates’ personal and moral qualities with holding a selection and their appointment for a judicial position for the first time.

II. The Commission’s powers are not, in the Constitutional Court’s view, limited by reference to the stage a candidate has reached in the process of being selected and appointed as a judge. The Commission is entitled to reveal a candidate’s personal and moral qualities, at the time of passing a qualification examination and during periods when he or she is in a “reserve” position, pending the filling of a vacant position, or pending resolution of an issue where he or she has been recommended for judicial office having won a contest.

The legal mechanism for a selection of candidates established by the Law provides an objective assessment of candidates’ personal and moral qualities as well as their professional qualities.

III. Judge V. Shyshkin attached a dissenting opinion.

Languages:

Ukrainian, Russian (translation by the Court).



Identification: UKR-2013-2-005

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 26.06.2013 / **e)** 5-rp/2013 / **f)** Official interpretation of the provisions of Articles 17.2.2, 26.1.8 and 50.1 of the Law on Execution Proceedings / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 50/2013 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.7.2 Institutions – Judicial bodies – **Procedure**.
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:

Court, ruling, deferment of execution / Execution proceedings, initiation, grounds.

Headnotes:

A ruling on the deferment of execution of a decision of a commercial court is not grounds for initiation of new execution proceedings. It should be executed within the remit of the execution proceedings initiated previously.

Summary:

1. The applicant, the stock company “Kharkivoblenergo”, requested an interpretation from the Constitutional Court as to whether a ruling by a commercial court on the deferment of execution of a court decision was a separate execution document which should be executed in the general order provided for by the Law on Execution Proceedings, 21 April 1999, no. 606-XIV (hereinafter, the “Law”) and whether a ruling on deferment of execution of a commercial court decision was grounds for the initiation of new execution proceedings.

II. The Constitutional Court analysed the provisions of the Constitution, the Commercial and Procedural Code (hereinafter, the “Code”) and the Law in terms of the issues raised in the constitutional appeal. It arrived at the following conclusion.

The Constitutional Court has previously indicated that execution of a court decision is an integral part of the universal right to judicial protection. It comprises a set of actions defined by legislation aimed at the protection and restoration of violated rights, freedoms, legal interests of natural and legal entities, society, state (item 2 of the motivation part of decision 13 December 2012, no. 18-rp/2012). Failure to execute a court decision strikes at the core of the right to fair trial (item 3 of the motivation part of decision, 25 April 2012, no. 11-rp/2012).

The right to judicial protection is the constitutional guarantee of human and citizens` rights and freedoms. Mandatory execution of court decisions forms part of the right to fair judicial protection.

Decisions are enforced on the basis of the execution documents which are the grounds for initiation of the execution proceedings by the state enforcement officer and performance of the execution actions. These documents are execution letters issued by courts; orders of commercial courts; rulings, court resolutions in cases envisaged by law and other documents defined in Article 17.2 of the Law.

Execution of a decision of a commercial court shall be performed on the grounds of the issued order which is an execution document (Article 116.1 of the Code).

Certain articles of the Code and the Law make provision for exceptions to the general order of the enforcement of decisions of a commercial court.

Under Article 121 of the Code, in circumstances where execution of a decision is complicated or impossible, upon the appeal of a party, state enforcement officer, prosecutor or upon its own initiative the commercial court which issued the execution document, as an exception, depending on the circumstances of the case, may postpone or defer execution of a decision (paragraph 1); a ruling will then be issued on postponement or deferment of a decision which may be disputed in the established order (paragraph 3).

One of the grounds for application of Article 36 of the Law is the existence of objective circumstances which complicate or render impossible application of the general order of the enforcement of decisions. Pursuant to case-law, such circumstances might include the illness of the debtor or members of his family, financial straits of a debtor, danger of bankruptcy (where the debtor is a legal entity), natural disaster and other emergencies.

The Constitutional Court noted that deferment should be based on the principles of adequacy and proportionality in order to strike a balance between the rights and legal interests of creditors and debtors. When considering whether to defer, a court must not change the essence of the decision adopted.

Analysis of the provisions of Articles 116 and 121 of the Code and Article 36 of the Law would indicate that the ruling of a commercial court on deferment of execution of a decision is an auxiliary procedural act on the part of a court, in reaction to obstacles which make it difficult or impossible for its decision to be executed. Such a ruling is derivative in nature from the court decision which decided on the case and is mandatory for the state executive service in execution of the relevant court order within the limits of open execution proceedings.

Having considered the various stages of commercial proceedings, the process of execution of decisions of a commercial court on the grounds of order, the legal nature of a ruling of a commercial court on the deferment of execution of a court decision, the Constitutional Court concluded that such a ruling is not the ground for initiation of the new execution proceedings but should be executed within the remit of the execution proceedings initiated previously.

Languages:

Ukrainian, Russian (translation by the Court).

*Identification:* UKR-2013-2-006

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 11.07.2013 / **e)** 6-rp/2013 / **f)** Official interpretation of the provisions of Article 59.1 of the Constitution and Article 44.1 of the Economic Procedural Code (case on the reimbursement of expenses for legal services in economic proceedings) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.7.15 Institutions – Judicial bodies – **Legal assistance and representation of parties.**

4.7.15.2 Institutions – Judicial bodies – Legal assistance and representation of parties – **Assistance other than by the Bar.**

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:

Court expenses, legal services, reimbursement.

Headnotes:

Under the Economic Procedural Code, in the context of Article 59 of the Constitution, the court costs which are to be reimbursed to a legal entity in economic proceedings, are the sums expended by that entity on the costs of a lawyer, unless otherwise provided for in the legislation.

Summary:

I. The applicant, a small private small enterprise named “Maksyma”, asked the Constitutional Court for an official interpretation of the provisions of Article 59.1 of the Constitution and Article 44.1 of the Economic Procedural Code (hereinafter, the “Code”) on court expenses to be paid for legal services, provided not by a lawyer but by another specialist in

the legal field, and whether a subject of appeal to the economic court, including a legal entity, has the right to be reimbursed for the expense of legal services, provided by a specialist in law, in the event a claim in an economic matter was satisfied.

II. Article 59.1 of the Constitution sets out the universal right to legal assistance, an inalienable individual right. Implementation of this right may depend on the status of an individual and the nature of his or her legal relationships with other subjects of law. The way such assistance is assured is dependent on the will of the individual striving to obtain it; the universal constitutional right to legal assistance is, by its nature, a guarantee of implementation, protection and preservation of other human and citizens’ rights and freedoms, which underlines its social importance. Recourse to court to protect the universal right to legal assistance is guaranteed directly on the basis of Article 8.3 of the Constitution.

Pursuant to Article 59.2 of the Constitution, advocateship serves to provide the right to protection against accusation and as an extension of legal assistance when cases are being decided in courts and other state authorities.

Article 12.1 of the Civil Procedural Code and Article 16.2 of the Code of Administrative Justice allow legal assistance to be provided by lawyers or other specialists in law in the order and in cases set out in the law.

Article 59.1 of the Constitution envisages that legal assistance may be provided on a paid or a free basis.

The grounds, limits and order of reimbursement of court expenses for legal assistance, provided both by lawyers and other specialists in law, are regulated in Articles 79.3.2, 84, 88, 89 of the Civil Procedural Code and Articles 87.3.1, 90, 94, 95, 96, 97 and 98 of the Code of Administrative Justice. In some cases, reimbursement will only be countenanced if the legal assistance is provided by a lawyer (Articles 48.3, 49.5 of the Code, Articles 118.1.1, 119, 120, 124, 125 and 126 of the Criminal Procedural Code).

Analysis of the legislative principles of rendering legal assistance and the order of reimbursement of court expenses for such assistance would indicate that the legislator applied an individual approach to the definition of rendering legal assistance and the order of reimbursement of the court’s expenses for such assistance.

The Constitutional Court started from the premise that a legal entity decides individually on the selection of his or her representative in the economic court, but the state will only guarantee reimbursement of expenses for legal services provided to such entity by a lawyer (Article 44.1 of the Code). These expenses will be reimbursed in the order established by the procedural law (Article 49.5 of the Code).

The provisions of the Code did not, in the Constitutional Court's view, envisage reimbursement of expenses for legal services provided by a specialist in law who was not a lawyer. However, this does not preclude legal settlement of the issue on compensation for such expenses to the subject of the right to appeal to the economic court for services provided by such a specialist.

In the case in point, a question had arisen over the possibility of including within the court expenses sums paid by a legal entity for services provided to them in economic proceedings by a specialist in law other than a lawyer. The provisions of Article 44.1 of the Code, should, in the context of Article 59 of the Constitution, be understood as reading that in economic proceedings the expenses for legal services which will be reimbursed are sums expended by the legal entity on a lawyer, unless the legislation provides otherwise.

Languages:

Ukrainian, Russian (translation by the Court).



United States of America Supreme Court

Important decisions

Identification: USA-2013-2-004

a) United States of America / **b)** Supreme Court / **c)** / **d)** 24.06.2013 / **e)** 11-345 / **f)** Fisher v. University of Texas at Austin, *et al.* / **g)** 133 *Supreme Court Reporter* 2411 (2013) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.2.2.2 Fundamental Rights – Equality – Criteria of distinction – **Race**.

5.2.3 Fundamental Rights – Equality – **Affirmative action**.

Keywords of the alphabetical index:

University, admission / Deference, judicial / Diversity, racial, university, student body / Racial classification, scrutiny, strict.

Headnotes:

Racial classifications are inherently suspect under the principle of equal protection of the laws, and will be constitutional only if they are narrowly tailored to further compelling governmental interests.

Racial classifications are subject to strict judicial scrutiny to determine if they are narrowly tailored to further compelling governmental interests.

Remediation of past discrimination cannot serve as a constitutionally compelling interest supporting the validity of a university's admissions policy.

The educational benefits that flow from a diverse student body are an interest that can constitutionally justify the consideration of race as a factor in university admissions processes.

