

# THE BULLETIN

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

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

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

*The decisions are presented in the following way:*

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

**T. Markert**

Secretary of the European Commission for Democracy through Law

# THE VENICE COMMISSION

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

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

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**Secretariat of the Venice Commission  
Council of Europe  
F-67075 STRASBOURG CEDEX  
Tel: (33) 3 88413908 – Fax: (33) 3 88413738  
Venice@coe.int**

## Editors:

Sc. R. Dürr, T. Gerwien, C. de Broutelles

T. Daly, D. Jones, D. Tran

A. Gorey, M.-L. Wigishoff

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C. Iannone / S. Hackspiel

Inter-American Court of Human Rights .....

J. Recinos

Strasbourg, September 2015

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There was no relevant constitutional case-law during the reference period 1 September 2014 – 31 December 2014 for the following countries:

Albania, Japan.

Précis of important decisions of the reference period 1 September 2014 – 31 December 2014 will be published in the next edition, *Bulletin* 2015/1, for the following country:

Cyprus.

# Armenia

## Constitutional Court

### Statistical data

1 September 2014 – 31 December 2014

- 93 applications have been filed, including:
  - 16 applications, filed by the President
  - 2 applications, filed by 1/5 of the deputies of National Assembly
  - 1 application, filed by the domestic court
  - 2 applications, filed by the Human Rights Defender
  - 72 applications, filed by individuals
- 33 cases have been admitted for review, including:
  - 8 cases, on the basis of individual complaints concerning the constitutionality of certain provisions of laws
  - 21 cases concerning the compliance of obligations stipulated in international treaties with the Constitution
  - 2 cases on the basis of the application filed by the Human Rights Defender
  - 1 case on the basis of the application filed by the Cour of Cassation
  - 1 case on the basis of the application filed by 1/5 of the deputies of National Assembly
- 31 cases heard and 31 decisions delivered including:
  - 27 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution
  - 3 decisions on cases initiated on individual complaints concerning the constitutionality of certain provisions of laws
  - 1 decision, on the basis of the application filed by the Human Rights Defender

### Important decisions

*Identification:* ARM-2014-3-004

**a)** Armenia / **b)** Constitutional Court / **c)** / **d)** 14.11.2014 / **e)** DCC-1175 / **f)** On the conformity with the Constitution of the provisions of Law on State Pensions / **g)** *Tegekagir* (Official Gazette) / **h)** CODICES (English, Russian).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Right to property, limitations to right to property, inheritance.

*Headnotes:*

In light of the constitutional regulations on the right to property, its realisation, the limitations and protection of the right to property, as well as the necessity to guarantee the rule of law, any legal condition, especially a newly added one, must have the legitimate aim to ensure more effective guarantees that do not compromise any constitutional norm or principle.

*Summary:*

I. The applicant challenged the Law on State Pensions. The specific provision at issue stipulated that a pension that was unpaid, due to the pensioner's death, could be inherited if the application and the necessary documents were submitted to a pension granting division within 12 months after the death of the pensioner. The applicant argued that the abovementioned regulation contradicted the Constitution as it constrained the right of a person to inherit the pension entitlements of the retired.

II. The Constitutional Court emphasised that the regulation refers to a person's right to inherit the pension entitlements of the retired. Simultaneously, the Court reiterated that the pension, being a means of social security, is also a form of property, in accordance with the case-law of the European Court of Human Rights. Thus, the Court stressed the importance to assess the constitutionality of the argued provisions in light of the constitutional regulations on the right to property.

The Court noted that the regulation on the 12 months time limit for the inheritance of the pension entitlements was added in the Law on State Pension in 2012. Previously, regulations on pension inheritance were set out in the Civil Code. The Court stated that the new regulation excludes the possibility to receive money if the omission of that time limit occurred for justifiable reasons.

With the new regulation, the legislator did not provide the possibility to recognise an omission as a justification for not respecting a time-limit, in a judicial matter. In this regard the Constitutional Court held that the absence of such regulation jeopardises the complete realisation of the constitutional right to property, particularly the protection of that right set forth in Articles 18 and 19 of the Constitution.

The Constitutional Court held that the time-limit is not conditioned by the demand to protect public values. Thus, it is not directed at guaranteeing a reasonable balance between the owner and other's rights and the public interest.

The Court emphasised that, according to the Civil Code, one can accept the inheritance by submitting the application to the notary within 6 months after opening the probate process. The Court stated that this time-limit is not absolute. Even if the person omits that time, he or she can still inherit the property if he or she satisfies some legal conditions. One can accept the property without applying to the Court if the other inheritors consent. The Code also stipulates the possibility to request the Court to recognise the omission of time-limit of 6 months as justified. The Civil Code also defines another way of accepting an inheritance, particularly one can accept the inheritance when he or she starts to dispose or administer the inherited property *de facto*. The Court stated that the mentioned regulations also refer to the inheritance of the pension of the retired.

As a result of the consideration, the regulation "if the application and necessary documents are brought to the department fixing the pension within 12 months after the death of the pensioner" has been declared to be in contradiction with the Constitution and void.

#### Languages:

Armenian.



## Austria Constitutional Court

### Important decisions

*Identification:* AUT-2014-3-003

a) Austria / b) Constitutional Court / c) / d) 08.10.2014 / e) G 97/2013 / f) / g) / h) www.icl-journal.com; CODICES (German).

*Keywords of the systematic thesaurus:*

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

3.21 General Principles – **Equality.**

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

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

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

*Keywords of the alphabetical index:*

Private life, burial / Property, right, scope.

*Headnotes:*

Neither the right to respect for private life nor the general principle of equality denies the State the right to determine that dead bodies must be placed in the morgue of a (public or private) grave structure. The personal right to give instructions as to the treatment of his or her body after death does not fall within the scope of the right to property.

*Summary:*

I. Under the Vienna Act on Dead Bodies and Burials (*Wiener Leichen- und Bestattungsgesetz*), after being examined by the coroner, dead bodies must be kept in the morgue of a grave structure until the day of the funeral.

The applicant wished that her dead body be placed in the cooling chamber of a private undertaker of her

choice and worthy of her trust. She lodged a constitutional complaint against the above-mentioned provision of the Vienna Act on Dead Bodies and Burials, claiming that it was contrary to her right to respect for her private life, to the principle of equality as well as to her right to property, as laid down in Article 8 ECHR, in Article 7 of the Federal Constitutional Act (*Bundes-Verfassungsgesetz*), and in Article 1 Protocol 1 ECHR, respectively.

II. The Constitutional Court held that the manner in which a dead body is treated by public authorities may constitute an interference with the right to respect for private life.

Though, the Court found that this interference served a legitimate aim – the prevention of risks to public health – and was justified under Article 8.2 ECHR, taking into account the wide margin of appreciation afforded to the States in such matters. In particular, the Court pointed out that the individual's interest in his or her dead body being treated according to his or her wishes is duly taken into account. That is, individuals were granted a lot of freedom as to the construction of the burial place, the type of burial, the arrangement of the funeral as well as the design of the tomb.

For the same reasons, the legal provision at stake proved to be justified in the light of the general principle of equality.

Finally, the Court recalled that the legal provision contested did not fall within the sphere of the constitutionally guaranteed right to property, as the right of disposal with regard to a corpse did not qualify as asset.

#### *Cross-references:*

European Court of Human Rights:

- *Dödsbo v. Sweden*, no. 61.564/00, 17.01.2006;
- *Şişman v. Turkey*, no. 46.352/10, 21.01.2014.

#### *Languages:*

German.



## Azerbaijan Constitutional Court

### Important decisions

*Identification:* AZE-2014-3-003

**a)** Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 28.10.2014 / **e)** / **f)** / **g)** Azerbaijan, *Respublika, Khalq gazetesi, Bakinski rabochiy* (Official Newspapers); *Azərbaycan Respublikası Konstitusiyası Məhkəməsinin Məlumatı* (Official Digest) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Legislative procedure / Property, private, right / Property, protection / Property, value, reduced / Ownership, right, restriction.

*Headnotes:*

Articles 43.4-43.8 and 48 of the Law on “Mortgage” concern the cancellation of an auction and the holding of repeated tendering due to the purchaser not buying the object of a mortgage (movable or immovable property). Article 43 of the Law on “Mortgage” allows only two auctions, and another auction carried out on any basis contradicts the present Law. According to the requirements of Article 43.8 of the Law on “Mortgage”, the mortgagee has only one opportunity to get a mortgage subject within 30 calendar days after the declaration of the re-auction failed. As such, the mortgagee under civil legal proceedings can demand the termination of a mortgage if the mortgagor within 30 calendar days after conducting the secondary auction does not purchase a “mortgage subject”.

*Summary:*

I. The Court of Appeal of Shirvan City requested the Constitutional Court to review Articles 43.4-43.8 and

48 of the Law on "Mortgage" which concern the cancellation of an auction and a retender because a purchaser failed to buy the private residence that is subject to a mortgage.

The District Court of the Masalli region heard Z. Samedov's claim regarding a terminated mortgage connected to the purchase of a private residence. On 13 May 2010, it decided to turn N. Guseynov's debt on the credit for the private residence belonging to him (which is the "mortgage subject") and to sell the residence in an auction.

The first auction was conducted by "Kulek", a limited company, on 28 February 2011 and the re-auction on 15 March 2011. On 5 April 2011, another auction was conducted. On 12 April 2011, the proposal was made to a purchaser to buy – within 30 calendar days – and for 25 % cheaper than the initial auction cost of the private residence, otherwise the mortgage would be terminated.

The purchaser wrote a letter to the auction organisers on 20 April 2011, asking to temporarily suspend the auction; and another letter on 1 September 2011 to restore actions according to the offer.

On 8 September 2011, Kulek conducted the auction and the Credit organisation (which is not bank KredAqro) won the auction. On the same day of the results of the auction between the customer of the Office of Execution of the Masalli region and the winner of the auction, the property purchase sale was concluded. By its decision on 15 January 2013, the Masalli District Court satisfied the claim of Z. Samedov.

On 16 April 2013, the Court of Appeal of Shirvan City was not satisfied with the appeal complaint of KONB "KredAqro" and upheld the decision of the Masalli District Court. The Civil Board of the Supreme Court, however, ruled against the decision of the Court of Appeal of Shirvan City and the case was sent to the Constitutional Court for review.

In the request, it was noted that the auction organiser conducted three auctions. Although the re-auction complied with the law, the possibility that it could be terminated by a second auction or carried on after the new auction was not clear. Given the uncertainty, Article 43.8 of the Law on "Mortgage" regulating the matter should be reconsidered.

In the request, it was also indicated that according to Article 43.8 of the Law on "Mortgage", if the mortgagor does not get the mortgage object in 30 calendar days after the declaration of re-auction, the mortgage is cancelled. The mortgagor's inaction

is specified as the main condition to cancel a mortgage. However, the Law does not address whether the mortgagor's desire to adjust the term, such that the purchase of the subject of the mortgage would be after the determined time, would constitute sufficient reason to cancel the mortgage.

II. According to Article 269.1 of CC, a pledge and hypothecation right gives rise to a property right of a pledgee in respect of a pledgor's property and at the same time, a method of guarantee to a pledgee of the debtor's monetary or other obligations.

From this point of view, if a mortgage is not executed or delayed, the additional obligations create a real threat of deprivation of the property, compelling the debtor to fulfill the main obligation in due time.

The Law on "Mortgage" regulates a mortgage connected with the fulfillment of obligations following from civil legal instruments, state registration, rules of repayment at the expense of a mortgage of a debt, other civil right obligations, and the rights and an obligation of the parties.

Article 43 of the Law on "Mortgage" and Article 42 of the present Law provide that only two auctions can be carried out. So, if the first auction did not take place for a reason provided in Article 43.1.2 of this Law, namely absence of a bidder, then the sale of a "mortgage subject" is re-auctioned for 15% lower than the initial sale price set at the previous auction. For other reasons provided in Article 43.1.1, 43.1.3 and 43.1.4 of the present Law (that is, less than two buyers come to the auction; the winner of the auction refuses to sign the report about auction results; the winner of the auction does not pay the entire sale price for a while intended in this Law, on the condition that time is not extended with the mortgagee's agreement), the auction is declared frustrated and the initial sale price remains invariable.

The Plenum of the Constitutional Court recognised that Article 43 of the Law on "Mortgage" envisages the conducting of only two auctions and that carrying out another auction on any basis is contradictory to the law.

The Plenum of the Constitutional Court also addressed the possibility of purchasing from the mortgagor a "mortgage subject" after the admission of the 30-day terms provided in Article 43.8 of the Law on "Mortgage". It noted that the possibility of purchasing a "mortgage subject" at the price that is no more than 25 % lower than its initial sale price within 30 days (case of re-auction due to a declaration of a frustrated auction) is provided to the mortgagor only once.

Due to the procedure of the termination of a mortgage based on Article 43.8 of the Law on “Mortgage”, the Plenum of the Constitutional Court noted that the mortgage can be cancelled on the basis of legal proceedings on the mortgagee’s claim if the mortgagor does not purchase a “mortgage subject” within 30 days after the declaration of the re-auction as frustrated.

Considering the above, the Plenum of the Constitutional Court ruled that because Article 43 of the Law on “Mortgage” allows only two auctions, the carrying out of another auction on any basis contradicts the present Law. According to the requirements of Article 43.8 of the Law on “Mortgage”, the mortgagee has only one opportunity to get a “mortgage subject” within 30 calendar days after the declaration of the re-auction was frustrated. As such, the mortgagee under civil legal proceedings can demand the termination of a mortgage if the mortgagor within 30 calendar days after conducting the secondary auction does not purchase a “mortgage subject”.

#### *Languages:*

Azeri (original), English (translation by the Court).



## Belarus Constitutional Court

### Important decisions

*Identification:* BLR-2014-3-005

**a)** Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 08.09.2014 / **e)** D-946/14 / **f)** On the definition of “unmarried mother” in labour relations / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 3/2014; www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

*Keywords of the systematic thesaurus:*

3.5 General Principles – **Social State**.  
3.10 General Principles – **Certainty of the law**.  
3.12 General Principles – **Clarity and precision of legal provisions**.  
5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work**.  
5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

*Keywords of the alphabetical index:*

Contract, termination, benefit, consequences / Employment, contract, cessation / Employment, worker, protection / Mother, unmarried, protection / Mother, working, protection.

*Headnotes:*

The Labour Code establishes guarantees for unmarried mothers whose labour contract ends or is terminated, including prohibition of any termination, by an employer, of a labour contract with an unmarried mother having children from 3 to 14 years of age (and in the case of disabled children, up to 18 years of age). However, for implementation of these guarantees the legislator is required to clearly define the category of individuals who may enjoy these guarantees.

*Summary:*

I. The Constitutional Court considered a case concerning the existence of legal uncertainty as regards the definition of “unmarried mother” in provisions of the Labour Code (hereinafter, the “LC”),

which establish guarantees for unmarried mothers with respect to the conclusion and termination of labour contracts.

The individual applicant who initiated the proceedings pointed out that the LC establishes guarantees for unmarried mothers whose labour contract ends or is terminated, but does not contain any definition of the term “unmarried mother”. For this reason, the applicant argued that she is unreasonably deprived of the guarantees of employment in spite of the fact that she is raising minors without any help from their father.

II. When considering the case the Constitutional Court proceeded from the following. First, according to the Constitution is a social state based on the rule of law (Article 1.1 of the Constitution); citizens of the Republic of Belarus shall be guaranteed the right to work as the worthiest means of an individual's self-assertion (Article 41.1 of the Constitution); marriage, family, motherhood, fatherhood, and childhood shall be under the protection of the State (Article 32.1 of the Constitution).

In accordance with Article 268 of the LC it shall be forbidden to refuse to conclude a labour contract and to reduce wages for unmarried mothers having a child under 14 years of age (and in the case of a disabled child, up to 18 years of age). Termination of a labour contract with an unmarried mother having children from 3 to 14 years (and in the case of disabled children, up to 18 years) by the employer is prohibited, except in the cases established by the LC.

However, the LC and other legislative acts do not define the criteria for considering individuals as unmarried mothers in order to extend the guarantees to them where their labour contract is concluded or terminated.

Second, the constitutional provisions on state protection of the family, motherhood and childhood comply with a number of international legal instruments mandatory for the Republic of Belarus including the International Covenant on Economic, Social and Cultural Rights (1966), the UN Convention on the Elimination of All Forms of Discrimination against Women (1979), International Labour Organisation (ILO) Convention no.111 concerning Discrimination in Respect of Employment and Occupation (1958) and the Convention on the Rights of the Child (1989).

The provisions of the Constitution and international legal instruments require legal regulation of labour relations concerning the family, motherhood and childhood to provide for the heightened social and legal protection of these social institutions.

The Constitutional Court took into account that the special role of the family, motherhood and childhood is enshrined in a number of legislative acts. Family is recognised as the basis of a stable society (paragraph 11.4 of the Guidelines of the Domestic and Foreign Policy of the Republic of Belarus, approved by the Program Law of 14 November 2005), and a natural and fundamental unit of the society under protection of the State (Article 3.1 of the Code on Marriage and Family). According to the mentioned Code the State is obliged to take care of the family, including by creating conditions for economic independence and improvement of the family's well-being, and the combination of work and family responsibilities by the parents (Article 3.2).

In the Message of the Constitutional Court “On Constitutional Legality in the Republic of Belarus in 2013” it is noted that the implementation of the constitutional provisions on state support and protection of the family, protection of the rights and legitimate interests of children, ensuring favourable conditions for their development, education and formation by the legislator fully complies with the social character of the Belarusian state enshrined in the Constitution.

Third, the Constitutional Court concluded that a clear and precise definition of a circle of individuals having the right to the guarantees provided by the LC for unmarried mothers has considerable importance for ensuring the implementation of these guarantees.

In order to ensure the constitutional principle of the rule of law, guarantees of the protection of the constitutional rights of individuals having family obligations in labour relations, the Constitutional Court recognised it necessary for the legislator to eliminate legal uncertainty in the LC caused by the absence of a clear and precise definition of the category of individuals having the right to the guarantees for unmarried mothers in case of the conclusion or termination of the labour contract.

The Constitutional Court requested the Council of Ministers (the Government) to prepare an appropriate draft law on supplementing the LC with a provision defining a category of individuals as “unmarried mothers” under the LC.

#### *Languages:*

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



*Identification:* BLR-2014-3-006

**a)** Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 08.12.2014 / **e)** D-952/14 / **f)** On the conformity of the Law of the Republic of Belarus “On Making Addenda and Alterations to the Law “On Combating Trafficking in Human Beings” to the Constitution / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 4/2014; www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

*Keywords of the systematic thesaurus:*

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

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

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

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

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

*Keywords of the alphabetical index:*

Human dignity, violation, trafficking in human beings / Child, trafficking, protection / Trafficking in human beings, criminalisation / Trafficking in human beings, human dignity, violation / Exploitation, criminalisation.

*Headnotes:*

The introduction by the legislator of additional criteria in the terms “trafficking in human beings” and “exploitation” is intended to criminalise a wider scope of socially dangerous acts related to various forms of exploitation of an individual. The amendment prescribing that the term “trafficking in human beings” covers all acts committed with the purpose of exploitation of minors – regardless of using such means as the deception, abuse of confidence, threat or use of force – is aimed at the protection of interests of minors and safeguards their well-being.

*Summary:*

I. The Constitutional Court in the exercise of obligatory preliminary review considered the constitutionality of the Law “On Making Addenda and

Alterations to the Law “On Combating Trafficking in Human Beings” (hereinafter, the “Law”). Obligatory preliminary review (i.e., abstract review) is required for any law adopted by the Parliament before it is signed by the President.

II. First, the Constitution establishes that the Republic of Belarus, as a state based on the rule of law, ensures the legality and legal order (Article 1.1 and 1.3 of the Constitution); the individual, his or her rights, freedoms and safeguards of their realisation are the supreme value and goal of the society and the state; the state shall assume responsibility before the citizen to create the conditions for free and dignified development of his or her personality; the citizen shall assume responsibility before the state to strictly discharge the duties imposed by the Constitution (Article 2 of the Constitution); and the state shall safeguard the rights and freedoms of citizens of Belarus enshrined in the Constitution, laws and state international obligations (Article 21.3 of the Constitution). The Republic of Belarus acknowledges the supremacy of the generally recognised principles of international law and ensures the compliance of legislation therewith (Article 8 of the Constitution).

The Constitutional Court noted that the Law is aimed at the implementation of these constitutional provisions as well as at the performance of international obligations assumed by the Republic of Belarus.

The Republic of Belarus acceded to the most significant international legal acts in the sphere of combating trafficking in human beings, including the Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005 (entered into force for the Republic of Belarus on 1 March 2014) based on the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime of 15 November 2000 (entered into force for the Republic of Belarus on 25 December 2003); provisions thereof are reflected in the Law.

Article 1.1 of the Law sets out definitions of “trafficking in human beings” and “exploitation”. The Constitutional Court is of the view that the introduction by the legislator of additional criteria in determining the mentioned terms is intended to criminalise a wider scope of socially dangerous acts related to trafficking in human being and various forms of exploitation of individuals, including their formerly unpunishable manifestations. It aims to strengthen the rule of law and legal order and complies with the constitutional obligations of the state to protect the life of every individual against any

unlawful infringements and safeguard personal liberty, inviolability and dignity (Articles 24.2 and 25.1 of the Constitution).

The extension of content of the term “trafficking in human beings” by indication of acts committed with the purpose of exploitation of minors regardless of use of such means as deception, abuse of confidence, threat or use of force is aimed at the protection of interests of minors and ensurance of the highest possible safeguards for their well-being. It conforms to the rule of Article 32.1 of the Constitution prescribing that childhood is placed under the protection of the state as well as ensuring due execution by the Republic of Belarus of commitments assumed under the Convention on the Rights of the Child (the Republic of Belarus is a Contracting Party) adopted by UN General Assembly Resolution of 20 November 1989.

Second, the Law enshrines a definition of identification of victims of trafficking in human beings as a complex of actions carried out with the purpose of obtaining data on the commission of trafficking in human beings and related crimes with regard to individuals (Article 1.1). At the same time the Law “On Combating Trafficking in Human Beings” is supplemented by Article 17.1 “Identification of victims of trafficking in human beings” (Article 1.4 of the Law).

Provisions on the identification of victims of trafficking in human beings implement rules of the Council of Europe Convention on Action against Trafficking in Human Beings which requires that a State Party to the Convention shall adopt such legislative or other measures as may be necessary to identify victims (Article 10.2); and shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim (Article 13.1).

The Constitutional Court considered that the legislator while assigning appropriate powers related to the identification of victims of trafficking in human beings to competent state bodies and organisations creates necessary conditions for the due execution of regulations of the said Convention as well as for making a grounded decision within the recommended time.

The Constitutional Court recognised the Law “On Making Addenda and Alterations to the Law “On Combating Trafficking in Human Beings” to be in conformity with the Constitution.

*Languages:*

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



# Belgium

## Constitutional Court

### Important decisions

*Identification:* BEL-2014-3-007

a) Belgium / b) Constitutional Court / c) / d) 25.09.2014 / e) 139/2014 / f) / g) *Moniteur belge* (Official Gazette), 24.11.2014 / h) CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Child, born out of wedlock, recognition / Paternity, right to contest, father / Private life, balance between rights and interests / Family, stable family environment, legal certainty / Child, best interest, overriding nature.

*Headnotes:*

By establishing *de facto* enjoyment of status as an absolute bar to the admissibility of proceedings to contest recognition of paternity, the legislature gave precedence in all cases to the social and emotional reality of fatherhood over the biological reality. Given this absolute bar to admissibility, the man who acknowledged the child is completely deprived of any possibility of contesting his own recognition of paternity. It is therefore impossible for the Court to take account of the interests of all the parties concerned. Such a measure is not proportional to the legitimate aims pursued by the legislature. The impugned provision is therefore incompatible with Article 22 of the Constitution taken together with Article 8 ECHR.

A legislative provision that does not establish an absolute bar to the admissibility of proceedings to

contest the recognition of paternity, but sets a time limit to initiate proceedings to contest paternity, may be justified by a desire to safeguard legal certainty and maintain the permanence of family relationships.

Unlike the establishment of a legal parent-child relationship in the case of a child born in wedlock, which results from the presumption of paternity of the husband, recognition implies an explicit expression of will on the part of the man acknowledging a child. Although this recognition creates a legal parent-child relationship, a man may acknowledge a child while knowing that there is no biological relationship between them.

In principle, a condition of admissibility precludes the Court from considering the merits of the case and balancing the interests. Article 330 of the Civil Code does not, however, prevent a man who acknowledged a child because he was convinced at the time that he was the biological father from contesting that recognition if it subsequently emerges that he is not the biological father. In such a case, it has to be accepted that his consent to recognition was vitiated.

*Summary:*

I. The Namur Court of First Instance referred several preliminary questions to the Constitutional Court concerning three different cases relating to Article 330 of the Civil Code. The cases concern proceedings to contest the recognition of paternity brought by the man who acknowledged the child. Three aspects of Article 330 of the Civil Code raise constitutionality issues in relation to the constitutional rules on equality and non-discrimination (Articles 10 and 11 of the Constitution) and the right to private and family life (Article 22 of the Constitution), taken together, if appropriate, with Article 8 ECHR. The Court examined these in turn.

II. Firstly, under the provision at issue, the action is inadmissible when the child enjoys *de facto* status in relation to the person who acknowledged him/her.

The Court notes the close link between Article 22 of the Constitution and Article 8 ECHR. It also refers to the case-law of the European Court of Human Rights resulting mainly from the *Kroon*, *Söderman*, *Konstantinidis*, *Backlund*, *Laakso*, *Röman* and *Pascaud* judgments. The Court concludes from its assessment that, when the legislature introduces rules governing legal parent-child relationships, it must in principle allow the competent authorities to balance the interests of the different parties involved in the particular case. Otherwise it risks adopting a measure that is not proportional to the legitimate aims

pursued. In this balancing of interests, the interests of the child have a special place and must be a paramount consideration, although they are not absolute.

The Court acknowledges that a stable family environment, the legal certainty of family ties and the interests of the child are legitimate aims, which the legislature can take into account in order to set limits on the denial of paternity. In this connection, it is appropriate not to give precedence *a priori* to the biological reality over the social and emotional reality of fatherhood.

However, the Court holds that, as an absolute bar to admissibility, the *de facto* enjoyment of status is incompatible with the right to respect for private life because the man who acknowledged the child is completely deprived of any possibility of contesting his own recognition of paternity and it is impossible for the Court to consider the interests of all the parties involved.

The provision in question raises a second issue owing to the fact that the father is required to bring his action within one year from the date of discovery of the fact that he is not the child's biological father. The Court acknowledges the constitutionality of this requirement given that the provision at issue creates an absolute bar to the admissibility of proceedings to contest the recognition of paternity, but sets a time limit for bringing proceedings, which is justified by the desire to safeguard legal certainty and maintain the permanence of family ties.

The Court further notes that the provision allows the child to bring an action between the ages of twelve and twenty-two or within one year from the discovery of the fact that the person who acknowledged him/her is not his/her father. The legislature thus safeguards the right to identity, which, according to the European Court of Human Rights, must be the subject of an in-depth examination when balancing the interests at stake. The Court also refers to its Judgment no. 96/2011 of 31 May 2011. The Court concludes that, in view of the concerns expressed by the legislature and the values it sought to reconcile, there is reasonable justification for the fact that the person who acknowledged the child only has a short time to contest recognition.

A third constitutionality issue arises owing to the fact that the person who acknowledged the child is only allowed to contest recognition if he proves that his consent was vitiated. According to the *travaux préparatoires* of the law, the legislature intended to restrict the possibilities of denying recognition in the interests of legal certainty. Therefore it took into

account the fact that the person who acknowledged the child expressly consented to this recognition. Consequently, it is only in cases where that consent was vitiated that the person is permitted to bring proceedings to deny paternity and therefore reverse the consent that was given. The Court acknowledges the constitutionality of this admissibility requirement, noting that there is no such requirement where other persons bring proceedings to contest recognition. Since other persons may bring proceedings to contest recognition without being subject to the same admissibility requirement, namely the child and the man claiming paternity, the legislature allows the Court to consider the merits of the action and to balance the interests of the different parties involved in the particular case.

#### *Cross-references:*

Constitutional Court:

- no. 96/2011 of 31.05.2011, *Bulletin* 2011/2 [BEL-2011-2-006].

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2014-3-008

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 13.11.2014 / **e)** 165/2014 / **f)** / **g)** *Moniteur belge* (Official Gazette), 09.02.2015 / **h)** CODICES (French, Dutch, German).

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

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

1.4.10.1 Constitutional Justice – Procedure – Interlocutory proceedings – **Intervention.**

2.1.1.3 Sources – Categories – Written rules – **Law of the European Union/EU Law.**

2.1.1.4.18 Sources – Categories – Written rules – International instruments – **Charter of Fundamental Rights of the European Union of 2000.**

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

4.7.6 Institutions – Judicial bodies – **Relations with bodies of international jurisdiction.**

4.7.15.1 Institutions – Judicial bodies – Legal assistance and representation of parties – **The Bar.**

5.2 Fundamental Rights – **Equality.**

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

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

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

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

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

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

*Keywords of the alphabetical index:*

Court of Justice of the European Union, preliminary question / Court of Justice of the European Union, question of validity / Court of Justice of the European Union, question of interpretation / Charter of Fundamental Rights of the European Union / Lawyers' services, VAT / Counsel, fees, VAT.

*Headnotes:*

The Constitutional Court referred several preliminary questions to the Court of Justice of the European Union in the interests of establishing whether Council Directive 2006/112/EC of 28 November 2006 relating to the common system of value added tax, which makes the provision of lawyers' services subject to VAT, without considering, in connection with the right to assistance of counsel and the principle of equality of arms, whether litigants not entitled to legal aid are subject to VAT or not, is compatible with Article 47 of the Charter of Fundamental Rights of the European Union. The Court also considered whether it was consistent with Article 14 of the International Covenant on Civil and Political Rights and Article 6 ECHR, in that this article guarantees everyone the right to a fair hearing, the right to counsel, to a defence and to representation, and the right to legal aid for those lacking sufficient means if such aid is necessary to ensure effective access to justice.

The Court raised further issues relating to both the validity of the directive and its interpretation.

*Summary:*

I. Applications were made to the Court to set aside Article 60 of the Law of 30 July 2013 introducing various provisions repealing the exemption from value added tax enjoyed by lawyers until that time. The applications were brought by individuals, associations and several Bars. The cases were joined. The Council of European Bars became involved in these cases. Some parties also requested the suspension of the law. The Court rejected this request in Judgment no. 183/2013 of 19 December 2013.

The impugned provision pursues a budgetary aim and additionally seeks to align the system for taxation of lawyers' services with EU law, since it puts an end to the exemptions enjoyed by Belgium under Council Directive 2006/112/EC of 28 November 2006 relating to the common system of value added tax.

II. The Court recognises the interest of the different applicants and intervening parties in taking proceedings in their capacity as citizens, lawyers, associations or professional organisations.

Several pleadings rely on the right to a fair hearing and the right to a lawyer's assistance based on the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution) and on Articles 13 and 23 of the Constitution. They are taken together with Articles 6 and 14 ECHR, Articles 6 and 14 of the International Covenant on Civil and Political Rights and Article 47 of the Charter of Fundamental Rights of the European Union.

According to the Court, the principles of respect for the right to a defence and the right to a fair hearing imply the right for litigants to be assisted by a lawyer, a right to which the constitutional principle of equality and non-discrimination is applicable. The right to be assisted by a lawyer is a corollary of the right to a defence, of which the legislature cannot deprive a category of litigants without establishing an unjustified distinction, given the nature of the principles at stake.

Article 6.1 ECHR safeguards everyone's right to a fair trial, which may imply the assistance of counsel with a view to appearing before a court if it appears from the circumstances of the case that the person is very unlikely to be able to effectively defend his/her own case.

The Court further notes that the Convention aims to protect concrete and effective rights. The European Court of Human Rights gives states discretion to choose the means to be employed to safeguard litigants' rights under Article 6.1. However, it

considers that a restriction on access to a court should not restrict a litigant's access in such a way or to such an extent that the very essence of his/her right of access to a court would be compromised. A restriction on access to a court may be of a financial nature.

The Court further notes the right of access to a court and the principle of equality of arms, which are elements of the wider notion of a fair hearing within the meaning of Article 6.1 ECHR. The Court emphasises that they entail an obligation to guarantee a fair balance between the parties to the proceedings and to offer each party a reasonable opportunity to state his/her case in conditions that do not place it at a clear disadvantage in relation to its adversary/adversaries. Article 14 ECHR strengthens this principle.

The Court next observes that the effect of the impugned provision is to make the provision of lawyers' services subject to a tax of 21% and that this increase could impair the effectiveness of the right to the assistance of counsel where some litigants are concerned.

The Court further notes that litigants are not affected in the same way. The reason is that persons subject to VAT will be able to recover the amount of the tax and litigants entitled to legal aid will not be affected by the impugned provision either. The Court then notes that, in view of the different treatment between litigants, the provision might also compromise the principle of equality of arms in proceedings. These two categories of litigants could be adversaries and uphold opposing claims in the same proceedings. This could be the case, for instance, when a dispute sets an employee against an employer, a consumer against a trader, a citizen against a contractor or architect, a citizen against a bank or insurance company, or a citizen against a public authority.

By increasing the cost of a lawyer's services by 21% solely for parties to proceedings who are not subject to VAT, the impugned provision might, according to the applicants, have the effect of placing such parties at a clear disadvantage in relation to their adversaries. In certain circumstances, this would upset the fair balance between the parties to the proceedings.

The Court then turns its attention to the general scheme provided for under the previously cited Directive 2006/112/EC, given that the legislature's intention was to bring Belgium into line with the general scheme and put an end to the exemptions that it previously enjoyed. Consideration of this directive and of a judgment of the Court of Justice of

the European Union of 17 June 2010 (*Commission v. France*, C-492/08) led it to refer several preliminary questions to the Court of Justice regarding the validity of the directive and its interpretation. One of these questions concerns the compatibility of the directive with Article 9.4 and 9.5 of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998.

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2014-3-009

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 27.11.2014 / **e)** 170/2014 / **f)** / **g)** *Moniteur belge* (Official Gazette), 09.02.2015 / **h)** CODICES (French, Dutch, German).

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

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

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:*

Property, right, restriction, car parks / Right to property, protection, Constitution taken together with the ECHR / Environment, air quality, transport / Environment, global warming, transport / Travel between home and work, employer's car park.

#### *Headnotes:*

Discouraging travel by car between home and work in the Brussels-Capital Region by restricting parking spaces for office buildings in order to preserve the environment is not inconsistent with the right to property (Article 16 of the Constitution and Article 1 Protocol 1 ECHR).

*Summary:*

I. The non-profit organisation “Belgian Federation of Car Parks” and the “Professional Union of the Real Estate Sector” brought an application to set aside several provisions of the Order of the Brussels-Capital Region of 2 May 2013 concerning the Brussels Code for Air, Climate and Energy Control.

The impugned provisions set an upper limit on the number of spaces in car parks serving office buildings or areas used for high-tech activities and the production of intangible goods, based on the area where the building in question is located and the floor space of the building. The better the area is served by public transport, the less the number of parking spaces authorised by m<sup>2</sup> of floor space. It appears from the preparatory documents that the intention of the legislature of the Brussels-Capital Region was to reduce car traffic by restricting the number of parking spaces in the capital. In principle, many office buildings easily accessible by public transport have an extremely large parking capacity that was permitted at a time when these environmental issues received less attention. Such facilities clearly do not encourage workers to adopt an alternative form of transport.

The applicants alleged that the legislature which issued the order had interfered with the right to property (Article 16 of the Constitution and Article 1 Protocol 1 ECHR) without justification by limiting the number of spaces allowed in car parks serving office buildings.

II. The Court, which has authority to review legislative provisions in relation to certain articles of the Constitution, such as, in this case, Article 16, included Article 1 Protocol 1 ECHR in its review. As this provision of international law has a similar scope to that of Article 16 of the Constitution, the guarantees it contains form a whole, which is inseparable from those contained in the constitutional provision. The Court therefore took both provisions into account in its review.

The Court emphasised that any interference with the right to property must strike a proper balance between public interest requirements and those relating to protection of the right to peaceful enjoyment of property. There must be a reasonable relationship of proportionality between the means employed and the aim pursued.

The impugned measure seeks to limit the use of cars for travelling between home and work in order to reduce road traffic congestion and preserve the environment by improving air quality and combating

global warming. As regards to environmental policy, which holds a central place in the social and economic policies of modern societies, the Court is required, in view of the obligation placed on regional legislatures by Article 23.3.4° of the Constitution to guarantee the right to protection of a healthy environment, to respect the judgment of these legislatures as to what is in the public interest, unless that judgment is unreasonable.

The Court stated that the legislature which issued the order had a wide margin of discretion to determine the appropriate measures for achieving its environmental aims. In this case, the impugned provisions were not manifestly inappropriate for achieving the aims pursued, especially as research had shown a correlation between use of personal vehicles to travel to work and the provision of parking spaces by employers. According to the Court, the Brussels legislature might have sought more specifically to ensure that the operation of car parks for which an environmental permit had previously been issued did not continue beyond the date of expiry of the permit in violation of the new rules.

Nevertheless, the Court must still consider whether the legislature that issued the order struck a proper balance between preservation of the right to peaceful enjoyment of property and the pursuit of its chosen aims.

During this examination, the Court found that the effect of the impugned provisions was not to prohibit the use of all the parking spaces in the car parks falling within their ambit. Instead, the effect was to prevent the use of parking spaces that was considered surplus to requirements having regard not only to the floor space of the building served by the car park but also to how well the area in question was served by public transport. Consequently, the legislature that issued the order did not introduce either a general prohibition or a blanket measure.

The Court emphasised that it was possible to waive the limit on the number of parking spaces. The condition must be that the car park was justified either because of the need to have sufficient parking spaces for company vehicles or for visitors' and clients' vehicles, or because of the particular economic or social features of the activities carried on in the building served by the car park or its limited accessibility having regard to the general characteristics of the location.

The Court examined another set of complaints lodged by the applicants, but dismissed them and, hence, the application as a whole.

*Cross-references:*

European Court of Human Rights:

- *Paratheristikos Oikodomikos Synetairismos Stegaseos Ypallilon Trapezis Tis Ellados v. Greece*, § 50, no. 2998/08, 03.05.2011;
- *Ansay and Others v. Turkey*, 02.03.2006;
- *Gorraiz Lizarraga and Others v. Spain*, § 70, no. 62543/00, 27.04.2004, *Reports of Judgments and Decisions* 2004-III;
- *Potomska and Potomski v. Poland*, § 67, no. 33949/05, 29.03.2011.

*Languages:*

French, Dutch, German.



*Identification:* BEL-2014-3-010

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 18.12.2014 / **e)** 185/2014 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**  
 1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect.**  
 5.2 Fundamental Rights – **Equality.**  
 5.3.5.1.4 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Conditional release.**

*Keywords of the alphabetical index:*

Criminal law, proceedings, Assize Court / Criminal law, proceedings, downgrading of offences / Criminal law, recidivism / Criminal law, mitigating circumstances / Sentence of imprisonment, execution, parole, conditions / Effect of judgments, unconstitutionality, maintaining the effects of the unconstitutional provision / Effect of judgments, unconstitutionality, directions given to the legislature.

*Headnotes:*

It is unjustifiable and contrary to the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) for a person who, after being sentenced to at least one year's imprisonment, is convicted of attempted murder less than five years after serving his/her sentence or after the time-limit for enforcement of the sentence expired, to be treated differently, as regards the possibility of parole, depending on whether he/she is committed for trial before the Assize Court and convicted of a serious crime or whether, the offence having been downgraded owing to mitigating circumstances or a ground of excuse, he/she is convicted of a lesser offence by the *tribunal correctionnel* (Criminal Court for less serious offences) or the Court of Appeal.

*Summary:*

I. The Court of Cassation asked the Constitutional Court to review the constitutionality of several criminal provisions which, taken together, mean that a person convicted of attempted murder by the *tribunal correctionnel* and not by the Assize Court (trial by jury) cannot claim parole until after he/she has served two thirds of the new sentence, given that the person is deemed to be a "recidivist" (where the new offence is committed less than five years after the person has completed a prison sentence of at least one year).

Attempted murder is a crime for which the accused is in principle tried by the Assize Court. However, in many cases – to relieve the jury – such crimes are tried by the *tribunal correctionnel*, after downgrading of the offence, if mitigating circumstances can be considered.

In response to the preliminary question referred to it by the Court of Cassation, the Court considered in particular whether it is consistent with the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) that a person who was sentenced by the *tribunal correctionnel*, after downgrading of the offence, to ten years' imprisonment, as a principal sentence, for attempted murder, and who is deemed a recidivist under Article 56.2 of the Criminal Code, should be unable to claim parole until he/she has served two-thirds of the sentence. This is compared to a person who is tried by the Assize Court for attempted murder and is given a criminal sentence can already claim parole after serving a third of the sentence, even if his/her circumstances are similar to those covered by the impugned provision.

The Assize Court cannot make a finding of recidivism, except in the cases provided for in Articles 54 and 55 of the Criminal Code, which concern persons who reoffend after receiving a criminal sentence. If the person had been prosecuted for the same offence in the Assize Court, the Court would not have been able, in the same circumstances, to make a finding of recidivism. A finding of recidivism has effects not only in terms of the quantum of the sentence, which may be doubled, but also in terms of the execution of the sentence. Whereas a sentenced person can normally claim parole after serving a third of his/her sentence, a person found to be a recidivist cannot claim parole until he/she has served two thirds of his/her sentence.

In its Judgments nos. 193/2011 and 199/2011, the Court had held the difference of treatment to be discriminatory where the quantum of the sentence was concerned. The Court of Cassation now wished to know whether there was also a violation of the principle of equality where the execution of the sentence was concerned.

II. The Constitutional Court first considered what the justification is, according to the legislature, for the difference in treatment in terms of the possibility of making a finding of recidivism. In the case of a conviction by the *tribunal correctionnel*, a finding of recidivism leads to a more severe sentence (up to twice the maximum sentence for less serious offences) because the first sentence clearly was not effective enough. In the case of a conviction by the Assize Court, the criminal sentence is already deemed sufficiently severe in itself and should the finding of recidivism require aggravation of the sentence, the judge can meet that need when sentencing.

The Court next observed that a finding of recidivism has the effect not only of increasing the sentence but also of limiting the possibility of parole, because a sentenced person found to be a recidivist must serve two thirds of his/her sentence before he/she can claim parole. The main aim in committing persons for trial before the *tribunal correctionnel* for identical offences is to reduce the number of cases heard by the Assize Court.

For the sentenced person, all this scarcely makes a difference. That is, although the prison sentences handed down by the *tribunal correctionnel* differ from those handed down for serious crimes, both types of penalty deprive the sentenced person of his/her liberty.

According to the Court, the principle of equality is therefore violated. Neither the nature of a criminal sentence nor a concern to reduce the caseload of the Assize Court can be reasonable justification for the

fact that a person who, after being sentenced to at least one year's imprisonment, is convicted of attempted murder less than five years after serving his/her sentence or after the time-limit for enforcement of the sentence expired, is treated differently. The challenged treatment pertains to the possibility of parole, depending on whether he/she is committed for trial before the Assize Court and convicted of a serious crime or whether, the offence having been downgraded owing to mitigating circumstances or a ground of excuse, he/she is convicted of a lesser offence by the *tribunal correctionnel* or the Court of Appeal.

The Court consequently ruled that Article 56.2 of the Criminal Code violates Articles 10 and 11 of the Constitution. The violation is only to the extent that, as a consequence of it, a person convicted by the *tribunal correctionnel* of an offence downgraded to a lesser offence committed less than five years after serving a prison sentence of at least one year, or after expiry of the time-limit for enforcing such a sentence, is denied the possibility of parole for longer than a person who is given a criminal sentence by the Assize Court for the same offence committed in the same circumstances.

Nevertheless, the Court maintained the effects of the provision found to be unconstitutional, for the reasons and to the extent stated below. It noted first of all that maintaining the effects of a provision should be regarded as an exception to the declaratory nature of the judgments given in preliminary proceedings. Before deciding to maintain the effects of a provision, the Court must establish that the benefit derived from an unqualified finding of unconstitutionality is disproportionate in relation to the disruption it would cause to the legal system. The Court then proceeded to weigh up the factors of the case. In view of the need firstly to avoid the excessive consequences which the finding of unconstitutionality would have by preventing measures that could be taken on the basis of the impugned provision from being taken. Secondly, to avoid the discriminatory situation described above to persist beyond a reasonable time, the Court maintained the effects of the impugned Article 56.2 until the entry into force of a law putting an end to this discrimination, and until 31 July 2015 at the latest.

#### *Languages:*

French, Dutch, German.



# Bosnia and Herzegovina Constitutional Court

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## Important decisions

*Identification:* BIH-2014-3-002

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 25.09.2014 / **e)** AP 1020/11 / **f)** / **g)** *Službeni Glasnik* (Official Gazette), 101/14 / **h)** CODICES (Bosnian, English).

*Keywords of the systematic thesaurus:*

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

5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly.**

*Keywords of the alphabetical index:*

Hate speech / Violence, public event.

*Headnotes:*

Failure by the public authorities to provide for a clear legal framework to reconcile competing interests in order to act preventively, which would have deterred the dissemination of insults, defamation and threats addressed to organisers of a festival dedicated to a legitimate issue and prevented the occurrence of violence on the day of the opening ceremony, which resulted in the remaining part of the festival being cancelled, breached the right to freedom of assembly.

*Summary:*

I. Organisation Q, the applicant in this matter, is concerned with the promotion and protection of culture, identity and human rights of homosexuals. It took issue with the failure by the public authorities to take the steps needed to safeguard the gathering related to the first Sarajevo Queer Festival (hereinafter, the “Festival”), alleging that this violated the right to public assembly. The applicant also claimed that the public authorities failed to conduct an effective investigation and put on trial the organisers and instigators of the violence that occurred.

II. The Constitutional Court noted the obligation on the part of public authorities to take reasonable and

adequate measures to allow authorised protests to take place peacefully. In this context, the obligation of the public authorities under Article 11 ECHR is the obligation with regard to the measures to be taken, not the results to be achieved. Jurisprudence from the European Court of Human Rights indicates that an assessment of the expediency or effectiveness of the tactics adopted by the police on these occasions is not needed; assessment is simply needed as to the existence of an arguable claim that the appropriate authorities failed to take the necessary measures (see ECHR, *Plattform “Ärzte für das Leben” v. Austria*, paragraph 36).