In making a determination as to whether to adopt a race-conscious admissions policy in order to serve a constitutionally valid compelling interest, universities

should receive some judicial deference, owing to their expertise and experience.

A race-conscious university admissions program cannot use a quota system, but instead must be flexible enough to ensure that an applicant's race is not the defining feature of her or his application.

As to whether a race-conscious admissions policy is narrowly tailored, a university should receive no judicial deference: at all times, a university must demonstrate, and the judiciary must determine after reviewing the evidence showing how the process works in practice, that the university's implementation of its objectives is valid.

Narrow tailoring requires that the means used be necessary to the accomplishment of the university's purpose; thus, a reviewing court must be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.

Summary:

I. Abigail Fisher applied to the University of Texas at Austin for admission to its 2008 entering undergraduate class. Her application was rejected. Fisher, who is Caucasian, sued the University and University officials in federal court, alleging that the University's policy of considering an applicant's race as a factor in its undergraduate admissions process violated the Equal Protection Clause in Section One of the Fourteenth Amendment to the U.S. Constitution. The Clause states that no State shall "deny to any person within its jurisdiction the equal protection of the laws." The University's policy did not assign race as a numerical value for each applicant, but did include it as one consideration in advancing its goal of increasing racial minority enrolment on campus.

The District Court granted the University's pre-trial motion for summary judgment, dismissing Fisher's claim. The federal Court of Appeals for the Fifth Circuit affirmed.

II. The U.S. Supreme Court accepted review, and concluded that the Court of Appeals had applied an incorrect standard in its review of the University's policies. The Supreme Court began by setting forth basic equal protection principles, as articulated in its case law. As a starting proposition, any official action that treats a person differently on account of his or her race or ethnic origin is inherently suspect under the Equal Protection Clause; thus, racial classifications designed to advance any goal, even if benign, must be subject to strict judicial scrutiny.

Strict scrutiny review places on any admissions program using racial classifications the burden of showing that the measure in question serves a compelling interest and is narrowly tailored to achieve that goal. As to the first of these requirements, the remediation of past discrimination cannot serve as a compelling interest, because a university's broad educational mission is incompatible with making the judicial, legislative, or administrative findings of constitutional or statutory violations necessary to justify remedial racial classification schemes. However, the Court has identified one compelling interest that could justify the consideration of race: the interest in the educational benefits that flow from a diverse student body. In this regard, universities should receive some judicial deference in making this determination, owing to their expertise and experience.

The narrow tailoring requirement, meanwhile, assesses the validity of the means used to implement the compelling interest. To be narrowly tailored, a race-conscious admissions program cannot use a quota system, but instead must be flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of her or his application. In addition, narrow tailoring requires that the means used be necessary to the accomplishment of the university's purpose.

In the instant case, the Court of Appeals erred in its application of the narrow tailoring requirement. The Court of Appeals read the Supreme Court's precedents to require the granting of judicial deference to an educational institution's implementation of its diversity goals. Thus, the Court of Appeals ruled that Fisher could challenge only whether the University's decision to use race as an admissions factor was made in "good faith". The Court of Appeals presumed that the University had acted in good faith and imposed on Fisher the burden of rebutting that presumption. According to the Supreme Court, this grant of deference was not permissible under strict scrutiny review: instead, while a court can take into account a university's experience and expertise in adopting or rejecting certain admissions processes, a university should receive no deference establishing a presumption of validity. At all times, it is a university's obligation to demonstrate, and the judiciary's duty to determine after reviewing the evidence showing how the process works in practice, that admissions processes ensure that all applicants are evaluated as individuals and not in ways that make applicants' race or ethnicity the defining feature of their applications. The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.

As to the “necessity” requirement in narrow tailoring, this involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications. The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. The Court of Appeals did not apply this “necessity” standard.

The Supreme Court vacated the judgment of the Court of Appeals. It remanded the case to that court for assessment of the University’s admissions process under the correct analysis: the Court of Appeals must determine whether the University has offered sufficient evidence to prove that its admissions program is narrowly tailored to achieve the educational benefits of diversity.

III. The Court’s decision was adopted by a 7-1 vote among the Justices. Two of the Justices wrote separate concurring opinions. The dissenting Justice authored a separate opinion.

Supplementary information:

The Court’s opinion in particular cited three of its decisions:

- *Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003);
- *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003); and
- *Regents of University of California v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978).

Languages:

English.



Identification: USA-2013-2-005

a) United States of America / **b)** Supreme Court / **c)** / **d)** 25.06.2013 / **e)** 12-96 / **f)** Shelby County, Alabama v. Holder *et al* / **g)** 133 *Supreme Court Reporter* 2612 (2013) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.8.4 Institutions – Federalism, regionalism and local self-government – **Basic principles.**

4.8.8.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods.**

5.2.2.2 Fundamental Rights – Equality – Criteria of distinction – **Race.**

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

Keywords of the alphabetical index:

Sovereignty, equal, between federal states / Legislation, regional, prior authorisation by the federal state / Federal balance / Federal state, power, diffusion, purpose / Federalism, asymmetric.

Headnotes:

The federal government lacks a general right to review and veto enactments of its federal units before they go into effect.

Equal sovereignty among the States is a fundamental principle of federalism.

All powers, including the exercise of broad regulatory authority over elections, not specifically granted to the federal government in the Constitution are reserved to the States or citizens.

The federal balance found in the Constitution is not just an end in itself, but also secures to citizens the liberties that derive from the diffusion of sovereign power.

Legislation that sharply departs from fundamental federalism principles will be constitutionally invalid if the burdens it imposes are not justified by current needs or if any disparate geographical coverage that it presents is not sufficiently related to the problem that it targets.

Summary:

I. The U.S. Congress enacted the Voting Rights Act of 1965 (hereinafter, the “VRA”) to address entrenched racial discrimination in voting. Section 2 of the VRA, which bans any “standard, practice, or procedure” that “results in a denial or abridgement of the right of any citizen . . . to vote on account of race or colour,” applies throughout the United States. Certain other Sections of the VRA apply only to parts of the U.S.: Section 5 requires certain States, as well as certain political subdivisions in other States, to

obtain pre-clearance from federal government authorities before making changes in their voting procedures; and Section 4.b sets forth the criteria for defining the Section 5 “covered jurisdictions”. The Section 4.b criteria are set forth in a “coverage formula”: the “covered jurisdictions” are States or political subdivisions that maintained tests or devices as prerequisites to voting in the 1960s and early 1970s, and had low voter registration or turnout in those years.

The Congress has re-authorised and amended the VRA four times, most recently in 2006. In 2006, Congress re-authorised the VRA for an additional 25 years. It did not change the Section 4.b coverage formula. Nine States and several additional political subdivisions in other States fall within the scope of Sections 4.b and 5.

Shelby County is a political subdivision of the State of Alabama, a covered jurisdiction. In 2010, Shelby County filed suit in federal court, challenging the constitutionality of Sections 4.b and 5. The County claimed that these provisions were unconstitutional because they imposed federal requirements on some, but not all, States and political subdivisions in other States. The U.S. District Court upheld the provisions’ validity, and the federal Court of Appeals for the District of Columbia Circuit affirmed the District Court’s decision.

II. The U.S. Supreme Court accepted review and reversed the judgment of the Court of Appeals, finding that Section 4.b is unconstitutional.

In its review of the VRA, the Supreme Court noted that the legislation represents a drastic departure from basic principles of federalism. For one thing, Section 5 requires States to obtain federal permission before enacting any law related to voting, even though, despite the fact that the U.S. Constitution dictates that State legislation may not contravene federal law, the federal government lacks a general right to review and veto state enactments before they go into effect. In addition, although the federal Constitution and laws are supreme, the U.S. Constitution in the Tenth Amendment provides that all powers not specifically granted to the federal government are reserved to the States or citizens, and the States exercise broad powers to regulate elections. Moreover, the VRA’s disparate treatment of certain States implicates the fundamental federalism principle of equal sovereignty among the States. The Court also noted as a general proposition that the federal balance found in the Constitution is not just an end in itself, but also secures to citizens the liberties that derive from the diffusion of sovereign power.

According to the Court, because the VRA constitutes “extraordinary legislation otherwise unfamiliar to our federal system”, its constitutionality must be subject to certain tests, despite the fact that the invalidation of an act of the federal legislature is the gravest and most delicate duty that the Court is called upon to perform. Thus, the current burdens that the legislation imposes must be justified by current needs. Also, any disparate geographical coverage must be sufficiently related to the problem that it targets.

The Court determined that the Section 4.b coverage formula did not satisfy these tests. Its infirmity is found in the fact that the conditions that originally justified it no longer characterise voting in the covered jurisdictions. In this regard, the Court emphasised that Congress in 2006 based the coverage formula on evidence comprising data and practices from the 1960s and early 1970s. Thus, in those years the covered jurisdictions employed voter requirements such as literacy tests; however, the VRA prohibited such requirements, and they have been banned nationwide for over forty years. As to data, when the VRA was first enacted, voter registration and turnout in the covered jurisdictions was very low, providing compelling evidence of racial disparity that justified the pre-clearance remedy and the coverage formula. But currently, statistical evidence shows that voter registration and turnouts have risen dramatically. In all, because the coverage formula continued in 2006 was based on outdated data and eradicated practices, the current burdens imposed by the VRA are not justified by current needs and the VRA’s disparate geographical coverage is not sufficiently related to the perceived problem that it targets.

Certainly, the Court recognised, it is undoubted that voting discrimination still exists in the United States. However, the Section 4.b coverage formula does not continue to satisfy constitutional requirements. The Court did not rule on Shelby County’s claim that Section 5 also is unconstitutional. Also, the Court emphasised that its ruling does not affect the rest of the VRA, including Section 2.

III. The Court’s decision was adopted by a 5-4 vote among the Justices. One Justice wrote a separate concurring opinion, and one of the dissenting Justices authored a dissenting opinion, in which the three other dissenting Justices joined.

Cross-references:

The Court’s opinion often refers to the Court’s 1966 decision in *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966). In that decision, the Court upheld the validity of the entire VRA, concluding that the legislation’s extraordinary

burdens on federalism principles were justified to address voting discrimination where it persisted on a pervasive scale.

In 2009, the Court raised constitutional concerns about the VRA similar to those it addressed in *Shelby County, Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009). However, it decided the case solely on statutory grounds.

Languages:

English.



Identification: USA-2013-2-006

a) United States of America / **b)** Supreme Court / **c)** / **d)** 26.06.2013 / **e)** 12-144 / **f)** Hollingsworth v. Perry / **g)** 133 *Supreme Court Reporter* 2652 (2013) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

1.4.9.4 Constitutional Justice – Procedure – Parties – **Persons or entities authorised to intervene in proceedings**.

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

4.9.13 Institutions – Elections and instruments of direct democracy – **Post-electoral procedures**.

Keywords of the alphabetical index:

Referendum, initiative, ballot / *Locus standi*, interest, injury particularised / Harm, personal / Law, defence, personal interest.

Headnotes:

The jurisdiction of federal courts is limited to concrete cases; an element of this requirement, based on separation of powers principles, is that parties to the litigation must establish that they have standing by

showing that they are seeking a remedy for a personal and tangible harm.

To establish standing, litigants are required to prove that they have suffered a concrete and particularised injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favourable judicial decision.

A generalised grievance is insufficient to confer standing for the satisfaction of constitutional requirements.

A party seeking to establish standing to defend a law's constitutionality must show a personal stake in defending the law's enforcement that is distinguishable from the general interest of all members of the populace.

For a federal court to have jurisdiction, the Constitution requires that an actual controversy persist throughout all stages of the litigation; therefore, standing must also be met by persons seeking appellate review as well as those appearing in a proceeding at a court of first instance.

Summary:

I. In the State of California, through the direct democracy process of "initiative", citizens have the power to propose amendments to the State Constitution and have the proposals placed on a state-wide election ballot for their adoption or rejection by the voters. In 2008, in a ballot initiative known as "Proposition 8", voters amended the California Constitution to define marriage in Article I, Section 7.5 as only a union between a man and a woman.

Two same-sex couples in California who wished to marry filed suit in federal court, challenging Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution. The lawsuit named as defendants the Governor of California and other state and local officials responsible for enforcing California's marriage laws. The defendants, however, declined to defend the law in the litigation, although they continued to enforce it. The U.S. District Court meanwhile allowed another group of individuals – the "proponents" of the ballot initiative, to intervene in the litigation to defend Proposition 8's constitutionality. In California's Elections Code, a "proponent" of an initiative is a California resident who submits the text of a proposed initiative to the State Attorney General with a request that he or she prepare the measure for inclusion on an electoral ballot.

After the trial, the U.S. District Court declared Proposition 8 unconstitutional and permanently enjoined the California officials named as defendants from enforcing the law. The defendants chose not to appeal the District Court's decision; however, the proponents of the initiative did. When the proponents filed their appeal, the federal Court of Appeals for the Ninth Circuit raised the question of their standing under Article III of the U.S. Constitution. Article III states that the jurisdiction of federal courts is limited to certain "cases" and "controversies", and an element of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so.

The Court of Appeals certified a question to the California Supreme Court, asking whether under California law an initiative's proponents possess either a particularised interest in the initiative's validity or the authority to defend the initiative's constitutionality when the public officials charged with that duty refuse to do so. The California Supreme Court answered in the affirmative. It did not address whether proponents have a particularised interest of their own in an initiative's validity, but did state that California law authorises proponents to assert the state's interest in an initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily appeal such a judgment decline to do so.

Based on this answer, the Court of Appeals concluded that the proponents had standing under federal law to defend the constitutionality of Proposition 8. On the merits, the Court of Appeals affirmed the District Court's decision that Proposition 8 was unconstitutional.

II. The U.S. Supreme Court accepted review and reversed the Court of Appeals on the standing question. Reiterating principles from its case law, the Supreme Court stated that the doctrine of standing serves vital interests in the federal system of separation of powers, by preventing the judicial process from being used to usurp the powers of the political branches. For a federal court to have authority under the Constitution to settle a dispute, a party before it must seek a remedy for a personal and tangible harm. Thus, litigants are required to prove that they have suffered a concrete and particularised injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favourable judicial decision. A generalised grievance is insufficient to confer standing for the satisfaction of Article III's requirements.

Of particular relevance to the instant case, the Court noted, was the fact that Article III requires that an actual controversy persist throughout all stages of the litigation. Although most standing cases consider whether persons appearing in a federal court of first instance have satisfied the requirement, standing must also be met by persons seeking appellate review. In the instant case, the only individuals who sought to appeal were the initiative's proponents who had intervened in the court of first instance, but had not been ordered by that court to do or refrain from doing anything. While recognising that proponents have a special role in the initiative process of enacting a law, the Supreme Court also noted that they do not have a role, special or otherwise, in its enforcement. They therefore had no personal stake in defending the constitutional amendment's enforcement that is distinguishable from the general interest of every California citizen. Thus, the proponents' interest in the upholding of Proposition 8 was not sufficiently particularised to create a case or controversy under Article III.

In regard to the California Supreme Court's ruling, the U.S. Supreme Court stated that it does not question the right of initiative proponents to defend laws in the California courts. However, the Court emphasised that standing in federal court is a question of federal, not State, law.

The Court vacated the judgment of the Court of Appeals and remanded the case with instructions to dismiss the appeal. As a result of its decision on the standing question, the Court did not address the constitutionality of Proposition 8.

III. The Court's decision was adopted by a 5-4 vote among the Justices. One of the dissenting Justices authored a separate opinion, which was joined by the other three dissenters.

Languages:

English.



Identification: USA-2013-2-007

a) United States of America / **b)** Supreme Court / **c)** / **d)** 26.06.2013 / **e)** 12-307 / **f)** United States v. Windsor / **g)** 133 *Supreme Court Reporter* 2675 (2013) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

4.8.8.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods**.

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

5.3.34 Fundamental Rights – Civil and political rights – **Right to marriage**.

Keywords of the alphabetical index:

Due process / Equal protection of rights / Jurisdiction, sufficient controversy / Marriage, same-sex / Prudential limits on judicial power / Standing to sue.

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.

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.

Prudential considerations, such as the avoidance of deciding abstract questions of wide public significance when other governmental institutions might be more competent to do so and judicial intervention is unnecessary, are matters of judicial self-governance and must be kept separate from constitutional requirements.

The definition and regulation of marriage are within the authority of the separate States, and federal action to distinguish a sub-set of State-sanctioned marriages confronts a heavy burden of justification.

Constitutional due process and equal protection principles prohibit government from disparately treating a politically unpopular group simply on the basis of a bare legislative desire to harm that group.

Summary:

I. In 1996, the U.S. Congress enacted the Defence of Marriage Act (hereinafter, the “DOMA”). In Section Three, the meaning of the word “spouse” as found in all federal legislation and regulations was limited only to a “person of the opposite sex who is a husband or a wife.” DOMA did not prohibit States from enacting laws permitting same-sex marriages.

In 2007, Thea Spyer and Edith Windsor were married in Canada. Both women were residents of the State of New York, and the State of New York recognises the validity of their Canadian marriage.

When Spyer died in 2009, Windsor inherited all of her property. In regard to federal estate tax, Windsor sought to claim an exemption that excludes from taxation any interest in property that passes from the decedent to that person’s surviving spouse. She paid an estate tax in the amount of 363,053 U.S. Dollars, but also sought a refund. The federal Internal Revenue Service denied her claim on the basis DOMA’s definition of “spouse”. She filed suit in federal court, contending that DOMA violated the guarantee of equal protection in the Fifth Amendment to the U.S. Constitution.

While the case was pending before the U.S. District Court, the U.S. Attorney General announced that the Department of Justice would no longer defend the constitutionality of DOMA Section Three. The Attorney General stated that the President of the United States had determined that classifications based on sexual orientation should be subject to a heightened equal protection standard of scrutiny. However, although the President instructed the Department of Justice not to defend DOMA in the instant case, he also decided that the executive branch would continue to enforce Section Three, thereby allowing the judiciary to fulfil its role as the final arbiter of the constitutional claims in question. In response to this notice from the Attorney General, a group of legislators in the U.S. House of Representatives – the Bipartisan Legal Advisory Group (hereinafter, the “BLAG”) – voted to intervene as an interested party in the litigation in order to defend Section Three’s constitutionality. The District Court permitted BLAG to intervene.

The District Court ruled that Section Three was unconstitutional and ordered the U.S. Treasury to refund Windsor’s tax payment. The federal Court of Appeals for the Second Circuit affirmed this decision and the U.S. Supreme Court accepted review. Meanwhile, the U.S. government did not pay the refund and the executive branch continued to enforce Section 3.

II. Before ruling on the merits, the Supreme Court addressed matters of jurisdiction and prudential limits on the exercise of judicial power. As to jurisdiction, Article III, Section 2 of the U.S. Constitution states that the jurisdiction of federal courts is limited to certain “cases” and “controversies”. One element of this requirement is that a plaintiff must establish standing: the claimed injury must be concrete, particularised, and actual or imminent; fairly traceable to the challenged action; and remediable by a favourable ruling. The Court concluded that Windsor satisfied these requirements: she suffered a remediable injury when she was required to pay a specific tax assessment.

A second jurisdictional issue, whether the United States retained an interest sufficient to create an Article III controversy, arose from the executive branch’s decision not to defend DOMA’s constitutionality but to continue to enforce Section Three. The Court concluded that a sufficient controversy existed because a judicial order directing the U.S. Treasury to pay money is a real and immediate economic injury to the government, regardless of the executive branch’s disagreement with DOMA. This would not have been the case, the Court noted, if the executive had paid Windsor the refund to which she was entitled under the District Court’s ruling.