There had been sufficient indication of the need to step up security on this occasion; this could be discerned from the media interest and posters conveying insulting messages and messages likely to incite violence posted all over the town along with the call for the organisation of a demonstration opposing the festival on the day of the opening ceremony. Participants were invited to appear in front of the building of Academy of Fine Arts and prevent the opening ceremony of the Festival. The applicant had notified the Police Administration about these developments

The Constitutional Court noted that in the application for public gathering, the applicant had indicated why it considered that security measures by the police were necessary, especially at points around the locations where the Festival was to take place because of possible “surprise attacks”. On the day of the opening ceremony of the Festival, seven people who were attending the Festival were attacked and sustained minor and major bodily injuries during such “surprise attacks” in addition to the incidents that occurred between supporters and opponents of the Festival in front of the building of the Academy of Fine Arts. In this connection, the Constitutional Court noted that the Police Administration conducted disciplinary proceedings against several police officers who were deployed to secure the points where the attacks occurred. Finally, it did not follow from the response of the Ministry of Internal Affairs of the Canton of Sarajevo (hereinafter, “the MoI”) or Cantonal Prosecutor’s Office of Sarajevo (hereinafter “the CPO”) that proceedings prescribed by the Law on Public Assembly were conducted against the persons designated as organisers of the Festival or against the security agency for possible failures.

The Constitutional Court noted that, in line with the positive obligation of public authorities to protect peaceful demonstration, the Criminal Code of the Federation of Bosnia and Herzegovina (hereinafter, the “Criminal Code”) made the prevention or hindering of a public gathering a criminal offence

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(Article 190). In this particular case, the public authorities had failed to take reasonable and appropriate measures in order to prevent conflict between supporters and opponents of the Festival and subsequent attacks on those taking part in it.

The Constitutional Court emphasised that the positive obligation of the State implies that action is to be taken with the aim of effective conduct of investigation and, if necessary, protection against unlawful acts, including violence.

The Constitutional Court noted that the applicant, as organiser of the Festival, was exposed to attacks, threats and open announcements of violence against it, its members and the LGBTIQ population in general from the moment the Festival was announced. Documents submitted to the Constitutional Court also showed that the Mol and CPO were informed of threats addressed to those who clearly expressed their support of the Festival. Yet up to the day of the opening ceremony, neither the Mol nor CPO had taken any action to investigate or identify the individuals who were making threats, casting insults and inciting violence. The investigation, which was initiated after the incident took place and which resulted in the cancellation of the Festival when the competent authorities were already aware of threats, but had done nothing to investigate them and prevent the violence from occurring, could not be accepted as meeting the positive obligation of public authorities to act preventively and conduct effective investigation.

The Constitutional Court further noted the use of the internet for the most part, in the announcement of the threats, insults and calls for violence. It could not be concluded that any measures or actions were undertaken against the owners of web pages where such content was published in order to prevent further dissemination of such messages.

The Constitutional Court noted that at the material time, a Cyber Crime Department existed within the Mol. However, the evidence submitted indicated that this department only took action to investigate and identify the persons who had addressed the threats and insults to the applicant and some of its members after the reports had been filed (i.e. after the violence had occurred). The Constitutional Court noted that the Mol and CPO did not indicate, in the response to the appeal, the reason for which that Department had not been involved at an earlier point, in view of the fact that the applicant had been filing reports on threats and insults sent via the internet, supported by documents indicating the content of the messages and, in a small number of cases, the names of those who sent them or information which could have been used to identify those involved. Finally, the Mol had

forwarded all the reports to the CPO which is competent to issue orders to involve that Department. The Constitutional Court noted that the fact that this part of the investigation resulted in certain persons being identified and minor offence proceedings conducted against them would indicate that action in this sense could not be regarded as an excessive burden on public authorities to investigate and prevent unlawful acts, including violence. It also observed that these steps were taken after the violence had occurred; they could not therefore be perceived as fulfilment of the positive obligations of the public authorities to take preventive actions.

In this case, the insults, defamation and threats to the applicant and the calls for violence were mostly addressed through the internet. All of this occurred in 2008, when it was already well-known that the high degree of anonymity on the internet encourages freedom of speech and the expression and exchange of the most diverse ideas, but that this very anonymity also represents a powerful tool for offending, threatening and violating the rights of others. Moreover, during this period, the Additional Protocol of the Convention on Cybercrime was ratified. All state signatories to this Protocol have undertaken an obligation to criminalise acts of a racist and xenophobic nature committed through computer systems.

It follows that there was an obligation on the part of the public authorities to provide for a legal framework in which the various claims competing for protection would be reconciled. As already indicated in this decision, according to the position of the European Court of Human Rights, in certain democratic societies it can be considered necessary to sanction or even prevent all forms of expression that spread, incite, promote or justify hatred based on intolerance, if it is shown that the "formalities", "conditions", "restrictions" or "penalties" are proportionate to the legitimate aim sought to be achieved. Expressions and comments used in the present case refer to the conclusion that they were motivated primarily by the manner in which the LGBTIQ population expresses its sexuality and gender and sexual orientation. These comments were mainly made via the internet, in view of its prevalence and accessibility. They unquestionably had a character of public expression. They represented "hate speech" which, in its broadest meaning, implies the public expression or causing of hatred towards certain groups or individuals due to their preferences, in order to create intolerance, discord, discrimination and violence or the incitement of hatred already present which is developed, strengthened and deepened through such public hate speech.

However, in the relevant period, as is the case today, the Criminal Code failed to stipulate crime committed out of hate as any other criminal offence committed on the account of race, colour of skin, religion, national or ethnic origin, disability, gender, gender orientation or gender identity of other persons. Failure by the public authorities to provide for a clear legal framework to reconcile competing interests in order to act preventively, which would have deterred the dissemination of insults, defamation and threats addressed to organisers of a festival dedicated to a legitimate issue and prevented the occurrence of violence on the day of the opening ceremony (which resulted in the remaining part of the festival being cancelled) resulted in a breach of the effective enjoyment of the applicant's right to freedom of assembly.

The Constitutional Court concluded that the applicant's rights under Article II.3.i of the Constitution and Article 11 ECHR had been violated.

III. Pursuant to Article 43 of the Rules of the Constitutional Court, the annex to this decision comprises the separate dissenting opinions of judges Mirsad Ceman and Margarita Caca-Nikolovska.

European Court of Human Rights:

- *Plattform "Ärzte für das Leben" v. Austria*, no. 10126/82, 21.06.1988 (paragraph 36).

*Languages:*

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



## Brazil

### Federal Supreme Court

#### Important decisions

*Identification:* BRA-2014-3-035

**a)** Brazil / **b)** Federal Supreme Court / **c)** First Panel / **d)** 28.04.2009 / **e)** 96.745 / **f)** *Habeas Corpus* / **g)** *Diário da Justiça Eletrônico* 99 (Official Gazette), 29.05.2009 / **h)**.

*Keywords of the systematic thesaurus:*

2.1.2.2 Sources – Categories – Unwritten rules – **General Principles of law.**

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

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

*Keywords of the alphabetical index:*

Conflict of laws / Law, abrogation / Law of general application / Law, particular / Minor, detention, conditions / Minor, protection / Offence, criminal, minor / *Lex specialis*, general norm, amendment.

*Headnotes:*

The reduction of the age of majority from 21 to 18 does not preclude the application of socio-educational measures of confinement and 'semi-freedom' to juvenile delinquents, as set forth in the Child and Adolescent Statute (hereinafter, the "ECA", in the Portuguese acronym). The measures can still be applied to persons younger than 21. The new Civil Code, as it establishes general rules, did not repeal the rules set forth by the ECA, because this one is a specific rule.

*Summary:*

I. This case refers to a request for a writ of *habeas corpus* (which in Brazil is an action for rights protection that goes beyond protection of liberty), filed against a decision that held that socio-educational measures of confinement and semi-freedom to juvenile delinquents are still applied to those who have reached the criminal responsibility age, but are

under 21 years old. The applicant argued that, since Law no. 10406/2002 (new Civil Code) reduced the age of majority to 18, it repealed the rules concerning socio-educational measures provided for by the ECA, to those who are over 18 years old (in Brazil, the age of majority is equal to the age of criminal responsibility). Furthermore, the applicant contended that only exceptionally could a socio-educational measure be applied to those who are over 18 years old. He argued that only confinement could be applied in such cases. Thus, other socio-educational measures to juvenile delinquents could not be applied, notably 'semi-freedom' (a regime under which confinement is significantly relaxed).

II. The First Panel of the Brazilian Supreme Court, by majority, did not grant the writ of *habeas corpus*, on the grounds that the reduction of the age of majority set forth by the new Civil Code did not change the age limits set forth by the ECA. Both confinement and 'semi-freedom' apply to juvenile delinquents, even after they are over the age of majority. The Court explained that the Statute does not provide the age of majority as a reason to terminate socio-educational measures to juvenile delinquents; it only provides that, exceptionally, its norms could be applied to those who are over 18 and under 21. The criterion to apply the Statute is the age of the juvenile when the offence was committed. Accordingly, lawmakers defined an objective time criterion, under which it is not important whether the minor reached the age of criminal responsibility due to other reasons. The Court held that socio-educational measures intend not only to give a sense of responsibility to the juvenile delinquent, but also to improve his behaviour as a member of society and to provide his return to social life. Such measures must be performed in accordance with the particular condition of a juvenile, as a person under development, who must have full protection until he or she reaches 21 years of age. The Court held that, in order to solve the conflict between the Civil Code and the ECA, it was necessary to apply the *lex specialis* doctrine, according to which the newest law that establishes general rules does not repeal or modify the oldest, when this one contains specific rules.

III. In a separate opinion, a dissenting Justice argued that the ECA established 21 years old as a criterion, because this was the age of majority when it was enacted. Accordingly, as the Civil Code lowered the age of majority from 21 to 18, the age referred to in the ECA was repealed.

#### Cross-references:

- Law no. 8069/1990;
- Law no. 10406/2002.

#### Languages:

Portuguese, English (translation by the Court).



#### Identification: BRA-2014-3-036

a) Brazil / b) Federal Supreme Court / c) Full Court / d) 09.02.2012 / e) 19 / f) Declaratory Claim of Constitutionality / g) *Diário da Justiça Eletrônico* 080 (Official Gazette), 29.04.2014 / h).

#### Keywords of the systematic thesaurus:

2.1.1.4.12 Sources – Categories – Written rules – International instruments – **Convention on the Elimination of all Forms of Discrimination against Women of 1979.**

3.16 General Principles – **Proportionality.**

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

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

#### Keywords of the alphabetical index:

Woman, rights, advancement / Woman, protection, special / Woman, violence against, special court.

#### Headnotes:

Law no. 11340/2006 (hereinafter, the “Maria da Penha Act”) is constitutional as it establishes a special court to hear domestic and family violence against women and withdraws the offences committed against them from the list of minor offences. The act fulfils the constitutional provision which sets out that the State shall establish mechanisms to restrain family relationships from violence.

#### Summary:

I. This case refers to a declaratory claim of constitutionality filed by the President of Brazil to support the Articles 1, 33 and 41 of the Maria da Penha Act, which establishes mechanisms to curb domestic and family violence against women. The norm also assigns civil and criminal courts to hear cases related to domestic and family violence against

women, pending the establishment of Special Courts for Domestic and Family Violence against Women, and withdraws the offences committed against them from the list of minor offences (Law no. 9099/1995). The petitioner argued that the protection granted to families by the State is a constitutional principle (Article 226.8 of the Constitution) and, therefore, there would be a preferential treatment towards women in order to redress the imbalance that exists due to women's physical and moral peculiarities in Brazilian culture. The petitioner also argued that there is no violation of the autonomy of States to set their own organisation, pursuant to Articles 96.II.d and 12.1 of the Federal Constitution.

II. The Brazilian Supreme Court, unanimously, granted the declaratory claim on the grounds that the Maria da Penha Act fulfils the constitutional provision which obliges the State to establish mechanisms to restrain family relationships from violence (Article 226.8 of the Constitution). The Court held that the Act represents a legislative advance given that it ensures to assaulted women effective access to repair, protection and justice. Accordingly, using gender as a criterion of differentiation is not disproportionate or illegitimate, given that women are vulnerable to physical, moral and psychological abuse in the private sphere. The Court held that the Act also reduces social and cultural discrimination, which must be fought by compensatory legislation and by the promotion of equality. Thus, the Act complies with the principle of equality and with the legal and constitutional order.

Furthermore, the Court held constitutional the article that assigns domestic and family violence cases against women to civil and criminal courts pending the establishment of Special Courts for Domestic and Family Violence. The Court held that neither the autonomy of the States to set their own organisation, nor their legislative competence to establish courts, were violated, since there is no enforcement or establishment of these Special Courts by federal law, but only authorisation for their creation, considering the need to give uniform and specialised treatment to cases of violence against women in all Brazilian States.

Lastly, the Court held that the withdrawal of offences committed against women from the list of minor offences (Law no. 9099/1995) was a political-normative option chosen by the legislator, who sought to give special protection to women and distinct treatment for crimes charged with domestic and family violence against them.

#### *Cross-references:*

- Articles 96.II.d, 125.1 and 226.8 of the Federal Constitution;
- Articles 1, 33 and 41 of Law no. 11340/2006;
- Law no. 9099/1995.

#### *Languages:*

Portuguese, English (translation by the Court).



#### *Identification: BRA-2014-3-037*

**a)** Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 09.05.2012 / **e)** 597.285 / **f)** Extraordinary appeal / **g)** *Diário da Justiça Eletrônico* 053 (Official Gazette), 18.03.2014 / **h)**.

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

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

5.3.45 Fundamental Rights – Civil and political rights – **Protection of minorities and persons belonging to minorities.**

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

Education, higher, access / Affirmative action / Education, public / Education, students, equal chances / Quota / Pupil / University, autonomy.

#### *Headnotes:*

An affirmative action programme that established a quota system for admissions to higher education to applicants from public schools, as well as to black and native students who studied in public schools, is constitutional.

#### *Summary:*

I. This case refers to an extraordinary appeal filed against a decision of the Regional Federal Court of the 4th Region. The Regional Court had held that the affirmative action programme of the Federal University of Rio Grande do Sul (hereinafter, the “UFRS”, in the Portuguese acronym), which

established a quota system for admissions to higher education to applicants from public schools, as well as to black and native students who studied in public schools, is constitutional.

The appellant argued that the quota system set an arbitrary distinction among applicants, because, although he had reached a higher score than some applicants who were admitted through the quota system, he was not admitted. He also contended that the Rector of the University went beyond his competence when he set the rules of the quota system, and that the matter should be regulated by federal law.

II. The Brazilian Supreme Court, by majority vote, denied the extraordinary appeal and declared the quota system of the UFRS to be constitutional. In addition, the Court held the system to be in accordance with its decision in a previous constitutional action (ADPF 186), when the constitutionality of affirmative action policies and the application of ethnic-racial criteria for admissions in higher education were affirmed by the Court.

The Court stated that, although there is no specific legal rule to allow the quota system, there is legal grounding to establish it, inasmuch as Brazil is a member of an International Convention that allows the establishment of affirmative action. Furthermore, the Court stated that this subject need not be regulated through a formal law, since it is within the scope of university autonomy. Accordingly, Law no. 9394/1996, which establishes the national guidelines and fundaments of education, does not set the criteria for student admissions to higher education, leaving this competence to universities.

III. In a separate opinion, a dissenting Justice argued that the Court's previous decision in ADPF 186 should not be deemed a precedent for this extraordinary appeal, because it was about a different matter. That previous decision concerned a racial quota. In this extraordinary appeal, the discussion concerned a quota for admissions according to the original school of the applicant – public or private. The Justice claimed that there is no ground to establish quotas according to the student's original school. This criterion would be a rebuke to the State, as it acknowledges the failure of public education.

#### Cross-references:

- Law no. 9394/1996.

#### Languages:

Portuguese, English (translation by the Court).



#### Identification: BRA-2014-3-038

a) Brazil / b) Federal Supreme Court / c) Full Court / d) 27.06.2012 / e) 111.840 / f) *Habeas Corpus* / g) *Diário da Justiça Eletrônico* 249 (Official Gazette), 17.12.2013 / h).

#### Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.  
5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees**.  
5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.

#### Keywords of the alphabetical index:

Crime, gravity, punishment / Drug offence, difference in penalisation / Drug, trafficking, penalty, execution / Crime, heinous, punishment, execution, special condition / Penalty, enforcement / Penalty, individualisation, principle / Sentence, custodial / Sentence, reduction, application, conditions.

#### Headnotes:

The imposition of mandatory statutory conditions for beginning the execution of a sentence for a heinous or equivalent crime breaches the principle of the individualisation of punishment.

#### Summary:

I. This case refers to a request for a writ of *habeas corpus* filed against a decision that established the closed conditions as the initial regime of the sentence execution for a drug-trafficking offense, set forth in Articles 33 and 40.IV of Law no. 11343/2006 (hereinafter, the “Drugs Law”). The plaintiff argued that the inmate fulfilled the requirements of Article 33.2.b of the Penal Code to be granted semi-open conditions and stated that the decision to establish stricter conditions was not based on valid grounds.

II. The Brazilian Supreme Court, by majority, conceded that the inmate had the subjective favourable circumstances to avail of a reduced sentence and granted the writ to establish the initial semi-open conditions. In order to ensure the constitutional safeguard of the individualisation of the punishment (Article 5.XLVI of the Federal Constitution), the Court declared incidentally the unconstitutionality of Article 2.1 of the Heinous Crimes Law, as amended by Law no. 11464/2007. Hence, the mandatory closed conditions to begin the execution of the sentence in cases of heinous or equivalent offences are void.

The Court stated that the criteria to define the initial conditions of sentence execution must be in accordance with constitutional safeguards and the reasons for the conditions are indispensable. Such rules do not hinder the possibility of the imposition of stricter conditions by the trial judge, so long as such imposition is grounded on specific circumstances of the case that indicate the need for stricter conditions for the deprivation of liberty, according to Articles 33.3 and 59 of the Penal Code.

III. In separate opinions, dissenting Justices deemed constitutional the special regime concerning heinous crimes, because the crimes and the criminals in these cases were considered more dangerous. They argued that penal punishment aims at deterring criminal acts. Hence, the establishment of a higher punishment and strict prison conditions for a more abominable crime is coherent with such strategy and with the principle of proportionality. They also contended that the individualisation of the punishment is not a self-applicable constitutional rule; thus, parliament has freedom to legislate on the matter and establish criminal policy regarding heinous crimes.

#### Cross-references:

- Article 5.XLVI of the Federal Constitution;
- Articles 33.2.b, 33.3 and 59 of the Penal Code;
- Article 2.1 of Law no. 8072/1990;
- Articles 33.4 and 40.IV of Law no. 11343/2006;
- Law no. 11464/2007.

#### Languages:

English (translation by the Court).



#### Identification: BRA-2014-3-039

**a)** Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 15.05.2013 / **e)** 630.733 / **f)** Extraordinary appeal / **g)** *Diário da Justiça Eletrônico* 228 (Official Gazette), 20.11.2013 / **h)**.

#### Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**  
 3.18 General Principles – **General interest.**  
 3.21 General Principles – **Equality.**  
 5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment.**  
 5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law.**  
 5.4.9 Fundamental Rights – Economic, social and cultural rights – **Right of access to the public service.**

#### Keywords of the alphabetical index:

Civil service / Civil service, examination, competitive / Civil service, impartiality / Employment / Equity / Equal protection of rights / Public interest.

#### Headnotes:

Personal circumstances, even of physiological significance or of *force majeure*, which impede a candidate from participating in the physical stage of a competitive civil service examination, do not give rise to the right to reschedule the physical test date, unless the invitation authorises such rescheduling. Such a rule complies with the principles of equality, impartiality and the supremacy of the public interest.

#### Summary:

I. This case refers to an extraordinary appeal against a decision that acknowledged the right of a candidate to perform a physical test on a different date from the one set in the invitation for a civil service examination. The decision, grounded on the principle of equality, considered the candidate's temporary inability, due to health problems attested by a medical certificate, to determine the legitimacy for rescheduling the test date.

The appellant argued that the invitation for the exam provided that personal circumstances impeding candidates from performing the physical test would not authorise the administration to grant candidates different treatment. Thus, the appellant claimed violation of Articles 5.*caput* and 37.*caput* of the Federal Constitution, since applying for the examination implies acceptance of all rules applying

to the invitation. The appellant also argued that permitting the performance of the test on a different date would breach the principles of equality and impartiality of public administration. The appellant stressed, furthermore, that the public interest should prevail over the principle of equality in this case.

II. The full Court, by majority, denied the appeal to ensure the legitimacy of the physical tests that were performed on different dates in this examination, considering the principle of legal certainty and the significant impact this ruling would have on the Court's case law. However, the Court, by granting 'general repercussion' effects to the appeal (i.e. effects beyond the parties to the procedure), decided that no candidate has the right to reschedule the physical test date of a civil service examination due to personal circumstances of any sort, unless the invitation, which constitutes the internal rules governing examinations, authorises so.

The Court held that allowing candidates to reschedule the exam due to personal circumstances would create precedents for the possibility of postponing any stage of the examination based on different individual reasons, causing commotion and unnecessary expenses for the administration, as well as delaying the closure of examinations and jeopardising their effectiveness.

The Court highlighted that both parties based their arguments on the principle of equality, which implies both equal opportunity to compete in an open contest and equal treatment when applying the test. As candidates act under competition, this principle must be linked with the impartiality of administrative action, which inhibits differential treatment of those competing, even if the individual situation is motivated or not by *force majeure*.

III. In a separate opinion, that had also denied the appeal, although on different grounds, the Justice considered it possible to withdraw the invitation rules if there is just cause. Moreover, he considered that it was not possible for the Court to grant general repercussion effects to the case, since the appeal was filed before the Law that established such effects came into force.

#### *Cross-references:*

- Articles 5.*caput* and 37.*caput* of the Federal Constitution.

#### *Languages:*

English (translation by the Court).



#### *Identification: BRA-2014-3-040*

**a)** Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 19.06.2013 / **e)** 4.617 / **f)** Direct claim of unconstitutionality / **g)** *Diário da Justiça Eletrônico* 029 (Official Gazette), 12.02.2014 / **h)**.

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

1.4.9.1 Constitutional Justice – Procedure – Parties – **Locus standi**.  
 4.5.10 Institutions – Legislative bodies – **Political parties**.  
 4.7.4.3 Institutions – Judicial bodies – Organisation – **Prosecutors / State counsel**.  
 4.9.8 Institutions – Elections and instruments of direct democracy – **Electoral campaign and campaign material**.

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

Democracy, defence / Election, campaign, televised debate / Election, propaganda, irregularity / Public Prosecutor's Office, participation in proceedings.

#### *Headnotes:*

In light of the Public Prosecutor's role as the defender of state institutions and the democratic regime, the Public Prosecutor's Office has concurrent standing, along with political parties, to submit a claim against irregular advertising by a political party.

#### *Summary:*

I. This case refers to a direct claim of unconstitutionality, with a request for a provisional measure (i.e., interim relief), filed by the Prosecutor General of the Republic against Article 45.3 of Law 9096/1995. This legal provision established that only political parties have standing to submit a claim against irregular advertising by a political party.

The plaintiff requested the Court to declare the unconstitutionality of the wording in the Article, "only a political party can submit", on the grounds that it breached the constitutional norms that establish the authority of the Public Prosecutor's Office to defend the legal order, inalienable individual rights and the democratic regime (Articles 127 and 129.II).

II. The Supreme Court, by majority, partially granted the direct claim. The Court adopted a construction which saved the challenged norm from unconstitutionality, establishing the concurrent standing of the Electoral Public Prosecutor's Office. The Court understood that advertising by political parties, which shall aim at spreading the proposals and ideas of political parties, is grounded on the "right to antenna" (i.e., access to radio and television, as guaranteed by Article 17.3 of the Federal Constitution). Due to its public nature, this advertising must be closely related to the principles of electoral law, such as the equality of opportunity among political parties, electoral morality and the defence of minorities. Thus, withdrawing the authority from the Prosecutor's Office to ensure the proper functioning of political parties' advertising breaches the Prosecutor's Office role as the defender of institutions and the democratic regime.

The Court decided to adopt a construction which saved the challenged norm from unconstitutionality, without excluding the word "only", so as to avoid constructions that could allow third parties (such as members of parliament) to have the standing to submit the claim, which could change the meaning of the norm.

III. In a separate opinion, a dissenting Justice partially granted the claim, to declare the unconstitutionality of the word "only" in Article 45.3 of Law 9096/1995. The Justice stated that it is impossible to give an alternative construction to the adverb "only", in order to attribute another meaning to it. Hence, the unconstitutionality should be resolved by reducing the text; that is, excluding this term from the Law.

#### *Cross-references:*

- Article 45.3 of the Law 9096/1995;
- Articles 127 and 129.II of the Federal Constitution.

#### *Languages:*

Portuguese, English (translation by the Court).



#### *Identification: BRA-2014-3-041*

**a)** Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 06.02.2014 / **e)** 4.868 / **f)** Petition / **g)** *Diário da Justiça Eletrônico* 097 (Official Gazette), 22.05.2014 / **h)**.

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

4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members.**

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

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

Election, campaign, restriction / Election, electoral law, infringement / Flag, picture, use in electoral campaign / Prosecution evidence, absence.

#### *Headnotes:*

The attendance of an election candidate at polling stations on election day does not constitute the crime of gathering votes on election day, the crime of political canvassing or the crime of disclosing irregular electoral advertising, if he only greets voters, even though he is wearing a campaign badge and is accompanied by supporters.

#### *Summary:*

I. This case refers to information filed against a candidate for elections to the House of Representatives who was charged with gathering votes on election day, performing political canvassing and issuing irregular electoral advertising, pursuant to Article 39.5.II and 39.5.III of Law 9504/1997. The Electoral Prosecution Office claimed that, on election day, the candidate attended a number of polling stations wearing a badge of his own electoral campaign. He was accompanied by supporters and greeted many voters and civil servants in a non-silent way.

II. The Supreme Court unanimously acquitted the defendant according to Article 386.III of the Code of Criminal Procedure. The Court ruled that the mere presence of the candidate in polling stations cannot be understood to be criminal conduct, since the legislation ensures his right to supervise the elections in any electoral area.

The Court emphasised that the information provided by the prosecution was generic and it did not describe

the conduct of the defendant. In fact, it only stated the practice of supposedly irregular acts. In addition, greeting people in polling stations does not lead to the conclusion that the candidate would influence the mind of the voter by convincing him to vote in a certain way. Hence, the prosecution did not demonstrate the commission of the crime of gathering votes on election day or political canvassing, established in Article 39.5.II of Law 9504/1997.

The Court also held that the candidate's attendance at polling places accompanied by supporters and wearing a badge of his own electoral campaign does not indicate irregular electoral advertising. Article 39-A of Law 9504/1997 allows the use of badges. Otherwise, there was no evidence that the presence of the accused with supporters constituted campaigning contrary to the Act.

#### *Cross-references:*

- Article 39.5.II and 39.5.III and Article 39-A of the Law 9504/1997;
- Article 386.III of the Code of Criminal Procedure.

#### *Languages:*

Portuguese, English (translation by the Court).



#### *Identification:* BRA-2014-3-042

**a)** Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 28.05.2014 / **e)** 774 / **f)** Internal Appeal on Request for a writ of injunction / **g)** *Diário da Justiça Eletrônico* 125 (Official Gazette), 01.07.2014 / **h)**.

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

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

4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces.**

5.1.1.4.4 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Military personnel.**

5.4.10 Fundamental Rights – Economic, social and cultural rights – **Right to strike.**

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

Military, right to strike / Police, right to strike / Public utility, strikes, limitation / Public interest / Strike, participation / Strike, public services, restriction.

#### *Headnotes:*

Civil Police agents have no right to strike, because their activities are similar to those of military agents (including military police), who are expressly forbidden by the Constitution to interrupt their activities (Article 142.3.IV of the Federal Constitution).

#### *Summary:*

I. This case refers to an internal interlocutory appeal on a request for a writ of injunction filed by the Association of Police Investigators of São Paulo State against a decision that denied the right to strike to Civil Police (the investigative police), on the grounds that the activities performed by these civil servants are similar to those performed by military agents, who are forbidden to interrupt their activities, under Article 142.3.IV of the Federal Constitution.

The appellant argued that the Ostensible Police (which is a military institution in Brazil) and the Civil Police are engaged in different activities. Thus, they should not receive equal treatment in respect to the prohibition of the right to strike, since the Ostensible Police aim to prevent the violation of the law (preventive police power), while the civil police investigate the commission of crime and its circumstances (investigative/judicial police). He argued, in addition, that regulation of the right to strike for the police service would not cause risks to society, given that a specific law would define what activities are essential to protect the population in general.

II. The Supreme Court, unanimously, denied the internal interlocutory appeal. The Court held that the right to strike is guaranteed to civil servants, but this prerogative is not indiscriminately extended to all professional categories, excluding from the list armed agents and police personnel. The Court held that the activity of the Civil Police is similar to the role of military agents (the Ostensible Police), because it is an essential public service carried out by armed civil servants. Such civil servants are representatives of national sovereignty and guarantors of citizens' safety, of public peace and tranquillity. The Court asserted that if these professionals interrupt their activities, even partially, it would result in severe harm to society. Thus, the Court concluded that the constitutional ban on the right to strike established to military agents (Article 142.3.IV of the Federal

Constitution) extends to police agents in general, taking into account the similarity of activities in which they are engaged.

*Cross-references:*

- Article 142.3.IV of the Federal Constitution.

*Languages:*

Portuguese, English (translation by the Court).



*Identification:* BRA-2014-3-043

**a)** Brazil / **b)** Federal Supreme Court / **c)** First panel / **d)** 19.08.2014 / **e)** 110.960 / **f)** Request for a writ of *habeas corpus* / **g)** *Diário da Justiça Eletrônico* 185 (Official Gazette), 24.09.2014 / **h)**.

*Keywords of the systematic thesaurus:*

5.3.13.3.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – ***Habeas corpus***.  
5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

*Keywords of the alphabetical index:*

Circumstance, aggravating / Child, abuse / Criminal code / Interpretation, constructive / Law-making task of the Court / Offence, sexual / Sexual abuse, minor / Victim, crime, family member / *Nullum crimen sine lege*.

*Headnotes:*

The teleological interpretation of the crime set out in Article 241 of the Child and Juvenile Statute covers the conduct of photographing acts of sexual intercourse of children, even though such conduct was not expressly established in the Law at the moment of the facts grounding the criminal prosecution of the applicant for said conduct.

*Summary:*

I. This case refers to a request for a writ of *habeas corpus* filed against a decision that upheld the sentence against the defendant for crimes committed contrary to Article 241 of the Child and Juvenile Statute (hereinafter, the “ECA”) and Article 214 of the Penal Code (hereinafter, the “CP”). The petitioner alleged that he was under criminal coercion, inasmuch as photographing sexual intercourse of minors was not established as a crime in the aforementioned Article 241 at the moment of the facts (2006/2007), and that hence, this was a lawful conduct. He referred, also, to the excessiveness of the sentence imposed, given that the Law allows the imposition of only one sentence-enhancing factor (Article 68 of the CP) and two enhancing factors were imposed.

II. The First Panel of the Supreme Court, by majority vote, dismissed the request, without prejudice, due to the inadequacy of the proceeding, once this request is not under the competence of the Court, according to sub items “d” and “i” of Article 102.I of the Federal Constitution (which regulate the Court’s competence concerning *habeas corpus* proceedings).

Although the Court denied the hearing of the request, it examined the merits of the case, in order to analyse the possibility of granting the writ on its own initiative. The arrestee was sentenced to prison, because he photographed his 6-year-old stepdaughter in scenes of explicit sex. The Court denied the grammatical interpretation that would make lawful this conduct. Instead, it adopted a teleological interpretation, which aims at the purposes of the Law. The Court stated, thus, that the act of photographing pornographic scenes of minors fits in the crime established in the Article 241 of the ECA, because the expression “to produce a photograph”, included in the norm, comprises the act of photographing, even though the scene photographed is not disclosed afterwards.

The Court explained that to punish a criminal who presents, sells, supplies, discloses or publishes photographs of scenes of explicit sex involving a child or juvenile and to release the one who photographed them would be contradictory. The arrestee’s argument that “to produce a photograph” differs from “photographing”, besides lacking logical, teleological and semantic consistency, goes against the basis of the norm, which is to protect children and juveniles from harmful behaviours to life in society and to the individual shaping of minors’ behaviour.

In regard to the sentencing, two enhancing factors were considered, because, besides being the stepfather of the sexually abused child, the arrestee

acted together with other agents, colluding with the mother of the victim (Article 226.I and 226.II of the CP). Article 68 of the CP allows that, in the union of enhancing or reduction sentence factors, the judge can opt for only one enhancing factor or one reduction factor, but the factor that enhances or reduces the most must prevail. Thus, it is not an obligation of the judge, but a possibility, hence, the sentence is not excessive. The Court decided, finally, that the adoption of only one enhancing sentence factor was not examined by the lower court. This fact would impede the examination of this argument by this Court; otherwise it could constitute a suppression of competence of the lower court.

#### Cross-references:

- Article 102.I.d and 102.I.i of the Federal Constitution;
- Article 241 of the Child and Juvenile Statute;
- Articles 68, 226.I and 226.II of the Penal Code.

#### Languages:

English (translation by the Court).



## Bulgaria

### Constitutional Court

#### Statistical data

1 September 2014 – 31 December 2014

Total number of decisions: 1

#### Important decisions

*Identification:* BUL-2014-3-003

**a)** Bulgaria / **b)** Constitutional Court / **c)** / **d)** 04.11.2014 / **e)** 12/14 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 95, 18.11.2014 / **h)**.

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

1.3.4.10.1 Constitutional Justice – Jurisdiction – Types of litigation – Litigation in respect of the constitutionality of enactments – **Limits of the legislative competence.**  
 2.1.1.2 Sources – Categories – Written rules – **National rules from other countries.**  
 2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**  
 2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**  
 3.16 General Principles – **Proportionality.**  
 4.5.2 Institutions – Legislative bodies – **Powers.**  
 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**  
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**  
 5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State.**

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

Powers, restriction, legislator / Conflict, administration / Appeal, limitation, administrative acts.

*Headnotes:*

The legislator cannot declare certain administrative acts exempt from appeal before the courts by availing itself solely of the possibility provided in Article 120.2 of the Constitution. Its discretion is limited by criteria which are not explicitly mentioned in the Constitution but follow from the spirit and the fundamental principles thereof.

Access to the courts may be limited, without being completely denied, in rigorously defined cases, that is where it affects a higher public interest recognised by the Constitution and justified by the need to protect the foundations of the constitutional order, which include national sovereignty, separation of powers and the form of the state's structure and of its government.; or because of the need to guard against encroachments on the country's defence and security, as well as for the sake of fulfilling the principles and aims of its foreign policy.

The legislator, when introducing the exemption of an administrative act from appeal, must comply with the principle of proportionality including the international rules of access to a court. Exemption from appeal secures the constitutive effect of the act in question, but does not prevent the injured person, under another procedure, from pleading its unlawfulness in all respects in order to be compensated for the damage sustained through its execution.

Exemption of an administrative act from appeal can in no circumstances limit the ability which the person concerned has to invoke before the court the defects which vitiate it owing to serious infringements of the legal system established by the Constitution which render it totally invalid, as for example the lack of jurisdiction of the authorities issuing this act, or non-compliance with the procedure prescribed by law.

*Summary:*

A group of members of parliament requested an interpretation of Article 120.2 of the Constitution permitting the legislator to declare certain administrative acts exempt from appeal. The Constitutional Court had to answer the question whether constitutional limitations existed to the legislator's power to pass laws exempting administrative acts from appeal.

The right to a defence proclaimed by Article 56 of the Constitution was a fundamental right securing to every person the possibility of defending their legal sphere against any violation or threat. It served as a

guarantee for the exercise of the other fundamental rights and for the protection of the legitimate interests of subjects of law.

The right to a defence has committed the state bodies to ensuring that those whose rights have been violated or threatened can overcome the consequences of it. However, relations between the administration and the citizens do not always result in redress of damage. This is why everyone must have free access to an independent and impartial tribunal. Though not explicitly set out in the fundamental law, the right to a defence was mentioned in the more general formulation of Article 56 of the Constitution and consequently must be considered a principle of the rule of law.

The Constitution stipulated the inalienability of fundamental rights; it outlawed abuse of rights and their exercise to the detriment of another's legitimate rights or interests (Article 57). Abusing the right of access to a court or exercising it to the detriment of a third party are inadmissible concepts. In a democratic, law-based state, the court's integrity as impartial arbiter of the relations between subjects of law could not be called into question, while the principles of justice guaranteed that a judicial act would not affect the rights and legitimate interests of those not involved in the proceedings.

It could therefore be inferred that access to a court as a self-sufficient fundamental right might be limited only if it interfered with a higher public interest recognised by the Constitution. The first legitimate reason for such a limitation was to preserve the foundations of the constitutional order, such as national sovereignty, separation of powers and the state structure and the form of its government. Another reason justifying limitation of access to justice was to protect particularly important interests of society such as national defence and security, as well as to achieve the aims of foreign policy.

The provision in Article 120.2 of the Constitution laid down the principle of the right to appeal against all administrative acts infringing the legitimate rights and interests of subjects of law. However, it made provision by way of an exception for the exemption of certain acts from appeal to be introduced by law without explicitly defining the criteria thereof. Thus the restrictions on access to the courts permitted limitation of a fundamental right such as the right to a defence.

Besides the scope of the judicial review referred to by the Constitution, there was the question of the legislative expediency justifying decision-making by the competent administrative authority. The courts

were authorised to verify the legality of acts originating from administrative bodies, not to assess the discretionary power properly vested in the latter.

Likewise, criminal orders issued by the administrative authorities were excluded from the scope of Article 120.2, as they are judicial acts and thus subject to review of legality.

Where the right to appeal against certain administrative acts was limited, legislative expediency was also limited by the above criteria for restriction of fundamental rights, given that exemption from appeal was only justified in order to protect particularly important interests of society with constitutional value. Thus, the protection of national security could justify restriction of appeal against administrative acts with repercussions on the country's defence capability or its foreign policy principles and aims. The position that the law may only declare exempt from appeal acts not affecting the citizens' fundamental rights was untenable. The constitutional rules laying down the criteria for restriction of rights, fundamental rights included, must absolutely be observed.

The Court upheld its earlier case-law in which it restrictively interpreted the legislator's right to introduce exemption from appeal. It was still of the view that such an exception was justified only in order to protect particularly important interests of the citizens and society, and applicable to a strictly defined category of acts. Accordingly, the legislator could not declare certain administrative acts exempt from appeal by having regard solely to the issuing authority, without adverting to their substance.

The Constitutional Court considered that the exemption from appeal provided for in Article 120.2 of the Constitution did not permit the legislator to prevent injured persons from contesting invalid administrative acts whose legality was challenged because they prejudiced the foundations of the administrative system established under the Constitution and developed by legislation (issuing authority's lack of jurisdiction or non-compliance with the procedure prescribed by law). Persons affected by such acts must have access to a court in order to plead the defects of invalidity vitiating the acts because of serious infringements of the legal system. They would then have an effective remedy enabling them to terminate the constitutive effect of completely vitiated administrative acts, and even to be compensated should they have sustained damage due to the execution of the acts. Otherwise, a blatant trespass would be committed against the foundations of rule of law within the meaning of Article 4 of the Constitution.

In accordance with the principle of rule of law, any limitation introduced by the law must comply with the requirement of proportionality, i.e. it must be appropriate, as lenient as possible, and effective enough to allow attainment of the constitutionally justified objective. "Prohibition of excess" as a component of the rule of law was linked with the stipulations of Article 14.1 of the International Covenant on Civil and Political Rights and with Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms in conjunction with Article 6.2 of the Treaty on European Union. The case-law of the European Court of Human Rights must also be taken into account. It was unacceptable that the exception made in Article 120.2 of the Constitution should contradict the country's international undertakings in terms of guaranteeing everyone access to an independent and impartial tribunal which would determine their rights and obligations.

The exemption of administrative acts from appeal secured, in practice, the constitutive effect of the acts concerned, which sufficed to achieve the constitutional aim sought. However, it would be immoderate and unjustified to accept that exemption from appeal could cause a subjective right like the right to a defence to be not only limited but also nullified. Consequently, to comply with the principle of proportionality, in particular the international rules of access to a court, the legislator must contemplate the possibility of indirect judicial review to allow the administrative act in question to have its legal effects, and the persons concerned to challenge the illegality of the act under another procedure and to seek compensation for the damage sustained. Otherwise the provision in Article 7 of the Constitution that the state shall be held liable for the damage caused by acts originating from its bodies would become a mere declaration.

#### *Languages:*

Bulgarian.



# Chile

## Constitutional Court

### Important decisions

*Identification:* CHI-2014-3-009

**a)** Chile / **b)** Constitutional Court / **c)** / **d)** 09.09.2014 / **e)** 2538-2013 / **f)** / **g)** / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

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

4.8.6.1.1 Institutions – Federalism, regionalism and local self-government – Institutional aspects – Deliberative assembly – **Status of members.**

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

*Keywords of the alphabetical index:*

Constitutional action, by municipal councillor, against municipality / Municipality, councillor, incompatibility / Municipality, property, protection / Public official, incompatibility.

*Headnotes:*

Although a legal provision prohibits municipal council members from filing actions against the municipality and its breach could be sanctioned with removal from office, in a case such as the filing of a constitutional action on behalf of a community, the prohibition does not extend to council members where they are not lawyers and where the action is taken to vindicate fundamental rights unrelated to the economic interests of the municipality.

*Summary:*

I. The applicants are members of a municipal council. They filed a constitutional action at the Court of Appeal against the municipality on behalf of a community that would have been affected by a municipal policy. This action was later dismissed. Because of that action, another member of the council requested the electoral tribunal to conduct a trial with the aim of achieving their resignation from office, on the basis that they had breached

Article 75.b of Municipality Law, which states that a member of the council shall not hold office if he or she acts as an attorney or represents any kind of process against the municipality during his or her period in office.

The applicants argued that this norm is unconstitutional, because it contravenes Article 20 of the Constitution that grants to any person the right to file an action to protect constitutional rights. They contended that the Municipality Law inhibits their right to file this action.

II. The Constitutional Court held that in this concrete case the impugned norm had no unconstitutional effect. In the Constitutional Court's reasoning, there are here two questions to be answered: first, whether the council member contravenes the norm when he intervenes as an actor in the constitutional action; and second, whether a consequential removal from office may be considered as constitutional.

The Court considered that the applicants had not breached the challenged norm, since none of them are lawyers. Norms in public law are to be interpreted in a strict sense, therefore analogies or extensive allegations are not admissible. Since the applicants participated in the constitutional action solely as defenders of a legitimate right, this prohibition may not be extended to them in this concrete case.

It also must be noted that the goal pursued by such norm is to make incompatible to civil servants to operate as lawyers that defend private patrimonial interests against the state interests. In the Court's view, in the instant case it was not visible how a constitutional action, without any economic interest, may fall within the case that prohibits the challenged norm.

*Languages:*

Spanish.



*Identification:* CHI-2014-3-010

**a)** Chile / **b)** Constitutional Court / **c)** / **d)** 09.10.2014 / **e)** 2536-2013 / **f)** / **g)** / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

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

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

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

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

*Keywords of the alphabetical index:*

Penalty, disproportionate / Sanction, administrative, proportionality / Social security, contribution, evasion, penalty / Social security, contribution, purpose.

*Headnotes:*

A punitive fee of 50% of debt amount in social security contributions does not infringe the Constitution, because those funds are workers' property, with the objective of safeguarding their right to social security.

*Summary:*

I. The applicant is a football club that is being sued for unpaid social security contributions for over three years. The applicant argued that a provision of social security law is unconstitutional since it establishes a punitive fee of 50% of the debt owed where the employer is in default of contributions to be paid to the social security institutions. The applicant argued that such rule is disproportionate and infringes its fundamental rights; in particular, the right to property, to equality, to freedom of enterprise and Article 1 of the Constitution, which protects the intermediate groups of society.

II. The Constitutional Court held that the impugned legal provision does not infringe the Constitution. Firstly, the Constitutional Court recalled that this particular case arose from the applicant's failure to pay the social contributions. Thus, the punitive fee would not be applicable if the plaintiff had paid in time. Secondly, it had to be considered that social security contributions are workers' property that seek to increase their individual capitals in pension funds. Thirdly, the Constitutional Court recalled that the obligation to pay social contributions by the employer is founded on a public interest and to safeguard the constitutional right to social security and economic order, because the workers' pension funds would be diminished by any default of the employer. Accordingly, the Constitutional Court did not consider that the rule of social security is disproportionate.

The Constitutional Court also stated that in this case there is no breach of the applicant's protection as an intermediate group, since the payment of a social security debt does not infringe its autonomy and functions. It must be recalled, nevertheless that the applicant had itself brought about the situation under challenge before the Constitutional Court.

Regarding the freedom of enterprise, the Constitutional Court did not agree with the applicant's allegations that here would be a breach of that right. It recalled that the Constitution does not consider that right as an absolute one and that it has to be exercised within the legal framework.

Finally the Constitutional Court did not recognise any violation of the applicant's property rights, mainly because the punitive aims at protecting worker's property regarding contributions to pension funds.

*Languages:*

Spanish.

*Identification:* CHI-2014-3-011

a) Chile / b) Constitutional Court / c) / d) 23.10.2014 / e) 2700-2014 / f) / g) / h) CODICES (Spanish).

*Keywords of the systematic thesaurus:*

1.3.4.5 Constitutional Justice – Jurisdiction – Types of litigation – **Electoral disputes**.

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

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

*Keywords of the alphabetical index:*

Election, candidature / Election, judge, jurisdiction, scope / Election, jurisdictional dispute / Election, term limit / University, autonomy.

*Headnotes:*

Electoral courts have no jurisdiction to review an electoral dispute at the University of Chile, because it is not an intermediate group but an administrative

organ.

### Summary:

I. The issue here is a dispute over jurisdiction between the University of Chile and Electoral Justice (Regional Electoral Tribunal). This case arose in relation to the nomination of candidates before the election of a new dean at the University's Law School. When the dean in office was proclaimed and registered as a candidate for a new period, a group of academics challenged his candidature at the Elections Board of the University, on the basis that it would contravene the University's statutes that prohibit candidates, such as the dean in the instant case, from running for an election for a third period. The Board held that the dean may not run for a third period, since he has already been dean for two periods. Against this resolution the dean filed an action at the Regional Electoral Tribunal, requesting its invalidation. The University, on his side, represented by the Rector, requested the Constitutional Tribunal to declare that the Electoral courts have no jurisdiction to solve this case, because of the autonomy which the Constitution grants to universities.

II. The Constitutional Court, by a majority, found in favour of the respondent and declared that Electoral courts have no jurisdiction to hear the dean's claim. The Court responded to two questions here: first, as a formal issue, whether this case falls into its own competence; and second, as substantive issue, whether the Electoral court has jurisdiction.