The Court also addressed whether prudential considerations arising from the executive branch’s position should preclude its exercise of jurisdiction. The Court emphasised that prudential considerations, such as the avoidance of deciding abstract questions of wide public significance when other governmental institutions might be more competent to do so and judicial intervention is unnecessary, are matters of judicial self-governance and must be kept separate from constitutional Article III requirements. Thus, even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that a federal court insist upon a level of concrete adverseness that is necessary for the sharp presentation of issues upon which the courts depend for illumination of difficult constitutional questions. In the instant case, the Court concluded that BLAG’s sharp adversarial presentation of the issues, coupled with the importance of the questions presented to the federal government and large segments of the public, satisfied these prudential concerns.

On the merits, the Court concluded that DOMA unconstitutionally deprived the equal liberty of persons, as guaranteed in the Fifth Amendment. The definition and regulation of marriage, by history and tradition, are within the authority of the separate States. DOMA’s operation was directed toward a

class of people that the laws of New York sought to protect, and its primary effect was to identify and make unequal a sub-set of State-sanctioned marriages. The constitutional due process and equal protection principles prohibit the federal government for disparately treating a politically unpopular group simply on the basis of a bare legislative desire to harm that group.

III. The Court’s decision was adopted by a 5-4 vote among the Justices. Three of the dissenting Justices authored separate opinions.

Supplementary information:

At the time of the Supreme Court decision, twelve of the fifty States recognised same-sex marriages.

Languages:

English.



European Court of Human Rights

Important decisions

Identification: ECH-2013-2-001

a) Council of Europe / **b)** European Court of Human Rights / **c)** Section V / **d)** 06.12.2012 / **e)** 12323/11 / **f)** *Michaud v. France* / **g)** Information Note on the Court's case-law no. 158 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

5.3.36.1 Fundamental Rights – Civil and political rights – Inviolability of communications – **Correspondence.**

Keywords of the alphabetical index:

Lawyer, professional conduct, guidelines / Lawyer, information, access / Lawyer, professional secrecy / Money laundering, fight / Lawyer, money laundering, reporting, obligation.

Headnotes:

Lawyers have a fundamental right of professional privilege protected by Article 8 ECHR. The right is not, however, inviolable and may be subject to interference provided (a) the interference is not excessive having regard to the importance of the legitimate aim pursued in the public interest, (b) any information received or obtained as part of the lawyer's defence role remains privileged and (c) a filter protecting professional privilege exists whereby the information concerned is shared with a legal professional subject to the same rules of conduct and elected by his or her peers and is only transmitted to the relevant administrative authority if the relevant statutory conditions are met.

Summary:

I. In July 2007 the National Bar Council decided to adopt a professional regulation intended, *inter alia*, to secure the implementation of obligations imposed on the legal profession in the context of the fight against money laundering, pursuant to European Directive

2005/60/EC. In consequence, lawyers were obliged in certain circumstances to report to the national financial intelligence unit (hereinafter, "Tracfin") sums of money belonging to their clients where they suspected that these had been obtained through a criminal activity such as money laundering. In October 2007 the applicant, a lawyer, applied to the *Conseil d'État* to have the Bar Council's decision set aside. On 23 July 2010 his application was dismissed.

II. The obligation placed on lawyers to report suspicions constituted an interference with their right to respect for their correspondence, in that they were required to transmit to an administrative authority information concerning another person obtained through exchanges with him or her. It also amounted to an interference with their right to respect for their private life, which covered activities of a professional or business nature. Admittedly, the applicant had not had reason to report such suspicions, nor had he been sanctioned pursuant to the impugned regulations for having omitted to do so. However, either he complied with the regulations if the circumstances in question arose, or, should he fail to do so, he would be exposed to disciplinary sanctions, including disbarment. Thus, the obligation to report suspicions represented a "continuing interference" with the applicant's exercise, in his capacity as a lawyer, of the rights safeguarded by Article 8 ECHR in respect of professional exchanges with his clients.

The obligation placed on lawyers to report suspicions was in accordance with the law as set out in the Monetary and Financial Code. The law was accessible and clear in its description of the activities to which it was applicable. The impugned interference was intended to combat money laundering and related criminal offences, thus pursuing the legitimate aim of the prevention of disorder and the prevention of crime.

The obligations of vigilance and reporting of suspicions resulted from the transposition of European directives into the Monetary and Financial Code that France had been required to carry out on account of the legal obligations arising from its membership of the European Union. Referring to the judgment in *Bosphorus Airways*, the Government considered that France should be presumed to have complied with the requirements of the Convention, given that it had merely discharged those obligations and that it had been established that the European Union afforded fundamental rights equivalent protection to that guaranteed by the Convention. However, the present case differed from the *Bosphorus Airways* case in two main ways. It concerned France's implementation of directives

which bound the member States with regard to the result to be attained, but left them free to choose the method and form. The issue of whether, in complying with the obligations resulting from its membership of the European Union, France had in consequence sufficient discretion to thwart application of the presumption of equivalent protection was not therefore irrelevant. Further and most importantly, the *Conseil d'État*, in deciding not to request a preliminary ruling from the European Court of Justice although that court had not yet examined the question concerning Convention rights that was before it, had ruled before the relevant international machinery for supervision of fundamental rights, in principle equivalent to that of the Convention, had been able to demonstrate its full potential. Having regard to that decision and the importance of what was at stake, the presumption of equivalent protection was not applicable. The European Court of Human Rights was therefore required to determine whether the interference had been necessary within the meaning of Article 8 ECHR.

The European Court of Human Rights concurred with the *Conseil d'État's* analysis in its Judgment of 23 July 2010, which, after noting that Article 8 ECHR protected the fundamental right of professional privilege, held that subjecting lawyers to an obligation to report suspicions did not constitute an excessive interference in view of the public interest attached to the fight against money laundering and the guarantee represented by the exclusion from its scope of information received or obtained by lawyers when acting for clients in court proceedings, and information received or obtained in the context of providing legal advice (except where the legal adviser played, through his or her acts, an active role in the money laundering). Legal professional privilege was not inviolable. It had to be weighed against steps to combat the laundering of proceeds of unlawful activities, themselves likely to be used in financing criminal activities. The European directives followed that logic. Even if any lawyer implicated in a money-laundering operation were to be liable to criminal proceedings, this could not invalidate the decision to provide for punitive sanctions in a measure that had a specifically preventive aim. Finally, two elements were decisive in assessing the proportionality of the impugned interference. The first was related to the fact that lawyers were subject to the obligation to report suspicions only in two cases: firstly, where, in the context of their professional duties, they took part for and on behalf of their clients in financial or property transactions or acted as trustees; and, secondly, where, still in the context of their professional duties, they assisted their clients in preparing or carrying out transactions concerning certain defined operations. Thus, the obligation to

report suspicions concerned only activities which were remote from the role of defence entrusted to lawyers and which resembled those carried out by the other professionals who were also subject to the above obligation. The second element was the fact that the legislation had introduced a filter which protected professional privilege: lawyers did not transmit reports directly to Tracfin but, as appropriate, to the president of the Bar of the *Conseil d'État* and the Court of Cassation or to the president of the Bar of which they were members. Thus, the information was shared with a professional who was not only subject to the same rules of conduct but was also elected by his or her peers to ensure compliance with them, thus ensuring that professional privilege was not breached. The president of the relevant Bar transmitted the disclosure of suspicions to Tracfin only after ascertaining that the conditions laid down by the Monetary and Financial Code had been met.

Thus, as implemented and having regard to the legitimate aim pursued and the latter's particular importance in a democratic society, the obligation to report suspicions did not constitute a disproportionate interference with legal professional privilege. The European Court of Human Rights therefore held that there had been no violation of Article 8 ECHR.

Cross-references:

- *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, *Reports of Judgments and Decisions* 2005-VI, *Bulletin* 2005/2 [ECH-2005-2-002].

Languages:

English, French.



Identification: ECH-2013-2-002

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 19.02.2013 / **e)** 19010/07 / **f)** X and others v. Austria / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Adoption, homosexual partners, discrimination /
Sexual orientation, equality, right to adopt /
Homosexual, couple, adoption.

Headnotes:

While there is no obligation under Article 8 ECHR to extend the right to second parent adoption to unmarried couples, statutory exclusion of second parent adoption in a same-sex couple, by contrast to an unmarried different sex couple, is not shown to be necessary for the protection of the family in the traditional sense or for the protection of the interests of the child and thus amounts to discrimination within the meaning of Article 14 ECHR. Domestic legislation prohibiting second-parent adoption in same-sex couples appears to lack coherence in so far as it allows adoption by one person, including homosexuals. Several considerations – the existence of *de facto* family life, the importance of legal recognition thereof and the lack of evidence showing that it would be detrimental to a child to be brought up by a same-sex couple or to have two mothers and two fathers for legal purposes – weigh in favour of allowing the courts to examine in each individual case whether the requested adoption is in the child's best interests.

Summary:

I. The first and third applicants were two women living in a stable homosexual relationship. The second applicant was the third applicant's minor son. He was born out of wedlock. His father had acknowledged paternity but the third applicant had sole custody. The first applicant wished to adopt the second applicant in order to create a legal relationship between them without severing the boy's relationship with his mother and an adoption agreement was concluded to that end. However, the domestic courts refused to approve the agreement after finding that under domestic law adoption by one person had the effect of severing the family-law relationship with the biological parent of the same sex, so that the boy's adoption by the first applicant would sever his relationship with his mother, the third applicant, not his father.

II.a. Merits: The relationship between the three applicants amounted to "family life" within the meaning of Article 8 ECHR. Article 14 ECHR, taken in conjunction with Article 8 ECHR, was therefore applicable.