The Court held that it does have the competence to resolve the jurisdictional dispute at issue. Firstly, because the Constitution states that the Constitutional Court has to "resolve jurisdictional disputes between political or administrative authorities and the judiciary". In this case the University, as a part of the State, is an administrative authority. As the Regional Electoral Tribunal has a judicial function, it is clear here that this case falls within the constitutional requirements.

On the substantive issue, the Court held that the Electoral courts lack jurisdiction to hear the case. First, because it has competence to resolve questions concerning the election process in an intermediate group, which the University of Chile is not. A university's foundations do not derive from the liberty of association but from law. Although it accomplishes social functions similar to intermediate groups, it is not possible to consider it as such. Thus, the University Board has sufficient authority to resolve the challenge against the dean's candidacy.

### Languages:

Spanish.



### Identification: CHI-2014-3-012

**a)** Chile / **b)** Constitutional Court / **c)** / **d)** 26.11.2014 / **e)** 2731-2014 / **f)** / **g)** / **h)** CODICES (Spanish).

### Keywords of the systematic thesaurus:

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

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

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

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

### Keywords of the alphabetical index:

Education, freedom, State intervention / Education, freedom to organise, limit / Education, institution, autonomy, limit / Education, oversight / Education, State's right to regulate / University, autonomy, limit.

### Headnotes:

The designation of a provisional administrator by the Minister of Education, who takes control of a university that is risking the right to education of students, does not infringe the right to property and the autonomy of universities.

### Summary:

I. Congress members challenged several provisions of a bill on provisional administration for universities. This bill creates a provisional administrator that is elected by the Minister of Education and the National Education Council in order to intervene in educational institutions when an inquiry detects problems that put an institution's viability in jeopardy. This administrator takes control of administrative and educational aspects of the institution for a maximum period of a year and he or she has the power to take any action in order to protect the public interest involved in the educational project of the institution.

The Congress members argued that this bill contravenes the Constitution, by breaching several provisions, such as the right to property, the principle of university autonomy and the freedom to teach.

II. The Constitutional Court, by a majority, declared that the bill does not breach constitutional rights. Although it university autonomy is guaranteed by the Constitution and therefore the State recognises that a university, as an “intermediate group” (body that acts between the State and an individual, e.g. political parties, unions, universities and all types of associations), has the liberty to establish an educational project, this recognition is subject to limitations and the State may revoke it if pre-existing conditions no longer exist. Thus, the Court recalled that university autonomy is not synonymous with any prohibition against the legislature from regulating these organisations because the legislative power is called to issue general and mandatory standards.

Freedom to teach has a direct connection to the right to education; it implies that certain conditions have to be met to ensure that universities provide a recognised educational project of adequate quality; therefore, in the interest of those rights, the State must give guarantees to protect those conditions.

The Constitutional Court also stated that, when the public interest is involved regarding the social function of property, limitations are justified. Thus, limitations on the private control of universities accomplish that principle, and therefore state intervention at the administrative and educational level of universities in difficulty are reasonable and in conformity with the rights involved here, in particular the right to education.

#### *Languages:*

Spanish.



## Croatia Constitutional Court

### Important decisions

*Identification:* CRO-2014-3-012

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 04.11.2014 / **e)** U-I-5553/2012, U-I-5888/2012 / **f)** / **g)** *Narodne novine* (Official Gazette), 139/14 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

3.5 General Principles – **Social State**.  
3.9 General Principles – **Rule of law**.  
3.18 General Principles – **General interest**.  
4.5.2 Institutions – Legislative bodies – **Powers**.  
5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens**.  
5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law**.  
5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

*Keywords of the alphabetical index:*

Construction, illegal, legalisation / Legislator, discretion / Legitimate aim.

*Headnotes:*

The existence of a legitimate objective does not justify measures taken with a view to achieving it; the legislator must achieve a fair balance between the objectives set and the means applied.

Legislation enacted to deal with buildings constructed unlawfully should represent a permanent obligation on the state of a timely and efficient prevention of illegal building through the establishment and use of effective supervisory mechanisms. Control of existing damage in the form of partial legalisation should not become a regular intervention on the part of legislative and executive bodies undertaken because the state is incapable of establishing an effective way of dealing with it.

*Summary:*

I. The Constitutional Court rejected proposals by three natural persons to launch proceedings to review the conformity with the Constitution of Articles 11, 12 and 13 of the Act on Procedures concerning Illegally Constructed Buildings (hereinafter, the "Act") and of the Act in its entirety.

The scope of the Act embraces the conditions, procedure and legal consequences of including illegally constructed buildings within the legal system.

The applicants argued that at a fundamental level the Act caused inequality of persons before the law contrary to Article 14.2 of the Constitution because it is designed in a way that puts "illegal builders" in a more favourable position. They raised the issue of the Act's lack of conformity with the constitutional guarantee of the right of ownership (Article 48.1 of the Constitution) because the legalisation of illegally constructed parts of residential buildings led to a decrease of ownership shares in relation to entire buildings. They also suggested that the Act had been applied retroactively, contrary to Article 90.4 of the Constitution.

II. The Constitutional Court began by explaining that the legislator had chosen a model that could be described as "maintenance of the existing situation" under prescribed conditions, namely the partial legalisation of unlawful acts. This was because the Republic of Croatia had inherited a legal situation in the sphere of planning and construction from the former SFRY and socialism which has continued to exist. It has resulted from citizens' actions, but such patterns of behaviour would have been impossible if the former state had not played a role, turning a blind eye for many years and allowing citizens to flout or to ignore the rules of construction and the damaging consequences and sanctions that might result from them.

The act in question is an expression of political will to deal with this situation; it represents a significant contribution by the state to the legal system by means of satisfying minimum spatial, social, economic and technical requirements. It could be described as a mechanism of "damage control".

The Constitutional Court found the Act, in the context of the circumstances outlined above, to be acceptable in terms of constitutional law. Its objectives are legitimate, in that the legalisation of illegal construction may be seen as a "lesser evil" than the mass destruction of illegally constructed buildings. From that perspective, they are economically and socially justified and thus in line with the interests of the state and society as a whole.

The Court noted that those who have acted in accordance with the law may feel dissatisfied; the Act could be said to favour those who did not abide by it. Nonetheless, it found no substance to the claim that the Act could cause someone damage. Dissatisfaction with the Act, in the sense described by one of the applicants, does not arise from a specific breach of someone's right or from intervention into his or her right by the state. If the disputed Act is perceived as having a legitimate purpose of damage control, and this control is in the public and general interest, certain concessions are implied. The position that other better solutions are possible is not sufficient grounds to regard the existing legal solution as constitutionally unacceptable. The Court consequently held that the Act was not contrary to Article 14.2 of the Constitution.

The Constitutional Court then went on to emphasise that issues of condominium ownership, co-ownership of common areas of residential buildings and relations between these two ownership categories are set out in the Act on Ownership and Other Proprietary Rights, rather than in the Act in question. Owners and co-owners of proportional parts of common areas of a building continue to be owners/co-owners of proportional parts of those areas. They have not been deprived of their ownership and their ownership has not been limited by the calculation of the amount of fees for legalisation. The process of legalisation of illegally constructed buildings does not affect the issue of ownership of property, as its final outcome is a decision as to whether the illegally constructed building "remains in place". The Constitutional Court therefore found no grounds that would indicate a lack of conformity between the Act and Article 48.1 of the Constitution.

Finally, the Constitutional Court found that the Act does not refer to the period before it came into force. It refers to buildings without a building permit, which at the date this decision was handed down, represent a material fact. It requires addressees to act in a certain manner in relation to those buildings; there will be legal consequences to these actions (or failure to act) in the future. The ruling on the "as-is built state" legalising illegally constructed buildings (Article 8 of the Act) does not regulate rights and legal relations that arose before the entry into force of the Act and does not have retroactive effect. It will enter into force when it becomes final.

*Languages:*

Croatian, English.



*Identification:* CRO-2014-3-013

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 13.11.2014 / **e)** U-III-6559/2010 / **f)** / **g)** *Narodne novine* (Official Gazette), 142/14 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

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

4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces**.

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

*Keywords of the alphabetical index:*

Investigation, effective / Torture, police custody.

*Headnotes:*

Where an individual claims to have been abused by officials and is unable to substantiate that claim with evidence (such as medical records), the Constitution and the European Convention on Human Rights require an official investigation of the allegations to take place, which would allow for those responsible to be identified and brought to justice, should the allegations be found to be true. Otherwise, the general prohibition of abuse would be ineffective for practical purposes; officials could abuse the rights of those in their custody with impunity. The investigation must be independent and impartial; those responsible for its conduct and those actually carrying out the investigation must be independent of those who have taken part in the events in question. It is not sufficient for there to be no hierarchical or institutional link; investigators must be truly independent. Investigation must be subject to public review, and the applicant must have effective access to it.

Competent authorities must act diligently and promptly. The obligation to conduct an investigation is not “an obligation of results, but of ways”: not all investigations have to be successful and lead to a conclusion coinciding with the applicant’s depiction of events. Serious allegations of abuse must be thoroughly investigated. Competent authorities must

invest significant effort into establishing what happened; they should not rely on hasty or unfounded conclusions in order to achieve a swift conclusion or base their decisions on such conclusions. They must take all reasonable and available steps to procure evidence, such as the procuring of detailed statements from the alleged victim and eye witnesses and forensic evidence and, where appropriate, additional medical records with a detailed and accurate description of injuries and an objective analysis of medical diagnoses, in particular concerning the cause of the injuries. An oversight in an investigation resulting in it being impossible to determine the cause of injuries may lead to the conclusion that the investigation was inefficient. The investigation must also be effective in helping to determine whether the force used by the police was justified in the circumstances.

*Summary:*

I. A constitutional complaint had been filed against a Supreme Court judgment rejecting an appeal submitted by the applicant against a County Court judgment in which he was found guilty of two criminal offences of robbery and sentenced to a single sentence of ten years in prison. The criminal case in question was a very complex one.

The applicant complained that he had been abused over several periods, i.e. during the bringing in, arrest and questioning by the police.

II. This decision brought the Constitutional Court case law into line with that of the European Court of Human Rights in relation to the failure to conduct an investigation, or in relation to an inefficient investigation in the light of Article 23.1 taken separately and read together with Article 25.1 of the Constitution and Article 3 ECHR.

The general prohibition of abuse is laid down in Article 23.1 of the Constitution and in Article 3 ECHR. The special positive obligation to treat arrested persons and convicted persons humanely is regulated by Article 25.1 of the Constitution.

The Constitutional Court found that it was unable to determine, on the basis of the documentation submitted, the manner in which the injuries were inflicted on the applicant and therefore it was not proven that he had actually been abused by the police. His complaint, based on Article 23.1 separately and in conjunction with Article 25.1 of the Constitution and Article 3 ECHR, was therefore considered from the perspective of the positive obligation to conduct an official investigation.

It was evident from the documents contained in the case file, that the applicant had fulfilled his duty to notify the competent authorities that he was abused by the police. He asked on several occasions during the criminal proceedings for an investigation of his arrest and beating by the police.

The Constitutional Court deemed that the medical evidence and the objections the applicant had submitted to the relevant authorities together led, at least, to grounds for suspicion that his injuries could have been caused by the use of force by the police. Thus, his objections represented a request that could have been defended and the competent authorities should have conducted an efficient investigation. However, they did not do that.

Consequently, the Constitutional Court found that the procedural aspect of Article 23.1 separately and in conjunction with Article 25.1 of the Constitution and Article 3 ECHR had been violated, because the applicant's claims of abuse from 9 May 2008 at 8.00 p.m. to 10 May 2008 at 8.45 p.m. were not investigated.

This finding entitled the applicant to monetary compensation for the period preceding the adoption of this decision.

Pursuant to Article 31.4-5 of the Constitutional Act on the Constitutional Court, the Constitutional Court established that the Office of the State Attorney of the Republic of Croatia should have initiated and conducted an effective investigation of the alleged abuse of the applicant from 9 May 2008 at 8.00 p.m. to 10 May 2008 at 8.45 p.m. and, depending on the result, taken appropriate action.

The other objections of the applicant were partly rejected by the same decision and partly dismissed by the ruling.

#### *Cross-references:*

European Court of Human Rights:

- *Dolenec v. Croatia*, no. 25282/06, 26.11.2009;
- *Gladović v. Croatia*, no. 28847/08, 10.05.2011;
- *Mađer v. Croatia*, no. 56185/07, 21.06.2011;
- *V. D. v. Croatia*, no. 15526/10, 08.11.2011;
- *Đurđević v. Croatia*, no. 52442/09, 19.07.2011.

#### *Languages:*

Croatian, English.



#### *Identification: CRO-2014-3-014*

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 10.12.2014 / **e)** U-VIIR-7346/2014 / **f)** / **g)** *Narodne novine* (Official Gazette), 156/14 / **h)** CODICES (Croatian, English).

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

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

4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility**.

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

Referendum, Constitution, amendment.

#### *Headnotes:*

The “total electorate of the Republic of Croatia” within the meaning of the Constitution means all Croatian citizens who have reached the age of eighteen years with registered domicile in Croatia who are registered as voters, as part of the electoral register, on the date scheduled as the first day of collecting signatures for calling a referendum as existing on this date at 00:00 hrs.

The competent authority will determine, in a special ruling, the total electorate of the Republic of Croatia on the reference day and at the reference hour as specified above, and calculate ten percent of such number. This ruling will then be published on its website on the reference date and submitted for publication to the Official Gazette on the same day.

Signatures for calling a referendum may only be collected within the national borders.

#### *Summary:*

I. Parliament submitted a decision to the Constitutional Court concerning the request of the Organising Committee of the Civil Initiative “In the Name of the Family” to call a national referendum to amend Article 72 of the Constitution entitled “Let Us Elect Deputies by Name”. In this decision, in accordance with Article 95 of the Constitutional Act on the Constitutional Court (hereinafter, the “CACC”),

Parliament asked the Constitutional Court to determine whether the requirements set out in Article 87.1-3 of the Constitution for calling a national referendum had been fulfilled.

Article 95 of the CACC stipulates that, at the request of Parliament, where ten percent of the total number of voters has requested the calling of a referendum, the Constitutional Court shall, within 30 days of receiving the request, establish the constitutional compliance of the question being posed in the referendum and whether the requirements in Article 87.1-3 of the Constitution for calling a referendum have been met.

Under Article 87 of the Constitution, Parliament may call a referendum on proposals to amend the Constitution, a bill or any other issue falling within its remit (paragraph 1), the President of the Republic may, at the proposal of the Government and with the countersignature of the Prime Minister, call a referendum on a proposal to amend the Constitution or any other issue he or she may deem to be of importance to the independence, integrity and existence of the Republic of Croatia (paragraph 2), and Parliament shall call referenda on the above issues in accordance with the law, when so requested by ten percent of the total electorate (paragraph 3).

II. As the proposed referendum question was aimed at amending a specific article of the Constitution, and under Article 87.1 of the Constitution a referendum may be called “on a proposal to amend the Constitution”, the Constitutional Court firstly found that the requirement referred to in Article 87.1 of the Constitution had been satisfied.

The requirement referred to in Article 87.3 of the Constitution covered the question of whether the proposed referendum “Let Us Elect Deputies by Name” was requested by “ten percent of the total electorate of the Republic of Croatia”.

The question Parliament submitted to the Constitutional Court in this case concerned a matter of principle; it presumed an obligation by the Constitutional Court to set out general standards that the competent state authorities must apply to determine the exact number of voters’ signatures required within the meaning of Article 87.3 of the Constitution in future cases.

Within the meaning of Article 45 of the Constitution, citizens who have reached the age of eighteen years are entitled to take part “in decision-making procedures by national referendum” (that is, the right to vote ‘in favour of’ or ‘against’ the proposed referendum question, regardless of where they have

their registered domicile or residence and whether they are away from it at the time of the referendum, or inside or outside Croatia).

The total number of citizens who have reached eighteen years of age within the meaning of Article 45 of the Constitution varies and is established in a special procedure laid down by the Voters’ Register Act.

The Act on the Referendum and Other Forms of Personal Participation in the Performance of State Authority and Local and Regional Self-government elaborated on the constitutional requirement that signatures can only be collected within the territory of the Republic of Croatia. The obligations set out in Article 8.c and 8.d.1 of the above Act on representatives of local self-government authorities regarding the process of collecting signatures, and on the organising committee to report locations where the expression of will is to be held to the police administration in the area concerned, and the prohibition on presenting any state insignia at the locations where signatures are collected, show clearly that they are aimed at the national territory; they exclude any possibility of collecting signatures outside state borders, including diplomatic missions and consular posts abroad.

The Constitutional Court set out the general standards stated in the Headnotes by interpretation within the context of the following provisions of Article 45 of the Constitution and certain Articles of the Voters’ Register Act and the Act on the Referendum and Other Forms of Personal Participation in the Performance of State Authority and Local and Regional Self-government; and on the basis of Articles 31, 87 and 95.1 of the CACC.

Based on the standards established in this decision (the number of voters in the record of citizens over the age of eighteen and having registered domicile in Croatia on the first day of the collecting of signatures for calling a referendum, at 00:00 hours), the Constitutional Court established that, on 21 September 2014, there were 4,042,522 such voters. Ten percent of that number made up the constitutional threshold (the absolute number of 404,252).

The Court therefore held that, because the Organising Committee of the Civil Initiative “In the Name of the Family” had stated in the request to call a referendum, which it submitted to Parliament, that the number of voters’ signatures collected from Croatia was 380,649, the popular initiative to amend the Constitution “Let Us Elect Deputies by Name” was not supported by a sufficient number of voters.

As a result, Parliament, even without a verification of the validity of signatures, was not bound by the Constitution to comply with Article 87.3 of the Constitution.

#### Cross-references:

#### Constitutional Court:

- no. U-VIIR-4696/2010, 20.10.2010, *Bulletin* 2010/3 [CRO-2010-3-012];
- no. U-I-3789/2003 *et al.*, 08.12.2010, *Bulletin* 2010/3 [CRO-2010-3-016];
- no. U-VIIR-5292/2013, 28.10.2013, *Bulletin* 2013/3 [CRO-2013-3-015];
- no. U-VIIR-4640/2014, 12.08.2014, *Bulletin* 2014/2 [CRO-2014-2-011].

#### Languages:

Croatian, English.



## Czech Republic Constitutional Court

### Statistical data

1 September 2014 – 31 December 2014

- Judgments of the Plenary Court: 3
- Judgments of panels: 66
- Other decisions of the Plenary Court: 4
- Other decisions of panels: 1 153
- Other procedural decisions: 21
- Total: 1 247

### Important decisions

*Identification:* CZE-2014-3-008

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 18.09.2014 / **e)** III.US 2331/14 / **f)** Lack of proper reasoning as to why an administrative complaint in asylum proceedings was not given suspensive effect / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech, English).

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

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.  
5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum**.  
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:*

Asylum law, reasoning, adequacy / Third-country national / Stateless person.

#### *Headnotes:*

The reasoning of a court decision must clarify the findings of fact the Court made and how it legally evaluated them. Findings of fact and legal conclusions may not be an expression of arbitrariness; the deliberations on which they are based must meet generally accepted methods of interpretation. Inadequate reasoning for a decision violates the right to a fair trial.

*Summary:*

I. The applicant, a citizen of Libya, applied for international protection in the Czech Republic. The applicant came to the Czech Republic by air, transferring in Malta, holding a short-term Schengen visa issued by the Republic of Malta. In the challenged decision, the Ministry of the Interior declared his application impermissible, stopped proceedings on the application, and determined that, under Regulation no. 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (the Dublin III Regulation), the state responsible is the Republic of Malta. The applicant challenged this decision through an administrative complaint, which is the subject of these court proceedings and also requested that the complaint be given suspensive effect. In the challenged decision, the Regional Court did not give the administrative complaint suspensive effect; nonetheless, the court proceedings regarding it are still ongoing. According to the applicant, the Regional Court did not address his arguments, although they could have affected the result of the proceeding and it did not provide adequate reasoning for its decision not to give suspensive effect, thereby violating his right to a fair trial.

II. The Constitutional Court began by examining the argument over the adequacy of the Regional Court decision. Regarding the requirement for adequate reasoning in court decisions, citing its previous case law, the Constitutional Court pointed out that parties to proceedings must be able to discern clearly from a decision the findings of fact the Court made and the way it legally evaluated them. Findings of fact and legal conclusions may not be an expression of arbitrariness; the deliberations on which they are based must meet generally accepted methods of interpretation.

The applicant in this matter applied to have the administrative complaint afforded suspensive effect citing the reasons why he believed that, if he were transferred to Malta, he could be subjected to inhuman or degrading treatment, prohibited by Article 3 ECHR. He cited a number of documents and foreign decisions to support his arguments. In the reasoning of the challenged decision, the Regional Court limited itself to stating that the Republic of Malta, as a Member State of the European Union, is required, in accordance with the Dublin III Regulation, to examine the applicant's application for international protection on the merits, impartially, objectively, and

in accordance with the fundamental guarantees and principles of asylum law. The Regional Court concluded that the applicant did not prove that he faced a disproportionately greater risk of harm in Malta, without dealing with the applicant's arguments. In the Constitutional Court's opinion, it thus made its decision non-reviewable due to insufficient grounds, thereby violating the applicant's right to a fair trial under Article 36.1 of the Charter and Article 6.1 ECHR. Therefore, the Constitutional Court annulled the Regional Court decision. The remainder of the constitutional complaint was denied, partly due to impermissibility, partly due to the Constitutional Court's lack of competence, and partly for the applicant's lack of standing.

III. The judge rapporteur in the case was Pavel Rychetský. None of the judges filed a dissenting opinion.

*Languages:*

Czech.

*Identification: CZE-2014-3-009*

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 30.10.2014 / **e)** III.US 3844/13 / **f)** The nature of the Facebook social network; unconstitutionality of imposing a disciplinary fine for statements made against a police body on the Facebook site / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech, English).

*Keywords of the systematic thesaurus:*

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

4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces.**

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

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

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

*Keywords of the alphabetical index:*

Police body, role / Police body, activities, public confidence / Social network, profile, use.

*Headnotes:*

The nature of the Facebook social network is not clearly private or public; it is up to individual users to determine the degree of privacy protection to set on their profiles. If bodies acting in criminal proceedings decide to obtain private information from a Facebook profile, they must adhere to the framework established by law and respect the general principles on which the activities of state bodies are based, so as to afford the maximum protection to the constitutionally guaranteed rights and freedoms of those affected.

Where bodies acting in criminal proceedings need to impose certain restrictions on the fundamental rights and freedoms of parties to proceedings prior to beginning criminal prosecution, for the purpose of uncovering criminal activity and bringing perpetrators to justice, they must act strictly in accordance with the Criminal Procedure Code and within its bounds, otherwise the information obtained cannot be used to the detriment of the person concerned.

*Summary:*

I. A police body had imposed a disciplinary fine of CZK 10,000 (EUR 370) on the applicant because his activities on Facebook during criminal proceedings conducted against him reduced the authority of the police body and the gravity and dignity of its role in the eyes of other witnesses and injured parties and endangered confidence in its activities. The circuit court overturned the police body's decision and issued a new decision, imposing a new disciplinary fine on the applicant of CZK 5,000 (EUR 185).

The applicant is alleged to have committed these actions by making on Facebook, as part of his private communication with the injured party L.K., several potentially insulting statements regarding the police body and posting a picture to which the witness T.B. responded with a comment concerning the police body. The applicant objected that in this case the institution of a disciplinary fine was misused and the police body imposed a fine based on completely private communication, without the applicant having consented to the monitoring of his electronic communication under Article 88a.4 of the Criminal Procedure Code. He also contended that the police body's decision did not contain adequate reasoning and that the circuit court did not provide him due protection, violating his right to a fair trial.

II. The Constitutional Court began by examining the nature of the Facebook social network, from which the police body obtained information about the statements for which it subsequently imposed a disciplinary fine. The Constitutional Court observed that users can individually set the degree to which they share published information and, using the privacy protection tools, they can choose who will see the content they publish or content that concerns them, who can contact or look them up and how this is done. A user's Facebook profile can function as a public profile for all Facebook users, all internet users, or as a closed profile, intended only for a certain circle of users or specific users. Likewise, the contents of a user's personal page (messages to and from other users), comments and multimedia content, can be accessible to everybody on Facebook or on the internet or only to certain persons or groups of persons.

As a result, the Constitutional Court did not agree with the circuit court's conclusions that Facebook is not intended for private conversation, noting instead that the nature of the Facebook social network is not clearly private or public. Each user can decide on the degree of privacy protection they set on their profile. If bodies acting in criminal proceedings decide to obtain information of a private nature from a Facebook profile, they must adhere to the framework established by legal regulations and respect the general principles on which the activities of state bodies are based, so as to afford the maximum level of protection of constitutionally guaranteed rights and freedoms to those affected. However, the contested decisions do not specify how the police body obtained the information which led it to its decision to impose a disciplinary fine on the applicant, or how the communication in question came into its possession and for what purpose the police body obtained it. That information only emerged from the police body's response to the constitutional complaint.

In the Constitutional Court's opinion, the steps chosen by the police body (obtaining print screen images of the communication concerned from the profile of a party to the proceedings), clearly circumvent the Criminal Procedure Code provisions on the tapping and recording of telecommunications. Bodies acting in criminal proceedings will sometimes need to impose certain restrictions on the fundamental rights and freedoms of parties to the proceedings (including tapping and recording telecommunications), prior to beginning criminal prosecution, for the purposes of uncovering criminal activity and bringing perpetrators to justice. However, they must proceed strictly in accordance with the Criminal Procedure Code and within its limits otherwise the information obtained cannot be used to

the detriment of the person concerned, which was the case in these proceedings. The Constitutional Court concluded that the contested decisions violated the applicant's right to confidentiality of communications and letters under Article 13 of the Charter and the right to a fair trial under Article 36 of the Charter. It therefore annulled them.

III. The judge rapporteur in the case was Jaroslav Fenyk. None of the judges filed a dissenting opinion.

#### *Languages:*

Czech.



## Estonia

### Supreme Court

#### Important decisions

*Identification:* EST-2014-3-004

**a)** Estonia / **b)** Supreme Court / **c)** *en banc* / **d)** 26.06.2014 / **e)** 3-2-1-153-13 / **f)** / **g)** 03.07.2014, 39; [www.riigiteataja.ee/akt/103072014039](http://www.riigiteataja.ee/akt/103072014039); [www.riigikohus.ee/?id=11&tekst=RK/3-2-1-153-13](http://www.riigikohus.ee/?id=11&tekst=RK/3-2-1-153-13) / **h)** [www.riigikohus.ee/?id=1515](http://www.riigikohus.ee/?id=1515) (in English); CODICES (Estonian, English).

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

3.9 General Principles – **Rule of law.**  
 3.12 General Principles – **Clarity and precision of legal provisions.**  
 3.13 General Principles – **Legality.**  
 4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**  
 4.7.4.2 Institutions – Judicial bodies – Organisation – **Officers of the court.**  
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**  
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**

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

Court, civil, jurisdiction, judge, authority / Ownership right, restriction / Minister, law-making-power / Minister, exceeding of power.

#### *Headnotes:*

In county court civil proceedings, the determination of procedural expenses constitutes an administration of justice within the meaning of the first sentence of Article 146 of the Constitution. Such administration of justice can only be carried out by a judge for the purposes of Articles 147, 150 and 153 of the Constitution.

To ensure legal clarity, provisions that are closely connected to the contested provision and that, provided they remain in force, may cause confusion about the legal situation must be considered relevant. If the wording of the regulations overlap such that

they substantively constitute the same provision, the other regulation can be considered as relevant.

Setting a compensation limit on the expenses of a contractual representative interferes with the fundamental right to property of a party to proceedings (Article 32 of the Constitution) and the right of recourse to the court (Article 15.1 of the Constitution). It may also interfere with the right of appeal (Article 24.5 of the Constitution). Depending on the circumstances, the interference may be serious. Therefore, establishing compensation limits to the expenses of a contractual representative may be considered an important matter for the purpose of the parliamentary reservation expressed in the first sentence of Article 3.1 of the Constitution.

### Summary:

I. The applicant filed with the court a request to determine whether the procedural expenses he had incurred in the amount of over 8 000 euros constitute legal assistance expenses and if so, the claimant be ordered to pay the expenses. The claimant objected to the request. An assistant court judge partially granted the applicant's request regarding the procedural expenses and ordered the claimant to pay the applicant the contractual representative expenses in the amount of 319 euros. According to the assistant judge, the applicant's reasonable and necessary expenses for the contractual representatives in the case amounted to approximately 5 400 euros. The assistant judge, however, only awarded the applicant 319 euros. The assistant judge relied on a government regulation, according to which the expenses of a contractual representative could be recovered from other parties in proceedings up to 319 euros in this kind of civil case.

The applicant appealed the county court order. The circuit court upheld the order and dismissed the appeal. The applicant appealed to the Supreme Court. The Civil Chamber C of the Supreme Court placed the case before the Supreme Court *en banc*.

Under § 174.8 of the Code of Civil Procedure (hereinafter, the "CCP"), an order on determining procedural expenses may also be made by an assistant judge.

§ 173 CCP provides that the government can set limits on the expenses recovered for a contractual representative and advisor from other parties. As such, the government established the regulation "Limits of Recovery of Expenses of Contractual Representative from Other Parties to Proceedings".

II. The Court reviewed the two main issues in the case and decided as follows:

a. The right of an assistant judge to determine procedural expenses that had arisen from § 174.8 of the CCP.

According to the first sentence of Article 146 of the Constitution, justice is administered exclusively by the courts. Determining procedural expenses in civil proceedings in a county court constitutes an administration of justice for the purposes of the first sentence of Article 146 of the Constitution. Determining the procedural expenses cannot be deemed as an activity of preparing or arranging the administration of justice or as a technical or calculation step. In essence, this is the adjudication of a claim for damage compensation. A substantive decision that qualifies as an enforcement title is made on the matter of dispute, thereby creating, altering or terminating the rights and obligations of the parties to the proceedings.

In court, justice can be administered for the purposes of the first sentence of Article 146 of the Constitution only by a judge for the purposes of Articles 147, 150 and 153 of the Constitution. Only judges have been provided with constitutional guarantees, such as the appointment to office for life, removal from office only by a judgment, the requirement that the grounds and procedure for release of judges from office as well as the legal status of judges and guarantees for their independence, including special procedure for appointment to office and bringing criminal charges against judges. The Constitution does not set out such guarantees or restrictions for any other officials working in the court system. The Court found § 174.8 of the CCP, which authorises an assistant judge to determine procedural expenses in civil proceedings, is in conflict with the first sentence of Article 146 of the Constitution. The Court declared it unconstitutional and repealed it.

b. The limits set on recovering the expenses of contractual representative from other parties to proceedings were established by two different government regulations at different times. Also, there were two different delegating norms in the CCP at different times. The Court found that the concrete norm control must be extended to the regulations at different times as the wordings of those regulations overlapped to such a great extent that they substantively constitute the same provision. The Court also took into consideration the principle of legal clarity.

Under the first sentence of Article 3.1 of the Constitution, governmental authority is exercised solely on the basis of the Constitution and laws that are in conformity therewith. This provision of the Constitution expresses the parliamentary reservation, i.e. the principle of importance, according to which the Legislature must decide all matters of importance from the point of view of fundamental rights itself and must not delegate their regulation to the Executive. The Executive is allowed to impose less intensive restrictions of fundamental rights by a regulation based on a provision delegating authority, which is accurate, clear and in conformity with the intensity of the restriction.

Setting a limit on the compensation of the expenses of a contractual representative thus interferes with multiple fundamental rights and depending on the circumstances, the interference may be serious. Therefore, the establishment of compensation limits on the expenses of a contractual representative may be considered an important matter for the purpose of the parliamentary reservation.

Additionally, it must be taken into account that since the matter concerns compensation of expenses incurred in judicial proceedings, the issue falls within the scope of application of an act governing court procedure that must be regulated by an act passed by the majority of the members of the Parliament (Article 104.2.14 of the Constitution).

The regulations and delegating norms of the CCP were declared unconstitutional.

III. There were two separate opinions from three judges.

#### *Cross-references:*

Legal norms referred to:

- Articles 3, 11, 15, 24, 32, 87, 146, 147, 150 and 153 of the Constitution.

Supreme Court:

- no. 3-4-1-29-13, 04.02.2014;
- no. 3-4-1-18-07, 26.11.2007;
- no. 3-4-1-10-02, 24.12.2002, *Bulletin* 2002/3 [EST-2002-3-010];
- no. 3-4-1-8-09, 16.03.2010, *Bulletin* 2010/1 [EST-2010-1-006];
- no. 3-4-1-1-08, 05.02.2008, *Bulletin* 2008/1 [EST-2008-1-003];
- no. 3-4-1-20-07, 09.04.2008, *Bulletin* 2008/1 [EST-2008-1-005];

- no. 3-4-1-16-06, 13.02.2007;
- no. 3-2-1-62-10, 12.04.2011;
- no. 3-4-1-20-13, 10.12.2013.

#### *Languages:*

Estonian, English (translation by the Court).



# France

## Constitutional Council

### Important decisions

*Identification:* FRA-2014-3-009

**a)** France / **b)** Constitutional Council / **c)** / **d)** 09.10.2014 / **e)** 2014-420/421 QPC / **f)** Mr Maurice L. and others [Exceptional extension of custody for a person accused of conspiracy to defraud by an organised gang] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 12.10.2014, 16578 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**

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

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

*Keywords of the alphabetical index:*

Organised gang, fraud.

*Headnotes:*

The provisions of sub-paragraph 8bis of Article 706-73 and of Article 706-88 of the Code of Criminal Procedure (CPP) which, in the case of inquiries or investigations pertaining to conspiracy to defraud by an organised gang, permit the implementation of a custody measure for up to 96 hours, constitute an infringement of personal freedom and of the right to a fair trial, which cannot be regarded as proportionate to the aim being pursued. The Constitutional Council therefore held sub-paragraph 8bis of Article 706-73 of the CPP to be unconstitutional.

*Summary:*

On 16 July 2014 the Court of Cassation asked the Constitutional Council to give two priority preliminary rulings concerning the conformity of sub-paragraph 8bis of Article 706-73 of the CPP and

Article 706-88 of the CPP with constitutionally guaranteed rights and freedoms.

During investigations or inquiries pertaining to organised fraud, these provisions permit the implementation of a custody measure for up to 96 hours under the conditions set out in Article 706-88 of the CPP.

The Council noted that, even where it is committed by an organised gang, the offence of fraud is not in itself liable to jeopardise the safety, dignity or lives of others. Therefore, in making it possible for police custody to be extended for up to 96 hours for such an offence, the legislator permitted an infringement of personal freedom and of the right to a fair trial, which cannot be regarded as proportionate to the aim being pursued. The Council accordingly held sub-paragraph 8bis of Article 706-73 of the CPP to be unconstitutional. The Council ruled that the amendment to Article 706-88 introduced under the Act of 27 May 2014 did not put an end to this unconstitutionality.

As regards the temporal effects of this declaration of unconstitutionality, the Council ruled that:

- Firstly, the immediate repeal of sub-paragraph 8bis of Article 706-73 of the CPP would have also had the effect of forbidding the use of special powers of surveillance and investigation for inquiries pertaining to conspiracy to defraud by an organised gang (although such powers are not contrary to the Constitution). In view of this clearly excessive consequence, the Council postponed the date of repeal of sub-paragraph 8bis of Article 706-73 of the CPP to 1 September 2015.

- Secondly, in order to put an end to the unconstitutionality it had ascertained to exist, the Council ruled that, from the publication of its decision, it would no longer be possible to extend a custody measure beyond 48 hours in investigations concerning conspiracy to defraud by an organised gang.

- Thirdly, the Council held that calling into question acts of criminal procedure adopted on the basis of sub-paragraph 8bis of Article 706-73 of the CPP would infringe the objective of constitutional value that offenders should be brought to justice and would have manifestly excessive consequences. Accordingly, custody measures adopted before the publication of the Constitutional Council's decision, and other investigative measures adopted before 1 September 2015 in accordance with the provisions declared contrary to the Constitution, cannot be challenged on the basis of this unconstitutionality.

*Languages:*

French.

*Identification:* FRA-2014-3-010

**a)** France / **b)** Constitutional Council / **c)** / **d)** 07.11.2014 / **e)** 2014-424 QPC / **f)** Association Mouvement raëlien international [Legal capacity of associations whose registered office is located abroad] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 09.11.2014, 18975 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Association, registered office abroad.

*Headnotes:*

No constitutional provision prevents the recognition in France of the legal personality, including the legal capacity, of associations whose registered office is located abroad and who have an establishment in France from being subject to their prior declaration to the prefecture of the department where their principal establishment is located, as in the case of associations whose registered office is located in France.

*Summary:*

On 25 August 2014 the Court of Cassation asked the Constitutional Council to give a priority preliminary ruling concerning the conformity of the third paragraph of Article 5 of the Act of 1 July 1901, concerning association agreements, with constitutionally guaranteed rights and freedoms.

Article 5 of this Act stipulates that associations whose registered office is located in France obtain legal capacity only after they have been declared to the prefecture of the department or the sub-prefecture of the district where the association's registered office is located. For associations whose registered office is located abroad, the contested third paragraph stipulates that this prior declaration must be made to the prefecture of the department where the principal establishment is located.

The Council noted that no constitutional provision precludes that the recognition in France of the legal personality, including the legal capacity, of associations whose registered office is located abroad and who have an establishment in France shall be subject, as in the case of associations whose registered office is located in France, to the filing of a prior declaration with the prefecture of the department where their principal establishment is located. The Council also formulated a reservation whereby the third paragraph of Article 5 of the Act of 1 July 1901 does not have the object of depriving associations having their registered office abroad, which have legal personality in accordance with the law applicable to them but do not have any establishment in France, of the capacity to participate in proceedings before the French courts, subject to the rules applicable to the admissibility of applications, and this paragraph cannot be interpreted in this way without unjustifiably infringing their right to an effective judicial remedy. Subject to this reservation, the Constitutional Council held that the third paragraph of Article 5 of the 1901 Act was in conformity with the Constitution.

*Languages:*

French.

*Identification:* FRA-2014-3-011

**a)** France / **b)** Constitutional Council / **c)** / **d)** 14.11.2014 / **e)** 2014-426 QPC / **f)** Mr Alain L. [Right to retain works of art proposed for exportation] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 16.11.2014, 19330 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Work of art, exportation, authorisation / Deprivation of ownership, public necessity.

*Headnotes:*

The fact that the State may refuse an export authorisation, thereby preventing works of art from leaving the national territory, ensures that the objective of keeping objects of historical or artistic interest within national territory is realised. The deprivation of ownership permitted under the contested provisions is not necessary to attain such an objective. By allowing the compulsory acquisition of these assets by a public entity, once their removal from national territory has already been refused, the legislator introduced a provision permitting deprivation of ownership without laying down criteria for establishing a public necessity. The contested provisions accordingly infringe the provisions of Article 17 of the 1789 Declaration.

*Summary:*

On 8 September 2014 the *Conseil d'État* asked the Constitutional Council to give a priority preliminary ruling concerning the conformity of Article 2 of the Act of 23 June 1941, concerning the exportation of works of art, with constitutionally guaranteed rights and freedoms.

The Act of 23 June 1941 governed the exportation of works of art until its repeal by the Act of 31 December 1992. Article 2 thereof establishes, for the State's benefit, a right to retain objects of historical or artistic interest refused an export authorisation under Article 1 of the same Act. This right may be exercised within six months following the request for an export authorisation if the owner has not shown any intention to sell the object.

The Constitutional Council noted that the fact that the State may refuse an export authorisation, thereby preventing works of art from leaving national territory, ensures that the objective of keeping objects of historical or artistic interest within national territory is realised. The Council considered that it followed from this that the deprivation of ownership permitted by the contested provisions is not necessary to attain such an objective. The Council accordingly held that, by providing for the compulsory acquisition of such assets by a public entity, once their removal from

national territory has already been refused, the legislator introduced a provision permitting deprivation of ownership without laying down criteria for establishing a public necessity. The contested provisions accordingly infringe the provisions of Article 17 of the 1789 Declaration.

The ruling concerning the unconstitutionality of Article 2 of the Act of 23 June 1941 takes effect from the date of publication of the Council's decision. It may be invoked in all proceedings instituted before the date of publication of the Constitutional Council's decision that have not been definitively resolved at that time.

*Languages:*

French.

*Identification: FRA-2014-3-012*

**a)** France / **b)** Constitutional Council / **c)** / **d)** 14.11.2014 / **e)** 2014-427 QPC / **f)** Mr Mario S. [Extradition of persons who have acquired French nationality] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 16.11.2014, 19331 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis*.**

5.3.8 Fundamental Rights – Civil and political rights – **Right to citizenship or nationality.**

*Keywords of the alphabetical index:*

Extradition.

*Headnotes:*

By prohibiting the extradition of French nationals, the legislature recognised the right of the latter not to be handed over to a foreign authority for the purposes of prosecution or a conviction for a criminal offence. The difference in treatment in the application of this protection, according to whether or not the person was a French national at the time of the offence for

which extradition is requested, is based on a difference in situation directly related to the object of the law. Moreover, the legislature also intended to prevent the usage of rules on the acquisition of nationality in order to avoid extradition.

### Summary:

On 9 September 2014, the Court of Cassation referred to the Constitutional Council an application for a priority ruling on constitutionality concerning the conformity of paragraph 1 of Article 696-4 of the Code of Criminal Procedure (hereinafter, "CPP") with the rights and freedoms guaranteed by the Constitution.

Article 696-4 of the CPP lists the cases in which extradition is not granted. Paragraph 1 thereof thus provides that extradition is not granted when the person has claimed French nationality. It specifies that nationality is assessed at "the date of the offence for which the extradition is requested". The Constitutional Council held that these provisions are in conformity with the Constitution.

The Constitutional Council noted that, by prohibiting the extradition of French nationals, the legislature recognised the right of the latter not to be handed over to a foreign authority for the purposes of prosecution or a conviction for a criminal offence. The Council held that the difference in treatment in the application of this protection, according to whether or not the person was a French national at the time of the offence for which extradition is requested, is based on a difference in situation directly related to the object of the law. Moreover, the legislature also intended to prevent the usage of rules on the acquisition of nationality in order to avoid extradition.

### Languages:

French.



### Identification: FRA-2014-3-013

**a)** France / **b)** Constitutional Council / **c)** / **d)** 21.11.2014 / **e)** 2014-430 QPC / **f)** Mrs Barbara D. and others [Sales of works and transfer of the right of reproduction] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 23.11.2014, 19678 / **h)** CODICES (French).

### Keywords of the systematic thesaurus:

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

5.4.8 Droits fondamentaux – Droits économiques, sociaux et culturels – **Liberté contractuelle**.

5.4.12 Fundamental Rights – Economic, social and cultural rights – **Right to intellectual property**.

### Keywords of the alphabetical index:

Work of art, sales / Work of art, reproduction.

### Headnotes:

Provisions whereby artists benefit from the right to sell their works and to transfer their ownership wholly or partially establish a presumption that respects the right of the parties to the sale contract to reserve the right of reproduction.

The constitutional protection of intellectual property rights and freedom of contract does not preclude a rule whereby the sale of the physical work entails the transfer of the right of reproduction, unless the parties decide to specify that this is not the case.

### Summary:

On 17 September 2014, the Court of Cassation referred to the Constitutional Council an application for a priority ruling on constitutionality on a question raised by the heirs of the painters Matisse and Picasso. This question concerned the conformity of Article 1 of the law of 19 July 1793, as interpreted by the Court of Cassation, with the rights and freedoms guaranteed by the Constitution.

This article provides that artists benefit from the right to sell their works and to transfer their ownership wholly or partially. According to the established case-law of the Court of Cassation, if a work was sold prior to the entry into force of the law of 11 April 1910, the sale of the work without reservations also transfers the right of reproduction to the buyer. The Constitutional Council held that these provisions, thus interpreted, do not hinder ownership or freedom of contract and are in conformity with the Constitution.

The Constitutional Council noted that the provisions challenged establish a presumption that respects the right of the parties to the sale to reserve the right of reproduction. The Council ruled that the constitutional protection granted to neither intellectual property rights nor freedom of contract precludes a rule whereby the sale of the physical work entails the

transfer of the right of reproduction, unless the parties decide to specify that this is not the case.

*Languages:*

French.



*Identification:* FRA-2014-3-014

**a)** France / **b)** Constitutional Council / **c)** / **d)** 28.11.2014 / **e)** 2014-432 QPC / **f)** Mr Dominique de L. [Incompatibility of the duties of an active member of the armed forces with local elected office] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 10.12.2014, 20646 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

5.1.1.4.4 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Military personnel.**

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

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

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

*Keywords of the alphabetical index:*

Member of the armed forces, local elected office, incompatibility / Voter, freedom of choice / Elected representative, independence / Election, municipal council, candidacy, member of the armed forces / Election, community council, candidacy, member of the armed forces.

*Headnotes:*

By making the duties of a professional member of the armed forces or holder of an equivalent position incompatible with the office of municipal councillor, the legislature introduced an incompatibility not restricted on the basis of the rank of the person

elected, the responsibilities exercised, the place where they are exercised or the size of the municipality. In view of the number of municipal council mandates with which all duties of a professional member of the armed forces or a holder of an equivalent position are thereby rendered incompatible, the legislature introduced a prohibition the scope of which is clearly greater than is necessary to protect voters' freedom of choice and the independence of the elected representative against the risk of confusion or conflict of interest.

*Summary:*

On 24 September 2014, the Council of State referred to the Constitutional Council an application for a priority ruling on constitutionality concerning the conformity of the first paragraph of Article L. 46 and the last paragraph of Article L. 237 of the Electoral Code with the rights and freedoms guaranteed by the Constitution.

These provisions specify that the duties of a professional member of the armed forces or the holder of an equivalent position, either active or serving beyond the legal duration, are incompatible with the exercise of the mandate of departmental, municipal or community councillor.

The Constitutional Council noted the specific constitutional requirements applied to the armed forces, whose free availability cannot be impeded by the exercise of electoral mandates. The Council also pointed to its established case-law, according to which, while the legislature can provide for incompatibility between electoral mandates or elected duties and professional activities or duties, the restriction thus imposed on the exercise of public duties must be justified by the need to protect voters' freedom of choice and the independence of the elected representative against the risk of confusion or conflict of interest.

Firstly, the Council held that, in view of the arrangements for electing departmental councillors and the inherent requirements of the exercise of their mandate, by providing for incompatibility between the duties of a professional member of the armed forces or holder of an equivalent position and the mandate of departmental councillor, the challenged provisions, in view of the particular obligations associated with the status of member of the armed forces, introduced a prohibition that is not unconstitutional. The Council held that the same applies to incompatibility with the mandate of community councillor.