The Court saw no reason to deviate from its findings in *Gas and Dubois v. France* and concluded that the first and third applicants in the instant case were not in a relevantly similar situation to a married couple, so that there had been no violation of Article 14 ECHR in conjunction with Article 8 ECHR when their situation was compared to that of a married couple in which one spouse wished to adopt the other spouse's child.

However, the applicants were in a relevantly similar situation to an unmarried different-sex couple in which one partner wished to adopt the other partner's child. The Austrian Government had not argued that a special legal status existed which would distinguish an unmarried heterosexual couple from a same-sex couple and had conceded that same-sex couples could in principle be as suitable (or unsuitable) for adoption purposes, including second-parent adoption, as different-sex couples. Austrian law allowed second-parent adoption by an unmarried different-sex couple. In contrast, second-parent adoption in a same-sex couple was not legally possible. The relevant regulations of the Civil Code provided that any person who adopted replaced the biological parent of the same sex. As the first applicant was a woman, her adoption of her partner's child could only sever the child's legal relationship with his mother. Adoption could therefore not serve to create a parent-child relationship between the first applicant and the child in addition to the relationship with his mother.

The Court was not convinced by the Government's argument that the applicants' adoption request had been refused on grounds unrelated to their sexual orientation and that, therefore, the applicants were asking it to carry out an abstract review of the law. The domestic courts had made it clear that an adoption producing the effect desired by the applicants was impossible under the Civil Code. They had not carried out any investigation into the circumstances of the case. In particular, they had not dealt with the question whether there were any reasons for overriding the refusal of the child's father to consent to the adoption. In contrast, the regional court had underlined that the notion of "parents" in Austrian family law meant two persons of the opposite sex and had stressed the interest of the child in maintaining contact with both those parents.

Given that the legal impossibility of the adoption had consistently been at the centre of their considerations, the domestic courts had been prevented from

examining in any meaningful manner whether the adoption would be in the child's interests. In contrast, in the case of an unmarried different-sex couple they would have been required to examine that issue. The applicants had thus been directly affected by the legal situation of which they complained since the adoption request was aimed at obtaining legal recognition of the family life they enjoyed, all three could claim to be victims of the alleged violation.

The difference in treatment between the first and third applicants and an unmarried different-sex couple in which one partner sought to adopt the other partner's child had been based on their sexual orientation. The case was thus to be distinguished from *Gas and Dubois*, in which the Court had found that there was no difference of treatment based on sexual orientation between an unmarried different-sex couple and a same-sex couple as, under French law, second-parent adoption was not open to either.

There was no obligation under Article 8 ECHR to extend the right to second-parent adoption to unmarried couples. However, given that domestic law did allow second-parent adoption in unmarried different-sex couples, the Court had to examine whether refusing that right to (unmarried) same-sex couples served a legitimate aim and was proportionate to that aim.

The domestic courts and the Government had argued that Austrian adoption law was aimed at recreating the circumstances of a biological family. The protection of the family in the traditional sense was in principle a legitimate reason which could justify a difference in treatment. The same applied to the protection of the child's interests. However, in cases where a difference in treatment based on sex or sexual orientation was concerned, the Government had to show that the difference in treatment was necessary to achieve the aim. The Government had not provided any evidence to show that it would be detrimental to a child to be brought up by a same-sex couple or to have two mothers and two fathers for legal purposes. Moreover, under domestic law, adoption by one person, including one homosexual, was possible. If he or she had a registered partner, the latter had to consent to the adoption. The legislature therefore accepted that a child might grow up in a family based on a same-sex couple and that this was not detrimental to the child. There was also force in the applicants' argument that *de facto* families based on a same-sex couple existed but were refused the possibility of obtaining legal recognition and protection. These considerations cast considerable doubt on the proportionality of the absolute prohibition on second-parent adoption in same-sex couples.

The Government had further argued that there was no consensus among European States regarding second-parent adoption by same-sex couples and that consequently the State had a wide margin of appreciation to regulate that issue. However, the issue before the Court was not the general question of same-sex couples' access to second-parent adoption, but the difference in treatment between unmarried different-sex couples and same-sex couples in respect of such adoptions. Consequently, only ten Council of Europe member States, which allowed second-parent adoption in unmarried couples, might be regarded as a basis for comparison. Within that group, six States treated heterosexual couples and same-sex couples in the same manner, while four adopted the same position as Austria. The narrowness of that sample did not allow conclusions to be drawn as to a possible consensus among European States.

The instant case did not concern the question whether the applicants' adoption request should have been granted, but the question whether the applicants had been discriminated against on account of the fact that the courts had had no opportunity to examine in any meaningful manner whether the requested adoption was in the second applicant's interests, given that it was in any case legally impossible.

The Government had failed to give convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility in an unmarried different-sex couple, was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child. The distinction was therefore discriminatory. There had therefore been a violation of Article 14 ECHR in conjunction with Article 8 ECHR.

Cross-references:

- *Schalk and Kopf v. Austria*, no. 30141/04, 24.06.2010, *Reports of Judgments and Decisions* 2010;
- *Gas and Dubois v. France*, no. 25951/07, 15.03.2012.

Languages:

English, French.



Identification: ECH-2013-2-003

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 22.04.2013 / e) 48876/08 / f) Animal Defenders International v. the United Kingdom / g) *Reports of Judgments and Decisions* / h) CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Media, advertising, political, prohibition.

Headnotes:

A State could, consistently with the European Convention on Human Rights, adopt general measures which applied to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases.

Among the relevant considerations to be taken into account when balancing the right under Article 10 ECHR to impart information and ideas of general interest which the public was entitled to receive against the authorities' desire to protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media were the extent to which the regulatory regime governing political broadcasting had been subjected to exacting and pertinent review by parliamentary and judicial bodies, the degree to which the prohibition was circumscribed to address the precise risk identified with minimum impairment of the right of expression and the availability of alternative media for exercising that right.

Summary:

I. The relevant legislation (the Communications Act 2003) prohibited political advertising in television or radio services, the aim being to maintain impartiality in the broadcast media and to prevent powerful groups from buying influence through airtime. The prohibition applied not only to advertisements with a political content but also to bodies which were wholly or mainly of a political nature, irrespective of the content of their advertisements. The legislation was

the subject of a detailed review and consultation process by various parliamentary bodies, particularly in the light of the Court's judgment in the case of *VgT Verein gegen Tierfabriken v. Switzerland* (in which a ban on political advertising had been found to violate Article 10 ECHR), before it became law.

The applicant was a non-governmental organisation that campaigned against the use of animals in commerce, science and leisure and sought to achieve changes in the law and public policy and to influence public and parliamentary opinion to that end. In 2005 it sought to screen a television advertisement as part of a campaign concerning the treatment of primates. However, the Broadcast Advertising Clearance Centre (hereinafter, the "BACC") refused to clear the advert, as the political nature of the applicant's objectives meant that the broadcasting of the advert was caught by the prohibition in Section 321.2 of the Communications Act. The decision to refuse the applicant's advert was upheld by the High Court and the House of Lords, with the latter holding in a Judgment of 12 March 2008 ([2008] UKHL 15) that the prohibition of political advertising was justified by the aim of preventing Government and its policies from being distorted by the highest spender.

II. The Court found that the statutory prohibition of paid political advertising on radio and television had interfered with the applicant's rights under Article 10 ECHR. The interference was "prescribed by law" and pursued the aim of preserving the impartiality of broadcasting on public-interest matters and, thereby, of protecting the democratic process. This corresponded to the legitimate aim of protecting the "rights of others". The case therefore turned on whether the measure had been necessary in a democratic society.

The Court reiterated that a State could, consistently with the European Convention on Human Rights, adopt general measures which applied to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases. It emerged from the case-law that, in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying the measure concerned. The quality of the parliamentary and judicial review of the necessity of the measure was of particular importance. Also relevant was the risk of abuse if a general measure were to be relaxed. The application of the general measure to the facts of the case remained, however, illustrative of its impact in practice and was thus material to its proportionality. In sum, the more convincing the general justifications for the general measure were, the less importance the Court would attach to its impact in the particular case.

Both parties to the instant case had the same objective of maintaining a free and pluralist debate on matters of public interest, and more generally, contributing to the democratic process. The applicant considered, however, that less restrictive rules would have sufficed. The Court was therefore required to balance the applicant's right to impart information and ideas of general interest which the public was entitled to receive against the authorities' desire to protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media.

In conducting that balancing exercise, the Court attached considerable weight to the fact that the complex regulatory regime governing political broadcasting in the United Kingdom had been subjected to exacting and pertinent reviews by both parliamentary and judicial bodies and to their view that the general measure was necessary to prevent the distortion of crucial public-interest debates and, thereby, the undermining of the democratic process. The legislation was the culmination of an exceptional examination of the cultural, political and legal aspects of the prohibition and had been enacted with cross-party support without any dissenting vote. The proportionality of the prohibition had also been debated in detail in the High Court and the House of Lords, both of which had analysed the relevant European Convention of Human Rights case-law and principles, before concluding that it was a necessary and proportionate interference.

Secondly, the Court considered it important that the prohibition was specifically circumscribed to address the precise risk of distortion the State sought to avoid with the minimum impairment of the right of expression. It only applied to paid, political advertising and was confined to the most influential and expensive media (radio and television).

The Court rejected the applicant's arguments contesting the rationale underlying the legislative choices that had been made over the scope of the prohibition, finding notably that:

- A distinction based on the particular influence of the broadcast media compared to other forms of media was coherent in view of the immediate and powerful impact of the former. There was no evidence that the development of the internet and social media in recent years had sufficiently shifted that influence to the extent that the need for a ban specifically on broadcast media was undermined.