Secondly, the Council noted that, by making the duties of a professional member of the armed forces or holder of an equivalent position incompatible with

the mandate of a municipal councillor, the legislature introduced an incompatibility that is not restricted on the basis of the rank of the person elected, the responsibilities exercised, the place where they are exercised or the size of the municipality. The Council held that, in view of the number of municipal council mandates with which all duties of a professional member of the armed forces or holder of an equivalent position are thereby rendered incompatible, the legislature introduced a prohibition the scope of which is clearly greater than is necessary to protect the voter's freedom of choice and the independence of the elected representative against the risk of confusion or conflict of interest.

Consequently, the Constitutional Council held that Article L. 46 of the Electoral Code is contrary to the Constitution. It postponed the date of repeal of these provisions to 1 January 2020 or the next general renewal of municipal councils if this takes place before that date.

#### *Languages:*

French.



## Germany

### Federal Constitutional Court

#### Important decisions

*Identification:* GER-2014-3-028

**a)** Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 08.09.2014 / **e)** 1 BvR 23/14 / **f)** / **g)** / **h)** *Monatsschrift für Deutsches Recht* 2014, 1406-1407; *Kommunikation & Recht* 2014, 796-798; *Neue Juristische Wochenschrift* 2014, 3711-3712; *Zeitschrift für Medien- und Kommunikationsrecht* 2014, 521-524; CODICES (German).

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

*Keywords of the alphabetical index:*

Preliminary injunction / Journalists, access to information.

*Headnotes:*

The requirements for preliminary injunctions awarding journalists access to information may not be excessive.

*Summary:*

I. The Federal Constitutional Court had to decide on a constitutional complaint of a journalist who had unsuccessfully applied for a preliminary injunction from the Federal Administrative Court granting him access to information held classified by the Federal Intelligence Service.

II. The Federal Constitutional Court ruled that the principle of effective legal recourse enshrined in Article 19.4 of the Basic Law mandates that requirements imposed on preliminary injunctions that award journalists access to information may not be overly strict. Applicants must show that there is a particular public interest in the information they see

and that the information concerns current public discussions. Limiting preliminary injunctions to cases in which disclosure cannot be postponed would interfere with the freedom of the press in an unjustified manner.

The decision is based on the following considerations:

1. Article 19.4 of the Basic Law provides for effective legal recourse against all state actions. Courts are required to particularly consider any affected fundamental rights as well as the requirements of effective legal recourse. The more severe the consequences of denying a preliminary injunction are and the more difficult it would be to remedy them in case the applicant won the main proceedings, the more urgent the need for a preliminary injunction becomes. These requirements also affect and may limit the prohibition on deciding a case's merits by way of preliminary injunction.

2. The Federal Administrative Court was right to assume that issuing a preliminary injunction granting access to information would already decide the case's merits. The consequences it derived for the present case are constitutionally questionable but still permissible.

a. In determining whether there is a severe disadvantage that would justify deciding the case's merits by way of preliminary injunction, the Court because of the fundamental character of the freedom of the press must consider the importance informational rights have for effective reporting.

b. The challenged decision ultimately does take into account the applicant's protected interest adequately in publishing information in a way that is as self-determined as possible concerning the time of publication.

(1) However, it is constitutionally questionable that the Federal Administrative Court assumed that reporting must always be expected to suffer from a certain delay in time and that exceptions may only be made if the inquiry concerns facts that must undeniably be investigated immediately, e.g. in cases of severe breaches of the law by government authorities or if immediate government action becomes necessary to prevent imminent harm to the common good. Such an interpretation excessively restricts the "severe disadvantage" and imposes a standard that is incompatible with the importance of a free press in a state governed by the rule of law.

The "if" and the "how" of reporting are core elements of the self-determination of the press, which also protects the methods of acquiring the corresponding information. The standard laid down by the Federal Administrative Court restricts the instrument of preliminary injunctions in a way that violates the freedom of the press.

Even though it is permissible to limit preliminary injunction to cases in which there is a particular public interest in the information sought and in which the information is relevant to ongoing public discussions, restricting this way of acquiring information by imposing excessive requirements on the urgency of the information's publication prevents the press from exercising its function of oversight.

(2) Nevertheless, the Federal Administrative Court's decision in the case at hand is beyond reproach, as the applicant failed to show why disclosing the information he sought – dating back to a period between 2002 and 2011 – was suddenly so urgent as to warrant a preliminary injunction, which would have even decided the case's merits. Even though past information may at a later point in time become critically urgent, it is the applicant who must show why this is the case.

#### *Languages:*

German.



#### *Identification:* GER-2014-3-029

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 24.09.2014 / **e)** 2 BvR 2782/10 / **f)** / **g)** / **h)** *Landes- und Kommunalverwaltung* 2014, 505-510; *Europäische Grundrechte-Zeitschrift* 2014, 691-698; CODICES (German).

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

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

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:*

Decision, arbitrary, prohibition / Investigate, duty to, *ex officio* / Children's homes, placing in, rehabilitation / Legal recourse, effective.

*Headnotes:*

1. The guarantee of effective legal recourse requires that courts deciding in rehabilitation proceedings follow up on every promising lead to establish the facts of the case.

2. Judicial decisions that disregard clearly applicable rules or that misinterpret a rule's content in a blatant manner violate the prohibition of arbitrary decisions enshrined in Article 3.1 of the Basic Law.

*Summary:*

I. The Federal Constitutional Court had to decide on a constitutional complaint of a applicant who had unsuccessfully sought rehabilitation for having been placed in children's homes in the former German Democratic Republic in the 1960s and 1970s.

II. The Federal Constitutional Court ruled that in order to satisfy the requirements of effective legal recourse, as provided for by Article 2.1 in conjunction with Article 20.3 of the Basic Law, courts that decide in rehabilitation proceedings must follow up on every promising lead and must employ every permissible means of obtaining evidence to establish the facts of the case. This requirement is also laid down by the first sentence of § 10.1 of the Criminal Law Rehabilitation Act (hereinafter, the "Act"), which imposes an *ex officio* duty on the Court to establish the facts of the case, because the Court has a particular duty of care towards the applicant.

These standards were not met in the case at hand, as the Court did not follow up on leads that suggested political reasons for the applicant's admission into the children's homes.

The Federal Constitutional Court also held that the prohibition on arbitrary decisions, enshrined in Article 3.1 of the Basic Law, bars courts from making decisions that appear completely unreasonable and that suggest that the Court was led by illegitimate considerations. However, this does not mean that every false interpretation of the law constitutes a violation. Only such decisions that clearly disregard applicable rules or that misinterpret a rule's content in a blatant manner contravene Article 3.1 of the Basic Law.

In the case at hand, the Court violated this prohibition by refusing to apply § 7.2 of the Act, which was clearly applicable to the case, and by denying that the conditions under which the applicant was forced to live in the children's homes amounted to imprisonment, even though the restrictions imposed on him were most severe – hereby blatantly disregarding the legislative intention of § 2 of the Act.

*Languages:*

German.

*Identification:* GER-2014-3-030

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 07.10.2014 / **e)** 2 BvR 1641/11 / **f)** / **g)** to be published in the Court's Official Digest / **h)** *Neue Zeitschrift für Sozialrecht* 2014, 861-868; *Juristenzeitung* 2014, 1153-1163; *Deutsches Verwaltungsblatt* 2014, 1534-1540; CODICES (German).

*Keywords of the systematic thesaurus:*

1.2.1.6 Constitutional Justice – Types of claim – Claim by a public body – **Local self-government body**.

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

*Keywords of the alphabetical index:*

Eternity clause / Responsibilities, administrative, overlapping, prohibition / Competence, legislative, distribution / Self-government / Local government / Municipal law / Basic support for persons seeking employment / Control, financial / Self-determination, municipal.

*Headnotes:*

1. By enacting Article 91e of the Basic Law, the Constitution-amending legislator established a comprehensive special provision regarding basic support for persons seeking employment. Where it applies, Article 91e of the Basic Law takes precedence both over Article 83ff of the Basic Law and Article 104a of the Basic Law.

2. Article 91e of the Basic Law establishes a direct financial relationship between the Federation and the *Optionskommunen* (a municipality that is solely responsible for providing basic support for persons seeking employment) and enables a kind of financial control that differs both from governmental oversight and from financial control by the Federal Audit Office (*Bundesrechnungshof*).

3. Article 91e.2 of the Basic Law allows municipalities and associations of municipalities to discharge the tasks of providing basic support for persons seeking employment under their sole responsibility as municipal agencies. The legal structure of this option must be set up without arbitrariness. To do so falls under the protection of the guarantee of municipal self-determination.

4. Article 91e.3 of the Basic Law contains a call for legislation in favour of the Federation, which is comprehensive and to be interpreted broadly. The Federation thus has the competence to legislate those legal issues that are related to the admission as a municipal agency. Its competence does not, however, cover the internal decision-making process of municipalities.

#### Summary:

I. The municipal constitutional complaint concerned questions arising from a new way municipalities could provide basic support for persons seeking employment. Forming so-called *Optionskommunen*, they could be the sole provider of these services, instead of both municipality and Federal Labour Office (*Bundesagentur für Arbeit*) working together (Article 91e.1 of the Basic Law). Following a new regulation in 2010, 15 districts (*Landkreise*) and one city challenged the legal status of these *Optionskommunen*.

II. The Federal Constitutional Court found that the challenged provisions were, for the most part, constitutional. The Court first stated that while there was a general prohibition of overlapping administrative responsibilities, which derives from the principle of democracy and the rule of law, this prohibition is not absolute. Article 91e.1 of the Basic Law, which violates this principle, thus does not violate the eternity clause of Article 79.3 of the Basic Law. In a second step, the Court argued that where Article 91e of the Basic Law applies, it takes precedence both over Article 83ff of the Basic Law (execution of federal laws by the *Länder* (federal states)) and Article 104a (financing of expenditures of administration). Following from this, the Court cautioned that the chance of being admitted as an

*Optionskommune* (which the Federation “may” and not “must” do) is protected by the guarantee of municipal self-determination. Such a decision must thus not be made arbitrarily. While most of the challenged provisions were deemed constitutional, the Court found that one provision, which stipulated criteria according to which the respective municipalities were to make their decisions, violated the Basic Law.

#### Languages:

German.



#### Identification: GER-2014-3-031

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 10.10.2014 / **e)** 1 BvR 856/13 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2014, 3567-3568; CODICES (German).

#### Keywords of the systematic thesaurus:

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

#### Keywords of the alphabetical index:

Individual, visually impaired / Documents relating to proceedings, accessibility / Attorney’s duties.

#### Headnotes:

Only in cases, the contents of which may equally be communicated by the party’s attorney, are documents relating to proceedings not required to be made available in braille.

#### Summary:

I. The Federal Constitutional Court had to decide on a constitutional complaint concerning a visually impaired applicant’s right to receive documents relating to a civil-law dispute in braille.

II. The Federal Constitutional Court ruled that it follows from the prohibition of discrimination

enshrined in the second sentence of Article 3.3 of the Basic Law that visually impaired individuals must be aided in a way that enables them to participate in social life in the same way as non-handicapped individuals. In cases involving merely simple matters, an individual who is represented by an attorney may generally be required to rely on his or her attorney to relay information concerning the proceedings. However, the respective court's obligation of care requires that documents relating to the proceedings be made available if there is reason to believe that the attorney is not able to communicate their contents in a way that is equal to the client reviewing them him or herself. The decision is based on the following considerations:

The prohibition of discrimination enshrined in the second sentence of Article 3.3 of the Basic Law is not limited to requiring state actors to treat handicapped and non-handicapped individuals alike on a legal level. Legislation that negatively affects the situation of handicapped individuals compared to non-handicapped individuals may also constitute discrimination. Therefore, the legislator and courts when conceiving and interpreting rules of procedure must ensure that handicapped parties possess the same means of participating in the proceedings as non-handicapped parties.

Requiring a visually impaired party to rely on his or her attorney to communicate information relating to the proceedings is permissible under the second sentence of Article 3.3 of the Basic Law at least in such cases that concern only simple matters and in which there is no indication that the attorney might not be able to communicate information in a way that is equal to the client reviewing it him or herself. Equal participation in the proceedings does not necessarily imply that visually impaired individuals be made available documents in braille. In cases in which the subject matter is simple and the party is represented by an attorney, it may generally be assumed that the contents of the proceedings will be relayed to the party by his or her attorney without loss of information and without impairing the party's possibility to participate in the proceedings. This is all the more true as it is one of the attorney's obligations to keep his or her client informed.

However, the courts' responsibility, arising from the second sentence of Article 3.3 of the Basic Law, to ensure that handicapped individuals dispose of the same means of participation in proceedings does not end when an individual is represented by an attorney. Courts must also comply with an individual's request for documents in braille if there is reason to believe that, notwithstanding their simplicity, the document's contents are not being relayed to the individual in a

way that is equal to the individual reviewing the documents him or herself. This also adequately serves to enable visually impaired individuals to monitor their legal counsel's performance. Should counsel not adequately perform his or her duty to keep the client informed, the client may bring this matter before the Court and again request that documents be made available in braille; in cases in which there are indications to this effect, the court's obligation of care requires it to take such measures *ex officio*.

Generally, the decision on whether it is necessary to provide documents in braille pertains to the regular courts and is subject to only limited review by the Federal Constitutional Court. In the case at hand, the decision taken complied with the applicable standards and was upheld.

#### *Languages:*

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



#### *Identification:* GER-2014-3-032

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 21.10.2014 / **e)** 2 BvE 5/11 / **f)** Armament exports / **g)** to be published in the Court's Official Digest / **h)** *Neue Zeitschrift für Verwaltungsrecht* 2014, 1652-1666; *Bundeswehrverwaltung* 2014, 274-282; CODICES (German).

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

3.4 General Principles – **Separation of powers**.  
4.5.7.1 Institutions – Legislative bodies – Relations with the executive bodies – **Questions to the government**.  
4.6.2 Institutions – Executive bodies – **Powers**.

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

Foreign policy / Export, armament, control / Scrutiny, parliamentary / Decision-making, executive, core sphere.

*Headnotes:*

1. Under the second sentence of Article 38.1 and the second sentence of Article 20.2 of the Basic Law, the German Parliament (*Bundestag*) has a right to ask questions of, and to receive information from, the Federal Government, and in general this corresponds with a duty of the Federal Government to give answers. It does not follow from the significance for foreign policy of this area of governmental action that such exports are automatically exempt from all parliamentary oversight. Neither does the allocation of responsibility under the first sentence of Article 26.2 of the Basic Law alone create an area of governmental decision-making that is always exempt from parliamentary scrutiny.

2. Nevertheless, Parliament and its individual members do not have an unlimited entitlement to be informed. Their right is limited by the principle of separation of powers, by the welfare of the state, and by third parties' fundamental rights.

a. The deliberations and decision-making of the Federal Security Council (*Bundessicherheitsrat*) are a part of the core sphere of executive decision-making. Thus, following requests by the representatives of the German Parliament, the Federal Government is merely required to inform them that the Federal Security Council has approved a given armaments export transaction (specified by the kind of arms, volume of the deal and recipient) or that approval of such a deal had been denied. There is no constitutional requirement to provide any further information.

b. The Federal Government can also refuse to answer questions regarding pending permits to export weapons designed for warfare, as well as information about advance queries from arms dealers, for reasons related to the welfare of the state. The same applies with regard to the fact that a permit was denied. Even in case of permits that have already been approved by the Federal Security Council, a refusal to answer can be justified for the same reasons.

c. An interference with German military equipment companies' freedom of occupation by disclosing business and trade secrets is justified insofar as the Federal Government releases information about the Federal Security Council's decision to approve a specific transaction for the export of arms and in that context provides information about the kind and number of weapons, the recipient country, the German companies involved and the total volume of the transaction. Any further disclosures would, as a general rule, constitute a disproportionate interference with the companies' freedom of occupation.

d. There is an obligation to state reasons if the Federal Government intends to deny information about a permit that has been granted or about general features of the export transaction that are to be communicated in this context.

*Summary:*

I. Pursuant to the first sentence of Article 26.2 of the Basic Law, arms suitable for warfare may only be produced, transported and distributed with the permission of the Federal Government. Details are laid down by the War Weapons Control Act. According to established practice, particularly delicate decisions are made by the Federal Security Council, a cabinet committee chaired by the Chancellor. Pursuant to its (classified) rules of procedure, its sessions are confidential. According to practice, the Federal Government presents an annual report on arms exports, which contains statistical information on export permits issued and gives figures for the types of arms concerned as well as their destination. Decisions on preliminary inquiries on whether individual export projects have prospects of being permitted, however, are not part of the report.

The applicants in this dispute between constitutional bodies (*Organstreit*) were three members of Parliament. In July 2011, they submitted questions to the Federal Government – the respondent in the proceedings – about exports of weapons to Saudi Arabia and Algeria. The respondent refused to answer any questions relating to specific approvals, pointing in particular to the need to keep decisions of the Federal Security Council secret. The applicants held that this refusal violated their rights as members of Parliament.

II. The Court held that the applications were in part well-founded. Under the second sentence of Article 38.1 and the second sentence of Article 20.2 of the Basic Law, the German Parliament has a right to ask questions of, and receive information from, the Federal Government, and in general this corresponds with a duty of the Federal Government to give answers. Parliamentary oversight over the government is, first of all, an exercise of the principle of the separation of powers, as Parliament cannot exercise its right of oversight without being a party to the government's knowledge. Second, the bond of answerability between the people and the power of the state also operates through Parliament's oversight over the government's policies. Keeping secrets from Parliament limits that body's options for oversight and may thereby impair or disrupt the necessary democratic legitimation.

Nevertheless, Parliament and its individual members do not have an unlimited entitlement to be informed. Their right is limited by the principle of the separation of powers, by the welfare of the state, and by third parties' fundamental rights.

Under the first sentence of Article 26.2 of the Basic Law, weapons designed for warfare may be manufactured, transported or marketed only with the permission of "the Federal Government". The formation of an opinion within the Federal Government does not conclude simply with a positive answer to an advance query; it concludes only with the final decision of the Federal Security Council on a formal application for permission. Answering an advance query provides information only about whether an intended export is eligible for approval – not an assurance, still less a partial approval. Consequently, the Federal Security Council and the participating ministries are not bound by a positive response to an advance query.

Therefore, any obligation for the Federal Government to give answers concerning advance queries would interfere with a multi-departmental decision-making process that is still pending. The Federal Security Council, which is not legally bound to its decision on the advance query, would be exposed to Parliamentary influence over its decision on the subsequent permit application. This would *de facto* empower Parliament to co-govern on a decision that is under the authority of the Federal Government alone. Parliament's task of oversight would be distorted into a steering capacity to which it is not entitled in this sphere, according to the first sentence of Article 26.2 of the Basic Law.

However, if asked, the Federal Government must inform Parliament and its members about any positive permit decision, but it is under no obligation to give information about the contents and course of deliberations within the Federal Security Council or about the votes of its members. A further limit on Parliament's entitlement to information is the welfare of the state, which may be endangered if information that requires secrecy becomes public.

#### *Languages:*

German; English (translation of the decision and of the press release on the Court's website).



#### *Identification:* GER-2014-3-033

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 05.11.2014 / **e)** 1 BvF 3/11 / **f)** Air Travel Tax Act / **g)** to be published in the Federal Constitutional Court's Official Digest / **h)** *Höchstrichterliche Finanzrechtsprechung* 2014, 1111-1116; CODICES (German).

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

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

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

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

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

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

Competence, legislative / Taxation, object.

#### *Headnotes:*

1. The Air Travel Tax is a miscellaneous traffic tax for motorised transport within the meaning of Article 106.1.3 of the Basic Law.

2. When choosing an object of taxation the legislator already complies with the principle of equality if this choice can be based on substantive reasons, if the use of inappropriate or arbitrary considerations can be excluded and if the specific allocation of burdens does not violate other constitutional provisions.

3. Due to the legislator's far-reaching margin of appreciation in the choice of taxable objects, the principle of equality does not require the legislator, after having decided on a specific object of taxation, to also tax any similar taxable objects that are also suitable for the tax purpose.

#### *Summary:*

I. The Federal Constitutional Court had to perform an abstract judicial review of the Air Travel Tax Act (hereinafter, the "Act"), which imposes a tax on commercial passenger flights departing from Germany after 1 January 2011. Exempt from taxation are government, military and medical flights, supply flights to the German islands in the North Sea as well as transit and transfer flights.

Apart from generating revenue, the legislator intended the tax to have an incentive function encouraging environment conscious behaviour in air travel.

II. The decision is based on the following considerations:

1. The Federation was competent to enact the Act under the first alternative of Article 105.2 in conjunction with number three of Article 106.1 of the Basic Law as the air travel tax is a “miscellaneous tax on motorised traffic” for the purposes of number three of Article 106.1 of the Basic Law.

§ 11.2 of the Act, which permits the Federal Ministry of Finance to annually reduce the tax rate by way of ordinance, meets the constitutional requirements for such a permission as it does not award the executive branch the power to decide on whether or how the reduction will be applied, but sets a specific framework within which the ministry merely calculates the exact reduction.

2. The rules contained in the Act concerning the object of taxation, tax privileges and the design of the tax rate are compatible with the equality principle of Article 3.1 of the Basic Law.

a. The legislator was not obliged to also tax non-commercial passenger or cargo flights. Since the legislator, by virtue of its democratic legitimation, possesses a far-reaching margin of appreciation in choosing objects for taxation, the principle of equality does not require it to tax all similar objects. Only after an object for taxation has been chosen do the strict requirements of Article 3.1 of the Basic Law apply to the tax law’s design.

b. The exemptions provided for by the Act are based on solid substantive grounds. Exempting supply flights to the German islands in the North Sea secures the subsistence of the islanders, while the exemptions for government and military flights are justified by their mere purpose. Sparing transit and transfer flights aims at securing German airports as competitive transportation hubs.

c. Nor does the challenged design of the tax rate violate the equality principle. By making the rate dependent on the distance travelled, the legislator chose a suitable and reasonably realistic standard of taxation that complies with the tax’s purpose of environmental protection. The fact that it is not the actual distance travelled but the distance to the major airport of the country of destination that is relevant does not violate the equality principle. Since this differentiation becomes relevant only in

a few cases of very large countries, it is permissible for reasons of simplification.

3. Taxing commercial passenger flights also does not violate the freedom of occupation of airlines or their passengers. Passengers are not affected in their freedom of occupation since the tax does not possess an occupation-related component and any interference with the airlines’ occupational freedom is justified by the tax’s purpose of environmental protection.

*Languages:*

German; English (translation on the Court’s website).



*Identification:* GER-2014-3-034

**a)** Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 20.11.2014 / **e)** 2 BvR 1820/14 / **f)** / **g)** / **h)** *Wertpapier-Mitteilungen* 2015, 65-67; CODICES (German).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Basic Law, principles, essential / Extradition.

*Headnotes:*

1. Decisions by regular courts on the legality of an extradition must show that the Court scrupulously – and for the individual case in question – ascertained that the expected sentence in the country the accused is extradited to is commensurate to the crime committed.

2. The applicable standard of care rises proportionally to the degree to which the accused’s liberty is at stake.

### Summary:

I. The Federal Constitutional Court had to decide on a constitutional complaint as well as on an application for a preliminary injunction filed by a Turkish applicant who was held by German authorities and was facing extradition to the United States for criminal prosecution. He was *inter alia* charged with “conspiracy” to conduct cyber-attacks on the networks of US and foreign companies.

II. The Federal Constitutional Court ruled that it is permissible to extradite an accused individual to a country in which he or she faces a sentence of lifelong imprisonment without the possibility of parole as long as there is a possibility for his or her release in the future. However, the courts deciding on the legality of the extradition must, for each case, ascertain that the sentence the accused faces in the country he or she is extradited to is commensurate to the crime committed.

The decision is based on the following considerations:

In applying the prohibition on arbitrary decisions enshrined in Article 3.1 of the Basic Law, the Federal Constitutional Court is responsible for reviewing whether regular courts correctly applied the law. However, only decisions that appear completely unreasonable and that suggest that the regular court was led by illegitimate considerations constitute an arbitrary decision. This means that not every false interpretation of the law constitutes a violation, but only such decisions that disregard clearly applicable rules or that misinterpret a rule’s content in a blatant manner.

The Court deciding on the legality of an extradition is obliged to investigate the facts of the case *ex officio*. This includes ascertaining that the minimum standards imposed by international law, which are binding under Article 25 of the Basic Law, are met and that the circumstances of the extradition comply with the essential principles of the Basic Law. These essential principles include the requirement of proportionality, which is derived from the fundamental rights as well as from the rule of law principle and which mandates that no German authority may allow an extradition that would expose the accused to a sentence that is unreasonably harsh or incommensurate with the crime committed. Another essential principle of the Basic Law under Articles 1.1 and 2.1 of the Basic Law requires that sentences not be cruel, inhumane or degrading.

These principles are, however, not violated if the accused faces a sentence that would merely appear to be very harsh or unreasonable if viewed exclusively

from the vantage point of German constitutional law. The Basic Law acknowledges that Germany is part of the international community and must respect foreign legal values and decisions if international co-operation in extradition proceedings is to succeed. Therefore, the Basic Law prohibits only such extraditions that would violate its essential principles.

Accordingly, cases that involve severe crimes may justify harsh sentences and even lifelong imprisonment without the possibility of parole as long as the accused has a possibility of someday regaining his or her freedom.

The decision to extradite in the case at hand did not meet these standards. The regular court did not make an individual determination of which kind of sentence the accused faced in the United States and whether such a sentence would be commensurate with the crime committed. Therefore, the decision violates the prohibition of arbitrary decisions enshrined in Article 3.1 of the Basic Law.

### Languages:

German.



### Identification: GER-2014-3-035

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 16.12.2014 / **e)** 2 BvE 2/14 / **f)** / **g)** to be published in the Federal Constitutional Court’s Official Digest / **h)** CODICES (German).

### Keywords of the systematic thesaurus:

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

### Keywords of the alphabetical index:

Political parties, equal participation, right / Government members, neutrality, principle.

### Headnotes:

1. The standards that apply to both statements by the Federal President on political parties and to judicial review of such statements by the Federal

Constitutional Court are not transferable to members of the Federal Government.

2. Holders of government office who participate in political competition must ensure that in doing so they do not use the means and possibilities of their office. Holders of government office who employ the authority or the resources of their office in a specific way are bound by the principle of neutrality.

### Summary:

I. The Federal Constitutional Court was called upon to resolve a dispute between federal organs (*Organstreit*). The action was filed by the “National-democratic Party of Germany” (hereinafter, the “NPD”) against the Federal Minister for Family, Senior Citizens, Women and Youth (hereinafter, the “Minister”) over a statement made in a newspaper interview during the 2014 elections to the legislature of a federal state.

Asked how one should deal with motions by the NPD should the party obtain seats in the legislature, the Minister said: “But I will support the Thuringian campaign to ensure that such a situation does not even arise. It must be the top priority to prevent the NPD from winning seats in the legislature.”

According to the NPD, this statement violated its right to equal participation under the first sentence of Article 21.1 of the Basic Law.

II. The Federal Constitutional Court held that even though members of the Federal Government are bound by the principle of neutrality when they exercise their official functions, this principle applies to statements made by the members only if they make specific use of the authority or the resources of their government office. In the case at hand, such a specific use could be established neither from the interview itself nor from its context. Accordingly, the statement challenged by the NPD must be attributed to the field of political competition, which is not governed by the principle of neutrality.

The decision is based on the following considerations:

1.a. The right of political parties to equal participation in the political process is violated if state organs influence the political process by favouring or disfavouring individual parties. Taking such an influence violates the principle of state neutrality in the political arena and compromises the people’s possibility to make free and informed political decisions.

b. The standards that apply in such cases to statements by the Federal President are not transferable to members of the Federal Government as they are directly derived from the particular role the Basic Law assigns to the Federal President. As opposed to the Federal Government and its members, the Federal President neither directly participates in the contest with other political parties nor possesses comparable means to influence public opinion.

c. Due to the Federal Government’s status under the Constitution and to its powers and functions, public statements by its members must be reviewed by a different standard.

aa. The Federal Government exercises functions of governing the state, which include the power to maintain public relations. This function encompasses *inter alia* the power to present and explain the government’s policies as well as to inform the public about questions of general interest – even outside of or well before its own political actions.

bb. In exercising these functions, the Federal Government is bound by the fundamental rights as well as by law and order (Articles 1.3 and 20.3 of the Basic Law). This fact alone bars the government from engaging in what in a different context would be judged as “vile criticism” in the meaning of §§ 185 et seq. of the Penal Code. This aspect notwithstanding, the Federal Government is obliged to respect the political parties’ right to equal participation from the first sentence of Article 21.1 of the Basic Law as well as the resulting principle of neutrality.

Since the government’s agenda reflects the positions of the parties of which it is composed and since the public associates its actions with these parties, public perception of such actions influences the governing parties’ chances of success in the political contest. This fact is part of the free democracy envisaged by the Basic Law and must be accepted as such. The Federal Government must, however, refrain from any actions that are apt to influence the political contest and are not part of its official functions. The Constitution bars it from identifying with any political party and from using the possibilities and state assets of which it disposes to aid or hinder any party.

cc. The same standards apply to individual members of the Federal Government. This does not, however, preclude holders of cabinet office from participating in political competition outside

of their official capacity, as such a prohibition would constitute an unjustified discrimination of the governing parties.

d. Yet, holders of government office who participate in political competition must ensure that in doing so they do not use the means and possibilities of their office. Nevertheless, one must take into account that it is impossible to strictly assign actions of government members to the fields of “Federal Minister”, “party politician” or “private individual”. Public perception, too, views holders of government office both as Federal Ministers and as members of their party.

Into which field individual statements belong must be established on a case-by-case basis. Statements will usually fall into the field of “Federal Minister” if they make express reference to the government office or if they exclusively concern actions of the respective ministry. The same goes for statements that are made through official channels, such as press releases etc. A statement’s context, too, may warrant such a classification, e.g. using state insignia or financial means or making the statement on the ministry’s premises. The same applies to statements made in the context of government events or events in which the minister participated exclusively in his or her official capacity. Participating in party events like conventions etc., however, qualifies as mere participation in the political contest.

Events of general political discussion, such as talk shows, interviews etc., on the other hand, must be examined in a different manner: holders of government office may participate in any one event, both in their official capacity and as private individuals or members of their party. Limiting holders of government office to official statements would violate the parties’ right to equal participation. However, statements that make specific use of the office’s authority must comply with the principle of neutrality.

e. The question of whether the principle of neutrality applies, and whether it has been complied with, is subject to complete judicial review by the Federal Constitutional Court.

2. According to these standards, the challenged statement did not violate the applicant’s right to equal participation from the first sentence of Article 21.1 of the Basic Law, as it constituted a mere act of participation in the political contest and was not subject to the principle of neutrality under the first sentence of Article 21.1 of the Basic Law. If the applicant wishes to counter such statements, it must do so using the means of political competition.

### Cross-references:

Federal Constitutional Court:

- Decision regarding Federal President’s authority to make statements concerning political parties, 2 BvE 4/13, 10.06.2014, *Bulletin* 2014/2 [GER-2014-2-019].

### Languages:

German.



### Identification: GER-2014-3-036

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 17.12.2014 / **e)** 1 BvL 21/12 / **f)** Inheritance tax / **g)** to be published in the Federal Constitutional Court’s Official Digest / **h)** *Wertpapier-Mitteilungen* 2015, 82-99; *Deutsches Steuerrecht* 2015, 31-67; CODICES (German).

### Keywords of the systematic thesaurus:

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

### Keywords of the alphabetical index:

Tax law / Inheritance tax / Treatment, preferential / Economic needs test / Tax breaks.

### Headnotes:

1. Article 3.1 of the Basic Law does not grant taxpayers a right to constitutional review of tax law regulations that favour third parties in violation of the principle of equality, but that do not concern the individual’s own legal obligations under the tax code. However, this is different if tax breaks undermine the equitable burden the tax shall impose altogether.

2. Pursuant to Article 72.2 of the Basic Law, a federal regulation is necessary for reasons of national interest not only if it is indispensable to maintain legal or economic unity. It is sufficient if the federal legislator could otherwise expect problematic developments for the legal and economic unity of the

country. The Federal Constitutional Court has to ascertain whether these conditions are met; the legislator has the prerogative of assessing the conditions of a federal regulation and its necessity in the interest of the state as a whole.

3. In the area of tax law, the principle of equality leaves a wide margin of appreciation to the legislator, both regarding the selection of the object to be taxed and the determination of the tax rate. Deviations from a final decision on taxation issues must be measured against the principle of equality (requirement to structure factual tax-law issues consistently). They require a special objective justification that increases in relation to the scope and extent of the deviation.

4. Considering its scope and the possible designs options, it is incompatible with Article 3.1 of the Basic Law to exempt the transition of business assets from inheritance tax under §§ 13a and 13b of the Inheritance and Gift Tax Act (*Erbschaftsteuer- und Schenkungsteuergesetz* – hereinafter, the “Act”).

a. It is within the discretion of the legislator to completely or in part exempt small and medium-sized companies managed by their owners from inheritance tax, in order to ensure their continued existence and to preserve jobs. The legislator, however, needs sound justification for any amount of preferential taxation.

b. Preferential treatment of the acquisition of business assets is, however, disproportionate if, without an economic needs test, it covers more than small and medium-sized companies.

c. While the aggregate wage regulation is, in principle, compatible with Article 3.1 of the Basic Law, this does not apply to the exemption of companies with no more than 20 employees.

d. The provision on operative assets for tax purposes is incompatible with Article 3.1 of the Basic Law. Without sound justification, it completely excludes from taxation the acquisition of preferentially treated assets even when they consist of up to 50% operative assets.

5. A tax law is unconstitutional if it allows for situations in which one can attain tax breaks that are not intended and that cannot be justified under the principle of equality.

### Summary:

I. The specific judicial review conducted by the Federal Constitutional Court concerned tax breaks under the Act on Inheritance and Gift Taxes

(hereinafter, the “Act”) that were granted for transfers of company shares. In essence, the proceedings concern §§ 13a and 13b of the Act in the version that was in force in 2009. These provisions date back to 2008 and were intended to grant tax breaks to companies that would largely refrain from job cuts in the event of transfer. §§ 13a and 13b of the Act provide *inter alia* for tax breaks of 85% in the event that company shares are inherited and certain requirements (e.g. whether the heir keeps the shares and whether jobs are cut) are met.

The plaintiff in the initial proceedings inherited money in various bank accounts as well as a claim for a tax refund. Both were set to be taxed 30% inheritance tax under tax bracket II. The plaintiff claimed that it is unconstitutional to treat individuals under tax brackets II and III the same, and his case eventually went before the Federal Finance Court (*Bundesfinanzhof*). This court submitted a question to the Federal Constitutional Court, asking whether § 19.1 of the Act, as applicable in 2009, and in conjunction with §§ 13a and 13b of the Act, is unconstitutional because it violates Article 3.1 of the Basic Law.

II. The First Panel of the Federal Constitutional Court declared §§ 13a, 13b and 19.1 of the Act unconstitutional. It decided that the provisions shall continue to apply for the time being, but that the legislator must adopt new regulations by 30 June 2016. The Federal Constitutional Court found that the violations of the principle of equality the Federal Finance Court alleged were significant enough to affect preferential treatment under inheritance tax law of business assets as a whole. Moreover, it found that the overall sum of the business assets that enjoy preferential treatment was of such weight that, in the event of its unconstitutionality, the taxation of non-business assets could not remain unaffected.

The Court stated that in the area of tax law, the principle of equality leaves a wide margin of appreciation to the legislator, both regarding the selection of the object to be taxed and the determination of the tax rate, but that deviations from a final decision on taxation issues must be measured against the principle of equality. They require special objective justifications that increase in relation to the scope and extent of the deviation.

The Court further elaborated that the legislator is not prevented from supporting, via tax law, goals outside the narrow fiscal scope. It has wide discretion in assessing which goals it deems worthy of support and which tax breaks it offers for their achievement. However, the legislator remains bound by the principle of equality. Depending on the extent of the unequal treatment, this can lead to a stricter review by the Federal Constitutional Court.

While the Court found that, in principle, the exemption regulation as such is compatible with Article 3.1 of the Basic Law, corrections were in order with regard to the transition of large company assets. The Court also found that the design of the exemption provisions of §§ 13a and 13b of the Act partly violate Article 3.1 of the Basic Law.

In the end, the Court concluded that the violations of the principle of equality it had found concern §§ 13a and 13b of the Act as a whole and that § 19.1 of the Act, which covers the taxation of both exempt and non-exempt assets, has to be declared incompatible with Article 3.1 of the Basic Law in conjunction with §§ 13a and 13b of the Act.

III. The decision was taken unanimously with regard to the results and the grounds; Justices Gaier, Masing, and Baer jointly submitted a separate opinion. They believe that a further element must be included to support the decision: the principle of the social state under Article 20.1 of the Basic Law, as it is only through this principle that the justice-related dimension of the issue becomes fully visible.

#### *Languages:*

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



## Hungary Constitutional Court

### Important decisions

*Identification:* HUN-2014-3-008

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 29.09.2014 / **e)** 28/2014 / **f)** On the ban on publishing photographs showing police officers on duty / **g)** *Magyar Közlöny* (Official Gazette), 2014/133 / **h)**.

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Photo, publication, police, work / Reputation, police officer.

*Headnotes:*

The publication of photographs of police at work in the press without the pixelation of the policemen's faces is in line with the Fundamental Law.

*Summary:*

I. In recent years, the police have won several court cases against media outlets on claims that their right to privacy had been harmed. This practice of blanking out faces on photographs showing police in action unless consent was given beforehand was confirmed by a Supreme Court (*Curia*) decision in 2012.

The online news portal Index.hu submitted a constitutional complaint against a court decision that found Index.hu at fault for showing the police at a political demonstration of the police officers' trade union without pixelating their faces. The petitioner argued that the police are representatives of public authority and they do not have the right to claim personal protection rights against the media reporting

on their actions. "Police at work represent the face of public authority. If the police are faceless, responsibility for that public authority will be lost" the petitioner argued.

II. The Constitutional Court, in its decision, emphasised that according to the Civil Code the main rule of publishing photographs is that permission is required from the affected person before publication. However, there are exceptions to this rule. For instance photographs taken in public places – if the photo depicts the subject in an objective and not harmful manner – can be published without the permission of the concerned person, when it is a part of a report that keeps track of public interest. Such exceptions shall be interpreted in accordance with the exercise of the freedom of the press in each case.

Accordingly, the photographs showing police actions shall be published without the permission of the concerned police officers if the publication is not self-serving, is about contemporary events or news based on the circumstances of the case, or delivers information on the exercise of the executive power that is of public interest. Deployment of the police in any demonstration is considered to be an event of public interest. Thus, the images about this event shall be published without any permission, unless it violates the human dignity of the police officer (for instance, showing the suffering of an injured police officer).

The Constitutional Court held that the Budapest-Capital Regional Court of Appeal, when it interpreted the relevant Civil Code provisions, did not take into account the just mentioned constitutional standards – connected to the freedom of press and freedom of information. Thereby the Constitutional Court annulled the concerned judgment as it violated the freedom of the press as ensured by Article IX.2 of the Fundamental Law.

III. Judges István Balsai, Egon Dienes-Oehm and Béla Pokol attached dissenting opinions to the decision.

#### *Languages:*

Hungarian.



#### *Identification:* HUN-2014-3-009

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 27.10.2014 / **e)** 32/2014 / **f)** On the size of the living space available for a detainee in a prison cell / **g)** *Magyar Közlöny* (Official Gazette), 2014/149 / **h)**.

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

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

5.3.1 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:*

Living space, prison cell.

#### *Headnotes:*

The provision on the size of personal living space in prison cells where more detainees are accommodated together, conflicts with international treaties and is unconstitutional.

#### *Summary:*

I. A judge of the Budapest-Capital Regional Court initiated the review of Section 137.1 of Decree 6/1996 (VII. 12.) IM of the Minister of Justice on the Rules of Executing Imprisonment and Pre-trial Detention. According to the challenged provision, the size of prison cells shall be determined so that – if possible – each detainee gets six cubic meters of space. Male detainees get three-square meters while female and juvenile detainees get three-and-a-half square meters of space.

The judge argued that the provision violated the prohibition of inhuman and degrading treatment ensured by Article 3 ECHR. The judge referred to the relevant decisions of the European Court of Human Rights, which ordered the Hungarian state to pay compensations for subjecting prisoners to inhumane and degrading treatment (*Szél v. Hungary*, *Kovács István Gábor v. Hungary*, *Hagyó v. Hungary*).

In the case of *Fehér v. Hungary*, the Court confirmed that prisoners must be ensured at least three square metres of space in their cells. Sándor Fehér, who had been convicted on robbery charges, turned to the Strasbourg Court because he was kept for more than

two years in a cell of about seven square metres along with three other prisoners, leaving only 1.7 square metres of space per person.

II. The Constitutional Court held that it follows from the prohibition of inhuman or degrading treatment – which is regulated not only in the European Convention on Human Rights, but also in the Fundamental Law of Hungary – that the personal living space for more than one detainee in the same prison cell must reach the minimal extent in every case. Thus, their placement in the assigned penal institution shall be ensured without the violation of their human dignity. The requirement mentioned above is unconditional, which means that the minimal extent of the living space for the detainees shall be defined in a mandatory way by a legal regulation.

The Constitutional Court declared, in its decision, that the challenged regulation did not meet the requirement regulated in the European Convention on Human Rights and the Fundamental Law. It violated the prohibition of inhuman or degrading treatment or punishment because the minimal size of prison cells was not determined in a mandatory way. Thus, this regulation allowed the accommodation of detainees in such prison cells where the minimal living space was not ensured.

Consequently the Constitutional Court annulled the challenged provision as of 31 March 2015. The reason for the *pro futuro* annulment is that the current regulation resulted in less violation of the rule of law than the lack of the regulation. However, the lawmaker has appropriate time to adopt a new legal regulation in accordance with the European Convention on Human Rights and the Fundamental Law.

III. Judges István Balsai, Egon Dienes-Oehm, Imre Juhász, Barnabás Lenkovics, Béla Pokol, László Salamon and András Zs. Varga judges attached dissenting opinion to the decision.

#### *Cross-references:*

European Court of Human Rights:

- *Szél v. Hungary*, no. 30221/06, 07.06.2011;
- *Kovács István Gábor v. Hungary*, no. 15707/10, 17.01.2012;
- *Hagyó v. Hungary*, no. 52624/10, 23.04.2013;
- *Fehér v. Hungary*, no. 69095/10, 02.07.2013.

#### *Languages:*

Hungarian.



#### *Identification:* HUN-2014-3-010

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 14.11.2014 / **e)** 34/2014 / **f)** On the consumer forex based loans / **g)** *Magyar Közlöny* (Official Gazette), 2014/149 / **h)**.

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

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

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

Contract, foreign currency loan / Legislation, retroactive / Procedure, fair.

#### *Headnotes:*

The Settlement Act, which describes the consequences of the application of the unfair clauses amending bank FX loan agreements unilaterally, is in harmony with the Fundamental Law.

#### *Summary:*

I.1. In the beginning of 2014, the government had asked the Constitutional Court to consider whether some conditions of the foreign-currency (hereinafter, “FX”) loan contracts, that are weighing on Hungarian households, might be unconstitutional and how existing contracts could be modified through legislation. The Constitutional Court, in its Decision 8/2014, pointed out that the “lawmaker, just like courts, is entitled to modify current and lasting contractual relationships if conditions that set in after the contract is signed mean sustaining the contract with an unchanged content hurts the substantial and justified interest of one of the signatories.”

In June 2014, the Supreme Court (*Curia*) ruled in favour of FX debtors, arguing that the banks should not have charged their clients the exchange rate spread. In addition, the Curia’s Uniformity Ruling no. 2/2014 declared that contractual provisions enabling the unilateral amendment of a contract are unfair if they do not comply with certain principles. The principles include clear and intelligible drafting, taxonomic definition, objectivity, factuality and

proportionality, transparency, terminability and symmetry. Contractual clauses defining the criteria of unilateral contract amendment are fair if they clearly and intelligibly define how and to what extent changes in the circumstances of the listed causes affect the consumer's payment obligations. Also, they are fair if they make it possible to verify the unilateral amendments' compliance with the principles of proportionality, factuality and symmetry.

Act no. XXXVIII of 2014 on the settlement of certain questions related to the Uniformity Ruling of the Curia on financial institutions' consumer loan contracts (hereinafter, the "Settlement Act"), issued in the wake of the Curia's decision, declared the application, as of May, 2014, of the bid/offer spread unfair. It also used the presumption of unfairness in respect of all General Contracting Terms and Conditions that stipulate the option of unilateral contract amendment. It also considered that financial institutions have, in the case of FX loans, 30 days from the effective date to contest such presumption of unfairness in court, in legal actions conducted under civil law. Under the Act, any unfairly settled sums must be reimbursed to clients based on a separate Settlement Act.

2. Three judges of the Budapest-Capital Regional Court initiated the constitutional review of the Settlement Act. The judges found problematic that the Settlement Act demands compliance with principles, going back a decade, which have so far not been formulated and published by either the lawmaker, the supervisory authorities or the courts. The Settlement Act rearranges the relationships that exist under private law between the banks and their clients in a retrospective manner. It, moreover, overrides the general guiding rule of 'lapsing' (the Statute of Limitation), which can have unforeseeable consequences on society. They also found unconstitutional that banks may file civil lawsuits against the assumption of unfairness, within 30 days from entry into force of the legislation in the case of FX loans.

II. First, the Constitutional Court examined whether the Settlement Act has violated the prohibition of retroactive legislation and whether the rules of the concerned judicial procedures complied with the requirement of a fair trial.

In connection with the prohibition of retroactive legislation, the Constitutional Court declared that the general legal requirements of good faith and fair trial had always been the limits of the unilateral modifications of the agreements. The enabling provisions of the Settlement Act did not repeal or suspend the requirement of a fair trial.

Although the interpretation of the concrete conditions of the fair unilateral modification of the agreements was adopted only later, by the Uniformity Ruling of the Curia and finally into the Settlement Act, these requirements were already deducible from the general legal principles. The standard of fairness has not been changed. Although it was expressively laid down in the Settlement Act, it had already been a requirement (based on the previous Civil Code and on the judicial practice) before. In other terms, the challenged regulation did not change the legal qualification of the unfair clauses of the contracts. It only codified the already existing legal principle and judicial practice.

In the context of the right to a fair trial, the Constitutional Court held that the matters in dispute are not only the problem of the concerned debtors, but are also of economic and social relevance. Thus, the problem cannot be solved effectively in the frame of a civil suit. The thirty days for the financial institutions to initiate the proceeding at the court cannot be considered an unnecessary or disproportionate limitation on fundamental rights. The deadline shall be sufficient for the financial institutions to decide on the commencement of action to rebut the presumption of unfairness. In order to prepare for the action, the plaintiffs were entitled to use the arguments and evidence from the previous lawsuits against them. In connection with the other short deadlines, the Constitutional Court declared that these deadlines shall not be considered as infeasible. In light of these arguments, the Constitutional Court rejected the judicial initiatives.