- As to the argument that broadcasted advertising was no longer more expensive than other media, advertisers were well aware of the advantages of broadcasted advertising and continued to be prepared to pay large sums of money for it going far beyond the reach of most NGOs wishing to participate in the public debate.
- The fact that the prohibition was relaxed in a controlled fashion for political parties – the bodies most centrally part of the democratic process – by providing them with free party political, party election and referendum campaign broadcasts, was a relevant factor in the Court's review of the overall balance achieved by the general measure, even if it did not affect the applicant.
- Relaxing the rules by allowing advertising by social advocacy groups outside electoral periods could give rise to abuse (such as wealthy bodies with agendas being fronted by social-advocacy groups created for that precise purpose or a large number of similar interest groups being created to accumulate advertising time). Moreover, a prohibition requiring a case-by-case distinction between advertisers and advertisements might not be feasible: given the complex regulatory background, this form of control could lead to uncertainty, litigation, expense and delay and to allegations of discrimination and arbitrariness.

Further, while there may be a trend away from broad prohibitions, there was no European consensus on how to regulate paid political advertising in broadcasting. A substantial variety of means were employed by the Contracting States to regulate political advertising, reflecting the wide differences in historical development, cultural diversity, political thought and democratic vision. That lack of consensus broadened the otherwise narrow margin of appreciation enjoyed by the States as regards restrictions on public interest expression.

Finally, the impact of the prohibition had not outweighed the foregoing convincing justifications for the general measure. Access to alternative media was key to the proportionality of a restriction on access to other potentially useful media and a range of alternatives (such as radio and television discussion programmes, print, the internet and social media) had been available to the applicant NGO.

Accordingly, the reasons adduced by the authorities to justify the prohibition were relevant and sufficient and the measure could not be considered a

disproportionate interference with the applicant's right to freedom of expression. And there had been no violation of Article 10 ECHR.

Cross-references:

- *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, 28.06.2001, *Bulletin* 1998/3 [SUI-1998-3-007];
- *TV Vest AS and Rogaland Pensjonistparti v. Norway*, no. 21132/05, 11.12.2008, Information Note no. 114;
- *Bowman v. The United Kingdom* [GC], no. 24839/94, 19.02.1998;
- *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], nos. 71412/01 and 78166/01, 02.05.2007;
- *Al Jedda v. the United Kingdom* [GC], no. 27021/08, 07.07.2011, Information Note no. 143;
- *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, *Reports of Judgments and Decisions* 2011.

Languages:

English, French.



Identification: ECH-2013-2-004

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 09.07.2013 / **e)** 2330/09 / **f)** *Sindicatul "Păstorul cel Bun" v. Romania* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

5.4.11 Fundamental Rights – Economic, social and cultural rights – **Freedom of trade unions.**

Keywords of the alphabetical index:

Trade union, in religious community / Religious community, trade union, internal, recognition by the state.

Headnotes:

In view of the lack of a European consensus on the question of relations between States and religious denominations in Europe, the State enjoys a wider margin of appreciation in this sphere, encompassing the right to decide whether or not to recognise trade unions that operate within religious communities and pursue aims that might hinder the exercise of such communities' autonomy. Accordingly, provided the statute of the religious community concerned does not provide for an absolute ban on forming trade unions, a refusal to register a trade union of priests pursuing such aims is not disproportionate and does not therefore violate Article 11 ECHR.

Summary:

I. In April 2008 thirty-five clergy members and lay employees of the Romanian Orthodox Church decided to form a trade union. The elected president applied to the court of first instance for the union to be granted legal personality and entered in the register of trade unions. However, the representative of the archdiocese lodged an objection. The union's representative maintained the application, which was supported by the public prosecutor's office. In May 2008 the court allowed the union's application and ordered its entry in the register, thereby granting it legal personality. The archdiocese appealed against that judgment. In a final Judgment of July 2008 the county court allowed the appeal, quashed the first-instance judgment and, on the merits, refused the application for the union to be granted legal personality and entered in the register of trade unions.

II. Applicability: The duties performed by the members of the trade union and the manner of their remuneration entailed many of the typical features of an employment relationship. However, the work of members of the clergy had certain special characteristics, such as its spiritual purpose, the fact that it was carried out within a church enjoying a certain degree of autonomy, and the heightened duty of loyalty towards the Church. It could therefore be a delicate task to make a precise distinction between strictly religious activities and activities of a more financial nature. However, notwithstanding their special circumstances, members of the clergy fulfilled their mission in the context of an employment relationship falling within the scope of Article 11 ECHR, which was therefore applicable to the facts of the case.

Merits: The refusal to register the applicant union amounted to interference, which had been based on the provisions of the Statute of the Romanian

Orthodox Church. The domestic courts had inferred from the Statute that the establishment of Church associations and foundations was the prerogative of the Holy Synod and the archbishop's permission was required for members of the clergy to take part in any form of association whatsoever. The interference had pursued the legitimate aim of protecting the rights of others, and specifically those of the Romanian Orthodox Church.

Bearing in mind the arguments put forward by the archdiocese before the domestic courts in support of its objection to recognising the trade union, it had been reasonable for the county court to take the view that a decision to allow the union's registration would create a real risk to the autonomy of the religious community in question. In Romania, all religious denominations were entitled to adopt their own internal regulations and were thus free to make their own decisions concerning their operations, recruitment of staff and relations with their clergy. The principle of the autonomy of religious communities was the cornerstone of relations between the Romanian State and the religious communities recognised within its territory. The Romanian Orthodox Church had chosen not to incorporate into its Statute the labour law provisions which were relevant in this regard, a choice that had been approved by a Government ordinance in accordance with the principle of the autonomy of religious communities. Having regard to the aims set forth by the applicant union in its constitution – in particular those of promoting initiative, competition and freedom of expression among its members, ensuring that one of its members took part in the Holy Synod, requesting an annual financial report from the archbishop and using strikes as a means of defending its members' interests – the judicial decision refusing to register the union with a view to respecting the autonomy of religious denominations did not appear unreasonable, particularly given the State's role in preserving such autonomy. In refusing to register the applicant union, the State had simply declined to become involved in the organisation and operation of the Romanian Orthodox Church, thereby observing its duty of neutrality under Article 9 ECHR.

The county court had refused to register the applicant union after noting that its application did not satisfy the requirements of the Church's Statute because its members had not complied with the special procedure in place for setting up an association. The court had thus simply applied the principle of the autonomy of religious communities. It had concluded, endorsing the reasons put forward by the archdiocese, that if it were to authorise the establishment of the trade union, the consultative and deliberative bodies provided for by the Church's

Statute would be replaced by or obliged to work together with a new body – the trade union – not bound by the traditions of the Church and the rules of canon law governing consultation and decision-making. The review undertaken by the court had thus confirmed that the risk alleged by the Church authorities was plausible and substantial, that the reasons they had put forward did not serve any other purpose unrelated to the exercise of the autonomy of the religious community in question, and that the refusal to register the applicant union did not go beyond what was necessary to eliminate that risk.

More generally, the Statute of the Romanian Orthodox Church did not provide for an absolute ban on members of its clergy forming trade unions to protect their legitimate rights and interests. Accordingly, there was nothing to stop the applicant union's members from availing themselves of their right under Article 11 ECHR by forming such an association that pursued aims compatible with the Church's Statute and did not call into question the Church's traditional hierarchical structure and decision-making procedures. Moreover, the applicant union's members were free to join any of the associations currently existing within the Romanian Orthodox Church which had been authorised by the national courts and operated in accordance with the requirements of the Church's Statute.

Lastly, there was a wide variety of constitutional models governing relations between States and religious denominations in Europe. In view of the lack of a European consensus on this matter, the State enjoyed a wider margin of appreciation in this sphere, encompassing the right to decide whether or not to recognise trade unions that operated within religious communities and pursued aims that might hinder the exercise of such communities' autonomy. In conclusion, the county court's refusal to register the applicant union had not overstepped the margin of appreciation afforded to the national authorities in this sphere, and accordingly was not disproportionate. Therefore, there had been no violation of Article 11 ECHR.

Languages:

English, French.



Identification: ECH-2013-2-005

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 09.07.2013 / e) 66069/09, 130/10 and 3896/10 / f) *Vinter and Others v. the United Kingdom* / g) *Reports of Judgments and Decisions* / h) CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Sentence, judicial review / Life sentence, reducibility, judicial review / Sentence, reduction, penological grounds / Life sentence, condition and foreseeability of review / Life sentence, justification / Life sentence, rehabilitation.

Headnotes:

Article 3 ECHR has to be interpreted as requiring reducibility of life sentences, in the sense of a review allowing the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds. Whole life prisoners are entitled to know, at the outset of their sentence, what they must do to be considered for release and under what conditions, including when a review of their sentence will take place or may be sought.

Summary:

I. In England and Wales murder carries a mandatory life sentence. Prior to the entry into force of the Criminal Justice Act 2003 the Secretary of State was empowered to set tariff periods for mandatory life-sentence prisoners indicating the minimum term they must serve before they became eligible for early release on licence. Since the entry into force of the Act, that power is now exercised by the trial judge. Prisoners whose tariff was set by the Secretary of State under the previous practice may apply to the High Court for a review.

All three applicants were given “whole life orders” following convictions for murder. Such an order meant that their offences were considered so serious that they had to remain in prison for life unless the Secretary of State exercised his discretion to order their release on compassionate grounds if satisfied that exceptional circumstances – in practice, terminal illness or serious incapacitation – existed. The whole life order in the case of the first applicant, Mr Vinter, was made by the trial judge under the 2003 Act and upheld by the Court of Appeal on the grounds that he already had a previous conviction for murder. The whole life orders in the cases of the second and third applicants had been made by the Secretary of State under the previous practice, but were confirmed on a review by the High Court under the 2003 Act in decisions that were subsequently upheld on appeal. In the case of the second applicant, Mr Bamber, it was noted that the murders had been premeditated and involved multiple victims; these factors, coupled with sexual gratification, had also been present in the case of the third applicant, Mr Moore.

In their applications to the European Court, the applicants complained that the imposition of whole life orders meant their sentences were, in effect, irreducible, in violation of Article 3 ECHR.