The currency-rate risk and rate spread in the FX loan contracts and the judicial initiatives of the Budapest-Capital Regional Court of Appeal and constitutional complaints of the concerned persons/institutions were not subject to this review.

III. Judges Imre Juhász, László Salamon, Tamás Sulyok attached concurring opinions and judges László Kiss, Miklós Lévy, Péter Paczolay and Béla Pokol attached dissenting opinions to the decision.

#### *Cross-references:*

- no. 8/2014, 20.03.2014, *Bulletin* 2014/1 [HUN-2014-1-002].

#### *Languages:*

Hungarian.



# Ireland

## Supreme Court

### Important decisions

*Identification:* IRL-2014-3-004

**a)** Ireland / **b)** Supreme Court / **c)** / **d)** 07.11.2014 / **e)** SC 263/2013 / **f)** M.R. and D.R. (suing by their father and next friend O.R.) & ors -v- An t-Ard-Chláraitheoir & ors / **g)** [2014] IESC 60 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

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

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.**

*Keywords of the alphabetical index:*

Motherhood, surrogacy, genetic/biological mother, gestational mother / Civil registration of birth, *mater semper certa est.*

*Headnotes:*

A genetic mother of twins was entitled to be registered as their “mother” for the purposes of civil registration, rather than their gestational mother under a surrogacy arrangement.

*Summary:*

I. The Supreme Court is the final court of appeal under the Constitution. It hears appeals from the Court of Appeal and in certain instances direct from the High Court. In this case the fourth respondent was unable to become pregnant and to give birth. She made an arrangement with the notice party so that ova provided by the fourth respondent were fertilised by sperm provided by the third respondent. That fertilisation took place *in vitro*. The zygotes which were produced as a result were implanted in the womb of the notice party, who subsequently gave birth to twins, the first and second respondents. The third and fourth respondents and the notice party agreed prior to the birth of the twins that they would

be brought up and would be reared as children of the third and fourth respondents. That is what occurred. There was no dispute between the genetic parents and the gestational mother as to how they wish the twins to be treated in fact and in law. However, the State authorities took the view that, as a matter of law, the person who must be registered as the mother of the twins is the gestational mother. After the birth, the request to have the fourth respondent recorded as the mother of the twins was refused.

II. In 2013, the High Court granted a declaration that the fourth respondent is the mother of the twins, in accordance with Section 35.8.b of the Status of Children Act 1987, and a declaration that the fourth respondent is entitled to have the particulars of her maternity entered on the Certificate of Birth. The General Register Office (or “*An tArd-Chláraitheoir*” in the Irish language), Ireland and the Attorney General, appealed against the judgment and orders to the Supreme Court in 2014. They submitted that: the maxim of *mater semper certa est* is an irrebuttable presumption well established in Irish law, recognised in Article 40.3.3 of the Constitution; the trial judge erred in finding that the case law provides that the relationship and “blood link” which exists between mother and child exclusively is contingent on the genetic link which exists between them; the Status of Children Act 1987, did not place genetic testing on a statutory basis in order to determine both motherhood and fatherhood; the Birth Registration System is based on a recording of observable facts pertaining to the birth of the child and is not capable of recording later events in the existence of the person concerned, relying upon *Foy v. An tArd-Chláraitheoir* [2012] 2 IR 1; it would not constitute invidious discrimination between mothers and fathers not to permit genetic testing for the basis of determining motherhood; the fourth respondent is not suffering from invidious discrimination as a result of a disability; the issues which arise are matters within the policy making role of the *Oireachtas* (Parliament); the trial judge erred and was in excess of jurisdiction in finding that it would be unconstitutional not to confer the legal status of motherhood to a genetic mother.

The respondents submitted that: the issues which arise for determination are governed by section 35 of the 1987 Act; blood tests can be used to establish whether a person is, or is not, the mother or father of a person; the *mater semper certa* rule does not take into account scientific developments. The Constitution does not expressly define “parents”; although temporal scope and effect of Article 40.3.3 of the Constitution are limited to when the child is in womb, this provision does not to determine who, after the birth, is to be considered the mother of the child in law. The Constitution recognises a duty to protect and

vindicate the genetic link between a parent and child, the respondents would otherwise be denied the rights and protections afforded to a family unit.

The majority of the Court agreed with Chief Justice Denham. She held that, having considered the Constitution, it contains no definitive definition of “mother”. Denham CJ noted that the principle that the mother is always certain is reflected in common law cases such as *Wilkinson v. Adam* (1 V. & B.422, 1812), however having reviewed academic literature, Denham CJ noted that there does not appear to be any authority to suggest that *mater semper certa est* is either an irrebuttable presumption or that it is enshrined as a maxim of “Irish public law”. Denham CJ held that neither the Civil Registration Act 2004, nor the 1987 Act, or any other legislation, has been passed by the *Oireachtas* (Parliament) to address the issues which arise on surrogacy arrangements. Denham CJ held that as a significant social matter of public policy it is clearly an area for the “*Oireachtas* (Parliament) and it is not for the Supreme Court to legislate on the issue. Denham CJ held that as neither the common law nor statutory law to date address the issue of the registration of the fourth respondent on the certificate of birth of children born by a surrogacy arrangement, the appeal would be allowed and the orders of the High Court quashed.

III. Five Judges of the Supreme Court delivered separate judgments in agreement with that of the Chief Justice. Justice Clarke delivered a dissenting judgment which would have provided for a declaration that the genetic mother is the mother of the twins without prejudice to the status of the birth mother. He also proposed making an order directing *An tArd-Chlárúitheoir* to take whatever steps might be necessary to ensure that the registration of the birth of the twins reflects the status of the genetic mother thus declared.

#### *Languages:*

English.



## Israel Supreme Court

### Important decisions

*Identification:* ISR-2014-3-004

**a)** Israel / **b)** Supreme Court (High Court of Justice) / **c)** Extended Panel / **d)** 17.09.2014 / **e)** HCJ 2311/11; 2504/11 / **f)** *Sabbah v. The Knesset* / **g)** / **h)**.

*Keywords of the systematic thesaurus:*

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

3.21 General Principles – **Equality.**

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

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

*Keywords of the alphabetical index:*

Constitutional complaint, admissibility, limits of review / Review, constitutional, proceeding / Constitutionality, review.

*Headnotes:*

The doctrine of the “unripe problem” can, in certain cases, justify the dismissal of a petition before the Court when it is not yet clear how a challenged law would actually be applied. With its limited resources, the Court should not deal with the clarification of hypothetical and theoretical claims. A two-stage approach should be adopted for evaluating the ripeness of a constitutional petition: first, whether the Court has been presented with the factual infrastructure required for deciding the questions posed by the petition; and second, whether there are reasons justifying the clarification of the petition even where the factual infrastructure presented is deficient. Regarding the second stage, the central exception that justifies the examination of a matter even before its ripening is where a law creates a “chilling effect”. The dismissal of a petition under the doctrine should not be understood as the expression of an opinion concerning the constitutionality or the non-constitutionality of the challenged law.

### *Summary:*

I. In this petition an expanded panel of nine Supreme Court justices heard two constitutional petitions directed against Amendment no. 8 of the Cooperative Societies Ordinance. The Amendment enables small communal towns in the Negev or in the Galilee (in the south and north of Israel), located on State Lands, to make acceptance of new members to the communal towns conditional upon the approval of the acceptance committee, consisting of representatives of that communal town. The Law establishes the criteria in accordance with which the committee is permitted to refuse to accept a candidate for residence in the communal town, including the candidate's incompatibility for social life in the community or the unsuitability of the candidate to the social cultural texture of the community village. The Law further determines that it is forbidden for the acceptance committee to reject a candidate for reasons of race, religion, gender, family status, age parenthood, sexual orientation, ethnicity, viewpoint or political affiliation.

II. In the majority opinion of the President A. Grunis, Deputy President M. Naor and Justices E. Rubinstein, E. Hayut and H. Melcer, it was decided to dismiss the petitions for the reason that they were not "ripe" for decision, as opposed to the dissenting opinion of Justice (Ret.) E. Arbel and Justices S. Joubran and Y. Danziger, who argued that an order should be given to annul the provisions enabling the committee to refuse to accept a candidate for the communal town and, as opposed to the dissenting opinion of Justice N. Hendel, who argued that an order should be given to annul the provision determining the composition of the acceptance committee.

In his leading opinion in the proceeding, President A. Grunis took the view that the petitions should be dismissed given that they were not yet ripe for a decision. In his opinion the President dealt at length with the "doctrine of the unripe problem" and ruled that this doctrine could, in certain cases, justify the dismissal of a petition when it was not yet clear how the law would actually be applied. In his view, the importance of the doctrine was in the fact that with its limited resources, the Court would not deal with the clarification of a hypothetical and theoretical claims.

In his opinion, the President outlined the criteria for applying the doctrine of the ripeness of constitutional petitions filed in the Supreme Court. According to his approach a two-stage approach should be adopted for evaluating the ripeness of a constitutional petition. At the first stage the Court is required to determine whether it has been presented with the factual

infrastructure required for deciding the questions posed by the petition. Accordingly, to the extent that the question discussed in the petition is essentially legal, the response thereto will require a narrow factual infrastructure and vice versa. In other words the question is to what extent is the implementation of the law necessary for the purposes of examining its constitutionality. At the second stage of the examination, the Court is required to further examine whether there are reasons justifying the clarification of the petition even where there factual infrastructure presented is deficient, in other words even before the implementation of the law. The President pointed out that the central exception that justifies the examination of a matter even before its ripening is the exception of the "chilling effect".

In addressing the merits of the Amendment to the Cooperative Societies Ordinance, the President opined that it was not possible to decide on the constitutional questions raised by the petitioners in the framework of the petition. According to the President, for as long as the law had not been implemented and decisions adopted by force thereof, the law's violation of basic rights (including the constitutionality of the violation) remained in the realm of a possibility only, the actual materialisation of which was unknowable. The President rejected the petitioners' claim that the general sections of the law, allowing the rejection of a candidate by reason of his unsuitability for the social life in the community town or the social-cultural fabric of the community town would constitute a guise for actual discrimination. According to the President, the existence of a guise for discrimination could only be proven after the implementation of the law. Furthermore, there is no public interest that justifies the clarification of the petitions before they ripen and it was not possible to demonstrate the problem of a chilling effect, for these reasons the President's view was that the petitions should be dismissed given that they were not "ripe" for decision at this stage of the constitutional litigation. All the same he stressed that the dismissal of the petitions should not be understood as the expression of an opinion concerning the constitutionality or the non-constitutionality of the law. The meaning of the decision was that at the present time the Court did not have a factual infrastructure that was sufficient for a decision on weighty constitutional questions and it was necessary to wait for the implementation of the law in the future.

III. Justice S. Joubran, who wrote the minority opinion, acknowledged that an acceptance process was not the ultimate evil and that occasionally it could assist in the development and maintenance of any particular settlement with certain unique features. All the same, the Justice made it clear that

in the existing reality in Israel, leaving the decision on the accepting candidates to the community town in the hands of an admission committee posed difficulties. Justice Joubran found that the discretion granted by the Law to the admissions committee was broad and opened the door to the exclusion of individuals from town communities for irrelevant reasons. Against the background of the existing mosaic of community towns and many years of accumulated experience in exercising discretion on the part of the admissions committees, Justice Joubran found that it was a mechanism that anchored and perpetuated discrimination, even if this was not the legislative intention. Justice Joubran was cognisant of the fact that the Ordinance had established systems of review and inspection that were intended to prevent discrimination, but he found that in reality, they were powerless to restrain the exaggerated discretionary powers of the admission committees.

Justice Joubran rejected the majority position, according to which the ripeness doctrine should be applied to this matter. In his view, Amendment 8 of the Ordinance does not constitute an innovation, resembling rather the arrangements that preceded it, which likewise, on a practical level, anchored an ongoing practice of exclusion based on irrelevant considerations and were accordingly discriminatory. He stated that past experience is instructive with respect to the manner of operation of the amendment up for examination. Justice Joubran emphasised that annulling a law enacted by the Legislature is no trivial matter and clarified that, in view of the complex and complicated nature of the realm of land allocation and given the existence of different views concerning the arrangement of settlement of lands in Israel, which is first and foremost a legislative choice, a declaration of the nullity of an arrangement concerning it, becomes even more difficult. However, at the end of the day, by reason of the reality of discrimination and based on extensive experience' Justice Joubran found that an order should be given to strike to annul Section 6C.a.4 and 6C.a.5 of the Cooperative Societies Ordinance, that leave an exaggerated degree of discretion to the acceptance committee.

#### *Languages:*

Hebrew.



#### *Identification: ISR-2014-3-005*

**a)** Israel / **b)** Supreme Court (High Court of Justice) / **c)** Extended Panel / **d)** 17.09.2014 / **e)** HCJ 3752/10 / **f)** Rubinstein v. The Knesset / **g)** / **h)**.

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

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

5.4.20 Fundamental Rights – Economic, social and cultural rights – **Right to culture.**

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

Right, constitutional, unwritten / Education, State, duty / Education, freedom to organise, limit / Education, interests of the child.

#### *Headnotes:*

A Law granting an exemption to Haredi (ultra-orthodox) educational institutions from teaching the core school curriculum that includes secular studies does not constitute a violation of the right to education in Israeli law. Different judges provided different reasons; either because the right to education cannot be defined as including the right to force core curriculum studies on the Haredi pupil in high school education; or because, even though the right to education is restricted, the restriction is proportionate.

#### *Summary:*

I. In this decision an expanded panel of nine Supreme Court justices discussed the question of the constitutionality of the Special Cultural Schools Law, 5768-2008 (hereinafter, the "Law"). This Law grants an exemption from "core curriculum studies", the basic study programme determined by the Ministry of Education in Israel, to Haredi educational institutions for pupils from grades nine to twelve. Under the Law, these institutions are exempt from core curriculum studies, but will continue to be budgeted at the rate of 60% of the budget for pupils studying in high school educational institutions in an academic studies track.

II. In accordance with the majority opinion, per President A. Grunis, Deputy President M. Naor and Justices E. Rubinstein, E. Hayut, N. Hendel, U. Vogelmann and Y. Amit, it was decided to dismiss the petition, contrary to the view of Justices E. Arbel and S. Joubran, who argued that that the Law was unconstitutional.

The majority position was that no order should be given annulling the Law. Justice Hendel argued that the petition posed, in its most profound sense, the question of whether the right to education, which is not included in the Basic Law, is a constitutional right. His view was that only certain aspects of the right, which are the very nucleus of human dignity and freedom and not the right *per se*, would be regarded as a constitutional right. In the case under discussion, Justice Hendel determined that the alleged constitutional right is the right to high school core studies, which should not be recognised as a basic constitutional right. His argument was that it has not been proved that a law that exempts Haredi high schools from the core curriculum violates a constitutional right.

According to Justice Hendel this legal conclusion is reinforced by the special status of education geared towards the study of the Torah in Israel, the fear of paternalism, the legislature's freedom of choice in decisions pertaining to the determination of the contents and nature of education and the changes in Haredi society over the past few years. He added that education is a supreme value in Haredi society and, hence, the dispute in the petition is not actually about education as such, but rather over the question of what constitutes a good and appropriate education. According to Justice Hendel, the petitioners are attempting to abrogate a central aspect of the cultural identity of a minority group, contrary to the traditional role of the Constitutional Court in protecting minority rights from the majority. The Justice further noted that the Haredi sector itself is changing with respect to the issue of education and that it is preferable for such a change to be consensual and not coerced. In his view, for as long as it was not found that a constitutional right had been violated, the rhythm of life should be allowed to do its work.

Justice Hayut concurred with the conclusion that the petitions should be dismissed, but for different reasons. According to her approach, the right to education is a constitutional right that derives from human dignity. The State must ensure that each pupil receives the basic education required in order to develop his or her abilities, his or her personality and his or her talents without suffering from social inferiority in the state in which he or she lives, by reason of his or her lack of education. However, according to the justice, the petitioners in this petition failed to lay an appropriate factual foundation for clarification of the question of whether the Yeshiva student's right to education had been violated, because the Ministry of Education had not determined the contents of that programme in legislation. Accordingly, they concluded that the Law should not be struck down. This determination was

concurrent with by Justice Vogelmann. All the same, Justice Hayut considered that citizenship studies should be mandatory for Yeshiva pupils, because one of the conditions for recognition as a special cultural institution under the law is the conformity of its educational programme with the values of the State of Israel as a Jewish and democratic state. According to Justice Hayut, an educational programme that places the emphasis entirely on the value of the state as a Jewish state, while ignoring its values as a democratic state, is a programme that does not comply with that requirement.

Deputy President Naor likewise deemed that the right to receive education should be recognised as a constitutional right and that the Law violated this right. However, the Deputy President found that the violation was proportionate. She argued that the central focus of the hearing was the conflict between the right to receive education and the right of parents to educate children according to their world view. The incremental addition of the Law to the realisation of the right to autonomy in education outweighs the marginal damage to the right to receive education. The Deputy-President stressed that even according to the Law, core curriculum studies continued to be mandatory until grade 8 and, as such, its application was limited. In view of her conclusion that the Law was within the boundaries of proportionality, the Deputy President ruled that the petition should be dismissed. A similar position was taken by Justice Rubinstein.

Justice Amit too concurred with the conclusion that the petition should be dismissed. He argued that, in principle, it was possible to justify the coercion of curriculum studies on the pupils of the Haredi sector or to condition the financing of the educational institutions upon core curriculum studies. However, the petition is not concerned with the question of whether, from a constitutional perspective, the state is entitled to adopt these methods, but rather with the question of whether the state should adopt them in a situation in which the State had chosen to grant an exemption from curriculum studies to the Haredi sector. He opined that a law that provides financing at the rate of 60% to educational institutions without any kind of condition concerning the contents of the studies is inappropriate. However, an inappropriate law does not necessarily violate constitutional rights. According to Justice Amit, the legislature made a choice and it is not the role of the Court to solve the State's legislative problem given the sensitive and explosive issue of education in the Haredi sector.

President Grunis too joined the majority view whereby the petition should be dismissed. According to President Grunis the petitioners did not present a proper factual infrastructure for hearing the petition. The petition did not specify the contents of the core curriculum programme for high-school students, in the absence of which, according to the petitions, there is an alleged violation of the right to education that is derived from human dignity. On the merits, neither did the President find that the Law violates a constitutional right. He argued that the scope of the right to education cannot be defined as including the right to force core curriculum studies on the Haredi pupil in high school education, in defiance of the wishes of his parents, whose autonomy should be respected.

President Grunis pointed out that the petition is exceptional in a number of senses. First, it makes a positive demand of the legislature to take a paternalistic approach to individuals who have not appeared before the Court. According to the President, the courts as a rule are reluctant to grant a remedy in a petition initiated by one person for the benefit of another, when the other person has no interest in that remedy. Second, the President noted that the petition comes to protect the general interest and not the right of an individual. President Grunis expressed his view that the legislature should have the broadest leeway in deciding not to promote a public interest. The President stated that not every social problem is a constitutional issue. Third, the President noted that the petition attempts to protect positive rights and hence the Court should practice restraint in exercising judicial review relating to the violation of that kind of right.

It should be noted that some of the justices also addressed the argument raised peripherally in the petition, according to which the public funding given to the Haredi institutions under the Law, notwithstanding their failure to teach core curriculum studies, violates the principle of equality. This question was not addressed in the decision for the reason that it was only raised briefly, without the petitioners having presented an appropriate factual infrastructure for its adjudication.

III. Justice Arbel, in a dissenting opinion, argued that the right to receive an education, even if in the basic and narrow sense, is a constitutional right. This right also covers the right of every pupil to receive the entire core curriculum programme determined by the competent authorities. Her position was based on the statutory arrangements in Israel in the field of education and which, as a rule, obligate all parents to send their children to school and to ensure the conduct of regular studies; the need for a common

element in the education given to all members of Israeli society; granting tool to each pupil that will enable him or her to become part of the employment market and granting each pupil the possibility of realising his or her personality, as part of his or her right to autonomy and dignity. Against that background, Justice Arbel found that the Law violates the right of Haredi children and youth to receive education and even their economic rights.

Justice Arbel recognised that these rights conflict with other rights. First, she examined the right of the parents to autonomy in the education of their children. In her view, this right should be balanced against the right and duty of the State to intervene and to make basic demands of the parent in order to ensure the rights of his or her child. Justice Arbel also dwelt on the right of cultural groups in a multi-cultural society to educate in the spirit of their culture. However, according to the Justice, the right to culture too is not an absolute right and must be balanced against competing rights.

Against this background, Justice Arbel found that the violation of the right of the Haredi youth to education and autonomy occasioned by the Law does not pass the constitutional muster as applied in Israel; chief among them, the requirement of proportionality. Even though the purpose of the Law – promoting the value of devotion to the study of the Torah in accordance with the values of Israel as a Jewish State – is an appropriate purpose, the Law does not pass the third test of proportionality, which examines the balance between the incremental benefit attained by the Law and the incremental violation of the right that it causes. The reason is that the Law gives almost absolute preference to the right to autonomy of the young men's parents and the right to culture of the Haredi sector over the constitutional rights of the young men themselves. Justice Arbel noted that the victims in this case are minors, who presumably will not apply to the Court themselves. It was for these reasons that Justice Arbel deemed the Law unconstitutional. Justice Joubran concurred with her view.

#### *Languages:*

Hebrew.



*Identification:* ISR-2014-3-006

**a)** Israel / **b)** Supreme Court (High Court of Justice) / **c)** Panel / **d)** 22.09.2014 / **e)** HCJ 7385/13 / **f)** Eitan - Israeli immigration policy v. The government of Israel / **g)** / **h)**.

*Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality.**

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

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

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

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

5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial.**

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

5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum.**

*Keywords of the alphabetical index:*

Detention, administrative / Detention, duration / Freedom, deprivation / Immigration, unlawful.

*Headnotes:*

A law, which allows illegal immigrants to be held in custody for a period of up to one year and obligates illegal immigrants to stay in a centre, which in fact functions as a closed installation, constitutes a non-proportionate violation of the right to liberty and dignity and of all of the other basic rights derived therefrom.

*Summary:*

I. Tens of thousands of illegal immigrants from Eritrea and North Sudan entered into the State of Israel over the past few years, posing a complex challenge for the State and its residents. In attempting to deal with the problem, the Knesset enacted Amendment no. 3 to the Prevention of Infiltrators (Offences and Jurisdiction) Law (hereinafter, the “Law”). The thrust of this Amendment is Section 30A that permits the State to hold an illegal immigrant in custody for a period of up to three years. This Amendment was struck down in 2011 after a panel of 9 Supreme Court

justices ruled that it was unconstitutional given its violation of the constitutional right to freedom. About two months after Amendment no. 3 was annulled, the Knesset passed Amendment no. 4 of the Law, consisting of two central foundations. The first is Section 30A of the Law that permits the detention of an illegal immigrant in custody for a period of up to one year. The second is Chapter D that regulates the establishment and operation of residency centres for illegal immigrants. The petitions challenged these two provisions of the Law.

II. A panel of nine justices ruled by a majority of six justices that Section 30A of the Law should be annulled and by a majority of seven judges that Chapter D of the Law should be annulled.

Regarding Section 30A of the Law which permits the State to hold the illegal immigrant in custody for a period of up to one year, the Court held that, even in its more moderate version in which the maximum period of custody was reduced from three years to one year, the Law still brings about a non-proportional violation of the constitutional rights of freedom and dignity, stating:

“Being held in custody exacts a heavy price from the person in custody. There is almost not a single right that is not infringed as a result. It negates the right to freedom and violates the right to dignity; it impinges on the right to privacy, eliminates the ability to conduct a family life and restricts individual autonomy in its most basic sense. The negation of the right to physical freedom, in turn, gives rise to the violation of other constitutional rights and influences all aspects of the individual’s life.”

The Court found that the violation of basic rights as described bears no proportion – even in an approximate sense- to the benefit derived therefrom. The Court stressed that the issue concerns the negation of freedom for people who pose no danger and who are not serving any sentence for wrongs that they committed. The Court also emphasised that it is inappropriate to hold an illegal immigrant in custody when no deportation proceedings are being conducted against him or her.

As for Chapter D of the Law, regulating the establishment and operation of the residency centre for infiltrators, the Court explained that presenting it as though it was an open residency centre is misleading. The infiltrator is, after all, obligated to report inside the centre three times a day for purposes of registration of presence and along with the centre’s remoteness from any area of population, the result is that an illegal immigrant finds himself or

herself inside the centre during all hours of the day. The same is true for the fact that the centre itself is operated by the Prisons Authority, which while not constituting a violation in and of itself, aggravates the sense of the trampled dignity and liberty of the persons detained.

Regarding Chapter D of the Law the Court noted that it is based on an appropriate purpose, however:

“The picture presented by the legislative arrangement of Chapter D of the Law is a gloomy one. Emerging therefrom is the image of the illegal immigrant who has no control over his or her daily actions, whose life routine is dictated by prison wardens who have search and disciplinary powers. The immigrant is subject to transfer to custody by administrative powers not subject to initiated judicial review of the required scope and whose hours are passed in inactivity, given that he or she has no real possibility of leaving the centre during the day-light hours and whose residence in the centre has a beginning, but has no foreseeable end. All of this amounts to an intolerable violation of his or her basic rights, chief among them the right to freedom and to dignity.”

The Court addressed the fact that this was the second time within a year that it was striking down the Law, but noted that this result was unavoidable and constituted a component of the constitutional dialogue between the legislative authority and the judicial authority.

III. A number of judges issued dissenting opinions. According to one of the minority views in the panel, there is a difference between Section 30A, which looks outward and towards the future, given that it concerns those illegal immigrants that have not yet penetrated into the State and Chapter D of the Law, which looks inside the State, given that it concerns illegal immigrants who are already in the State. According to this view, the complex circumstances related to the immigrants necessitate providing the State with tools for confronting the resulting challenges, along with the protective mechanisms stipulated in the section, which make the violation proportionate.

Another minority opinion seeking to recognise the constitutionality of Section 30 of the Law, emphasised that this was not the first time that the Court was examining Section 30A of the Law and that, in the wake of the Court's previous intervention, the maximum period of custody was reduced from three years to one year. The holding that this period too was too long, as per the majority justices, according

to this majority places the Court in the legislature's shoes and leaves the legislature with no room to manoeuvre.

Another minority opinion also noted that all the Western states have adopted a common approach which permits holding an illegal immigrant in custody, quite often in excess of six months and occasionally even for a period of time unrestricted by law. It was also written that the localised constitutional defects found in the Law do not justify its sweeping annulment and that one should aspire to a solution that responds to localised defects with localised remedies.

The minority opinion in the panel opined that Chapter D should not be annulled in its entirety, but only the provision requiring illegal immigrants to report for registration of presence three times a day and that it should be replaced by a provision requiring them to report in the centre twice a day. The minority opinion further maintained that the residence period in the centre should not be regarded as unlimited because the Law itself was enacted as a temporary provision for a period of three years so that the validity of the Law was limited to three years only. An additional view expressed in the panel suggested turning the centre into a night centre only.

#### *Languages:*

Hebrew.



# Kazakhstan

## Constitutional Council

### Important decisions

*Identification:* KAZ-2014-3-001

**a)** Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 11.06.2014 / **e)** 2 / **f)** / **g)** *Kazakhstanskaya pravda* (Official Gazette), 25.05.2013 / **h)** CODICES (Russian).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Property, right, equal protection / Property ownership / Property, claim / Property, ownership, joint.

*Headnotes:*

Natural restrictions apply to property belonging to more than one owner. Each owner has the right to own, use and dispose of the general property so long as their right does not breach the competences of the other owners.

*Summary*

I. On 20 May 2014, the Karaganda Regional Court requested the Constitutional Council to declare Article 218.6 of the Civil Code (General part) of 27 December 1994 unconstitutional.

Article 218.6 stipulates that “Where the non-expedience of division of common property or the appropriation of a share out of it in accordance with the rules outlined in paragraphs 3-5 of this Article are obvious, the Court shall have the right to adopt the decision to sell the property through a public auction with the subsequent distribution of the received amount between the participants in common property in proportion to their shares”.

II. In reviewing Article 218.6, the Constitutional Council also considered Article 1.1 of the Constitution, describing the government as a democratic, secular, legal, and social state.

The government places the highest values in the individual, his or her life, rights, and freedoms, as there is no task more important than the care for the person and his or her material welfare.

The general constitutional principles underlying the regulation of the relations of property are enshrined in the Basic Law.

In this regard, property relations must be governed in strict accordance with the Constitution based on the principles of the rule of law, equality and justice, which entails balancing the rights and legitimate interests of the people.

The constitutional right of property is exercised by means of both individual and joint (collective) forms of possession, use and the order of property.

Natural restrictions apply to property belonging to more than one owner. Each owner has the right to own, use and dispose of the general property so long as their right does not breach the competences of the other owners.

The Civil Code provides various ways and conditions of the general property or an apportionment of it. The shared ownership in property may be divided between its participants by an agreement between them (Article 218.1 of the Civil Code).

Where the participants fail to reach an agreement on the methods and conditions of dividing the common property or appropriation of the share of one of them, a participant in the shared ownership shall have the right to claim the appropriation of his or her share out of the common property, in kind. When the appropriation of a share in kind is not allowed by law or is impossible without unreasonable damage to the property in common ownership, the owner who aims to appropriate it shall have the right to be paid by the other participants of the shared ownership property for the value of his or her share (Article 218.2-5 of the Civil Code).

Where the non-expedience of division of common property or the appropriation of a share in accordance with the rules outlined in paragraphs 3-5 of this Article are obvious, the Court shall have the right to adopt the decision to sell the property through a public auction. The subsequent distribution of the received amount shall be between the participants in common property in proportion to their shares (Article 218.6 of the Civil Code).

The Constitutional Council claimed that courts are legally obliged to create conditions for the most effective protection of the rights and legitimate

interests of each joint owner. Therefore in considering the requirements of the claimant regarding the sale of property in a public auction, the Court needs to check, first of all, the possibility of the section (apportionment) by the rules provided by points 3-5 of Article 218 of the Civil Code. The sale of property in a public auction should be considered as the last resort applied by a court decision in exceptional cases according to the request of the interested joint owner (joint owners) when there is no other way to resolve the dispute.

While recognising the constitutionality of Article 218.6 of the Civil Code, the Constitutional Council noticed that its statement does not contain the objective criteria allowing law enforcement officials to clearly define the terms, which may lead to a broad interpretation of the contents and lead to challenges in resolving it in a civil case.

The Constitutional Council recommended the government to consider amending the Civil Code.

Besides, the Constitutional Council recommended the Supreme Court to adopt a resolution to clarify the application of Article 218 of the Civil Code in light of constitutional and legal principles established in this resolution.

#### *Languages:*

Kazakh, Russian.



## Kosovo Constitutional Court

### Important decisions

*Identification:* KOS-2014-3-006

**a)** Kosovo / **b)** Constitutional Court / **c)** / **d)** 08.12.2011 / **e)** KO119/10 / **f)** Ombudsperson of the Republic of Kosovo – Constitutional Review of Articles 14.1.6, 22, 24, 25 and 27 of the Law on Rights and Responsibilities of the Deputy, no. 03/L-111, 4 June 2010 / **g)** Official Gazette, 12.12.2011 / **h)** CODICES (Albanian, English).

*Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.  
 4.5.2 Institutions – Legislative bodies – **Powers**.  
 5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law**.  
 5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.  
 5.2.2 Fundamental Rights – Equality – **Criteria of distinction**.  
 5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension**.

*Keywords of the alphabetical index:*

Parliament, member, pension.

*Headnotes:*

Parliament has the discretion to enact a constitutionally appropriate pension plan for Deputies and their surviving family members in the event of death or injury. Pensions for Members of Parliament that are distinctly disproportional to average Kosovo pensions may constitute a gift without a clearly demonstrated public purpose. The Assembly has no constitutional authority to enact such pension legislation.

*Summary:*

I. The applicant filed a referral pursuant to Article 113.2.1 of the Constitution, asserting that Articles 14.1.6, 22, 24, 25 and 27 of the Law on

Rights and Responsibilities of the Deputy were incompatible with the Constitution on four grounds:

1. it provides deputies with pensions that are more favourable than those offered to other citizens, which is inconsistent with the constitutional principles of equality, the rule of law, non-discrimination and social justice;
2. the pensions are clearly disproportionate with average pensions in Kosovo, and are therefore disharmonious with the principles of democracy, equality, non-discrimination and social justice encompassed by Article 7 of the Constitution;
3. the arrangement allows for a retired Deputy's reinstatement to a public sector or publicly funded job held by the Deputy before service in the Assembly; and
4. there is no justification for treating Deputies' pensions so differently from those of other citizens.

In response, the Assembly asserted that the Law on Rights and Responsibilities of the Deputy was enacted legitimately.

II. The Court held that the referral was admissible because the Ombudsperson was authorised by Articles 113.2 and 135.4 of the Constitution to make the referral, and that the referral was submitted within the 6-month deadline set by Article 30 of the Law on the Constitutional Court, calculated from the date of the challenged law's enactment.

On the merits, the Constitutional Court considered the challenged provisions of the legislation, compared them to similar arrangements for legislators in 16 other countries and reviewed relevant decisions by the Constitutional Courts of Croatia, Montenegro and Macedonia. The Court reached five conclusions:

1. the pension arrangement unreasonably deviated from the pension provisions of UNMIK Regulation no. 2005/20 and Law no. 03/L-084;
2. the legislation provided an insufficient definition of the benefit, which does not resemble severance pay, a salary increase, life insurance or bonus, and it may constitute a gift without a clearly demonstrated public purpose, meaning that the Assembly had no constitutional authority to enact it;
3. the disputed pensions were distinctly disproportional to average Kosovo pensions and therefore no apparent legitimate public purpose for such discriminatory treatment;

4. the challenged pensions were 8-10 times higher than basic pensions set by the Kosovo Budget, and such disproportionate treatment raises questions about the Assembly's consideration of Articles 3, 7 and 24 of the Constitution when enacting the legislation; and
5. the Assembly never provided a reasonable explanation of the legitimate aim of the disputed legislation, depriving it of the general presumption of constitutionality, and neither the Minister of Finance nor the Central Bank provided an explanation or justification concerning the fiscal or economic implications of the enactment, which occurred despite strenuous objections by some Deputies.

Finally, the Constitutional Court decided that the pension arrangement was incompatible with the Constitution, but added that the Assembly had the discretion to enact a constitutionally appropriate pension plan for Deputies and their surviving family members in the event of death or injury.

For the reasons stated, the Court issued a Judgment reflecting that the Referral was admissible, concluding that the relevant provisions of the Law on Rights and Responsibilities of the Deputy were not compatible with Articles 3.2, 7 and 74 of the Constitution, invalidating the relevant provisions, holding that the Court's interim order suspending the implementation of the relevant provisions had become permanent, and declaring that the Judgment was immediately effective.

#### *Languages:*

Albanian, English (translation by the Court).



#### *Identification:* KOS-2014-3-007

**a)** Kosovo / **b)** Constitutional Court / **c)** / **d)** 25.06.2012 / **e)** KO 45/12, KO 46/12 / **f)** Request of Liburn Aliu and 11 other Members of the Assembly of the Republic of Kosovo for constitutional assessment of the Law on the Village of Hoçë e Madhe v. Velika Hoča and the Law on the Historic Centre of Prizren / **g)** Official Gazette, 27.06.2012 / **h)** CODICES (Albanian, English).

*Keywords of the systematic thesaurus:*

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

3.18 General Principles – **General interest.**

*Keywords of the alphabetical index:*

Cultural heritage, preservation, municipal committee, composition / Municipality, committee, religious group, representation, discrimination / Municipality, general interest / Religion, secularism, principle.

*Headnotes:*

Chapter III of the Constitution provides for a special protection to communities that traditionally were present in the territory of the Republic of Kosovo. Chapter II, Article 45.3 of the Constitution provides that the State institutions support the possibility of every person to democratically influence decisions of public bodies. The Assembly has broad constitutional mandate to regulate for the consultative planning processes that are proposed in the Laws on the Village of Hoçë e Madhe and the Historic Centre of Prizren.

*Summary:*

I. The applicants filed referral based on Article 113.5 of the Constitution, alleging that Article 4.3.3 of the Law on the Village of Hoçë e Madhe, Article 14.1.2 of the Law on the Historic Centre of Prizren, are in contradiction with the Constitution.

The applicants stated that Article 4.3.3 of the Law on the Village of Hoçë e Madhe was in contradiction with the principle of secularism and neutrality in the religious matters and that creates privileges to a religious community, by marginalising and discriminating other religious communities and the citizens who do not have that religious orientation or belief. The Applicants filed the same arguments regarding Article 14.1.2 of the Law on the Historic Centre of Prizren. Article 4 of the Law on the Village of Hoçë e Madhe provides for a Committee to be established by the Municipality of Rahovec.

The abovementioned committee will be composed of five members, where one of them is selected by the Serbian Orthodox Church and must be a resident of the village of Hoçë e Madhe. The applicants stated that it is necessary that the composition of the Committee for the village of Hoçë e Madhe does not include any member, selected by the Serbian Orthodox Church, because it automatically creates a

privileged position for it and in that case among the other is violated Article 24 of the Constitution (Equality before the Law), openly creating inequality between the Serbian Orthodox Church towards the members and other religious communities and persons that do not belong to any religious orientation. Article 14.1.2 of the Law on Historic Centre of Prizren, foresees the establishment of the Cultural Heritage Committee by the Municipality of Prizren.

The above-mentioned Committee is composed of seven members, where the Islamic Community, the Serbian Orthodox Church and the Catholic Church select a member for representation in that Committee. Regarding the Article 24 of the Constitution, the applicants stated that the inclusion of three religious communities in the Law, clearly favours them compared to other religious communities and to citizens without religious affiliation and *inter alia* violates Article 24 of the Constitution. In order to substantiate their allegations, the applicants cited cases from the European Court of Human Rights case-law, as well as a case of the US Supreme Court.

II. The Constitutional Court concluded that the applicants are authorised parties and the referrals were submitted within legal time limit, they have met all criteria of requirements and, consequently, the referrals were admissible.

Regarding the merits of the referral, the Court reminded the applicants that the Chapter III of the Constitution provides for a special protection to communities that traditionally were present in the territory of the Republic of Kosovo, and that the Chapter II, Article 45.3 of the Constitution provides that the State institutions support the possibility of every person to democratically influence decisions of public bodies.

Furthermore, the Court noted that the Assembly has broad constitutional mandate to regulate the consultative planning processes that are proposed in the Laws on the Village of Hoçë e Madhe and the Historic Centre of Prizren. The Court further stated that although, in both instances, the Committees are given a large degree of consultative responsibility, they do not have executive powers and that the decisions on planning matters are ultimately taken, after appropriate consultation, by the relevant municipalities and not by the Committees established under the Laws. The Court also stated that Article 24.3 of the Constitution promotes the rights of individuals and groups, who are in unequal position, while the applicants read Article 24.1 and 24.2 of the Constitution, separately from Article 4.3 of the Constitution.

The Court further noted that the case-law cited by the applicants does not relate to the rights of religious communities to have a consultative voice in the decisions on planning that influence on the village Hoçë e Madhe and on Historic Center of Prizren, and that they do not support the argument that the articles of the challenged laws are not in compliance with the Constitution.

Due to the abovementioned reasons, the Court concluded that the referral is admissible from a procedural-formal aspect; that the Article 4.3.3 of the Law on village Hoçë e Madhe is in compliance with the Constitution of Kosovo; that Article 14.1.2 of the Law on Historic Center of Prizren is in compliance with the Constitution of Kosovo; ordered that the Judgment is served on the parties and pursuant to Article 20.4 of the Law, is published in the Official Gazette; and declared that the Judgment is effective immediately.

#### Languages:

Albanian, English (translation by the Court).



#### Identification: KOS-2014-3-008

**a)** Kosovo / **b)** Constitutional Court / **c)** / **d)** 20.07.2012 / **e)** KO 29/12, KO48/12 / **f)** Proposed Amendments of the Constitution submitted by the President of the Assembly of the Republic of Kosovo, dated 23 March 2012 and 4 May 2012 / **g)** Official Gazette, 23.07.2012 / **h)** CODICES (Albanian, English).

#### Keywords of the systematic thesaurus:

1.1.2.4 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointment of members.**  
 1.3.5.3 Constitutional Justice – Jurisdiction – The subject of review – **Constitution.**  
 4.4.3 Institutions – Head of State – **Powers.**  
 4.4.3.3 Institutions – Head of State – Powers – **Relations with judicial bodies.**  
 4.4.4 Institutions – Head of State – **Appointment.**  
 4.4.5.4 Institutions – Head of State – Term of office – **End of office.**

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

4.7.4.3.2 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Appointment.**

4.9 Institutions – **Elections and instruments of direct democracy.**

4.18 Institutions – **State of emergency and emergency powers.**

#### Keywords of the alphabetical index:

President, mandate / Constitutional amendments, control / Election, participation / President, acting, powers / President, candidate, nomination, right / Pardon, power to grant, acting President / Judge, appointment, by acting President / Prosecutor, appointment, by acting President / Emergency, state, declaration, power, acting President.

#### Headnotes:

Draft amendment to the Constitution that limit the candidates to stand for election as President of the Republic of Kosovo, which limit the power of an Acting President, which given the President a suspensive veto against the appointment of judges to the Constitutional Court and which provide for the early termination of the mandate of the President diminish constitutional rights and freedoms set forth in Chapter II of the Constitution.

#### Summary:

I. The applicant filed the referral based on Articles 113.9 and 144.3 of the Constitution, on which occasion, he submitted a set of proposed amendments for a prior review as to whether they would diminish any of the rights and freedoms set forth in Chapter II of the Constitution.

II. Referring to the draft constitutional amendments, the Constitutional Court concluded that the draft Articles 85.2, 86.3, 90.5.2, 90.5.3, 90.5.5, 104.1, 114.2 and 162.1 diminish human rights and freedoms as set forth in Chapter II of the Constitution.

Draft Article 85.2 would restrict the right to be the candidate for President, only to citizens who are permanent residents of the Republic of Kosovo for five years. The Court reasoned *inter alia*, that the proposed amendment would result in a restriction for citizens of the Republic of Kosovo, who do not have permanent residence in Kosovo for full five years before their candidacy for the post. This would diminish the rights and freedoms set forth in Chapter II of the Constitution.

Draft Article 86.3 would limit the competence to make a proposal for the post of the President of Kosovo to parliamentary political entities which have passed the electoral threshold in the last election. The Court reasoned *inter alia*, since the draft Article does not allow all registered political entities to make such a proposal, this would diminish human rights and freedoms set forth in Chapter II of the Constitution.

Draft Article 90.5.2 would exclude the power of an Acting President to declare a state of emergency. The Court reasoned that if circumstances occur, which require that the state is secured and the hands of Acting President were tied, then a constitutional crisis could arise. The human rights and freedoms of all citizens in the State could be in jeopardy in such a situation and restricting the Acting President in declaring a State of Emergency diminishes the rights and freedoms in Chapter II of the Constitution.

The draft Article 90.5.3 regarding the restriction of the power of an Acting President to appoint judges and prosecutors, the Court, *inter alia*, reasoned that justice cannot be administered if judges and prosecutors are not in place. This obstacle to the appointment of judges and prosecutors may be considered as an impediment to the administration of justice and as diminishing rights and freedoms in Chapter II of the Constitution.

Draft Article 90.5.5 on the restriction of the power of an Acting President to grant pardons, the Court reasoned that when an individual deserved a pardon in accordance with the law, such a pardon might not be granted and this would diminish the rights and freedoms set forth in Chapter II of the Constitution.

Draft Article 104.1 regarding the suspensive veto of the Acting President on appointing Judges of the regular courts, the Court reasoned that the reasoning relating to Article 90.5.3 above applied also to the proposed suspensive veto on a President, sending back the names of judges proposed to be appointed by the Kosovo Judicial Council.

The draft Article 114.2 would provide for a suspensive veto of the President on appointing judges of the Constitutional Court. The Court reasoned that the position in relation to the appointment of judges to the Constitutional Court is one that can unnecessarily be retarded by the President if he or she sends back a nominated Judge of the Constitutional Court and that the draft Article thus diminishes the rights and freedoms set forth in Chapter II of the Constitution.

The draft Article 162.1 concerns the early termination of the mandate of the President of the Republic of Kosovo. The Court reasoned that the early termination

of the President's mandate as envisaged by the proposed amendment touches upon fundamental constitutional principles, in particular, the principle of the prohibition of the shortening of a legitimately obtained mandate of a constitutional office as well as the principle of protecting the justified confidence of the citizens in the laws of Kosovo and the election and mandate of their President based upon such laws. The Court further stated that the mandate was based on the Constitution and as such is inviolable so as to ensure adherence to the principle of the separation of powers and to preserve certainty in the legal and constitutional order. The Court concluded that early termination of the mandate of the President of the Republic of Kosovo diminishes rights and freedoms set forth in Chapter II of the Constitution.

For the abovementioned reasons, the Court concluded that the abovementioned amendments:

1. diminish human rights and freedoms set forth in Chapter II of the Constitution;
2. the judgment shall be notified to the parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law;
3. the judgment is effective immediately.

*Languages:*

Albanian, English (translation by the Court).



*Identification: KOS-2014-3-009*

**a)** Kosovo / **b)** Constitutional Court / **c)** / **d)** 25.01.2013 / **e)** KI 41/12 / **f)** Gezim and Makfire Kastrati v. Municipal Court in Prishtina and Kosovo Judicial Council / **g)** Official Gazette, 27.02.2013 / **h)** CODICES (Albanian, English).

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

*Keywords of the alphabetical index:*

Domestic violence, prevention, obligation / Court, duty to protect, inaction.

*Headnotes:*

The inaction of the competent court to provide protective measures against domestic violence and the failure of the Judicial Council to remedy against such inaction result violate Articles 32 and 54 of the Constitution (Right to Legal Remedies and Right to Judicial Protection of Rights) as well as Article 13 ECHR (Effective Remedy).

*Summary:*

I. The applicants are the parents of the deceased D.K., who after some misunderstandings followed by threats to life from her former partner, had requested an emergency protection order from the Municipal Court in Prishtina. The Municipal Court in Prishtina did not respond to D.K. neither for approval or disapproval of her request. After a few days, D.K. was killed through gunshots by her former partner.

The applicants filed the referral based on Article 117.3 of the Constitution of Kosovo, alleging that the Municipal Court did not act according to the Law no. 03/L-182 on Protection against Domestic Violence. According to the applicants, the violation is not a consequence of a court decision, but of inaction of the Municipal Court in Prishtina, which by its inaction violated Article 25 of the Constitution (Right to Life), Article 31 of the Constitution (Right to Fair and Impartial Trial), Article 32 of the Constitution (Right to Legal Remedies) and Article 54 of the Constitution (Judicial Protection of Rights). The applicants also allege that the Kosovo Judicial Council, not only did not address the issue of D.K. and the violation of her rights, but it did not even offer legal remedies for the future cases of domestic violence when the victims request action from municipal courts. They did not act at all.

II. The Court found that responsible authority, in this case the Municipal Court in Prishtina, ought to have known about the real risk that had existed when the request for issuance of an emergency protection order was submitted, since D.K. had explained in a chronological order the deterioration of relations between them, by specifying also the death threats by her former partner and by offering evidence for previous reports to the police authorities about these received threats.

Furthermore, the Municipal Court in Prishtina, previously treated a case initiated by D.K. for dissolution of extra marital union and for the issue of entrustment of the child's custody and with her ex-partner, when the serious problems started to appear between them and which later resulted in different threats. The Municipal Court in Prishtina was responsible for taking actions foreseen by the Law on Protection against Domestic Violence and that its inaction presents violations of constitutional obligations that derive from Article 25 of the Constitution and Article 2 ECHR.

In assessing the merits of the applicants' referral, the Constitutional Court concluded that the Municipal Court in Prishtina was competent for taking actions foreseen by the Law on Protection against Domestic Violence and that its inaction represented violations of constitutional obligations that derive from Article 25 of the Constitution and Article 2 ECHR. Further, the Constitutional Court concluded that the inaction of the Municipal Court in Prishtina regarding the request of the deceased D.K. for issuing an emergency protection order, as well as the practice developed by Kosovo Judicial Council in not addressing the inaction of the regular courts, when they should, has obstructed the victim and the applicants in exercising their rights to effective legal remedies, as foreseen by Articles 32 and 54 of the Constitution and Article 13 ECHR.

*Cross-references:*

European Court of Human Rights:

- *Osman v. the United Kingdom*, 23452/94, 28.10.1998, *Reports of Judgments and Decisions* 1998-VIII;
- *Kontrova v. Slovakia*, 7510/04, 24.09.2007;
- *Opuz v. Turkey*, 33401/02, 09.06.2009, *Reports of Judgments and Decisions* 2009;
- *Silver and Others v. the United Kingdom*, 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, 25.03.1983, Series A, no. 61;
- *Kudla v. Poland*, 30210/96, 26.10.2000, *Reports of Judgments and Decisions* 2000-XI.

*Languages:*

Albanian, English (translation by the Court).



*Identification:* KOS-2014-3-010

**a)** Kosovo / **b)** Constitutional Court / **c)** / **d)** 03.09.2013 / **e)** KO 95/13 / **f)** Visar Ymeri and 11 other deputies of the Assembly of the Republic of Kosovo requesting constitutional review of the Law, no. 04/L-199, on Ratification of the First International Agreement of Principles Governing the Normalisation of Relations between the Republic of Kosovo and the Republic of Serbia and the Implementation Plan of this agreement / **g)** Official Gazette, 10.09.2013 / **h)** CODICES (Albanian, English).

*Keywords of the systematic thesaurus:*

1.3.5.1 Constitutional Justice – Jurisdiction – The subject of review – **International treaties.**

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

*Keywords of the alphabetical index:*

Treaty, constitutionality, control, after ratification.

*Headnotes:*

The Constitution does not provide for a review by the Constitutional Court of the constitutionality of the substance of international agreements.

*Summary:*

I. The applicants submitted the referral to the Court for the constitutional review of the contested Law on Ratification itself, because the First International Agreement annexed to the Law on Ratification contains 15 items concerning the establishment of the Association/Community of the Municipalities in the North, which allegedly violate the Constitution as follows:

- Items 1 to 6 violate Article 1.1 of the Constitution, because they violate the indivisibility and uniqueness of the state of Kosovo;
- Item 1 violates Article 3.1 of the Constitution, pursuant to which the Republic of Kosovo is a multi-ethnic society, as well as the principles expressed in Article 123.3 of the Constitution in relation to the principles of Local Self-Governance;
- Item 3 violates Article 1.1 of the Constitution regarding the qualification of Kosovo as a unique state;
- Item 4 violates the constitutional principles provided in Articles 123 and 124 of the Constitution and also exceeds the principles of

Article 2 of the European Charter on Local Self-Governance (hereinafter, the “ECLSG”);

- Item 6 violates Article 1.1 of the Constitution in relation to the qualification of the Republic of Kosovo as a unique state;
- Item 7 violates the general constitutional principles in relation to the security sector, as laid down in Article 125.2 of the Constitution;
- Item 9 violates Article 3.1 (multi-ethnic qualification of the Republic of Kosovo) and Articles 125.2 and 24.2 of the Constitution;
- Item 10 violates Articles 102.2 and 24.1 of the Constitution and Article 6 ECHR in conjunction with Articles 13 and 14 ECHR;
- Item 11 violates Article 139.1 of the Constitution;
- Item 14 violates Article 2.2 in conjunction with Article 20.1 of the Constitution.

II. The Constitutional Court declared the referral admissible, unanimously declared that the procedure followed for the adoption of the Law, no. 04/L-99, on Ratification of the First International Agreement of Principles Governing the Normalisation of Relations Between the Republic of Kosovo and the Republic of Serbia and the Implementation Plan of this agreement is compatible with the Constitution of the Republic of Kosovo, and by majority rejects the applicants' request to review the First International Agreement of Principles Governing the Normalisation of Relations between the Republic of Kosovo and the Republic of Serbia and the Implementation Plan to this agreement as being outside of the scope of the Court's jurisdiction *ratione materiae*.

The Court considered that the Law on Ratification and the First International Agreement are two separate legal acts. Each of these acts follows a different legal procedure, for the adoption of the Law on Ratification in the first-mentioned case, and for the signing of the First International Agreement in the second-mentioned case, respectively. As to the adoption of the Law on Ratification by the Assembly, the Court notes that the ratification law was adopted by the required two-thirds majority in one reading. Therefore, the Court considered that the adoption by the Assembly of the Law on Ratification was in compliance with the procedural provisions of the Constitution.

Furthermore, as to whether the Court has jurisdiction to review international agreements after adoption by the Assembly of the Republic of Kosovo, the Court notes based on a comparative analysis that there are some Constitutions that empower the Constitutional Court to review the conformity of international agreements with the Constitution. For example Albania and Bulgaria empower their Constitutional Court to review the constitutionality of an international

agreement prior to its ratification, while Bosnia and Herzegovina, Croatia and Macedonia have chosen not to give jurisdiction to their Constitutional Court to review international agreements. In addition, Slovenia has adopted a mixed system whereby, during the ratification procedure, the Constitutional Court reviews the constitutionality of international agreements if expressly requested to do so by the President, the Government or one third of the Deputies of the Parliament.

Thus, the comparative analysis reveals that Constitutional Courts of the countries surveyed generally do not have jurisdiction to review the constitutionality of international agreements after the adoption of the ratification law by the Parliament. However, some Constitutional Courts may indeed review the constitutionality of international agreements prior to its ratification. The Constitution of the Republic of Kosovo does not empower the Constitutional Court to review the constitutionality of international agreements after adoption by the Assembly of the Republic of Kosovo.

#### *Languages:*

Albanian, English (translation by the Court).



#### *Identification:* KOS-2014-3-011

**a)** Kosovo / **b)** Constitutional Court / **c)** / **d)** 30.06.2014 / **e)** KO 103/14 / **f)** The referral of the President of the Republic of Kosovo, concerning the assessment of the compatibility of Article 84.14 (Competencies of the President) with Article 95 (Election of the Government) of the Constitution of the Republic of Kosovo / **g)** Official Gazette, 07.07.2014 / **h)** CODICES (Albanian, English).

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

4.4.3.2 Institutions – Head of State – Powers – **Relations with the executive bodies.**  
4.6.4 Institutions – Executive bodies – **Composition.**  
4.9 Institutions – **Elections and instruments of direct democracy.**

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

Prime Minister, candidate, proposal / Government, majority in Parliament / Prime Minister, candidate, appointment, head of State / Government, formation, consultation / Election, renewed, avoidance / Coalition, power to propose Prime Minister.

#### *Headnotes:*

The President of the Republic does not have the discretion to approve or disapprove the nomination of the candidate for Prime Minister by the party or coalition, but has to assure his or her appointment. If the proposed composition of the Government does not receive the necessary votes in the Assembly, it is the discretion of the President of the Republic, after consultations with the parties or coalitions, to decide which party or coalition will be given the mandate to propose another candidate for Prime Minister. The President of the Republic has to assess what is the highest probability for a political party or coalition to propose a candidate for Prime Minister who will obtain the necessary votes in the Assembly for the establishment of a new Government. Since, under the Constitution the President of the Republic represents the State and the unity of the people, it is the President's responsibility to preserve the stability of the country and to find prevailing criteria for the formation of the new government in order for elections to be avoided.

#### *Summary:*

I. The referral was lodged by the President of the Republic of Kosovo, Her Excellency Atifete Jahjaga, pursuant to Articles 84.9 and 113.3, requesting from the Court to give interpretation on several notions, such as: the party or the coalition that has won the elections, necessary to create the Government, according to the same procedure and majority in the Assembly, which are which are used under Article 95 of the Constitution, and to specify the order of precedence between Articles 84.14 and 95 of the Constitution as they relate to the competence of the President to mandate the candidate for Prime Minister after elections.

II. The Court found that the referral of the applicants is admissible since it meets all the requirements of admissibility which are foreseen by the Rules of Procedure. In assessing the merits of the referral, the Court concluded that:

- the candidate for Prime Minister is appointed by the President of the Republic through a decision in which the person is explicitly mentioned;

- the proposal for the appointment must stem from a political party or coalition which will forward the name of the person for candidate for Prime Minister to the President of the Republic. The wording used clearly indicates that the name of the candidate has to be proposed by a political party or coalition registered in order to participate in the general elections. As a result, it is not within the discretion of the President of the Republic to propose on her/his own initiative such a candidate;
- the political party mentioned in Article 84.14 of the Constitution must be a political entity registered by Central Election Commission (hereinafter, the "CEC") and must have passed the threshold established by the CEC after the elections; that the term "coalition" in Article 84.14 of the Constitution concerns eligible political entities which were certified by the CEC as a "coalition to compete the relevant elections under one name" and passed the threshold established by the CEC after the elections. Thus, coalitions which are not certified by the CEC are not eligible under Article 84.14 of the Constitution to propose a candidate for Prime Minister;
- the criteria for proposing the government after elections, used in Article 95.1 of the Constitution are cumulative and are a prerequisite for the President of the Republic to make the necessary consultations with the party or coalition that won the majority of seats in the Assembly;
- the democratic rule and principles, as well as political fairness, foreseeability and transparency require the political party or coalition that won the highest number of seats as a result of the elections to be given the possibility to propose a candidate for Prime Minister to form the Government;
- if the proposed composition of the Government does not receive the necessary votes in the Assembly, it is the discretion of the President of the Republic, after consultations with the parties or coalitions, to decide which party or coalition will be given the mandate to propose another candidate for Prime Minister.

#### *Languages:*

Albanian, English (translation by the Court).



#### *Identification: KOS-2014-3-012*

**a)** Kosovo / **b)** Constitutional Court / **c)** / **d)** 26.08.2014 / **e)** KO 119/14 / **f)** Xhavit Haliti and 29 other Deputies of the Assembly of the Republic of Kosovo, Constitutional review of Decision no. 05-V-001 voted by 83 Deputies of the Assembly of the Republic of Kosovo on the election of the President of the Assembly of the Republic of Kosovo, dated 17 July 2014 / **g)** Official Gazette, 27.08.2014 / **h)** CODICES (Albanian, English).

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

4.5.4.2 Institutions – Legislative bodies – Organisation – **President/Speaker**.  
4.5.4.5 Institutions – Legislative bodies – Organisation – **Parliamentary groups**.

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

Parliament, President, election, candidate, right to propose / Parliament, constitutive session, termination / Parliament, political group, largest, right to propose President of Parliament.

#### *Headnotes:*

Only the largest parliamentary group can propose the President of the Assembly.

A constitutive session of the Assembly, which does not elect a candidate proposed by the largest parliamentary group has not been accomplished and needs to be completed until such election takes place.

#### *Summary:*

I. The referral was filed by 30 deputies of the Assembly of the Republic of Kosovo (the Assembly), who challenged the Decision no. 05-V-001 voted by 83 Deputies of the Assembly of the Republic of Kosovo on the election of the President of the Assembly as regards its substance and as well the procedure followed during the Constitutive Session of the Assembly on 17 July 2014.

The applicants filed the referral based on Article 113.5 of the Constitution, alleging that during the preparation for the constitutive session of the Assembly there was a violation of the Constitution, because the chairperson of the meeting, the President of the previous legislature Mr Krasniqi, exceeded his powers set out in the Constitution, namely his interpretation of "the largest parliamentary

group". The applicants further claimed that the Decision of the Assembly of the Republic of Kosovo, dated 17 July 2014 (no. 05-V-001), on the election of the President of the Assembly of the Republic of Kosovo, including the preparatory procedure followed in connection with the constitutive process of the Assembly are not in accordance with the provisions of Article 67 of the Constitution, which provide that the President of the Assembly is proposed by the largest parliamentary group which won the majority of seats in the Assembly and is elected by a majority vote of all deputies of the Assembly.

II. On 23 July 2014, the Constitutional Court granted the applicants request for an interim measure, suspending the implementation of the challenged decision, until the Court would render a final decision on the matter.

The Court found that the referral of the applicants is admissible since it meets all the requirements of admissibility which are foreseen by the Rules of Procedure. In assessing the merits of the referral, the Court concluded that the Decision no. 05-V-001 of 17 July 2014 is unconstitutional as regards the procedure followed as well as in substance as it was not the largest parliamentary group that proposed the President of the Assembly and, therefore, is null and void; and that the constitutive session of the Assembly, which started on 17 July 2014, has not been accomplished, namely by not electing President and Deputy Presidents of the Assembly. Therefore, the Assembly has to complete the constitutive session, by electing President and Deputy Presidents in accordance with Article 67.2 of the Constitution in conjunction with Article 64.1 of the Constitution and Chapter III of the Rules of Procedure implementing these articles and this judgment.

#### Languages:

Albanian, English (translation by the Court).



## Latvia Constitutional Court

### Statistical data

1 January 2014 – 31 December 2014

Decisions of the Panels: 246

Decisions of the Plenary Court: 1

Judgments: 16

### Important decisions

*Identification:* LAT-2014-3-004

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 28.11.2014 / **e)** 2014-09-01 / **f)** On the compliance of Section 495.1 of the Civil Procedure Law with the first sentence of Article 92 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 01.12.2014, 238(5298) / **h)** CODICES (Latvian, English).

*Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.

4.7.14 Institutions – Judicial bodies – **Arbitration**.

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

*Keywords of the alphabetical index:*

Arbitration court, decision, review.

*Headnotes:*

Not allowing a court of general jurisdiction to verify the jurisdiction of an arbitration court is disproportionate.

An arbitration court is not part of the system of the judicial power; the State is not responsible for proceedings before it. However, under the Constitution, there is a universal right to defend one's rights and lawful interests in a fair court hearing. This presupposes an obligation on the part of the State to create an effective legal mechanism to ensure that serious breaches that have occurred in proceedings before an arbitration court can be rectified, along with

an obligation not to recognise the result of proceedings before arbitration courts where such breaches have occurred.

Where somebody has not agreed that their case will be heard by an arbitration court and the proceedings before the arbitration court have significantly encroached on their rights, they should have the right of recourse to a court to defend these rights directly and immediately, independently of the wishes or actions of others.

### *Summary:*

I. The contested norm of the Civil Procedure Law allowed an arbitration court to decide itself as to the jurisdiction regarding a dispute, even if one of the parties disputed the existence or legal force of the arbitration court agreement.

According to the applicant, this norm restricted a person's rights and accessibility to a court in situations where they wished to challenge the existence or the validity of an arbitration court agreement; moreover, the restriction to the rights mentioned above was incompatible with the principle of proportionality.

The applicant in these proceedings had had a civil law dispute, which was heard by an arbitration court. The applicant maintained that it did not sign an agreement to the effect that disputes would be examined by an arbitration court (i.e. the agreement was forged) which meant this particular dispute should not have been subject to adjudication by an arbitration court.

The applicant had applied to a court of general jurisdiction, filing a petition to recognise the agreement about disputes being adjudicated by an arbitration court as being invalid. The claim was rejected at all court instances, on the basis of the contested norm.

II. The Constitutional Court noted that in cases where parties have freely chosen to transfer the hearing of disputes to an arbitration court, it is presumed that they are waiving their rights to a fair court hearing. The State is not responsible for the fairness of the hearing of cases by arbitration courts, but in cases where a court of general jurisdiction controls the process of arbitration, it should verify whether legal proceedings before the arbitration court have been fair.

The obligation to create a legal mechanism which allows verification as to whether somebody has voluntarily waived their rights to a fair court hearing,

follows both from the Constitution and the international instruments that bind Latvia, for example, the European Convention on International Commercial Arbitration, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the UNICTRAL Model Law on International Commercial Arbitration of 1985.

The Constitutional Court found that the restriction on fundamental rights included within the contested norm was established by law and had a legitimate aim, namely the protection of the rights of other persons, which manifests itself as decreasing the work load of courts.

The Court observed that the legitimate aim of the restriction on the fundamental right in this case could have been achieved by means which encroached less on rights and lawful interests. The Court found that in this particular case the work load of courts of general jurisdiction had not decreased; in connection with the jurisdiction of the arbitration court in question and the enforcement of the judgment, courts had already adopted a total of six decisions.

The Constitutional Court also recognised that contesting the jurisdiction of an arbitration court before a court of general jurisdiction does not impede proceedings before the arbitration court. If they have already been initiated when a request is lodged with the court of general jurisdiction for an assessment of the arbitration court's validity, they can simply continue; if not, they can be initiated in parallel with the proceedings before the court of general jurisdiction.

It accordingly found the contested norm to be incompatible with the principle of proportionality and, to the extent that it prohibited challenges to the jurisdiction of an arbitration court at a court of general jurisdiction, to be incompatible with the Constitution.

### *Supplementary information:*

The Constitutional Court held that the contested norm became invalid at the point where the infringement of fundamental rights occurred.

The Constitutional Court noted that Parliament had adopted the Law on Arbitration Courts, which comprised a norm that was identical to the contested norm (Section 24.1 of Law on Arbitration Courts). This Law was scheduled to enter into force on 1 January 2015. The Constitutional Court resolved to expand the claim and found Section 24.1 to be incompatible with Article 92 of the Constitution (the right to a fair trial) to the extent that it prohibits contesting the jurisdiction of an arbitration court before a court of general jurisdiction.

*Cross-references:*

## Constitutional Court:

- no. 2001-10-01, 05.03.2002;
- no. 2001-12-01, 19.03.2002; *Bulletin* 2002/1 [LAT-2002-1-004];
- no. 2002-04-03, 22.10.2002; *Bulletin* 2002/3 [LAT-2002-3-008];
- no. 2003-04-01, 27.06.2003; *Bulletin* 2003/2 [LAT-2003-2-009];
- no. 2004-10-01, 17.01.2005; *Bulletin* 2005/1 [LAT-2005-1-001];
- no. 2004-16-01, 04.01.2005;
- no. 2004-18-0106, 13.05.2005; *Bulletin* 2005/2 [LAT-2005-2-005];
- no. 2005-12-0103, 16.12.2005;
- no. 2005-18-01, 14.03.2006;
- no. 2005-19-01, 22.12.2005;
- no. 2006-03-0106, 23.11.2006; *Bulletin* 2006/3 [LAT-2006-3-005];
- no. 2007-01-01, 08.06.2007; *Bulletin* 2007/3 [LAT-2007-3-004];
- no. 2007-23-01, 03.04.2008;
- no. 2008-36-01, 15.04.2009;
- no. 2010-01-01, 07.10.2010;
- no. 2010-44-01, 20.12.2010;
- no. 2010-72-01, 20.10.2011;
- no. 2011-21-01, 06.07.2012; *Bulletin* 2012/2 [LAT-2012-2-004];
- no. 2012-23-01, 24.10.2013;
- no. 2012-26-03, 28.06.2013.

## European Court of Human Rights:

- *Dory v. Sweden*, no. 28394/95, 12.11.2002, para 37;
- *Jacob Boss Sohne KG v. Germany*, no. 18479/91, 02.12.1991;
- *Jussila v. Finland*, no. 73053/01, 23.11.2006, para 41;
- *Regent Company v. Ukraine*, no. 773/03, 03.04.2008, para 54;
- *Suda v. Czech Republic*, no. 1643/06, 28.10.2010, para 48, 49, 54;
- *Suovaniemi and Others v. Finland*, no. 31737/96, 23.02.1999.

*Languages:*

Latvian, English (translation by the Court).



## Liechtenstein State Council

### Important decisions

*Identification:* LIE-2014-3-004

**a)** Liechtenstein / **b)** State Council / **c)** / **d)** 01.07.2014 / **e)** StGH 2014/39 / **f)** / **g)** / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

3.17 General Principles – **Weighing of interests.**  
 5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion.**  
 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**  
 5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship.**  
 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:*

Sex education, course, exemption / Rights of the child / Religious freedom / Religion, freedom, positive / Religion, religious conscience, restrictions, dress / Religion, religious conviction / Religion, religious sentiment, respect / Child, welfare / Child, rights / Child, integration / Child, interest.

*Headnotes:*

There is a significant public interest in carrying out the compulsory course of sex education, as in the school's social and integrating function. The compulsory course of sex education helps enable children and adolescents to protect themselves physically and mentally against certain types of disease or exploitation. Moreover, the school's function of socialisation and integration is thereby enhanced. Having regard to the public interest in the fulfilment of the compulsory general school education system, the compulsory course of sex education forming part of the state's educational mission takes priority as a matter of principle over observance of religious restrictions. Derogation from this principle is not justified. Unlike swimming instruction which

concerns an aspect of sports education and activity, sex education impinges on wide areas of human life, hence of personality development. An exemption from the sex education course would also, unlike exemption from swimming lessons, lead to inadequacies in the organisation of the school system. Where the sex education course is concerned, notwithstanding a possible conflict of loyalty, the public interest of the state's educational mission outweighs parents' right to the religious instruction of their children which springs from the parents' freedom of religion. Freedom of belief and conscience can be given the importance owing to it by observing certain guidelines and limits in the sex education course at school.

#### Summary:

I. The parents of a school-age child, and the child personally, filed a constitutional appeal against the refusal to grant an exemption from the compulsory sex education course on religious grounds. They considered the school sex education course incompatible with their belief, that of the Christian Palmarian Church, but would have agreed to the proposed solution, more moderate from their standpoint, of a sex education course outside the school setting, given by a paediatrician. On the basis of a rule of organisation of the school system, newly introduced in 2010, diverging from the earlier practice and providing that exemptions allowing release from educational objectives under the learning programme were not permitted, this request for exemption from the school sex education course was refused. The decision was upheld by the Administrative Court.

II. The State Court did not allow the appeal brought against this decision. With regard to the sex education course, it held that the public interest carried more weight – contrary to its judgment delivered recently which had concerned exemption from swimming lessons on religious grounds in which, after weighing up all the interests, it had finally ruled in favour of exemption for reasons linked with the child's welfare.

#### Languages:

German.



## Lithuania Constitutional Court

### Important decisions

*Identification:* LTU-2014-3-006

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 03.07.2014 / **e)** 6/2011 / **f)** On the right to the state annuity of the President's widow(er) / **g)** TAR (Register of Legal Acts), 9761, 03.07.2014 / **h)** CODICES (English, Lithuanian).

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

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

5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status**.

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

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

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

Pension, annuity / Pension, privilege / Pension, social status, discrimination / Pension, widow / President, social assistance / President, spouse, pension / President, widow, pension / Widowhood.

#### *Headnotes:*

The mere fact that a person is the widow(er) of the President of the Republic who, by virtue of that status, had been granted the right to receive social assistance, is not in itself a basis to objectively justify that the widow(er) would possess the right to receive such social assistance, which would, in substance, differ and be a much larger amount than that ensured for the widow(er)s of other persons. Corresponding legal regulation is judged as consolidating a privilege on the basis of the social status of the person.

#### *Summary:*

I. The applicants, a group of members of Parliament (*Seimas*), introduced a petition requesting the Constitutional Court to review the constitutionality of the Law on the State Annuity of the President of the Republic of Lithuania. Specifically, it provides the

right of the spouse of a deceased President to receive the state annuity of the widow(er) of the President. The conditions for the implementation and the size of which are inseparably linked to the state annuity of the President. The applicants expressed concerns that the right to annuity of the widow(er) of the President does not stem from the constitutional legal status of the Head of State. Thus the granting and payment of such annuity is a privilege, prohibited by the Constitution.

II. The Constitutional Court held that the state is constitutionally obliged to provide social assistance in the event of widowhood, i.e., partly compensate for the family income lost by a person as a result of the death of his/her wife/husband. However the mere fact that a person is the widow(er) of a person who belonged to a group of persons with a certain social status (the distinction of which is objectively justified) and who, by virtue of that status, had been granted the right to receive social assistance (pension) is not in itself a basis to objectively justify that such legal regulation would consolidate the right of the said widow(er) to receive the pension. This pension would, in substance, differ and be of much larger amount than that ensured for the widow(er)s of other persons. Corresponding legal regulation would be judged as consolidating a privilege on the basis of the social status of the person.

The Constitution does not protect and defend any such rights acquired by a person that are privileges in terms of their content. The defence and protection of privileges would breach the constitutional principles of the equality of rights of persons and justice. It would also violate the imperative of a harmonious society, as consolidated in the Constitution, and thus the constitutional principle of a state under the rule of law.

Consequently, the disputed legal regulation is not constitutionally justified in addition to distorting the content of the provisions of the Constitution that the state guarantees social assistance in the event of widowhood.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2014-3-007

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 11.07.2014 / **e)** 16/2014-29/2014 / **f)** On organising and calling referendums / **g)** TAR (Register of Legal Acts), 10117, 11.07.2014 / **h)** CODICES (English, Lithuanian).

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

1.3.4.6.1 Constitutional Justice – Jurisdiction – Types of litigation – Litigation in respect of referendums and other instruments of direct democracy – **Admissibility**.  
 2.1.1.1 Sources – Categories – Written rules – **National rules**.  
 2.2.2.1 Sources – Hierarchy – Hierarchy as between national Sources – **Hierarchy emerging from the Constitution**.  
 3.1 General Principles – **Sovereignty**.  
 3.3.2 General Principles – Democracy – **Direct democracy**.  
 4.9.1 Institutions – Elections and instruments of direct democracy – **Competent body for the organisation and control of voting**.  
 4.9.2.1 Institutions – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy – **Admissibility**.

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

Referendum, organisation / Nation, actual will / Sovereignty, nation / Constitution, supremacy / Constitution, amendment, substantive limitation / Referendum, requirements / Sovereign power, limitation.

#### *Headnotes:*

The Constitution reflects the obligation of the national community – the civil nation to create and reinforce the state by following the fundamental rules consolidated in the Constitution. The Constitution is the legal foundation for the common life of the nation as the national community. The Constitution equally binds the national community – the civil nation itself. Therefore, the supreme sovereign power of the nation may be executed, *inter alia*, directly by referendum, only in observance of the Constitution.

The citizens' direct participation in state governance is a very important expression of their supreme sovereign power. Therefore, a referendum must be a testimony to the actual will of the nation. In view of this fact, where the most significant issues concerning the life of the state and the nation are put to a referendum, they must be issues that relate to the

actual will of the nation. Formulated clearly, the issues must not be misleading. Also, they must not be unrelated by their content and nature, unrelated to the amendments to the Constitution, or unrelated to the provisions of laws.

The legislator has a constitutional obligation to establish regulations concerning the organisation and proclamation of a referendum. The laws must clarify the content and form of the issues submitted to a referendum, such as requirements that it must be germane, clear and not misleading, and complies with the Constitution. The legislator must also set requirements for a citizens' initiative group. The issue proposed to be put to a referendum, besides the decision, must be constitutional and the institution must ensure that the Constitution and laws are observed in the course of organising the referendum, besides verifying that the issue is consistent with requirements regarding the content and form. The legislator must also set regulations to refuse to register a citizens' initiative group for a referendum that fails to meet these requirements.

### Summary:

I. The applicants (Parliament and Supreme Administrative Court of Lithuania) initiated the case, raising concerns about the proclamation and organisation of a referendum. The applicants sought to verify the constitutionality of a legal regulation that obliges competent subjects to organise a referendum even if the question to vote brought *inter alia* by the nation (not less than 300,000 nationals) conflicts with the Constitution.

II. The Constitutional Court construed constitutional provisions related to the referendum. Under the Constitution, a referendum is a form of direct execution of the supreme sovereign power of the nation.

The national community – the civil nation itself, while executing its sovereign power, as well as all the legal subjects, *inter alia*, law-making subjects, institutions organising elections (referendums), initiative groups for referendums – are equally bound by the Constitution. The principle of the supremacy of the Constitution, *inter alia*, gives rise to the imperative that it is not permitted to put to a referendum any decision that would potentially conflict with the requirements of the Constitution.

The Constitution provides that the most significant issues concerning the life of the State and the Nation shall be decided by referendum. The Court pointed out that these issues include the alteration of the provisions of the Constitution, which may be decided only by referendum.

The *Seimas* cannot call a referendum where the decision proposed to be put to the referendum fails to observe the Constitution. This may occur when it is impossible to determine the actual will of the nation based on the issue, as it may be unclear or misleading, included several issues unrelated by their content and nature, not related to the amendments to the Constitution, or several unrelated provisions of laws. This may also transpire where the provisions of law proposed to be put to the referendum would conflict with the Constitution, or where the proposed amendment to the Constitution would not comply with the requirements stemming from the Constitution. The requirement that the Constitution be observed may not be regarded as an additional condition for calling a referendum. The duty of the *Seimas* not to call a referendum if the issue to be put to the referendum fails to comply with the Constitution may not constitute the *Seimas*' power to adopt a preliminary decision to determine the calling of a referendum, i.e., which limits the supreme sovereign power of the nation.

The Court recalled substantive limitations imposed on the alteration of the Constitution. It noted that they are equally applicable in the event of the alteration of the Constitution by referendum. It is not permitted to put to a referendum any such draft amendment to the Constitution that would disregard substantive limitations set on the alteration of the Constitution.

### Languages:

Lithuanian, English (translation by the Court).



### Identification: LTU-2014-3-008

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 13.10.2014 / **e)** 10/2014 / **f)** On the titles of electoral committees / **g)** TAR (Register of Legal Acts), 13988, 13.10.2014 / **h)** CODICES (English, Lithuanian).

### Keywords of the systematic thesaurus:

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

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

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

*Keywords of the alphabetical index:*

Election, European Parliament / Election, electoral committee / Election, committee, title, right to choose.

*Headnotes:*

The title of an electoral committee helps the voters not only to recognise and differentiate between the candidates, but also to decide upon the values, ideas and goals proposed by them in the election campaign. The prohibition to use a self-determined title unjustifiably burdens the right to stand for election of candidates nominated by those electoral committees and violates the principles of the transparency, equality and fair competition of a democratic election.

*Summary:*

I. The Supreme Administrative Court of Lithuania submitted an application requesting the Constitutional Court to review the Law on the Elections to the European Parliament. The issue is that it does not specifically provide a right to determine the title of an electoral committee; instead, the Central Electoral Commission assigns a letter to be used as the identification of an electoral committee in the European Parliament elections. The applicant expressed concerns whether such regulation violates the right to stand for election of candidates nominated by electoral committees. The reason is that these candidates are provided unequal opportunities for public recognition compared to candidates nominated by political parties who are able to use recognisable titles.

II. The Constitutional Court acknowledged that the Law on the Elections to the European Parliament does not include the setting of a self-determined title of an electoral committee as a mandatory element in the establishment of such a committee. This does not mean, however, that the self-determined title cannot be agreed upon with the Central Electoral Commission during the committees establishment.

The Constitutional Court also held that the Constitution prescribes a duty to the legislator to set such legal regulation to ensure the observance of the principles of democratic elections. The principles include the transparency of the electoral process, the equal position of the elections participants, fair competition as well as the publicity of important electoral information. Thus, the legal regulation must include provisions for due access to important

information on candidate-nominating elections participants, such as electoral committees and political parties, including their self-determined titles. This information must be public, easily accessible and valid. The title of candidate-nominating elections participants aids the voters not only to recognise and differentiate between other elections participants and their nominated candidates, but also to assess the values, ideas and goals proposed by them in the election campaign when deciding upon a vote.

However, while the legislator is setting the legal regulation and the electoral committees are determining their titles, they are bound by the Constitution. They must uphold the principles of democratic elections, constitutional imperatives, public order, societal morality and cannot promote ethnic, racial, religious, social hatred, violence or discrimination. The prohibition to use a self-determined title unjustifiably burdens the right to stand for election of candidates nominated by electoral committees and violates the principles of the transparency, equality and fair competition of a democratic election.

While the Constitutional Court ruled that the aforementioned legal regulation is unconstitutional, the European Parliament elections held on 25 May 2014 and their results remain valid.

*Languages:*

Lithuanian, English (translation by the Court).



*Identification:* LTU-2014-3-009

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 10.11.2014 / **e)** 24/2012 / **f)** On the formation of the council of a school of higher education and on funding studies / **g)** TAR (Register of Legal Acts), 16400, 10.11.2014 / **h)** CODICES (English, Lithuanian).

*Keywords of the systematic thesaurus:*

3.10 General Principles – **Certainty of the law.**  
 3.12 General Principles – **Clarity and precision of legal provisions.**  
 5.4.2 Fundamental Rights – **Economic, social and cultural rights – Right to education.**

*Keywords of the alphabetical index:*

Good learning / State funding / Criteria, learning / Education, academic results / High education, legitimate expectation, access.

*Headnotes:*

Regarding students who earned good academic results and possess the corresponding constitutional right to a free education at State schools of higher education, the criteria used to deem them as “good” must be known in advance. The criteria must be clear, objective and transparent. It must not deviate from the constitutional concept of “good learning”, as well as from such concept of “good learning” that arises out of the social experience of society and does not deny the meaning of the word “good” generally understood and recognised.

*Summary:*

I. The applicant, a group of parliamentarians, contested a legal regulation implementing a former Constitutional Court’s ruling. The applicant argued that the status of persons identified as good at their studies is determined not by objective criteria established by law, but rather by the students’ evaluation relative to the average of that of other students. They contend that the regulation is not in line with the criteria formulated in the Constitution, which also establishes that students selected as “good” shall have the right to free access to higher education at State schools.

II. The Court recalled its jurisprudence enshrining that the law-established criteria according to which persons whose studies are funded by the state are regarded as those who are good at their studies cannot be formalistic. The Court, moreover, noted it is not permissible to establish in advance a number (either its absolute or relative size) of citizens who are allegedly “good at their studies”. The establishment of such quotas would completely distort the constitutional concept of “good learning”.

In this case, the Court added that the law may not establish any such criteria, according to which the persons whose studies are funded by the state are regarded as those who are good at their studies, but whose learning is not in line with the generally recognised meaning of the word “good”.

Under the challenged regulation, the average results of a respective study programme and form by higher education school students of the same year compared a different period may not necessarily

conform to the generally recognised meaning of the word “good”. Put another way, the average results of studies less than 20 percentage points lower may not fall into this meaning of “good”. Yet, if the average results conformed to the generally recognised meaning of the word “good”, the average results of studies that are less than 20 percentage points lower may not necessarily conform to such a meaning.

For example, consider the average results of a respective study programme and form by students of the same year of studies during a respective period are “eight” according to a 10-point scale of assessment. The studies of a concrete person, whose studies of the first cycle or integrated studies are funded by the state, will further be funded by the state if the average results of their studies during a respective period are 6.4 points and higher. In case the average results are “seven” according to a 10-point scale of assessment, then the studies of the concrete person, whose studies of the first cycle or integrated studies are funded by the state, will further be funded by the state if the average results of their studies during a respective period are 5.6 points and higher. As such, the learning of a person, whose average results of studies during a respective period are 6.4, let alone 5.6, according to a 10-point scale of assessment, is not in line with the concept of good learning that arises out of the social experience of society and the generally recognised meaning of the word “good”.

Hence, while the regulation established the criterion of good learning, it also created preconditions for the State to fund the higher education of students at State schools whose average results of studies, including learning, do not conform to the generally recognised meaning of “good”. Consequently, State funds could be used in a constitutionally unreasoned and unfair manner from the social point of view. This is not in line with the provision of Article 41.3 of the Constitution that citizens who are good at their studies shall be guaranteed education at state schools of higher education free of charge and not in line with the constitutional principle of a state under the rule of law.

*Languages:*

Lithuanian, English (translation by the Court).



# Moldova

## Constitutional Court

### Important decisions

*Identification:* MDA-2014-3-008

**a)** Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 09.10.2014 / **e)** 24 / **f)** Constitutional review of the Association Agreement between the Republic of Moldova, of the one part, and the European Union and the European Atomic Energy Community and their Member States, of the other part, and of the Law no. 112 of 2 July 2014 on the ratification of the Association Agreement / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 2014/333-338 / **h)** CODICES (Romanian, Russian).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Sovereignty / European Union / Association Agreement.

*Headnotes:*

In line with the Declaration of Independence and Article 1 of the Constitution, the orientation towards European democratic values is a defining element of the constitutional identity of Moldova. The orientation of Moldova towards European democratic values is based on fundamental constitutional values, such as sovereignty, independence and democracy, which are universally recognised and protected.

*Summary:*

I. On 9 October 2014, the Constitutional Court ruled on the constitutionality of the Association Agreement between Moldova and the European Union, the European Atomic Energy Community and their Member States. The Constitutional Court also ruled

on Law no. 112 of 2 July 2014 on the ratification of the Association Agreement (complaint no. 44/2014).

The case originated in the application lodged with the Constitutional Court on 14 July 2014 by the Parliamentary faction of the Communist Party.

According to the applicants, the provisions of the Association Agreement affect the sovereignty, independence, neutrality, economic, and financial interests of Moldova, thus infringing on Articles 1, 7, 8, 9.3, 11 and 126 of the Constitution.

The President of Moldova opined that the provisions of international law constitute rules of obligatory conduct, setting out state rights and duties within the relations they govern. The internal action of an international treaty is determined by its validity in relation to international norms.

According to Parliament's view, co-operation between Moldova and the European Union Member States under this Agreement does not modify the nation's political system. Also, the relation does not restrict the people's right to freedom of expression, political decision-making via free elections, etc. On the contrary, the nation's approach towards the European integration model enlarges external and inter-dependent capacities of national sovereignty by strengthening its capacity to more efficiently regulate economic and political issues.

According to the Government, the Association Agreement neither pursues the country's objective of accession to the European Union nor involves any transfer of sovereign rights to European institutions. It only implies a political association and economic integration in the European Union.

II. The Constitutional Court held that Moldova's aim to establish relations in all fields of shared interest with European countries and the orientation of the state towards European democratic values are enshrined in the founding act of the state.

The Declaration of Independence provides fundamental elements that define the constitutional identity of the new State and its population. They include aspirations of freedom, independence and national unity, linguistic identity, democratisation, rule of law, market economy, history, rules of morality and of international law, European orientation, ensuring social, economic, cultural and political freedoms of all citizens, including persons belonging to national, ethnic, linguistic and religious groups.

The Declaration of Independence marks Moldova's break with the totalitarian Soviet values and the reorientation of the newly independent State towards European democratic values.

Thus, in line with the Declaration of Independence and Article 1 of the Constitution, the orientation towards European democratic values is a defining element of the constitutional identity of Moldova.

The Court noted that the main subject of international law is the state. As a bearer of sovereignty, the state represents the country in its relations with other states and international organisations and is the holder of international rights and duties.

Concurrently, the Court underscored that the state possesses the sovereign, exclusive and inalienable right to independently establish and carry out its domestic and foreign policies. It can exercise its functions to implement practical measures in order to secure the internal social life and its external relations based on respect for the sovereignty of other states, in light of the principles and rules of international law accepted by state's agreement.

The Court noted that the state's right to assume international obligations constitutes an element of sovereignty. The Court emphasised that delegating certain powers to international organisations by concluding treaties does not imply any renunciation of sovereignty. These treaties represent conventions, whereby the bearer of sovereignty delegates certain powers to another authority.

The Court held that compliance with international obligations assumed by the state willingly constitutes a legal tradition and a constitutional principle as an inseparable component of the rule of law.

The Parliament's ratification of the Association Agreement through Law no. 112 of 2 July 2014 confirms the sovereign decision of the people of Moldova to pursue European values.

The supremacy of the Constitution over the entire legal system concerning the sovereignty of Moldova must not be questioned by the signing, ratification and entry into force of the Association Agreement. The constitutional norms, which are an expression of the will of the nation, do not lose their binding force and do not change their content automatically with the entry into force of an international treaty.

Having examined the provisions of the Association Agreement, the Court found that they promote political association and economic integration between Moldova and the European Union based on

common values. They include respect and promotion of the principles of sovereignty and territorial integrity, inviolability of borders, the independence of Moldova, democracy, respect for human rights and freedoms.

Thus, the Court concluded that the orientation of Moldova towards European democratic values is based on fundamental constitutional values, such as sovereignty, independence and democracy, which are universally recognised and protected.

#### *Languages:*

Romanian, Russian.



#### *Identification: MDA-2014-3-009*

**a)** Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 13.11.2014 / **e)** 27 / **f)** Review of the constitutionality of Article 21.5.e of Law no. 52 of 3 April 2014 on People's Advocate (Ombudsman) / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 2014/352-357 / **h)** CODICES (Romanian, Russian).

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

5.1.1.4.2 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Incapacitated**.  
5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability**.  
5.3.37 Fundamental Rights – Civil and political rights – **Right of petition**.

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

Ombudsman, incapacitated persons filing complaint.

#### *Headnotes:*

The institution of the Ombudsman holds specific legal features, as it is the only one that supervises the administrative authorities in their relations with citizens. Legislative intervention, which established the exception that complaints lodged by persons declared incapacitated are not examined by the Ombudsman cannot be accepted. This would deprive them of an effective remedy concerning the protection of their rights. Thereby, the incapacitated persons are

exposed to a potential degree of vulnerability, risk and abuse, which implies the necessity for enactment of protection mechanisms and of a cautious and diligent intervention from the state.

### *Summary:*

I. On 13 November 2014, the Constitutional Court ruled on the constitutionality of Article 21.5.e of Law no. 52 of 3 April 2014 on Ombudsman (complaint no. 42a/2014).

The case originated in the complaint lodged at the Constitutional Court on 18 June 2014 by the Ombudsman Anatolie Munteanu.

On 3 April 2014, the Parliament adopted the Law no. 52 on Ombudsman, which repealed the Law no. 1349 – XIII of 17 October 1997 on Ombudsman.

According to the provision of Article 21.5.e of the aforementioned law, complaints submitted by persons declared incapacitated by court decisions are not examined by the Ombudsman.

The applicant alleged that the contested norm breached Articles 16, 52 and 54 of the Constitution and is contrary to provisions of international acts.

In the opinions of Parliament and of the President of Moldova, by exempting the Ombudsman from examining complaints submitted by incapacitated persons, the legislature had sought to protect the interests of the latter. This is in line with Article 12 of the UN Convention on the Rights of Persons with Disabilities.

From the Government's view, such restrictions deprived people with mental disorders the opportunity to defend their rights. The reason is that the submission of a request to the Ombudsman is an important defence instrument against abuses from other people. Subsequently, the aforementioned provision is discriminatory.

II. In light of the above, the Court noted that the right of petition is one of the most important rights of persons declared incapacitated. Once it is applied, it affects the exercise of all rights and freedoms affected by disability.

The Court held that the right of petition is not an absolute right. Analysed through the prism of Article 54.3 of the Constitution, it admits restrictions. However, limitations made by the legislature must not affect the very essence of the right to petition.

By relating the challenged norm to constitutional law, the Court could not identify any of the cases stated in Article 54.2 of the Constitution that would allow the restriction of the right of petition, thereby justifying the different treatment between incapacitated persons and persons with full capacity of exercise.

The Court noted that the institution of Ombudsman is the guarantor of democratic development, being the mediator between society and state administration. The purpose of the Ombudsman is to ensure a dialogue, as well as to oversee that universal values of human rights and freedoms are observed.

The Court reiterated that while a person may be declared incapacitated by a judicial act, this circumstance cannot damage the dignity of the person, which is the subject of absolute protection. Through the prism of providing a guarantee of dignity to all persons, the possibility of an activity in their own right within society shall be ensured to incapacitated persons implicitly, by providing opportunities to develop and protect their rights and freedoms.

The Court noted that the institution of the Ombudsman holds specific legal features, as it is the only one that supervises the administrative authorities in their relations with citizens. The Court cannot accept legislative intervention, which established the exception that complaints lodged by persons declared incapacitated are not examined by the Ombudsman. This would deprive them of an effective remedy concerning the protection of their rights. Thereby, the incapacitated persons are exposed to a potential degree of vulnerability, risk and abuse, which implies the necessity for enactment of protection mechanisms and of a cautious and diligent intervention from the state.

In addition, the Court held that the right of incapacitated persons to submit complaints to the Ombudsman represents an important instrument of defence against abuse from the tutor. Or, the respective state of affairs cannot entail the deprivation of the right to prove and report eventual mistreatments or abuses.

In light of the above, the Court stressed the need to increase insofar as possible the autonomy of people suffering from mental disorders in undertaken activities and measures, according to the standards enshrined in the international acts in the field.

In conclusion, the Court held that restricting direct access of a person declared incapacitated by a court decision to the institution of Ombudsman is an intervention of the legislature into the content of the right of petition. The result is that it affects its very

substance and does not pursue a legitimate aim. Hence, it is contrary to Articles 52, 16 and 54 of the Constitution.

At the same time, the Court noted that, under new approaches of international instruments, the legal mechanisms designed to protect the interests of incapacitated persons shall be wide enough to allow the adoption of appropriate legal solutions in light of different degrees of incapacity and variety of situations.

#### *Languages:*

Romanian, Russian.



#### *Identification:* MDA-2014-3-010

**a)** Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 18.11.2014 / **e)** 28 / **f)** Review of the constitutionality of Article 234 of Contravention Code of the Republic of Moldova no. 218-XVI of 24 October 2008 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 2014/366-371 / **h)** CODICES (Romanian, Russian).

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

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

5.3.13.1.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Non-litigious administrative proceedings.**

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:*

Right to silence / Penalty, administrative.

#### *Headnotes:*

A public interest of major importance, such as road traffic safety, may impose certain responsibilities towards citizens, particularly to inform the police

concerning the person entrusted with driving a vehicle. The aim is to protect traffic participants against accidents and other negative consequences, as well as to set up legal preconditions for holding liable those who breached traffic rules.

#### *Summary:*

I. On 18 November 2014, the Constitutional Court delivered its Judgment on the constitutional review of Article 234 of Contravention Code of Moldova no. 218-XVI of 24 October 2008.

The case originated in the complaint lodged at the Constitutional Court on 3 October 2014 by the Member of Parliament, Simion Furdui, to review Article 234 of Contravention Code.