II. The Grand Chamber agreed with and endorsed the Chamber’s finding that a grossly disproportionate sentence would violate Article 3 ECHR, although that test would be met only on rare and unique occasions. In the instant case, the applicants had not sought to argue that their whole life orders were grossly disproportionate; instead, they submitted that the absence of an in-built procedural requirement for a review constituted ill-treatment, not only, as the Chamber had found, when there ceased to be legitimate penological grounds to justify continued detention, but from the moment the order was made.

The Court reiterated that Contracting States must be allowed a margin of appreciation in deciding on the appropriate length of prison sentences for particular crimes and must remain free to impose life sentences on adult offenders for especially serious crimes. However, the imposition of an irreducible life sentence on an adult could raise an issue under Article 3 ECHR. In determining whether a life sentence in a given case could be regarded as irreducible, the Court would seek to ascertain whether the prisoner could be said to have any prospect of release. Where national law afforded the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, that would be sufficient to satisfy Article 3 ECHR.

There were a number of reasons why, for a life sentence to remain compatible with Article 3 ECHR, there had to be both a prospect of release and a possibility of review. Firstly, it was axiomatic that a prisoner could not be detained unless there were legitimate penological grounds for that detention. The balance between the justifications for detention was not necessarily static and could shift in the course of the sentence. It was only by carrying out a review at an appropriate point in the sentence that these factors or shifts could be properly evaluated. Secondly, incarceration without any prospect of release or review carried the risk that the prisoner would never be able to atone for his offence, whatever he did in prison and however exceptional his progress towards rehabilitation. Thirdly, it would be incompatible with human dignity for the State forcefully to deprive a person of his freedom without at least providing him with the chance to someday regain that freedom. Moreover, there was now clear support in European and international law for the principle that all prisoners, including those serving life sentences, should be offered the possibility of rehabilitation and the prospect of release if rehabilitation was achieved.

Accordingly, Article 3 ECHR had to be interpreted as requiring reducibility of life sentences, in the sense of a review allowing the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds. While it was not the Court's task to prescribe the form (executive or judicial) which that review should take or to determine when it should take place, the comparative and international law materials before it showed clear support for the institution of a dedicated mechanism guaranteeing a review no later than 25 years after the imposition of a life sentence, with further periodic reviews thereafter. A whole life sentence would not measure up to the standards of Article 3 ECHR where the domestic law did not provide for the possibility of such a review. Lastly, although the requisite review was a prospective event necessarily subsequent to the passing of the sentence, a whole life prisoner should not be obliged to wait and serve an indeterminate number of years of his sentence before he could raise the complaint that the legal conditions attaching to his sentence failed to comply with the requirements of Article 3 ECHR. Whole life prisoners were entitled to know, at the outset of their sentence, what they must do to be considered for release and under what conditions, including when a review of their sentence will take place or may be sought. Consequently, where domestic law did not

provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 ECHR on this ground already arose when the whole life sentence was imposed and not at a later stage of incarceration.

The Government had argued before the Court that the aim of the 2003 Act was to remove the executive from the decision-making process concerning life sentences, and this was the reason for abolishing the 25-year review by the Home Secretary which had existed beforehand. However, the Court considered that it would have been more consistent with the legislative aim to provide that the 25-year review would be conducted within a judicial framework, rather than completely eliminated.

The Court also found that the current law concerning the prospect of release of life prisoners in England and Wales was unclear. Although Section 30 of the 1997 Act gave the Justice Secretary the power to release any prisoner, including one serving a whole life order, the relevant Prison Service Order provided that release would only be ordered if a prisoner was terminally ill or physically incapacitated. These were highly restrictive conditions and in the Court's view, compassionate release of this kind would not be what was meant by a "prospect of release" in *Kafkaris*.

In light, therefore, of this contrast between the broad wording of Section 30 and the exhaustive conditions announced in the Prison Service Order, as well as the absence of any dedicated review mechanism for whole life orders, the Court was not persuaded that, at the present time, the applicants' life sentences could be regarded as reducible for the purposes of Article 3 ECHR. The requirements of that provision had not, therefore, been met in relation to any of the three applicants.

The Court emphasised, however, that the finding of a violation in the applicants' cases should not be understood as giving them any prospect of imminent release. Whether or not they should be released would depend, for example, on whether there were still legitimate penological grounds for their continued detention and whether they should continue to be detained on grounds of dangerousness. These questions were not in issue in this case and were not the subject of argument before the Court.

Cross-references:

- *Kafkaris v. Cyprus* [GC], no. 21906/04, *Reports of Judgments and Decisions* 2008;
- *Iorgov v. Bulgaria* (no. 2), no. 36295/02, 02.09.2010;
- *Schuchter v. Italy* (dec.), no. 68476/10, 11.10.2011;
- *Harkins and Edwards v. the United Kingdom*, nos. 9146/07 and 32650/07, 17.01.2012.

Languages:

English, French.

*Identification:* ECH-2013-2-006

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 12.07.2013 / **e)** 25424/09 / **f)** *Allen v. the United Kingdom* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Acquitted person, compensation / Judgment, reasoning / Justice, miscarriage, compensation / Judgment, language / Acquittal, innocence, proof.

Headnotes:

The right under Article 6.2 ECHR to be presumed innocent was not violated where nothing in the statutory criteria applicable to a claim for compensation for an alleged “miscarriage of justice” or in the language and reasoning of the court refusing that claim undermined

the claimant’s acquittal or treated her in a manner inconsistent with her innocence.

Summary:

I. In September 2000, the applicant was convicted of the manslaughter of her baby son on the basis of medical evidence that the boy’s injuries were consistent with “shaken baby syndrome” (also known as “non-accidental head injury”; hereinafter, “NAHI”). On appeal she claimed that new medical evidence suggested that the injuries could be attributed to a cause other than NAHI. In July 2005 the Court of Appeal (Criminal Division) (hereinafter, the “CACD”) quashed her conviction on the grounds that it was unsafe after finding that the new evidence might have affected the jury’s decision to convict. The prosecution did not apply for a re-trial given that the applicant had already served her sentence and a considerable amount of time had passed.

The applicant lodged a claim with the Secretary of State under Section 133 of the Criminal Justice Act 1988 (hereinafter, the “1988 Act”), which provided for compensation to be paid to someone who has been convicted of a criminal offence but has subsequently had that conviction reversed on the ground that a new or newly discovered fact showed beyond reasonable doubt that there had been a miscarriage of justice. Her claim was refused. An application for judicial review of that decision was dismissed by the High Court, which concluded that the CACD had only decided that the new evidence, when taken with the evidence given at trial, “created the possibility” that a jury “might properly acquit” the applicant. The Court of Appeal subsequently dismissed an appeal by the applicant after noting that the acquittal decision did “not begin to carry the implication” that there was no case for her to answer, so that the test for a “miscarriage of justice” had not been made out.

In her application to the European Court, the applicant alleged that the reasons given in the decision not to award her compensation had violated her right to be presumed innocent.

II. Scope of the case: The question before the Court was not whether the refusal of compensation per se violated the applicant’s right to be presumed innocent (Article 6.2 ECHR did not guarantee a person acquitted of a criminal offence a right to compensation for a miscarriage of justice), but whether the individual decision refusing compensation in the applicant’s case, including the reasoning and the language used, was compatible with the presumption of innocence.

Applicability: There were two aspects to Article 6.2 ECHR. The first imposed certain procedural requirements in the context of the criminal trial itself (for example relating to the burden of proof, presumptions of fact and law and the privilege against self-incrimination). The second, which was the one relevant in the applicant's case, was aimed at protecting individuals who had been acquitted of a criminal charge, or in respect of whom criminal proceedings had been discontinued, from being treated by public officials and authorities as though they were in fact guilty. Where criminal proceedings had concluded, an applicant seeking to rely on Article 6.2 ECHR in subsequent proceedings would have to show that there was a link between the two sets of proceedings. Such a link was likely to be present, for example, where the subsequent proceedings required examination of the outcome of the prior criminal proceedings and, in particular, where they obliged the Court to analyse the criminal judgment, to engage in a review or evaluation of the evidence in the criminal file, to assess the applicant's participation in some or all of the events leading to the criminal charge, or to comment on the subsisting indications of the applicant's possible guilt. The necessary link was present in the instant case because the right to commence compensation proceedings was triggered by the acquittal in the criminal proceedings, and because the Secretary of State and the courts had had to have regard to the judgment in the criminal proceedings when making and reviewing the decision on compensation. Article 6.2 ECHR was therefore applicable.

Merits: There was no single approach to ascertaining the circumstances in which Article 6.2 ECHR would be violated in the context of proceedings which followed the conclusion of criminal proceedings. Much depended on the nature and context of the proceedings in which the impugned decision was adopted. However, in all cases and no matter what the approach applied, the language used by the decision-maker was of critical importance in assessing the compatibility of the decision and its reasoning with Article 6.2 ECHR.

Turning to examine the nature and context of the proceedings in the applicant's case, the Court noted that the applicant's acquittal was not an acquittal "on the merits" in a true sense. Although formally an acquittal, the termination of the criminal proceedings in her case shared more of the features present in a case in which criminal proceedings had been discontinued.

It further noted that specific criteria had to be met under Section 133 of the 1988 Act for the right to compensation to arise, namely: the claimant had to have been convicted, she had to have suffered punishment as a result, an appeal had to have been allowed out of time, and the ground for allowing the appeal had to have been that a new fact showed beyond reasonable doubt that there had been a miscarriage of justice. Those criteria reflected, with only minor linguistic changes, the provisions of Article 3 Protocol 7 ECHR, which had to be capable of being read in a manner which was compatible with Article 6.2 ECHR. Nothing in those criteria called into question the innocence of an acquitted person and the legislation itself did not require criminal guilt to be assessed.