The applicant considered that the invoked provisions infringed upon a person's right of defence and the right to silence.

According to the written opinion of the President, the right to silence is a basic requirement of a fair trial and is connected with the presumption of innocence. At the same time, under the European Convention of Human Rights case-law, the right to silence is not absolute and must be related each time to the circumstances of the case.

In its opinion, the Parliament mentioned that based on the constitutional provisions and the European Court of Human Rights, any person may be required by law to undertake necessary actions for the defence of public order and protection of the rights and freedoms of others.

According to the Government, a vehicle represents a source of high-risk for both life and health of persons and goods of others. Therefore, in order to ensure public safety, the state bears the duty to hold accountable vehicle owners who entrust a third party to drive their vehicles. In this respect, the state shall enjoy the right and have at its disposal mechanisms in order to obtain information on the identity of the person entrusted with driving.

II. The Court mentioned that, in accordance with Article 15 of the Constitution, all citizens shall enjoy the rights and freedoms granted by the Constitution and other laws, and are assigned the duties provided for thereby.

In this regard, the Court held that under Article 21 of the Constitution, any person accused of having committed an offence shall be presumed innocent until found guilty on legal grounds, brought forward in

a public trial, safeguarding all the necessary safeguards for his or her defence. Article 26 of the Constitution guarantees the right of defence.

The Court noted that the right to silence is an element of the right to defence as part of a fair trial.

The Court noted that the safeguard of this right by international norms is justified, particularly by the need to protect the defendant against abuse by the authorities. This includes preventing judicial errors and ensuring a fair trial. Concurrently, under the European Convention of Human Rights case-law, "the right of silence is not absolute".

The Court held that, in order to safeguard and protect traffic safety, the legislature in the Contravention Code regulated the liability for illegal acts, in the field of road traffic.

The Court noted that road traffic safety constitutes a matter of major public interest; therefore, security is a positive obligation of the state. The transportation unit, as a road traffic participant, represents a source of increased danger. The driver is compelled to comply with certain regulations imposed by the authorities to avoid the risks that can result from the use of motor vehicles. Also, the owner of the vehicle is liable for the damage caused by using the vehicle in his or her possession.

The Court held that the person, as owner of the vehicle, by enjoying the right not to disclose the names of family members and his or her close relatives, cannot prevaricate from certain obligations specifically provided by the law.

Therefore, a public interest of major importance, such as road traffic safety, may impose certain responsibilities towards citizens, particularly to inform the police concerning the person entrusted with driving a vehicle. The aim is to protect traffic participants against accidents and other negative consequences, as well as to set up legal preconditions for holding liable those who breached traffic rules.

The Court found that there are no other less restrictive means that would reach the goal of ensuring road safety. Therefore, establishing such a liability is proportionate to the aim pursued, and the imposition of such an obligation is not of excessive nature.

The Court noted that the owner of the authorised agent (user) of a vehicle is held liable under the Contravention Code in case of refusal to communicate to the authorities the identity of the person

entrusted with driving and only if the means of transport is involved in a misdemeanour or contravention.

Subsequently, the Court held that the owner enjoys the safeguards established under Article 377 of the Contravention Code, namely, the right not to testify against him or herself or his or her close relatives, regarding the matter involving the vehicle that potentially could result in a misdemeanour or contravention.

At the same time, the Court emphasised that the owner or the authorised agent's (user) mere obligation to communicate the identity of the person driving the vehicle cannot lead to the incrimination of other subsequent acts. Law enforcement institutions bear the burden of proof with respect to the infringement of legal provisions.

In conclusion, the Court stated that the contravention sanctioning of the owner or of the authorised agent (user) of a vehicle due to his or her refusal to communicate the identity of the person entrusted with driving, does not constitute an infringement of Articles 21 and 26.1 of the Constitution.

#### *Languages:*

Romanian, Russian.



# Montenegro

## Constitutional Court

### Important decisions

*Identification:* MNE-2014-3-002

**a)** Montenegro / **b)** Constitutional Court / **c)** / **d)** 17.04.2014 / **e)** UŽ-III 455/10 / **f)** / **g)** *Službeni list Crne Gore* (Official Gazette), no. 39/14 / **h)** CODICES (Montenegrin, English).

*Keywords of the systematic thesaurus:*

- 3.16 General Principles – **Proportionality.**
- 5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion.**
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
- 5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press.**
- 5.3.24 Fundamental Rights – Civil and political rights – **Right to information.**
- 5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation.**

*Keywords of the alphabetical index:*

Indemnification / Journalist, investigative / Media / Journalist, legitimate right / Public interest, legitimate / Freedom to publish information in the press.

*Headnotes:*

Following Article 10 ECHR, freedom of expression represents one of the essential foundations of a democratic society. It applies not only to “information” or “ideas” favourably received or regarded as inoffensive, but also to those that offend, shock or disturb. Protecting this freedom is of particular importance to the press, as the press is tasked, among other things, to publicise information of public importance.

The freedom to publish information in the press is limited by the need to protect the reputation and rights of other people. When assessing whether a breach of the freedom of expression occurred, each individual case must be considered in light of all the circumstances, including the contents of the

contested assertions and the context in which they were made. In particular, it is necessary to establish whether the measures taken to limit the freedom of expression are proportionate to the legitimate aim pursued by that restriction. It is important to determine under what circumstances state authorities take measures that could affect the operation of the press in cases that are of legitimate public interest. Also, in accordance with Article 10.2 ECHR, the government can interfere with the exercise of the freedom of expression only if three cumulative conditions are fulfilled:

- a. interference is prescribed by law;
- b. interference aims to protect one or several specified interests or values;
- c. interference is necessary in a democratic society.

Courts must follow these three conditions when hearing and deciding cases concerning the freedom of expression. Article 47 of the Constitution, which guarantees political rights and freedoms, states that everyone shall have the right to freedom of expression that covers speech, writing, pictures or in some other manner, which may be limited only by the right of others to dignity, reputation and honour and if it threatens public morality or the security of Montenegro.

*Summary:*

I. The applicant submitted a constitutional appeal against the Judgment of the High Court in Podgorica Gž. no. 3031/10-07, 9 July 2010. In the complaint, the applicant contended that the judgment at issue infringed upon his rights enshrined in Article 47 of the Constitution and in Article 10 ECHR. The applicant works as an investigative journalist for the weekly *Monitor* and the radio and television channel *Vijesti*. As the author of the disputed article published in the *Monitor*, he aimed to inform the public about the existence of organised drug-trafficking groups in the country. Regarding the article, the applicant claimed that he had literally transposed information published by another paper, which described that the plaintiff was associated with members of drug-trafficking groups by designating him as their protector. The applicant added that if the plaintiff denied the media reports, he was supposed to do it after the publication of the first article, not by filing a lawsuit against the journalist who quoted another paper.

The judgment of the Basic Court in Podgorica P. no. 1424/07 dated 14 May 2010 rejected as unfounded the claim seeking to oblige the applicant (who lodged the constitutional appeal) to pay to the plaintiff the sum of € 1.00 as non-pecuniary damage

for mental anguish suffered as a result of injury to his honour and reputation, with the corresponding statutory default interest starting from the date of adjudication, until the final payment.

The Judgment of the High Court in Podgorica Gž. no. 3031/10-07, 9 July 2010, reversed the first instance judgment. It upheld the plaintiff's claim to oblige the respondent to pay to the plaintiff the amount of € 1.00 as non-pecuniary damage for mental anguish suffered as a result of injury to honour and reputation.

II. The Constitutional Court reviewed the plaintiff's claim filed to the Basic Court in Podgorica against the respondent (the applicant). The claim pointed to an article on page 15 titled *Colombia on the Lim River* in the weekly *Monitor* no. 861 of 20 April 2007. In the article, "the Belgrade NIN named Rožaje resident S.K. as the boss of D.V., and the high-ranking official of the Montenegrin National Security Agency Z.L. as their protector". Furthermore, on the same page, the text reads: "The Belgrade NIN writes about that in the latest number and names D.V. "an important member of the Berane-Rožaje group".

In the proceedings before the Constitutional Court, the High Court upheld the plaintiff's claim and imposed on the respondent (the applicant) the obligation to pay non-pecuniary damages to the plaintiff suffered as a result of mental anguish and injury to honour and reputation. The Court expressed the view "that the actions of the respondent resulted in presenting false information available to the general public, which injure the honour and reputation of the plaintiff". It added that "this is a clear case of presentation of factual assertions that are susceptible of a potential truth verification and that the assertions from the concerned text inflicted mental anguish to the plaintiff because he had been presented, as a human being and a senior official of the National Security Agency, as the protector of persons who are connected with the criminal milieu, which undoubtedly had a harmful effect on his psychological experience of the text".

In the concrete case, it is undisputed, under the finding of the Constitutional Court, that the decision of the High Court constituted an "interference" with the applicant's right to freedom of expression and that it was "prescribed by law". The reason is that the challenged judgment was rendered on the basis of the Law on the Media and the Law on Obligations, in a civil action launched by the plaintiff due to damage caused to his reputation. Moreover, under the finding of the Constitutional Court, interference with the applicant's right pursued the legitimate aim of "protection of the reputation of another person". The

Constitutional Court found that the information concerning the public life of Z.L. can be considered to be a matter of public interest, especially because he is a high official of the National Security Agency.

Further, the Constitutional Court found that the interference with the applicant's right to freedom of expression was not justified and "necessary in a democratic society". It emphasised that there was no "pressing social need" to restrict freedom of expression. In not taking into account the essential meaning of the right to freedom of expression, the High Court disregarded the legitimate right of journalists to use the press to respond publicly and polemically to specific assertions made by other media in the context of matters focusing on issues of public interest (activities of criminal groups), which stem from the content of the text and from its overall context.

Therefore, the Constitutional Court determined that the High Court did not base its decision on an acceptable analysis of the relevant facts and of all circumstances important in this particular case in connection with the injury of the plaintiff's reputation. Hence, the High Court's decision breached the principle of proportionality in respect of the balance between limiting the rights of the applicants to freedom of expression and protecting the reputation of a public figure, in this case that of the plaintiff.

As such, the Constitutional Court established that the reasons given in the impugned judgment by the High Court cannot be regarded as a sufficient and relevant justification for the interference in the applicant's right to freedom of expression. The High Court did not convincingly establish that there is any "pressing social need" due to which protection of individual rights should be put above the applicant's right to freedom of expression and the public interest. The interference, according to opinion of the Constitutional Court, therefore, was not "proportionate to the legitimate aim" sought to be achieved. Also, it was not "necessary in a democratic society", which is why the applicant's constitutional right to freedom of expression referred to in the provisions of Article 47 of the Constitution and Article 10 ECHR was breached.

The Constitutional Court therefore upheld the constitutional appeal, overruled the Judgment of the High Court in Podgorica Gž. br. 3031/10-07, 9 July 2010, and remanded the case to the High Court in Podgorica for retrial.

*Cross-references:*

European Court of Human Rights:

- *Dalban v. Romania*, no. 28114/95, paragraph 50, 28.09.1999, *Reports of Judgments and Decisions* 1999-VI;
- *Lepojić v. Serbia*, no. 13909/05, 06.11.2007, p. 73.75;
- *Šabanović v. Montenegro and Serbia*, no. 5995/06, 31.05.2011, p. 36;
- *Pedersen and Baadsgaard v. Denmark*, *Reports of Judgments and Decisions* 2004-XI, p. 105, no. 49017/99;
- *Lingens v. Austria*, no. 9815/82, 08.07.1986, Series A, no. 103;
- *Ieremeiov v. Romania*, no. 2 from 2009;
- *Jersild v. Denmark*, 23.09.1994, Series A, no. 298;
- *Thoma v. Luxembourg*, 29.03.2001, no. 38432/97, *Reports of Judgments and Decisions* 2001-III;
- *Oberschlick v. Austria*, 23.05.1991, p. 57, no. 11662/85.

*Languages:*

Montenegrin, English.



## Morocco

### Constitutional Council

### Important decisions

*Identification:* MAR-2014-3-001

**a)** Morocco / **b)** Constitutional Council / **c)** / **d)** 25.07.2014 / **e)** 943 / **f)** Organic law no. 066-13 on the Constitutional Court / **g)** *Official Bulletin* (in Arabic), no. 6288, 04.09.2014 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

1.1.1.1.2 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Sources – **Institutional Acts.**

1.1.2 Constitutional Justice – Constitutional jurisdiction – **Composition, recruitment and structure.**

1.1.3 Constitutional Justice – Constitutional jurisdiction – **Status of the members of the court.**

1.2 Constitutional Justice – **Types of claim.**

1.3.4.5 Constitutional Justice – Jurisdiction – Types of litigation – **Electoral disputes.**

1.4 Constitutional Justice – **Procedure.**

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

1.4.8.3 Constitutional Justice – Procedure – Preparation of the case for trial – **Time-limits.**

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

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

*Keywords of the alphabetical index:*

Election, candidate, gender / Lawyer.

*Headnotes:*

The law cannot set aside in advance a percentage of posts in the Constitutional Court, whether for men or for women, without coming into conflict with the substantive and procedural conditions, set out in the Constitution itself, for the appointment of the members of the Constitutional Court.

Article 33 of the organic law, limiting to 6 months the possibility for the Court to extend the deadline within which it must rule on appeals concerning parliamentary elections, is not in keeping with Article 132 of the Constitution: while the legislator is permitted to lay down rules with a view to applying or amplifying the provisions of the Constitution, this should not involve the addition of a new rule such as to transform the constitutional rule itself.

The further conditions, introduced by Article 35.1 of the organic law, for lodging an appeal in electoral matters, constitute an unjustified restriction on the right of appeal and so are not in keeping with the Constitution.

### *Summary:*

Asked by the Head of the Government to rule on the conformity with the Constitution of organic law no. 066-13 on the Constitutional Court, the Council held as follows:

Article 1.4 of the aforementioned law, guaranteeing in advance a percentage of representation of women among the members of the Constitutional Court, is not consistent with the Constitution in that setting aside a percentage of Constitutional Court members' posts for one of the two sexes is incompatible with the substantive and procedural conditions, recited in the Constitution itself, for the appointment of the members of the Constitutional Court; there may be no contestation of these conditions, even if founded on the principle of prohibition of discrimination between the sexes;

Article 33, the final paragraph of which provides that the Constitutional Court shall rule by a decision stating grounds, beyond the limit of one year laid down for it to rule on appeals concerning parliamentary elections if this is necessitated by the number of appeals referred to it or by the appeal before it, but limits this extra time to 6 months, is not consistent with Article 132, final paragraph of the Constitution. This has itself directly established the time within which the Constitutional Court shall rule on the propriety of the election of the members of Parliament, and has limited this period to one year while permitting the Court to exceed it though without setting a length of time in excess. Thus Article 33, which indicates that the extra time should not exceed 6 months, does not comply with the Constitution;

Finally, Article 35 whose first paragraph requires that the written submissions made to the Constitutional Court in respect of electoral litigation be presented by a lawyer and include the address of the elected member or members whose election is challenged,

constitutes an unjustified restriction on the right of appeal, whereas the Constitution surrounds elections with a maximum of guarantees.

### *Languages:*

Arabic, French.



# Poland

## Constitutional Tribunal

### Statistical data

1 September 2014 – 31 December 2014

Number of decisions taken:

Judgments (decisions on the merits): 22

- Rulings:
  - in 13 judgments the Tribunal found some or all challenged provisions to be contrary to the Constitution (or other higher ranking act)
  - in 9 judgments the Tribunal did not find any challenged provisions to be contrary to the Constitution (or other ranking act)
- Initiators of proceedings:
  - 3 judgments were issued upon the request of a group of MPs (one of those judgments was issued upon the request of two groups of MPs and one of those judgments was issued upon the request of a group of MPs and the Ombudsman)
  - 2 judgments were issued upon the request of the Prosecutor General
  - 8 judgments were issued upon the request of the Commissioner for Citizens' Rights (i.e. Ombudsman; one of those judgments was issued upon a request of the Ombudsman and upon a request of a group of MPs)
  - 1 judgment was issued upon the request of the National Council of Probation Officers
  - 1 judgment was issued upon the request of the Union of Jewish Religious Communities in Poland
  - 2 judgments were issued upon the request of courts – question of law procedure
  - 5 judgments were issued upon the request of a physical person – constitutional complaint procedure
  - 1 judgment was issued upon the request of a legal person – constitutional complaint procedure
- Other:
  - 1 judgment was issued by the Tribunal in plenary session

- 3 judgments were issued with at least one dissenting opinion

### Important decisions

*Identification:* POL-2014-3-005

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 13.03.2013 / **e)** K 25/10 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2013, no. 432; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2013, no. 3A, item 27 / **h)** CODICES (English, Polish).

*Keywords of the systematic thesaurus:*

4.7 Institutions – **Judicial bodies.**

4.7.13 Institutions – Judicial bodies – **Other courts.**

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

5.3.13.1.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Non-litigious administrative proceedings.**

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

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

*Keywords of the alphabetical index:*

Appeal, right / Church, property / Church, Property, Committee / Church, property, restitution / Church, State, separation / Judicial protection.

*Headnotes:*

A decision issued by the decision-making panel of the Regulatory Committee, on the basis of statutes concerning relations between the state and religious communities, is a unilateral determination which has legal effect with regard to the property rights of a given religious community and a given unit of local self-government that is obliged to return an immovable property, or part thereof. The preclusion of an appeal from the decision of the Regulatory Committee, within the regulatory framework, does not preclude appeal by way of a review of the Committee's decisions by the administrative courts.

### Summary:

I. The Ombudsman challenged the constitutionality of several provisions of the Act of 17 May 1989 on Relations between the State and the Roman Catholic Church in the Republic of Poland (hereinafter, “the Catholic Church Relations Act”) and of the Act of 20 February 1997 on Relations Between the State and Jewish Religious Communities in the Republic of Poland (hereinafter, “the Jewish Communities Relations Act”), concerning the obligation of local self-government units to return immovable property or parts thereof that had been expropriated by the People’s Republic of Poland to the respective religious communities.

The applicant contended that the challenged provisions are unconstitutional for two reasons. First is the absence of any possibility for units of territorial self-government to challenge decisions issued by the so-called regulatory committees, as there allegedly is no judicial protection for the right of ownership revoked by a decision issued by a competent regulatory committee. Second, as regards the Catholic Church Relations Act, the applicant challenged the territorial units’ deprivation of the status of participants in regulatory proceedings.

II. The Constitutional Tribunal held that decisions of the Regulatory Committee have neither the character of a civil-law settlement nor of a decision issued by a quasi-common court. Nevertheless, even if it is hard to categorise the Committee as an organ of public administration, the activity of the Regulatory Committee, which consists in issuing decisions, constitutes a form of public administration activity understood in a broad sense.

Consequently, since by means of a decision issued on the basis of the second sentence of Article 33.2 of the Jewish Communities Relations Act, the Committee determines, in a unilateral way and with legal effects, the legal situation of individual entities that are outside of the Committee and the structure of government administration, a decision by the Committee bears the characteristics of an external administrative act, the issuance of which is carried out in accordance with the administrative procedure.

Regardless of the final characteristic of a decision by the Regulatory Committee, regulatory proceedings before the Regulatory Committee constitute an administrative procedure characterised by a considerable degree of autonomy within which the provisions on general administrative proceedings are applied – if not directly then at least accordingly – with a clear preference for the application of the general administrative procedure to protect the

interests of parties against any arbitrary action by an organ of public administration.

The wording “there shall be no appeal against a decision issued by the decision-making panel of a given regulatory committee” means only that regulatory proceedings are conducted at one stage. One-stage proceedings before the Regulatory Committee do not rule out the application of the other means of appeal in the course of the administrative procedure. Since a decision issued by the Committee constitutes a form of public administration activity, it falls within the scope of a review by administrative courts (Article 3.1 of the Act on Proceedings before Administrative Courts).

The entry into force of the Constitution on 17 October 1997, i.e. after the enactment of the challenged Acts, resulted in changes in the legal system that involved the introduction of certain constitutional norms, but also the modification of the content of norms derived from statutory provisions with relation to the obligation to interpret binding statutes in conformity with the Constitution. In particular, statutory regulations that were binding after the entry into force of the Act of 29 December 1998, which amended certain statutes due to the implementation of the systemic reform of the state (Journal of Laws – Dz. U. no. 162, item 1126), provided a legal basis for appealing decisions of the Regulatory Committee to administrative courts by interested communes or private parties, if issued decisions could affect their interests.

Consequently, the Tribunal ruled that the challenged provisions of the Jewish Communities Relations Act, construed in a way that does not rule out other means than an appeal against a decision issued by the Regulatory Committee, are consistent with the Constitution.

Proceedings as to the remainder, i.e. concerning the challenged provisions of the Catholic Church Relations Act, have been discontinued, because they ceased to have effect to the extent challenged prior to the delivery of the judgment by the Tribunal.

III. The Tribunal issued this judgment *en banc*. Six dissenting opinions were raised.

### Cross-references:

Constitutional Tribunal:

- Resolution W 11/91, 24.06.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, item 18;

- Judgment K 38/97, 04.05.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 3, item 31;
- Judgment SK 11/99, 16.11.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 7, item 158; *Bulletin* 1999/3 [POL-1999-3-029];
- Judgment K 8/98, 12.04.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 3, item 87;
- Judgment SK 29/99, 15.05.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 4, item 110; *Bulletin* 2000/2 [POL-2000-2-014];
- Judgment K 5/01, 29.05.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 4, item 87; *Bulletin* 2002/1 [POL-2002-1-002];
- Judgment K 21/01, 09.04.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 2A, item 17;
- Judgment P 13/01, 12.06.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 4A, item 42; *Bulletin* 2002/2 [POL-2002-2-019];
- Judgment K 13/02, 02.04.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 4A, item 28;
- Judgment K 37/02, 25.11.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 9A, item 96; *Bulletin* 2004/1 [POL-2004-1-003];
- Procedural decision Tw 41/03, 22.03.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 3B, item 168;
- Judgment K 4/03, 11.05.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 5A, item 41; *Bulletin* 2004/2 [POL-2004-2-016];
- Procedural decision Tw 46/04, 23.02.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 3B, item 99;
- Judgment SK 24/04, 21.03.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 3A, item 25;
- Judgment SK 4/05, 14.03.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 3A, item 29;
- Judgment SK 54/04, 13.06.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 6A, item 64;
- Procedural decision Tw 10/06, 13.06.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 5B, item 171;
- Procedural decision SK 70/05, 22.05.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 6A, item 60;
- Judgment P 57/07, 15.12.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 10A, item 178;
- Procedural decision Tw 23/09, 15.12.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 3B, item 140;
- Procedural decision Tw 7/10, 17.06.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 6B, item 400;
- Judgment P 10/10, 19.10.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 8A, item 78;
- Judgment K 35/08, 16.03.2011, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2011, no. 2A, item 11; *Bulletin* 2011/3 [POL-2011-3-005];
- Judgment K 3/09, 08.06.2011, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2011, no. 5A, item 39; *Bulletin* 2011/2 [POL-2011-2-003];
- Procedural decision Ts 255/10, 26.09.2011, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2011, no. 6B, item 449.

#### Languages:

Polish, English (translation by the Tribunal).



#### Identification: POL-2014-3-006

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 30.07.2014 / **e)** K 23/11 / **f)** / **g)** *Dziennik Ustaw* (Journal of Laws), 2014, no. 1055; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2014, no. 7A, item 80 / **h)** CODICES (English, Polish).

#### Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.  
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.  
 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.  
 5.3.36 Fundamental Rights – Civil and political rights – **Inviolability of communications**.  
 5.3.36.2 Fundamental Rights – Civil and political rights – Inviolability of communications – **Telephonic communications**.

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

*Keywords of the alphabetical index:*

Data, personal, protection / Data, personal, retention, blanket and indiscriminate nature / Data, retention / Privacy, invasion, proportionality.

*Headnotes:*

There is no “natural antinomy” that could not be overcome between guaranteeing security and public order and the protection of constitutional rights and freedoms. The constitutional protection of the right to privacy, arising from Articles 47, 49 and 51.1 of the Constitution, comprises all ways of exchanging messages, in every form of communication, regardless of the actual means of communication. This protection covers the entire process of obtaining, collecting, storing and processing (which includes analysing and comparing) data on individuals. In a democratic state ruled by law, the organisation of social and public life must include the possibility of individuals to act in the public realm in an anonymous way.

*Summary:*

I. The Ombudsman and the Prosecutor General challenged the constitutionality of various legal provisions concerning the operational and surveillance activities of the Police, Military Police, Border Guard and the counter-intelligence secret services. The applicants challenged a number of provisions on the basis that they did not specify with sufficient clarity the catalogue of situations that justify the use of surveillance activities, the technical measures that may be used and the application of surveillance activities to individuals obliged to respect professional secrecy and the grounds for destruction of redundant telecommunication data and on the basis that they constituted a disproportionate restriction of the right to the protection of privacy.

II. The Constitutional Tribunal observed that the constitution-maker established the privacy of the individual, not as a constitutionally assigned subjective right, but as a constitutionally-protected freedom, with all the consequences arising therefrom. The Constitutional Tribunal construes the freedom of communication in a broad sense, without juxtaposing it so strictly with the right to the protection of privacy. The Constitutional protection of privacy arising from Article 49 of the Constitution directly covers the content of communication, as well as means of distant communication.

The Tribunal noted that the growing risk that new technologies will be used to commit offences and breach the law justifies entrusting specialised organs of public authority, such as police forces and state security services with adequate powers, on the basis of which they will be able to counteract offences and detect them, prosecute offenders, and provide information concerning threats to interests that are legally protected.

The failure to provide police and other state services with the possibility of relying on the latest technology, or the provision of inadequate equipment, may entail a state failure to fulfil its constitutional duty to ensure the security of the citizens (Article 5 of the Constitution) or may infringe the principle of efficacy of the activity of public institutions (the preamble to the Constitution). What arises therefrom is the obligation on the part of the state to create conditions in which citizens may freely enjoy rights and freedoms that are guaranteed to them. A prerequisite for ensuring rights and freedoms is the sense of security in the state and the lack of threats to citizens, including threats that emerge outside the state itself.

Undoubtedly, granting police forces and state security services the possibility of acquiring traffic and location data facilitate and expedite a fight against crime; however, it considerably interferes in the realm of privacy of the individual. Regardless of particular, at times diversified, forms of interference in the realm of private life, even the mere awareness of being under constant surveillance by public authorities may discourage individuals from freely exercising the constitutional rights and freedoms that are guaranteed to them. Making it possible for police forces and state security services to gain access to information about the content, time and form of communication between individuals as well as to monitor the lifestyle of those persons in a different way, inevitably is in conflict with the right to protection of privacy, the protection of the privacy of communication, informational self-determination and in some cases (e.g., interception of communications or video surveillance) including the inviolability of the home.

Provisions that regulate access to such data require justification in the light of the principle of proportionality.

In a democratic state ruled by law the secret collection, storage and processing of information and data on individuals by public authorities and, in particular, data falling within the scope of their privacy, is admissible only on the basis of an explicit and precise statutory provision. It should specify what organs of the state are authorised to collect and process data on individuals;

the grounds for the secret collection of information on persons; the categories of subjects with regards to which operational and surveillance activities may be carried out; the types of measures applied for the secret obtaining of information, as well as the types of information acquired by means of particular measures; a maximum period for carrying out operational and surveillance activities with regard to individuals; what procedure should be applied to order operational and surveillance activities; as well as rules of procedure for handling materials gathered in the course of operational and surveillance activities.

Operational and surveillance activities should constitute a subsidiary measure for the secret gathering of information or evidence on individuals and there is a need to regulate a procedure for notifying individuals about the secret obtaining of information related to them. Furthermore, it is indispensable to guarantee that operational and surveillance activities are carried out in a transparent way by particular organs of public authority. Finally, collected data must be protected against unauthorised access on the part of other individuals and entities.

However, the Tribunal held that it is not to be ruled out that differentiation may be introduced with regard to the degree of protection of informational self-determination as well as the privacy of communication from the point of view of whether data on given persons are obtained by intelligence services and state security services or whether they are gathered by the Police, as well as due to the fact that the secret gathering of information concerns citizens or persons who are not Polish citizens.

The Tribunal declared three norms unconstitutional: concerning the destruction of redundant telecommunication data (insofar as they do not provide for a guarantee that redundant information should be subject to immediate, witnessed and recorded destruction), the disclosure of data subject to retention (insofar as they do not provide for independent supervision over disclosing) and the legal basis of civil counter-intelligence to use surveillance measures in case of crimes against essential economic interests of the State. The date on which they would cease to have effect has been deferred by 18 months (with the exception of the last quashed norm).

III. The Tribunal issued this judgment *en banc*. Three dissenting opinions were raised.

### Cross-references:

#### Constitutional Tribunal:

- Judgment U 5/97, 19.05.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 4, item 46; *Bulletin* 1998/2 [POL-1998-2-010];
- Judgment K 39/97, 10.11.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 6, item 99; *Bulletin* 1998/3 [POL-1998-3-018];
- Judgment P 12/99, 15.11.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 7, item 260;
- Judgment K 19/99, 13.02.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 2, item 30; *Bulletin* 2001/1 [POL-2001-1-008];
- Procedural decision SK 3/01, 03.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7A, item 218;
- Judgment K 11/01, 08.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 210;
- Judgment K 33/00, 30.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 217;
- Judgment U 3/01, 19.02.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 1A, item 3; *Bulletin* 2002/2 [POL-2002-2-014];
- Judgment SK 40/01, 12.11.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 6A, item 81; *Bulletin* 2003/1 [POL-2003-1-005];
- Judgment K 41/02, 20.11.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 6A, item 83; *Bulletin* 2003/1 [POL-2003-1-006];
- Procedural decision P 26/02, 28.07.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 6A, item 73;
- Judgment SK 22/02, 26.11.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 9A, item 97; *Bulletin* 2004/1 [POL-2004-1-004];
- Judgment P 21/02, 18.02.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 2A, item 9; *Bulletin* 2004/2 [POL-2004-2-012];
- Judgment K 45/02, 20.04.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 4A, item 30;
- Judgment P 2/03, 05.05.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 5A, item 39; *Bulletin* 2004/2 [POL-2004-2-015];

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- Judgment K 20/03, 13.07.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 7A, item 63;
  - Judgment SK 64/03, 22.11.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 10A, item 107;
  - Judgment P 15/02, 13.01.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 1A, item 4;
  - Judgment P 1/05, 27.04.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 4A, item 42; *Bulletin* 2005/1 [POL-2005-1-005];
  - Judgment K 4/04, 20.06.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 6A, item 64;
  - Judgment SK 56/04, 28.06.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 6A, item 67;
  - Judgment K 32/04, 12.12.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 11A, item 132; *Bulletin* 2006/1 [POL-2006-1-001];
  - Decision S 2/06, 25.01.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 1A, item 13;
  - Judgment K 17/05, 20.03.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 3A, item 30; *Bulletin* 2006/3 [POL-2006-3-011];
  - Judgment K 51/05, 05.09.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 8A, item 100;
  - Judgment SK 21/05, 12.09.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 8A, item 103;
  - Judgment P 10/06, 30.10.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 9A, item 128; *Bulletin* 2007/2 [POL-2007-2-003];
  - Judgment SK 3/05, 27.03.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 3A, item 32;
  - Judgment K 41/05, 02.07.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 7A, item 72;
  - Judgment SK 43/05, 21.05.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 4A, item 57;
  - Judgment K 8/04, 17.06.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 5A, item 81; *Bulletin* 2008/3 [POL-2008-3-008];
  - Judgment K 51/07, 27.06.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 5A, item 87;
  - Judgment P 16/08, 17.12.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 10A, item 181;
  - Judgment K 54/07, 23.06.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 6A, item 86; *Bulletin* 2009/3 [POL-2009-3-003];
  - Judgment Kp 3/09, 28.10.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 9A, item 138; *Bulletin* 2010/1 [POL-2010-1-002];
  - Judgment Kp 8/09, 03.12.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 11A, item 164;
  - Judgment SK 25/08, 22.06.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 5A, item 51;
  - Decision S 4/10, 15.11.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 9A, item 111;
  - Judgment K 41/07, 01.12.2010, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2010, no. 10A, item 127;
  - Procedural decision K 36/09, 25.10.2011, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2011, no. 8A, item 93;
  - Judgment K 33/08, 13.12.2011, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2011, no. 10A, item 116;
  - Judgment Kp 10/09, 12.01.2012, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2012, no. 1A, item 4;
  - Judgment K 37/11, 11.12.2012, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2012, no. 11A, item 133;
  - Judgment K 7/12, 15.07.2013, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2013, no. 6A, item 76.
- Court of Justice of the European Union:
- C-293/12 (*Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others*) and C-594/12, 08.04.2014, joined cases.
- European Court of Human Rights:
- *Klass et al. v. Germany*, 5029/71, 06.09.1978, *Special Bulletin – Leading Cases ECHR* [ECH-1978-S-004];
  - *Malone v. the United Kingdom*, 8691/79, 02.08.1984, *Special Bulletin – Leading Cases ECHR* [ECH-1984-S-007];
  - *Kruslin v. France*, 11801/85, 24.04.1990, *Special Bulletin – Leading Cases ECHR* [ECH-1990-S-001];
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- *Goodwin v. the United Kingdom*, 17488/90, 27.03.1996, *Bulletin* 1996/1 [ECH-1996-1-006];
- *Amann v. Switzerland*, 27798/95, 16.02.2000, *Bulletin* 2000/1 [ECH-2000-1-001];
- *Rotaru v. Romania*, 28341/95, 04.05.2000;
- *Khan v. the United Kingdom*, 35394/97, 12.05.2000;
- *P. G. and J. H. v. the United Kingdom*, 44787/98, 25.09.2001;
- *Taylor-Sabori v. the United Kingdom*, 47114/99, 22.10.2002;
- *Weber and Saravia v. Germany*, 54934/00, 29.06.2006;
- *Heglas v. the Czech Republic*, 5935/02, 01.03.2007;
- *Copland v. the United Kingdom*, 62617/00, 03.04.2007;
- *Dumitru Popescu v. Romania*, 71525/01, 26.04.2007;
- *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, 62540/00, 28.06.2007;
- *Liberty et al. v. the United Kingdom*, 58243/00, 01.07.2007;
- *Voskuil v. the Netherlands*, 64752/01, 22.11.2007;
- *Iordachi et al. v. Moldova*, 25198/02, 10.02.2009;
- *Uzun v. Germany*, 35623/05, 02.09.2010;
- *Sanoma Uitgevers B.V. v. the Netherlands*, 38224/03, 14.09.2010;
- *Hadzhiev v. Bulgaria*, 22373/04, 23.10.2012;
- *Savovi v. Bulgaria*, 7222/05, 27.10.2012;
- *Telegraaf Media Nederland Landelijke Media B.V. et al. v. the Netherlands*, 39315/06, 22.11.2012;
- *Lenev v. Bulgaria*, 41452, 04.12.2012;
- *Valentino Acatrinei v. Romania*, 18540/04, 25.06.2013;
- *Youth Initiative for Human Rights v. Serbia*, 48135/06, 25.06.2013.

- Constitutional Court of Slovenia, no. U-I-65/13-19, 03.07.2014;
- Supreme Court of the United States of America, *United States v. Jones*, 131 S. Ct. 3064 (2011).

*Languages:*

Polish, English (translation by the Tribunal).



Other Constitutional Courts:

- Constitutional Court of Austria, nos. G 47/2012, G 59/2012, G 62/2012, G 70/2012, G 71/2012, 27.07.2014; *Bulletin* 2014/2 [AUT-2014-2-003];
- Supreme Administrative Court of Bulgaria, no. 13627, 11.12.2008;
- Constitutional Court of the Czech Republic, no. Pl. ÚS 24/10, 22.03.2011;
- Federal Constitutional Court of Germany, nos. 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, 02.03.2010; *Bulletin* 2010/1 [GER-2010-1-005];
- Constitutional Court of Romania, no. 1258, 08.12.2009;
- Constitutional Court of Slovakia, no. Pl. ÚS 10/2014, 23.04.2014;

# Portugal

## Constitutional Court

### Statistical data

1 January 2014 – 31 December 2014

Total: 1 738 judgments, of which:

- Abstract reviews
  - Prior: 4
  - Ex Post Facto*: 23
  - Omission: -
- Referenda
  - National: 1
  - Local: -
- Concrete reviews
  - Summary Decisions<sup>1</sup>: 848
  - Appeals: 683
  - Challenges: 130
- President of the Republic<sup>2</sup>: -
- Mandates of Members of the Assembly of the Republic<sup>3</sup>: -
- Electoral Matters<sup>4</sup>: 13
- Political Parties<sup>5</sup>: 22
- Declarations of Assets and Income: 5
- Incompatibilities<sup>6</sup>: -

<sup>1</sup> Summary decisions are those that can be issued by the rapporteur if he/she believes that the Court cannot hear the object of the appeal, or that the question which is to be decided is a simple one – particularly because it has already been the object of a decision by the Court, or it is manifestly without grounds. A summary decision can consist simply of a referral to earlier Constitutional Court jurisprudence. It can be challenged before a Conference of the Court (made up of three Justices from the same Chamber). The Conference's decision is then definitive if it is unanimous; otherwise it can itself be challenged before the Chamber's Plenary.

<sup>2</sup> Questions regarding the President's mandate, not his/her election.

<sup>3</sup> Questions involving disputes over the loss of a seat.

<sup>4</sup> Cases involving electoral coalitions, electoral disputes and disputes about electoral administrative matters.

<sup>5</sup> Includes records of the abolition or disbanding of political parties, and challenges against decisions taken by party organs.

<sup>6</sup> Only with regard to declarations of incompatibility and disqualifications of political officeholders.

- Funding of Political Parties and Election Campaigns<sup>7</sup>: 9

### Important decisions

*Identification*: POR-2014-3-017

**a)** Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 17.09.2014 / **e)** 582/14 / **f)** / **g)** *Diário da República* (Official Gazette), 230 (Series II), 27.11.2014, 29836 / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus*:

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

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

*Keywords of the alphabetical index*:

Access to courts, regulatory system / Legal aid.

*Headnotes*:

The positive discrimination which the law affords to those lacking the economic resources to bear the costs of legal action, and which is required by the constitutional principle of effective jurisdictional protection, is designed to secure the right of universal access to courts for the effective protection of rights.

This does not mean that discrimination should extend beyond the final decision in which the Court definitively rules on the assisted litigant's right (a decision which also depends on the particular nature of the right in question). The legislator enjoys a sufficiently broad degree of discretion to shape legislation to allow it to decide whether to allow the receipt of compensation for damages in proceedings

<sup>7</sup> Annual accounts of political parties, election campaign accounts, and appeals against decisions by the Political Accounts and Funding Entity (ECFP). The ECFP is an independent organ that operates under the aegis of the Constitutional Court and whose mission is to provide the latter with technical support when it considers and scrutinises political parties' annual accounts and the accounts of campaigns for elections to all the elected entities with political power (President of the Republic; Assembly of the Republic; European Parliament – Portuguese Members; Legislative Assemblies of the autonomous regions; elected local authority organs).

where the recipient benefited from legal aid to be seen as an “increase in assets” of a type that can alter his or her economic situation and thus his or her right to legal aid.

### Summary:

I. The applicant had been granted legal aid in the form of dispensation from the requirement to pay court costs in a civil lawsuit that he would otherwise have been unable to bring because he lacked the necessary economic resources. His case was upheld and the other party was ordered to pay him compensation, whereupon the Social Security Institute cancelled the legal aid with retroactive effect.

Questions had arisen over the constitutionality of part of a norm within the legislation on the regime governing access to the law and the courts, on the basis of which the Court had upheld the cancellation of the legal aid because the beneficiary had received compensation for moral damages in a lawsuit in which he had been granted legal protection in the shape of legal aid. Under the norm, such protection must be cancelled if the person who requested it (or their household) acquires sufficient resources to be able to dispense with it.

The applicant argued that this interpretation was in violation of that part of the constitutional principle relating to access to law and the court which includes a guarantee of legal representation and other means necessary in order to go to court, should the litigant’s own economic resources be insufficient for this purpose.

II. The Court had addressed aspects of the implementation of the constitutional principle of effective jurisdictional protection in numerous earlier cases and had always adopted the same approach to the principle whereby a lack of economic resources must not prevent access to justice. The Constitution does not intend the legislator to be duty bound to build a system of justice to which every citizen has access free of charge. The constitutional principle under which no one may be deprived of access to justice due to inadequate economic resources is brought into effect through the legal aid system. The legislator must, however, implement a system under which litigants with insufficient funds to pay for their lawsuits can still defend their rights in court and are not placed at a disadvantage by comparison to a party in a more advantageous financial position.

The legislator has a wide scope in this regard; it simply has to make sure that anyone with “insufficient economic resources” receives sufficient protection. It is reasonable for the material situation of somebody

seeking legal aid to be verified during the preparatory or initial phase of legal proceedings, using criteria and procedures defined by the law. It is reasonable for this initial evaluation to be revised and for any legal aid to be cancelled if, during those proceedings and as a result of supervening facts, the beneficiary’s assets increase to the point where the benefit that was initially granted could be dispensed with. This is the solution that results from a literal reading of the norm before the Court.

The norm took on a specific dimension when the court *a quo* interpreted it in the way it did. The applicant litigated with the benefit of legal aid in the format ‘exemption from payment of court costs and other procedural expenses’. Legal aid was granted as a result of an evaluation of his assets by the competent services. The applicant had brought that lawsuit with a view to obtaining compensation in court for moral damages caused by the acts of a third party, and the court deemed that he was entitled to such compensation. The court *a quo* found that this compensation constituted acquisition of sufficient resources to allow for legal protection in the shape of legal aid to be dispensed with. The competent services then cancelled the legal aid benefit the applicant had initially been granted.

The law had not permitted such an interpretation in the past; however, the current text of the norm now allows compensation awarded by a court for damages to be considered an “increase in assets” which can be taken into account in order to cancel legal aid.

The Constitutional Court then considered whether the Constitution requires that the compensation in such cases should be excluded from this evaluation. This exclusion would preclude the interpretation made by the court *a quo*. It found that the constitutional principle did not include this prohibition.

The Constitution does preclude the situation where somebody is denied the ability to secure a just decision following a fair hearing due to lack of sufficient economic resources. The Constitution protects the right to a just and fair decision in the search for the protection of any legal position. The fact that the present case concerned the right to reparation of moral damages caused by harmful acts of a third party does not make the situation special enough to warrant an interpretation other than that the Constitution prohibits any denial of access to justice due to insufficient economic resources. Constitutional Court jurisprudence already exists to the effect that the principle of *nemine laederem* which underlies the ‘institute’ of civil liability is an unwritten constitutional principle. The principle of the state

based on the rule of law inherently includes a fundamental legal principle to the effect that any perpetrator of an unlawful act that causes damage to third parties is obliged to make up for the losses they have caused. However, this dimension of the constitutional principle did not justify changing the Court's consistent interpretation of the constitutional guarantee contained within the principle of access to the law and effective judicial protection.

III. The original rapporteur disagreed with the majority decision, was replaced in that role, and attached a dissenting opinion to the Ruling.

In his opinion, the normative interpretation before the Court was based on the assumption that, because it constitutes income, receipt of compensation for moral damages causes a positive change in the economic situation of the legal aid beneficiary. However, court-imposed compensation for moral damages does not constitute income for tax purposes under the Personal Income Tax Code (CIRS). The dissenting Justice agreed that both supervening improvements and supervening deteriorations in the person's economic situation ought to have repercussions for legal aid in existing legal proceedings; but noted that if one perceives the reparation of damage suffered as an extra-constitutional fundamental right – a category that is admitted under the principle of the open clause, when the legislator constructed the 'institute' of legal aid in the way it did, it prevented full enjoyment of the right to the reparation of damages, thereby frustrating equality of opportunity in access to justice.

#### *Cross-references:*

Constitutional Court:

- nos. 433/87, 04.11.1987; 467/91, 18.12.1991; 495/96, 20.03.1996; 245/97, 18.03.1997; 363/07, 20.06.2007; 127/08, 20.02.2008; 53/09, 28.01.2009 and 25/2010, 13.01.2010.

#### *Languages:*

Portuguese.



#### *Identification: POR-2014-3-018*

**a)** Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 17.09.2014 / **e)** 587/14 / **f)** / **g)** *Diário da República* (Official Gazette), 234 (Series II), 03.12.2014, 30383 / **h)** CODICES (Portuguese).

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

3.9 General Principles – **Rule of law**.  
 3.10 General Principles – **Certainty of the law**.  
 3.12 General Principles – **Clarity and precision of legal provisions**.  
 3.13 General Principles – **Legality**.  
 3.14 General Principles – **Nullum crimen, nulla poena sine lege**.

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

Criminalisation / Prohibition, analogy.

#### *Headnotes:*

The interpretation of a norm in the legislation governing the legal regime applicable to the consumption of narcotic drugs and psychotropic substances and the health-related and social protection of persons who consume them without medical prescription, in such a way as to maintain the previous criminalisation of the acquisition or possession for personal use of substances listed within the Executive Law in quantities greater than those needed for average individual consumption over a ten day period is not unconstitutional.

#### *Summary:*

I. Until the 2000 Law entered into force, the consumption of narcotic drugs was a crime, which attracted heavier penalties if the perpetrator possessed or acquired larger quantities of the illegal substance. However, the boundary between trafficking and consumption was defined not by a finite amount of drugs, but by whether they were intended for the agent's personal consumption. The legislator also established a crime of drug trafficking and related activities; a crime of "lesser" trafficking, and a legal classification of "dealer/consumer", which covered situations which could have been described as trafficking, but where the perpetrator intended to procure plants, substances or preparations for his or her personal use.

The National Anti-Drug Strategy (ENLD), which was approved in 1999, was founded on a strategic decision to decriminalise the possession, consumption and acquisition of narcotics, for personal use,

designating it instead as a social administrative offence. This type of acquisition and possession for personal use could not exceed the quantity needed for average individual consumption over a ten-day period. This gave rise to the question of what sanctions should be imposed on someone found in possession of a volume of drugs greater than that which a person would need for ten days of their own consumption.

Some sort of penalty clearly had to be incurred otherwise the situation would be unconstitutional. To allow someone in possession of ten days' worth of drugs to be punished by an administrative offence whilst not subjecting someone in possession of a larger amount (even if they had no intention to traffic it) would violate the principle of equality.

The Supreme Court of Justice addressed this issue in a Jurisprudential Standardisation Ruling, in which it decided that situations involving the possession or acquisition of drugs for personal use that were not converted into administrative offences by the 2000 Law would still be punishable under the crime of drug consumption. The view could also be taken that the possession or acquisition of quantities of drugs greater than those established in the Law is a punishable administrative offence.

The issue here was whether the provisions of a norm in a 1993 Executive Law should remain in force when a subsequent Law had repealed the whole of the Executive Law except the article containing the norm in question.