As to the language used by the domestic courts, the Court did not consider that, when viewed in the context of the exercise which they had been required to undertake under Section 133 of the 1988 Act, it had undermined the applicant's acquittal or treated her in a manner inconsistent with her innocence. In assessing whether a "miscarriage of justice" had arisen, the domestic courts had not commented on whether, on the basis of the evidence as it stood at the appeal, the applicant should be, or would likely be, acquitted or convicted. Equally, they had not commented on whether the evidence was indicative of her guilt or innocence. Indeed, they had consistently repeated that it would have been for a jury to assess the new evidence, had a retrial been ordered.

Moreover, under the law of criminal procedure in England it was for a jury in a criminal trial on indictment to assess the prosecution evidence and to determine the guilt of the accused. The CACD's role in the applicant's case was to decide whether the conviction had been "unsafe", not to substitute itself for the jury in deciding whether, on the basis of the evidence now available, her guilt had been established beyond reasonable doubt. The decision not to order a retrial had spared the applicant the stress and anxiety of undergoing another criminal trial and she had not argued that there ought to have been a re-trial. Both the High Court and the Court of Appeal had referred extensively to the judgment of the CACD to determine whether a miscarriage of justice had arisen and had not sought to reach any autonomous conclusions on the outcome of the case. They had not questioned the CACD's conclusion that the conviction was unsafe and had not suggested that the CACD had erred in its assessment of the evidence before it. They had accepted at face value the findings of the CACD and drawn on them, without any modification or re-evaluation, in order to decide whether the Section 133 criteria had been satisfied.

Languages:

English, French.

*Identification:* ECH-2013-2-007

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 18.07.2013 / **e)** 2312/08 and 34179/08 / **f)** Maktouf and Damjanović v. Bosnia and Herzegovina / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Penalty, heavier, application of previous legislation / Effective safeguard / Criminal law, retroactive application, exception / War crime, adequate punishment, obligation.

Headnotes:

Where there is a real possibility, albeit no certainty, that the retroactive application of criminal-law legislation has operated to an accused's disadvantage as regards sentencing, it cannot be said that the accused has been afforded the effective safeguards required by Article 7 ECHR against the imposition of a heavier penalty.

Summary:

I. Both applicants were convicted by the Court of Bosnia and Herzegovina (hereinafter, the "State Court") of war crimes committed against civilians during the 1992-1995 war. War crimes chambers were set up within the State Court in early 2005 as part of the International Criminal Tribunal for the former Yugoslavia's completion strategy. The State Court, which consists of international and national judges, can decide to take over war crime cases because of their sensitivity or complexity, and can transfer less sensitive and complex cases to the

competent courts of the two entities of Bosnia and Herzegovina (hereinafter, the "Entity courts").

The first applicant (Mr Maktouf) was convicted by the State Court in July 2005 of aiding and abetting the taking of two civilian hostages as a war crime and sentenced to five years' imprisonment under the 2003 Criminal Code of Bosnia and Herzegovina. In April 2006, an appeals chamber of the court confirmed his conviction and the sentence after a fresh hearing with the participation of two international judges. The second applicant (Mr Damjanović), who had taken a prominent part in the beating of captured Bosniacs in Sarajevo in 1992, was convicted in June 2007 of torture as a war crime and sentenced to eleven years' imprisonment under the 2003 Criminal Code.

In their applications to the European Court, both men complained, *inter alia*, that the State Court had retroactively applied to them a more stringent criminal law, the 2003 Criminal Code, than that which had been applicable when they committed the offences, namely the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia and that they had received heavier sentences as a result.

II. The Court reiterated that it was not its task to review *in abstracto* whether the retroactive application of the 2003 Criminal Code in war crimes cases was, *per se*, incompatible with Article 7 ECHR. That matter had to be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case and, notably, whether the domestic courts had applied the law whose provisions were most favourable to the defendant concerned.

The definition of war crimes was the same in both the 1976 and the 2003 Criminal Codes and the applicants did not dispute that their acts had constituted criminal offences defined with sufficient accessibility and foreseeability at the time they were committed. What was at issue was therefore not the lawfulness of their convictions but the different sentencing frameworks applicable to war crimes under the two Codes.

The State Court had sentenced the first applicant to five years' imprisonment; the lowest possible sentence for aiding and abetting war crimes under the 2003 Code, whereas under the 1976 Code his sentence could have been reduced to one year. Likewise, the second applicant had been sentenced to eleven years' imprisonment, slightly above the ten-year minimum applicable in his case under the 2003 Code. However, under the 1976 Code, it would have been possible to impose a sentence of only five years.

As the applicants had received sentences at the lower end of the sentencing range, it was of particular relevance that the 1976 Code was more lenient in respect of the minimum sentence. In this context, the fact that the 2003 Code may have been more lenient as regards the maximum sentence was immaterial as the crimes of which the applicants had been convicted clearly did not belong to the category to which the maximum sentence was applicable. Further, while the Court accepted that the applicants' sentences were within the latitude of both the 1976 Criminal Code and the 2003 Criminal Code, so that it could not be said with any certainty that either applicant would have received lower sentences had the 1976 Code been applied, the crucial point was that the applicants could have received lower sentences if it had been. Accordingly, since there was a real possibility that the retroactive application of the 2003 Code had operated to the applicants' disadvantage as regards sentencing, it could not be said that they had been afforded effective safeguards against the imposition of a heavier penalty.

Nor was the Court able to agree with the Government's argument that if an act was criminal under "the general principles of law recognised by civilised nations" (Article 7.2 ECHR) at the time it was committed then the rule of non-retroactivity of crimes and punishments did not apply. That argument was inconsistent with the intention of the drafters of the European Convention on Human Rights that Article 7.1 ECHR contained the general rule of non-retroactivity and that Article 7.2 ECHR was only a contextual clarification, included to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of crimes committed during that war. It was thus clear that the drafters of the European Convention of Human Rights had not intended to allow for any general exception to the rule of non-retroactivity.

With regard to the Government's argument that a duty under international humanitarian law to punish war crimes adequately required that the rule of non-retroactivity be set aside in the applicants' case, the Court noted that that rule also appeared in the Geneva Conventions and their Additional Protocols. Moreover, as the applicants' sentences were within the compass of both the 1976 and 2003 Criminal Codes, the Government's argument that the applicants could not have been adequately punished under the former Code was clearly unfounded.

Accordingly, there had been a violation of Article 7 ECHR in the particular circumstances of the applicants' cases. However, the Court emphasised that that conclusion did not indicate that lower

sentences ought to have been imposed, but simply that the sentencing provisions of the 1976 Code should have been applied.

Languages:

English, French.



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* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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¹ This chapter – as the Systematic Thesaurus in general – should be used sparingly, as the keywords therein should only be used if a relevant procedural question is discussed by the Court. This chapter is therefore not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only look for decisions in this chapter, the subject of which is also the keyword.

² Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

³ For example, rules of procedure.

⁴ For example, age, education, experience, seniority, moral character, citizenship.

⁵ Including the conditions and manner of such appointment (election, nomination, etc.).

⁶ Including the conditions and manner of such appointment (election, nomination, etc.).

⁷ Vice-presidents, presidents of chambers or of sections, etc.

⁸ For example, State Counsel, prosecutors, etc.

⁹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

¹⁰ For example, assessors, office members.

¹¹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

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¹² Including questions on the interim exercise of the functions of the Head of State.

¹³ Referrals of preliminary questions in particular.

¹⁴ Enactment required by law to be reviewed by the Court.

¹⁵ Review *ultra petita*.

¹⁶ Horizontal distribution of powers.

¹⁷ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁸ Decentralised authorities (municipalities, provinces, etc.).

¹⁹ For questions other than jurisdiction, see 4.9.

²⁰ Including other consultations. For questions other than jurisdiction, see 4.9.

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²¹ Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).

²² As understood in private international law.

²³ Including constitutional laws.

²⁴ For example, organic laws.

²⁵ Local authorities, municipalities, provinces, departments, etc.

²⁶ Or: functional decentralisation (public bodies exercising delegated powers).

²⁷ Political questions.

²⁸ Unconstitutionality by omission.

²⁹ Including language issues relating to procedure, deliberations, decisions, etc.

³⁰ For the withdrawal of proceedings, see also 1.4.10.4.

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³¹ Pleadings, final submissions, notes, etc.

³² May be used in combination with Chapter 1.2. Types of claim.

³³ For the withdrawal of the originating document, see also 1.4.5.

³⁴ Comprises court fees, postage costs, advance of expenses and lawyers' fees.

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³⁵ For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

³⁶ Only for issues concerning applicability and not simple application.

³⁷ This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

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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.

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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.

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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*.

¹⁰² Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

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¹⁰³ Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

¹⁰⁴ Positive and negative aspects.

¹⁰⁵ For rights of the child, see 5.3.44.

¹⁰⁶ The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

¹⁰⁷ Includes questions of the suspension of rights. See also 4.18.

¹⁰⁸ Taxes and other duties towards the state.

¹⁰⁹ Universal and equal suffrage.

¹¹⁰ According to the European Convention on Nationality of 1997, ETS no. 166, “‘nationality’ means the legal bond between a person and a state and does not indicate the person’s ethnic origin” (Article 2) and “... with regard to the effects of the Convention, the terms ‘nationality’ and ‘citizenship’ are synonymous” (paragraph 23, Explanatory Memorandum).

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¹¹¹ For example, discrimination between married and single persons.

¹¹² This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

¹¹³ Detention by police.

¹¹⁴ Including questions related to the granting of passports or other travel documents.

¹¹⁵ May include questions of expulsion and extradition.

¹¹⁶ Including the right of access to a tribunal established by law; for questions related to the establishment of extraordinary courts, see also keyword 4.7.12.

¹¹⁷ In the meaning of Article 6.1 of the European Convention on Human Rights.

¹¹⁸ This keyword covers the right of appeal to a court.

¹¹⁹ Including the right to be present at hearing.

¹²⁰ Including challenging of a judge.

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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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