II. Having established that there were possible legal grounds for the court *a quo's* position, the Constitutional Court proceeded to examine whether the lower court might have taken its interpretation too far, using analogy to complete the Law, resulting in a broadening of the definition of what attracts a penal sanction. This would be unconstitutional. It also examined the existence of possible interpretations of the Law that were not unconstitutional, were methodologically more appropriate and which would lead to outcomes that were more favourable for the accused person in this particular case.

The court *a quo* had decided that the criminalisation had indeed remained in force. Methodologically speaking, it made a corrective interpretation justified by the teleology of the norm, resolving to ignore a grammatical element in the text that could have caused the norm to encompass less cases than would have been covered had it been taken literally (a literal reading of the norm would have made possession of narcotic substances up to a certain limit punishable as a social administrative offence, but

would have left a vacuum in relation to punishment for the possession of larger quantities).

The Constitutional Court noted that the lower court had acted by analogy. This was not one of the types of analogical situation which the Constitution precludes, as would have been the case had the analogy led to a broadening of the criminal liability of the individual concerned.

It would be incorrect to perceive the norm as establishing a mere social administrative offence rather than a criminal one. The courts are legally required to presume that the legislator is capable of expressing its thinking appropriately. The fact that the text of a precept categorically excludes any applicability of the administrative offence regime means that the norm cannot be interpreted to possess such a meaning.

The legislator had moved from a "criminal sanctions model" to a "prohibition by administrative offence model" to avoid catching out occasional consumers or drug addicts who should be seen as suffering from an illness. However, the reasons for this move are not valid for every kind of possession or acquisition, with no thought to the risks associated with the quantities possessed and the difficulties arising from the fact that it is often impossible to determine the exact purposes for which people are in possession of drugs.

The Court thus concluded that the normative interpretation validated by the court *a quo* did not violate the principle of legality in criminal law. This prohibition of analogy in penal law is justified by the need to respect the criminal policy programme outlined by a democratically legitimated legislator. The principle of the separation of powers is also at issue.

Traditionally, the type of analogy that is forbidden in criminal law and proceedings arises when someone interprets a norm and deduces a meaning that no longer corresponds at all to the wording of the text, however imperfectly it may be written. Shortcomings in this area always work against the legislator and in favour of the liberty of the alleged perpetrator.

The Constitutional Court had to determine whether it would be excessive, arbitrary or disproportionate to punish someone for unauthorised possession of a quantity of narcotic substances greater than that needed for average individual consumption over a ten-day period, even if it was proved to be for personal use. It found that this would not be the case.

The legislator was not, in the Court's view, acting arbitrarily or disproportionately by seeking to classify conduct involving the possession of narcotics under the above conditions as unlawful. Possession by an unauthorised person of a quantity of substances in excess of that which would serve for their own consumption for a given period of time signifies or at least allows for the possibility that they intend to offer, supply, give, distribute or sell them to third parties.

It accordingly found that the interpretation applied by the lower court was not unconstitutional.

III. The President of the Court dissented from the Ruling, taking the view that the constitutional principle of legality in criminal law means that those interpreting and applying the law cannot resolve a normative oversight in criminal law rules by "revalidating" a legal type of crime that has been expressly repealed.

#### *Cross-references:*

Constitutional Court:

- nos. 634/94, 29.11.1994; 154/98, 10.02.1998; 674/99, 15.12.1999; 559/01, 07.12.2001; 295/03, 12.06.2003 and 183/08, 12.03.2008.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2014-3-019

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 05.11.2014 / **e)** 745/14 / **f)** / **g)** *Diário da República* (Official Gazette), 233 (Series II), 02.12.2014, 30237 / **h)** CODICES (Portuguese).

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

- 3.16 General Principles – **Proportionality.**
- 3.17 General Principles – **Weighing of interests.**
- 3.22 General Principles – **Prohibition of arbitrariness.**
- 4.10 Institutions – **Public finances.**
- 4.11 Institutions – **Armed forces, police forces and secret services.**

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

Healthcare system, beneficiary contributions / Self-sustainability / Income tax, unitary nature.

#### *Headnotes:*

New legislation governing the cost of healthcare provided to members of the Republican National Guard, the Public Security Police and military personnel was not inconsistent with the Constitution.

#### *Summary:*

I. A group of Members of the Assembly of the Republic had raised questions over the constitutionality of norms that had increased the amount of the contributions to the Directorate for the Social Protection of Public Administration Servants and Agents (hereinafter, the "ADSE"), the in-house Health Service of the Republican National Guard and Public Security Police (hereinafter, the "SAD") and the Armed Forces Health Service (hereinafter, the "ADM") health sub-systems by one percent.

Healthcare during illness is provided to members of the Republican National Guard (hereinafter, "GNR") and the Public Security Police (hereinafter, "PSP") and their families by in-house health services known as SAD. The same type of care used to be given to military personnel by three subsystems, one for each branch of the armed forces, but these have now been merged into a single subsystem called ADM, which is subject to a regime parallel to that governing ADSE.

Beneficiaries are free to join ADSE or not, and then to leave it at any time. This is not the case of the SAD and ADM subsystems, membership of which is obligatory.

ADSE did not receive any transfers from the State Budget to fund its activities in 2012 or 2013. ADSE's 2014 Activity Plan says that in that year it not only expected to be financially self-sustainable, but would also have a budget surplus which would help fund 2015.

The SAD and ADM funding structure is different from ADSE's one. Both the costs of healthcare provided to SAD and ADM beneficiaries by SNS establishments and services and those inherent in the part-payment of the cost of medicines supplied by pharmacies are borne by the National Health Service budget. Where the expenditure/revenue ratio for the three subsystems is concerned, at the time of this Ruling it was estimated that while ADSE would enjoy a surplus in 2014, the SAD and ADM subsystems

would experience a budget deficit even after the increase in contributions.

Violation of the principle that personal income tax must possess a unitary nature and of the principle of equality

II. Although the petitioners took it as a given that there was a causal link between the increase in the beneficiaries' contributions and another legislative provision under which 50% of the revenue derived from the latter's employers' contributions should revert to the state purse, the Court was of the opinion that it was not possible to accept that the two solutions were normatively intertwined. The reversion to the state's coffers of half the revenues from the contributions paid by public integrated and autonomous departments, services and funds did not extend to any other income received by ADSE. The petitioners argued that the challenged norms created a personal income tax that is different from the IRS tax. In this respect the Court took the view that the ADSE contribution regime cannot be categorised as a tax. A tax is a contribution of a type which the public authorities impose on everyone, or on a certain category of people, and is designed to finance the state and public functions in general. The contribution addressed in the present case does not possess these characteristics.

ADSE beneficiaries' contributions constitute consideration for the benefits provided to them by ADSE. There is therefore no breach of the principle that personal income tax must be unitary in nature.

The explanatory statement attached to the government bill containing the norms before the Court makes it clear that the "immediate" purpose of this legislation was to ensure ADSE's medium and long-term self-sustainability.

Constitutional doctrine and jurisprudence are in general agreement that the principle of proportionality is less intensely binding on the legislator than on other aspects of the state; the judicial control based on this principle varies in extent and intensity depending on whether its object is a legislative act, an administrative act, or a jurisdictional act. The legislator is recognised to possess a considerable freedom to shape legislation. This freedom is especially important with regard to the requisites governing both the appropriateness of the means employed and their proportionality in the strict sense.

The Court said that the self-sustainability of a health subsystem is not exactly the same thing as that subsystem's ability to (self)finance itself in a given year, so it is reasonable to assume that sustainability

will presuppose the formation of surpluses. In a state based on the rule of law there cannot be any areas of "non-law". The state cannot fail to observe the need to be faithful to the key structural principles that must underlie its actions, on the circumstantial pretext that one subsystem is merely voluntary and complements another. However, the Court also acknowledged that once adequately understood, the argument regarding the non-obligatory nature of membership of ADSE is not a negligible one when it comes to applying the principle of proportionality in the strict sense.

Where the norms that require contributions to be discounted from the base pay and pensions of SAD and ADM beneficiaries are concerned, and after considering the previous legal regime, the Court found that here too the amendments only entailed changing the amount of the discounts applicable to both regular and extraordinary SAD and ADM beneficiaries.

Looking at the question of the constitutionality of these norms from the point of view of the state's obligation to ensure the defence of the nation, compliance with the law and internal security, the Court noted that these norms do not presuppose the existence of a health subsystem funded wholly by revenue from its beneficiaries' contributions. The norms do not do away with the public funding. The Court concluded that although the norms may contribute to attaining the declared goal of self-sustainability, they are not capable of doing so on their own; nor do they themselves lay down anything about the costs which these health subsystems are supposed to provide for.

Violation of the principles of equality and proportionality

The Court took the position that one cannot say that the costs of the healthcare which these beneficiaries receive from the SNS are passed on in full to the SAD and ADM subsystems.

Successive budget norms have said that the costs of the healthcare provided by SNS services and establishments to beneficiaries of the GNR/PSP SAD and of ADM must be borne by the National Health Service budget.

Turning to the principles of necessity and proportionality, the Court said that one of the grounds for finding that the principle of proportionality is not violated in the case of the ADSE health subsystem – the "freedom to join" and the "freedom to continue to be a member or to leave" – is indeed not applicable in that of the SAD and ADM subsystems, to which the respective beneficiaries are obliged to belong.

However, there was no evidence that the increase in the revenue from SAD/ADM beneficiary contributions would create a budget surplus which would in turn make the increase unnecessary and disproportionate.

The Court found no unconstitutionality in the norms before it.

III. Three Justices dissented from the majority view in relation to all the norms addressed in this Ruling, and one only from that on the norms for the SAD and ADM subsystems. With regard to ADSE, the dissenting voices considered that the fact that this subsystem had not been dependent on any transfers from the State Budget since 2012, and that in 2014 it not only became self-sustainable, but generated a budget surplus, meant that subjecting its beneficiaries to an increased contribution designed to secure a surplus over and above the system's self-funding needs, with the purpose of achieving budgetary goals linked to the consolidation of the country's public finances, accompanied moreover by persistent austerity measures including cuts in pay and pensions and an increase in the fiscal burden, meant that this measure was unnecessary and excessive.

The dissenting Justices were not swayed by the counter-argument based on the beneficiaries' freedom to join, and then remain in or leave, the subsystem. They said the increase in the contribution affected the synallagmatic relationship on which that contribution is based, regardless of whether membership is mandatory or optional.

#### *Cross-references:*

Constitutional Court:

- nos. 555/99, 19.10.1999; 484/00, 22.11.2000; 187/01, 02.05.2001; 73/09, 11.02.2009; 135/12, 07.03.2012; 862/13, 19.12.2013 and 572/14, 30.07.2014.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2014-3-020

**a)** Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 11.11.2014 / **e)** 748/14 / **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.**

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

Private security profession, accreditation / Penalties, automatic, prohibition.

#### *Headnotes:*

A norm that establishes the conditions and causes for disqualification from the work of private security guard is not unconstitutional, when interpreted to mean that the commission of the crime of domestic violence automatically leads to the denial of an application to renew a private security guard's professional accreditation. The norm is not in breach of the constitutional principle under which penalties cannot have automatic effects.

#### *Summary:*

I. This case arose from an appeal by the Interior Ministry regarding a legal norm included within an Executive Law regulating the private security industry. Under this norm, the commission of deliberate crimes attracting maximum prison sentences of over three years will be taken as evidence that the person concerned is unfit to perform the work of a private security guard. The norm sets out the crimes which the legislator deems incompatible with the exercise of this profession; conviction for any such crimes would result in an application to renew the convicted person's professional accreditation as a private security guard being automatically denied.

The court *a quo* refused to apply this norm, on the basis of the constitutional principle to the effect that automatic penalties are prohibited. This principle is intended to prevent a criminal conviction from having an automatic effect on the convicted person's civic, professional or political rights. Its rationale is simultaneously that of obviating the stigmatising effect of penal sentences, and preventing the violation of the principles of proportionality and the establishment of guilt, by making it impossible for there to be fixed penalties in criminal cases.

The Constitutional Court had already been developing a body of case law on the principle that automatic penalties are prohibited, containing a number of important examples of its implementation of relevance to the present decision, both in terms of the constitutional concept of the “loss of civic, professional or political rights” and what is meant by the “necessary effects” of criminal penalties.

The Court emphasised that dismissal, demotion, non-promotion, suspension, cancellation of professional registration and the revocation or otherwise of a licence to engage in a particular occupation all fall within the scope of this constitutional concept.

In its past cases the Court had gradually been accepting that the concepts of a prohibition on “necessary effects of criminal penalties” and of a prohibition on “automatic effects linked to conviction for committing certain crimes” are one and the same thing.

An important consideration when assessing the constitutionality of certain situations in this context is whether “accessory” sanctions or certain types of effect have been imposed mechanically, and whether the judge in the proceedings or the administrative authority with the competence to issue a licence for the occupation concerned is empowered to determine the relative weight of the relationship which the legislator has established between these sanctions on the one hand and the negative value of the conduct leading to their imposition on the other.

The Constitutional Court had been tending, when determining the applicability of the constitutional norm that prohibits the automatic nature of criminal penalties, to prefer the criterion of whether the law permits value judgements or relative weightings which can preclude that automaticity.

However, in certain cases the Court either did not consider an effect to be automatic, or identified a sufficiently relevant link between the crime committed and the activity requiring a licence, and accordingly resolved decided that the normative provisions in question were not unconstitutional.

It had, for instance, been asked to assess the constitutionality of a norm that caused a hunting licence to lapse whenever its holder was convicted of a hunting-related crime. It found that this norm was not unconstitutional; hunting is an activity that can only be undertaken by subjects who demonstrate a specific training or aptitude, and this rule is in turn justified by the need to protect environmental values to which the Constitution attaches value.

In another case, the Court found no unconstitutionality in an Executive-Law norm whereby someone convicted of the crime of driving under the influence of alcohol would inevitably be sanctioned by a ban from driving. The driving ban was, in the Court’s view, configured as part of a composite penalty, each part of which is evaluated in accordance with the same criteria. The imposition of a driving ban and that of a prison term or fine are based on proof that the accused person was responsible for the fact that typifies the crime and criminally guilty of having committed it, without the need to prove any additional facts.

In the Court’s view the constitutional norm that serves as a parameter for the present Ruling does not prohibit outright legal norms which provide for rigid sanctions. Such provisions must, however, be reasonably proportionate in relation to every form of behaviour that can constitute the legal type of crime in question.

In this particular case, the Constitutional Court found that the non-renewal of a private security guard’s professional accreditation is equivalent to a loss of professional rights for the purpose of the provisions of the constitutional norm which the court *a quo* held had been breached. Such failure to renew can be said to configure an automatic effect if someone is convicted of one of the crimes listed in the Executive-Law norm (an effect mechanically derived from the norm). This is tantamount to stating that the administrative body with competence to determine the renewal has no latitude allowing it to decide, case-by-case, on the existence of a link between the commission of a particular crime and the loss of the professional right in question.

The precept cannot be unequivocally described as unconstitutional. It might be unconstitutional if a strong connection could not be deduced between the crime committed and the activity subject to licensing, which could then justify the proportionality of the automatic nature of the effect. The existence of such a connection would mean that there was no manifest lack of proportion between the unlawful fact and its effect under the norm.

The crime of which the former security guard in this case had been convicted entailed a crime against the person. There was a sufficiently strong link between the type of crime that had effectively been committed and the type of professional activity the norm seeks to disallow in such cases. The Court noted the significance of and risk posed by the work of private security guards in a state based on the rule of law, particularly in view of the technical resources available to such persons in certain situations.

Moreover, the restriction does not last indefinitely; the regime provided for in the norm does not exclude the possibility that a court can subsequently wipe the offender's record clean. The Court therefore concluded that the norm before it was not unconstitutional.

III. The Ruling was unanimous.

#### *Cross-references:*

- nos. 91/84, 29.08.1984; 255/87, 26.06.1987; 363/91, 30.07.1991; 291/95, 07.06.1995; 522/95, 28.09.1995; 53/97, 23.01.1997; 202/00, 04.04.2000; 461/00, 25.10.2000; 149/01, 28.03.2001; 562/03, 18.11.2003; 154/04, 16.03.2004 and 25/11, 12.01.2011.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2014-3-021

**a)** Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 12.11.2014 / **e)** 786/14 / **f)** / **g)** *Diário da República* (Official Gazette), 251 (Series II), 30.12.2014, 32733 / **h)** CODICES (Portuguese).

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

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

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

Emphyteutic lease / Possession, adverse / Compensation, right.

#### *Headnotes:*

A normative act established a regime under which emphyteutic leases (a type of real estate contract that specifies the lessee must improve the property with construction) were created by adverse possession. The norms had the effect of causing the transfer of full title to the property in question, without any compensation.

#### *Summary:*

I. This concrete review case, where the issue was the right not to be deprived of one's assets, arose from a mandatory appeal the Public Prosecutors' Office had brought against a decision in which the Supreme Court of Justice refused to apply a legal norm on the grounds it was unconstitutional.

Questions had arisen over the constitutional compliance of certain norms that, taken together, established a regime under which emphyteutic leases were constituted by adverse possession. When this regime was combined with the abolition of emphyteutic leases and the 'useful' and 'direct' forms of domain over real property were merged, this resulted in the transfer of full title to the land in question. The law containing the norms had no provision for compensation.

II. The Court began by describing the legislative evolution of the 'institute' of emphyteutic leases, which had existed for over a thousand years. The 19<sup>th</sup> Century Seabra Civil Code defined it as a right whereby the owner of any piece of land (rural or urban) transferred the useful domain over it to another person, who undertook to pay the owner a fixed annual rent. The emphyteutic lease thus took the shape of the division of the right of ownership into two types of domain over the same asset – the direct domain and the useful domain. Both domains were autonomous and possessed their own content.

The 1966 Civil Code maintained this 'institute'. The emphyteutic lease was a real right and was perpetual, although it could be remitted. Contracts with a limited term were instead seen as rentals. The useful domain was indivisible unless the landlord agreed otherwise, as was the direct domain. The ground rent (paid annually in cash or kind by the emphyteutic lessee) could be remitted if the lessee exercised the option available to him or her under certain conditions to buy the direct domain.

Emphyteutic leases could be entered into by contract, bequeathed in a will, or acquired by adverse possession. The latter case could involve acquisition of the direct domain, the useful domain, or both at the same time by different people.

After the Revolution of 25 April 1974, the legislator put an end to the legal emphyteutic lease relationship, abolition of which was sanctioned by the Constitution. In 1976, emphyteutic leases of rural property and of urban property were abolished by two separate Executive Laws. At the time, the state alone still held around 400 000 rural direct domains valued at more than a billion escudos.

In the case of rural emphyteutic leases, the principle was established that full title should be concentrated solely in the hands of the emphyteutic lessee. The state undertook the obligation to compensate a restricted subjective number of holders of the direct domain over these properties. The remaining holders were not entitled to any indemnity. The legislator opted for a different solution in relation to urban emphyteutic leases, under which all holders of direct domains were compensated.

A number of different legislative acts regulated the formation of emphyteutic leases (of rural properties) by adverse possession. One of them recognised the possibility that adverse possession be constituted *ex lege*. However, legal doctrine considered this possibility to be in breach of the 1976 Constitution and a distortion of the notion of adverse possession.

The Constitution guarantees the right to private property and states that requisition and expropriation in the public interest must give rise to payment of fair compensation.

In its jurisprudence, the Constitutional Court has taken the position that although the right to property is covered in the Title of the Constitution on “Economic, social and cultural rights and duties”, there is a dimension to this right enabling it to be seen as analogous to the constitutional rights, freedoms and guarantees themselves.

The Court has repeatedly found that the civil law concept of property and ownership and the corresponding constitutional law concept are not exactly the same. It has also held that the constitutional guarantee of the right to property means that no one can be deprived of their property except by means of an appropriate process and in return for fair compensation.

When the 1976 Executive Law came into force, full title was consolidated in the holder of the useful domain over the type of property in question, and the landlord’s right was lost. The 1997 Law introduced a regime under which it was possible to recognise that emphyteutic leases had been constituted by adverse possession, solely in order for this to be used as a stepping stone to full title.

Given that the right to property is guaranteed “in accordance with the Constitution”, the ordinary legislator’s freedom to shape legislation in this area is especially strictly bound by the need to comply with constitutional limits. In previous cases, the Court had taken the view that the Constitution not only permits the deprivation of ownership by expropriation or requisition, for which it makes express provision, as

well as other forms of deprivation undertaken in the name of a necessary public interest, but also other more or less intrusive limitations and restrictions on the right to property. Some of these result from solutions adopted in order to resolve conflicts of rights in the field of private law relations, under which it may be possible for one of the opposing positions to be sacrificed in its entirety. The decisive factor in deciding whether such restrictions are permissible is whether they possess constitutional coverage or justification.

In the case of the abolition of emphyteutic leases, the deprivation of the right of the party with direct domain over the property by consolidation of ownership in the holder of the useful domain does possess a constitutional justification, derived from a relative weighing up of the various constitutional commands regarding the national agricultural policy. However, this justification does not extend to any interpretation that would legitimise a transfer of ownership without providing for compensation. The norms before the Court were therefore held unconstitutional.

III. One Justice dissented from the Ruling.

#### *Cross-references:*

[http://www.tribunalconstitucional.pt/tc/content/files/biblioteca/cc/cc\\_volume\\_21.pdf](http://www.tribunalconstitucional.pt/tc/content/files/biblioteca/cc/cc_volume_21.pdf)

- nos. 14/84, 08.02.1984; 404/87, 29.07.1987; 44/99, 19.01.1999; 329/99, 02.06.1999; 331/99, 02.06.1999; 517/99, 22.09.1999; 205/00, 04.04.2000; 215/00, 05.04.2000; 263/00, 03.04.2000; 425/00, 11.10.2000; 57/01, 13.02.2001; 187/01, 02.05.2001; 391/02, 02.10.2002; 491/02, 26.11.2002; 139/04, 10.03.2004; 360/2004, 19.05.2004; 159/07, 06.03.2007; 444/08, 23.09.2008; 496/08, 09.10.2008 and 421/09, 13.08.2009.

#### *Languages:*

Portuguese.



*Identification:* POR-2014-3-022

a) Portugal / b) Constitutional Court / c) First Chamber / d) 10.12.2014 / e) 851/14 / f) / g) / h) CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Professional order, membership, requirements, changes.

*Headnotes:*

The Statute governing a professional order sets out the requisites for registering as a member of that order. A section of this legislation subjected that registration (and thus the ability to practise the profession in Portugal) to possession of a Bachelor's Degree (formerly a Licentiate). This norm did not safeguard the legal position of persons already exercising the profession under the previous rules, which is not in line with the constitutional principle of legal certainty.

*Summary:*

I. This concrete review case resulted from an appeal against a decision of the Central Administrative Court – South (hereinafter, “TCAS”).

The norm within the Statute governing the Order of Portuguese Psychologists (hereinafter, “EOPP”) submitted to the Constitutional Court had been approved by a 2008 Law that made no provision for the position of psychologists who were already pursuing that professional occupation under the previous legal framework.

The applicant had successfully completed the Psychology Course at the Institute of Applied Psychology, ISPA) in the 1978/79 academic year, and obtained her professional accreditation as a psychologist in 1983. The ISPA Psychology Course's curricular structure at the time meant that its completion did not award a bachelor's degree (or, in pre-Bologna terms, a licentiate). The course was only recognised as equivalent to a bachelor's degree in

1986.

She alleged that the norm undermined the constitutional right to exercise a profession, and was in breach of the principles of necessity, appropriateness and proportionality to which norms that restrict constitutional rights, freedoms or guarantees are subject. The applicant submitted a request for an injunction to protect constitutional rights, freedoms and guarantees to the Lisbon Judicial District Administrative Court (hereinafter, “TACL”), and when she was unsuccessful, appealed to TCAS and then the Constitutional Court.

The object of the present appeal on the grounds of unconstitutionality was directed at the part of an EOPP norm that subjected membership of the Order of Psychologists and thus the exercise of that profession, to possession of a Bachelor's Degree (Licentiate) in Psychology. This was a new requirement. No provision was made for a transitional regime for persons who did not hold such a degree, but who did fulfil the requirements which had applied prior to the entry into force of the new norm, particularly possession of the former Psychologist's Professional Accreditation.

II. The Court began by examining the former regime governing training for psychologists. Until the Order and its Statute were created, psychologists who had trained before there was a Bachelor's Degree (Licentiate) in Psychology had practised with the qualifications they needed at the time.

Those qualifications did not include membership of a professional order – there was none – but did involve holding professional accreditation. The 2008 Law made membership of the Order of Psychologists a condition for the professional practice of psychology in any sector of activity.

2012 saw the approval of a regime that permitted admission to the Order by means of a “grand-parenting” system, an alternative channel for access to registration with the Order and thus the ability to practise as a professional psychologist, subject to fulfilment of several cumulative requisites. However, the Constitutional Court did not consider the existence of this alternative to be relevant to its ruling on the norm before it. The “grand-parenting” system was introduced under the regulatory authority of the Order of Psychologists itself, but the Court noted that the question of constitutionality here was clearly linked to the freedom to gain access to a profession. That freedom is one of the personal constitutional rights, freedoms and guarantees. Only the Assembly of the Republic is competent to legislate on matters concerning constitutional rights

freedoms and guarantees, although it does have the power to authorise the Government to do so as well (this is an area which falls within the Assembly's partially exclusive legislative competence). On the legislative level, a transitional regime in this field could only be created by a Law passed by Parliament, or by an Executive Law if the Government was authorised to issue it.

The Court noted the sensitivity of this matter, which strikes at the core of the right to a free choice of profession, in direct conflict with a person's freedom to choose a profession which they had been practising lawfully under the terms of the requirements that had applied until the norm came into force.

The court *a quo* had concluded that the change in the legal system brought about by making it necessary to hold a bachelor's degree (licentiate) in order to exercise the profession of psychologist was something which could have been expected. However, the Constitutional Court noted that there is a recent legislative trend in Portugal, whereby the imposition of new requirements for engaging in a professional occupation is generally accompanied by a transitional regime. These regimes allow existing practitioners to register with public associations during a given transitional period, although they do not meet the new requisites.

To determine the applicability of the principle of legal certainty, or trust in the legal system, an assessment was made of the consistency and legitimacy of the expectations of the citizens affected by the change in the law.

The legislator must take particular care when introducing changes which could potentially prevent someone from pursuing an occupation which has hitherto been the driving force behind their income and subsistence. The Constitutional Court could not identify a particularly important public interest that would have enabled it to disregard the need to observe the principle of the protection of legal certainty.

The measure under challenge imposes substantial requisites for joining a public association, membership of which is mandatory in order to engage in the activity regulated by the association. The Court's consolidated jurisprudence shows that it can only be perceived as a measure that restricts the freedom to choose a profession. This is an area in which it is not permitted for professional associations or 'orders' to possess autonomous regulatory competence.

An assessment was then needed, under the principle of proportionality, as to the existence of public interest reasons why the amended regime should not continue in its previous form, and thus why it is justifiable for the existing trust not to be protected. Constitutional jurisprudence says that when this weighing-up process takes place, and especially when what is at stake are lasting legal relations in the professional domain or certain fundamental rights, such as the right to a pension, significant importance must be attached to whether provision has been made for a transitional regime allowing for the possibility of mitigating the abrupt nature of the normative changes.

The norm before the Court in the present case could be described as retroactive. This was the situation in which the applicant found herself: after previously securing the right to practise as a professional psychologist by obtaining the applicable professional accreditation, in order to continue practising under the new regime, she needed an academic qualification – a bachelor's degree – she did not possess.

As such, and without sufficient reason for doing so, the norm obstructed a legitimate trust or certainty that merited constitutional protection. The Court declared it unconstitutional.

#### *Cross-references:*

- nos. 347/92, 04.11.1992; 786/96, 19.06.1996; 255/02, 12.06.2002; 368/03, 14.07.2003; 355/05, 06.07.2005; 128/09, 12.03.2009; 3/10, 06.01.2010; 3/11, 04.01.2011; 362/11, 12.07.2011; 88/12, 15.02.2012; 89/12, 15.02.2012; 176/12, 28.03.2012; 353/12, 05.07.2012 and 294/14, 26.03.2014.

#### *Languages:*

Portuguese.



#### *Identification: POR-2014-3-023*

**a)** Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 10.12.2014 / **e)** 858/14 / **f)** / **g)** / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Public service, disciplinary proceedings.

*Headnotes:*

The imposition of a sanction that leads to the total deprivation of a retirement pension of a public servant who has already left the service on retirement cannot be intended to have any special preventative effect; that person is no longer in a position to commit the same infraction. It can only be justified by goals of retribution and general prevention based on the dual need to punish the person in question for the damage caused by the unlawful fact for which he or she is responsible, and to dissuade other staff who are still active from doing anything similar.

*Summary:*

I. This concrete review case arose from an appeal against a decision of the Supreme Administrative Court (STA). The applicant, a retired police officer (Public Security Police, PSP) was sentenced to the loss of his right to a pension for four years for infractions committed when he was still on active duty, under a norm that allowed the disciplinary penalty of dismissal from the service to be substituted by this loss of pension. A norm with identical scope used to exist as part of the Disciplinary Statute governing Staff and Agents of the Central, Regional and Local Administration. It was revoked when a Law came into force in 2008 that made a number of changes to previous version of the Statute.

The right to a public sector retirement pension can be claimed when the public servant ceases his or her active professional life. Pensioners at that point usually no longer enjoy mechanisms enabling them to protect and provide for themselves and adapt their behaviour to new circumstances. Their earning capacity may be diminished by their age. The material sacrifice that may be imposed on them by losing the right to a pension because they committed a disciplinary infraction whilst still on active duty cannot normally be made up from other economic

resources available to them by other means. In the absence of a safeguarding clause that precludes eliminating the entire pension for a given period of time, the pensioner may be placed in a hardship situation that may even endanger his or her basic living conditions.

Such retirees arguably have a right to material assistance within the overall framework of a non-contributory social protection system which is funded by transfers from the State Budget and is intended to deal with hardship situations. Exercising this right for four years instead of receiving the pension they were deprived of for that time would concretely fulfil their right to a dignified standard of living. However, it was illogical and unnecessary to use this as a way of replacing pensions formed under a compulsory, contributory social protection system, without considering the negative effect this might have on the lives of those targeted by the measure.

II. The court *a quo* had given no indication that the applicant possessed assets or other forms of income that could have provided for his life needs and which could have prevented the alleged violation of the principle of human dignity raised with the Constitutional Court. In the absence of such elements, the Court analysed this question of constitutionality in the light of the legal effect which directly resulted from the norm – the suppression of the right to a pension for a period of time, and the ensuing deprivation of the economic conditions that would have provided for the pensioner's upkeep in place of his previous salary.

In the past, the Constitutional Court had used the fundamental right to a dignified standard of living as a parameter for its decisions on the constitutional conformity of legal provisions that cause retired public servants to lose the right to a pension for infractions that would have caused their dismissal had they still been working. Its point of reference was its prior jurisprudence on the unconstitutionality of norms that allow the attachment of income derived from social pensions or pay from work when that income is not greater than the national minimum wage.

This jurisprudence is not entirely uniform. It includes rulings in which the Court found no unconstitutionality in that part of a legal regime that is designed to fulfil the guarantee that pensioners enjoy a minimum level of subsistence by precluding the attachment of benefit payments from social security institutions in certain circumstances. Yet it has held unconstitutional certain procedural norms that would have allowed the attachment of parts of pensions or salaries with a total value not exceeding the national minimum wage, thus bringing the recipient's income below that wage. It has also found that the deduction of amounts from a

parent's social invalidity pension in order to pay maintenance to an underage child, which would have deprived the parent of the income required to satisfy his essential needs, was unconstitutional.

On the other hand, in a situation quite similar to the one in this matter, the Court found that it was constitutionally permissible for a retired public servant to lose an amount in pension due to a disciplinary infraction he committed before he retired.

By completely eliminating the pension, the measure presently before the Court went beyond the strictly pecuniary nature of a disciplinary penalty and affected the agent's means of subsistence. The measure had this effect not within the framework of a working relationship, but within the scope of what was now a legal social security relationship.

Any legislative solution needs to ensure a minimally decent standard of living, even if this means extending the duration of the penalty in such a way as to diminish the person's assets by the same amount, but over a longer period of time, thereby effectively achieving the goals of retribution and general prevention without endangering the right to subsistence.

In reaching the present decision, the Court attached special importance to the difference between the imposition of a penalty and the satisfaction of a credit. The retirement pension was not lost because it was attached with a view to coercively fulfilling a credit right which the debtor (the pensioner) had not satisfied voluntarily; rather, it was a disciplinary penalty designed to pursue goals of exacting retribution and generally preventing other occurrences – goals that would have been definitively prejudiced if agents who committed infractions were exempt from penalty because they had retired in the meantime.

The Court concluded that the imposition of a disciplinary penalty and the fulfilment of a credit right are different. What is at stake in the former is the public interest in punishing an infraction in breach of certain operational matters, although the actual penalty was imposed after the person in question had retired.

It has previously been contended that if the application of the legal regime in question had deprived the pensioner of the minimum considered indispensable in order to ensure a minimally dignified level of subsistence, he or she could have resorted to the normal social welfare mechanisms which the Portuguese system provides for in situations of unacceptable social hardship.

The Court accepted that the interested party could resort to welfare mechanisms if he was deprived of the minimum deemed indispensable to a dignified subsistence. Then there would be no violation of the principle of the dignity of the human person.

However, the Court went on to emphasise that although one must recognise that the loss of the right to a pension due to the commission of a disciplinary infraction on the one hand, and the attachment of salaries or social benefits in order to coercively fulfil a credit right on the other, are subordinated to legislative policy reasons with varying degrees of importance, when it is applied to either of these situations the fundamental right to a dignified standard of living, which itself arises from the principle of the dignity of the person, is subject to the same relative valuation criterion.

In its jurisprudence, the Court has recognised that the dignity of the human person is a principle which can be directly invoked in the field of the protection of material living conditions. Whenever the Court has looked at the essential core of the guarantee of a dignified standard of living, which is inherent in the respect for the dignity of the human person, it has repeatedly and constantly used the amount of the national minimum wage as its reference point. This amount was defined as being the "absolute minimum"; it cannot be reduced for any reason.

The Court has taken the view that the Constitution does not permit the attachment of social benefits, the amount of which does not exceed the national minimum wage, and that it precludes any attachment of labour income that might mean that the worker or debtor no longer had at least the national minimum wage available to them, even if they had no other assets or income that could be attached. In another situation, the Court used the guarantee of a minimum level of subsistence to decide that it is constitutionally justifiable for the law to require insurers to update the annual amount of pensions due as the result of deaths caused by work-related accidents.

The Court considered that there was no reason why this principle should not apply to the elimination of the whole of a retirement pension for a continuous period of four years, even if this resulted from the imposition of a disciplinary measure.

Such disciplinary measures are designed to protect the proper operation of the Public Administration. Their primary purpose is as a deterrent, to motivate the administrative agent who committed the disciplinary infraction to fulfil his or her duties in the future. The goals of retribution and general prevention are seen as secondary, mainly because of

the principle that a measure must be opportune (the Administration can decide whether to implement a disciplinary procedure, based on its assessment as to whether it is opportune from the perspective of the public interest to exercise its disciplinary power).

Since the entry into force of the 2008 Law, termination of a legal public employment relationship in the Central, Regional and Local Administration extinguishes any outstanding disciplinary matter (provided the relationship is not subsequently renewed).

In the decision that was the object of the present appeal, the court *a quo* had argued that application of the principle that people must enjoy a dignified standard of living could undermine the ability to impose penalties involving actual dismissal from the service, because dismissal also eliminates the dismissed person's income. This situation was not, in the Constitutional Court's view, comparable to the loss of the right to a pension. The effects on the dismissed person's assets caused by this measure and the resulting elimination of the remuneration paid in return for doing the job are simply the consequence of the termination of the labour relationship. The dismissed agent is entirely at liberty to take up other employment or seek other sources of income via the labour market. As a last resort, he or she also continues to enjoy the right to unemployment benefits with which the welfare system replaces income from work in such cases.

The Constitutional Court accordingly found the norm unconstitutional.

#### Cross-references:

- nos. 105/90, 29.03.1990; 232/91, 23.05.1991; 349/91, 03.07.1991; 411/93, 29.06.1993; 62/02, 06.02.2002; 177/02, 23.04.2002; 306/05, 08.06.2005; 442/06, 12.07.2006; 518/06, 26.09.2006; 28/07, 17.01.2007 and 188/09, 22.04.2009.

#### Languages:

Portuguese.



## Romania Constitutional Court

### Important decisions

*Identification:* ROM-2014-3-005

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 25.06.2014 / **e)** 356/2014 / **f)** Decision as to the constitutional compliance of provisions of Article 118.2.a of the 1969 Criminal Code / **g)** *Monitorul Oficial al României* (Official Gazette), 691, 22.09.2014 / **h)** CODICES (Romanian).

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

5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis***.

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

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

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

Criminal procedure, evidence, admissibility.

#### *Headnotes:*

Where somebody has been convicted of a serious offence which poses a danger to society, which has allowed the perpetrator to accumulate goods with a value clearly in excess of his or her lawful income, and the judge is firmly of the mind that these goods have resulted from the perpetration of this type of offence, confiscation of the goods for an extended period does not violate the constitutional presumption of lawful acquisition of wealth. This presumption is not absolute; it may be overturned by evidence and by mere assumptions provided these assumptions are accompanied by effective judicial guarantees.

The provisions under dispute establish such guarantees, namely the measure must be ordered by a court which has reached the firm conclusion that the

property to be confiscated originates from criminal activities, following public judicial proceedings in which those concerned have had access to the file and to the arguments of the prosecution, along with the chance to put forward any evidence they deemed necessary. Extended confiscation is a concept of substantive law; it cannot be applied to goods acquired before the entry into force of the law that governs it. This would violate the principle of non-retroactivity.

### *Summary:*

I. The Constitutional Court was asked to assess the constitutional compliance of Article 118.2.a of the 1969 Criminal Code, which reads:

“Extended confiscation shall be ordered where the following conditions are cumulatively met: a. the value of the property acquired by the sentenced person, during the five years before and, if necessary, after the time when the offence was committed, and until the date of issue of the document instituting the proceedings, clearly exceeds the income obtained lawfully by the respective person;”.

The suggestion was made that these provisions ran counter to Article 15.2 of the Constitution, (retrospective application of criminal law) and Article 16.1 of the Constitution (the principle of equal rights) because they placed those defendants who were tried before Article 118 was introduced into the Criminal Code by Article I.2 of Law no. 63/2012, (published in the Official Gazette Part I, no. 258 of 19 April 2012) in a clearly favourable situation. This was discriminatory against those defendants who were prosecuted after the provisions came into force, for acts they had committed within the same time span as the first group. There is no objective or reasonable justification for bringing about such a difference in treatment, which is dependent on when the court tries the case, and it has affected the rights of defendants who were sentenced before Law no. 63/2012 entered into force.

The applicant also claimed that the provisions violated the second sentence of Article 44.8 of the Constitution (the principle of the lawful acquisition of wealth). In terms of the lawful acquisition of wealth, the burden of proof is not on the defendant to demonstrate how he or she has acquired wealth or obtained revenue but on the prosecution, to show that the defendant's property or assets were acquired through unlawful activities of a criminal type.

II. The Court began by noting that the preventive measure of extended confiscation was introduced by

Law no. 63/2012 amending and supplementing the Criminal Code and Law no. 286/2009 on the Criminal Code, which implements the Council Framework Decision 2005/212/JHA. The conditions required by the national legislation for the measure of extended confiscation can also be found in the provisions of Article 3.2, 3.3 and 3.4 of the above Decision.

Before the legislative amendment in criminal matters was introduced, the Constitutional Court, in its Decision no. 799 of 17 June 2011 (published in the Official Gazette, Part I, no. 440 of 23 June 2011) stated that the assumption of lawful acquisition of wealth does not prevent the primary or the delegated legislature, in the application of Article 148 of the Constitution (integration into the European Union) from adopting regulations to ensure that EU legislation is fully respected in the area of the fight against crime. The contested provisions allow for extended confiscation to be ordered where somebody has been convicted for a serious offence which poses a danger to society and which has allowed the perpetrator to accumulate goods clearly in excess of his or her lawfully obtained income, and the judge is convinced that these goods result from perpetration of the same type of criminal offences.

Turning to the alleged violation of Article 16.1 of the Constitution, the Court held that the principle of equal rights does not mean uniformity, so that, if equal treatment must be applied to similar situations, in cases of different situations the treatment can only be different. Thus, the more favourable criminal law, which does not provide for extended confiscation, will apply to those who committed offences before the disputed provisions came into force, and the law in force at the time, i.e. the law which provides for extended confiscation, will apply to those who committed offences after the entry into force of these provisions. The Court accordingly found that Article 16.1 of the Constitution had been complied with in full.

With regard to the suggestion that the disputed provisions deprived the presumption of lawful acquisition of wealth of its content, the Court drew a distinction between the two categories of rights envisaged in the Basic Law, namely absolute rights (i.e. the right to life and the right to physical and mental integrity), which cannot be restricted in any circumstances by State authorities, and relative rights, which may be subject to restriction under certain conditions.

The right to property is not unlimited. Boundaries are set to its exercise by the law. The law also expresses the balance between the individual interests of property owners and the collective or general interest.

Yet the assumption of lawful acquisition of wealth is one of the constitutional guarantees of the right to property. It is based on the general principle according to which any legal act or deed is lawful until there is proof to the contrary. In relation to a person's wealth, unlawful acquisition must be proven. Therefore, since the right to property is not an absolute right, but may involve certain limitations, it cannot be claimed that a guarantee of this right may be absolute. Otherwise, a situation could arise where the primary right might be subject to limitation, but in certain situations, through the application of this assumption, it could become absolute. If the assumption of the lawful acquisition of wealth was absolute, contrary to the constitutional provisions, this would deny the legitimate interests of society as a whole, which the State is required to protect, and would also disturb the balance which must exist between the general interests of society and the legitimate interests of each individual. The Court also noted that extended confiscation could be ordered in cases of serious crime, with the potential to procure and generate illicit money, offences often connected with organised criminal groups that are part of the organised crime phenomenon. If the assumption of lawful acquisition of wealth were absolute, this would impose a "*probatio diabolica*" on the judicial bodies.

As the assumption of lawful acquisition of wealth is not irrebuttable, this does not lead to a reversal of the burden of proof, and the principle *actori incumbit probatio* remains fully applicable. The Court then examined the standard of proof needed to rebut a rebuttable legal assumption. With regard to extended confiscation, the Court held that it must not be presumed that the assumption of lawful acquisition of wealth may be rebutted only by evidence, namely by proving that the goods in question came from the proceeds of crime; it could also be rebutted by a mere assumption.

The Court observed that the use of assumptions in confiscation proceedings has been recognised by the European Court of Human Rights, although this must be accompanied by certain guarantees, which are intended to protect the rights of the defence. The European Court of Human Rights has ruled that each legal system recognises the assumptions of fact or of law; such assumptions are not ruled out by the European Convention on Human Rights. However, the right of the applicants to respect for their property presupposes the existence of an effective judicial guarantee (Judgment of 5 July 2001 in *Arcuri v. Italy*). Jurisprudence from the European Court of Human Rights (Judgment of 23 September 2008 in *Grayson and Barnham v. the United Kingdom*, § 45; Judgment of 5 July 2001 in *Phillips v. United Kingdom*, §§ 42 and 43; Judgment of 5 July 2001 in *Arcuri v. Italy*;

Judgment of 27 June 2002 in *Butler v. the United Kingdom*) indicates the necessity for certain guarantees.

Firstly, the assessment must be made by a court, during criminal proceedings, including a public hearing; the defence must have access to the case-file in advance of the arguments of the prosecution; the parties concerned must be able to raise objections and to put forward whatever evidence, whether in written or oral form, they consider necessary; the assumptions on which the accusation relies must not be absolute, so that they are open to rebuttal by the defendant.

The Court found that the provisions on extended confiscation, introduced by Law no. 63/2012, encapsulate the guarantees set out in European Court jurisprudence. Extended confiscation is ordered by a court on the basis of its certainty that the property in question originates from criminal activities, a certainty reached following public judicial proceedings in which those concerned have had access to the file and to the arguments of the prosecution, along with the opportunity to put forward whatever evidence they deemed necessary. The provisions did not, therefore, infringe the provisions of Article 44.8 of the Basic Law.

However, the Court upheld the argument the applicant had put forward to the effect that the provisions subject to constitutional review allowed for retroactive application of the measure of extended confiscation, in breach of Article 15.2 of the Constitution, in that they applied to goods acquired up to five years previously (i.e. before Law no. 63/2012 came into force). Having regard to Constitutional Court case law which describes extended confiscation as a concept of substantive law, the Court found that the legal rule could not apply retrospectively to the confiscation of goods acquired before it came into force, even if the offences for which the conviction was ordered were committed after that date. If extended confiscation applied to goods acquired before Law no. 63/2012 came into force, this would violate the principle of non-retroactivity of the law enshrined in Article 15.2 of the Constitution.

The Court unanimously voted to uphold the exception of unconstitutionality, finding the provisions of Article 118.2.a of the 1969 Criminal Code constitutional insofar as extended confiscation does not apply to goods acquired before the entry into force of Law no. 63/2012 amending and supplementing the Criminal Code and Law no. 286/2009 on the Criminal Code.

*Cross-references:*

European Court of Human Rights:

- *Arcuri v. Italy*, no. 52024/99, 05.07.2001;
- *Phillips v. United Kingdom*, no. 41087/98, §§ 42 and 43; 05.07.2001;
- *Butler v. United Kingdom*, no. 41661/98, 27.06.2002;
- *Grayson and Barnham v. United Kingdom*, nos. 19955/05 and 15085/06; § 45; 23.09.2008.

*Languages:*

Romanian.

*Identification:* ROM-2014-3-006

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 16.09.2014 / **e)** 461/2014 / **f)** Decision on the constitutionality of provisions of the Law amending and supplementing Government Emergency Ordinance no. 111/2011 on electronic communications / **g)** *Monitorul Oficial al României* (Official Gazette), 532, 17.07.2014 / **h)** CODICES (Romanian, English).

*Keywords of the systematic thesaurus:*

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

3.16 General Principles – **Proportionality.**

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

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

*Keywords of the alphabetical index:*

Data, retention, internet access point.

*Headnotes:*

The retention and storage of data poses a limitation on the right to the protection of personal data. A limitation of this nature is allowed, under the Constitution, on the exercise of certain rights or

freedoms where appropriate, in order to protect national security, public order, health and morality and citizens' rights and freedoms, in order to develop a criminal investigation or to ward off the consequences of a natural calamity or an extremely serious catastrophe. Such measures must be implemented through legislation and may only be ordered if this is necessary within a democratic society, they must be proportionate to the situation which has given rise to them, enforceable in a non-discriminatory way and with no limitations on rights or freedoms.

The legal framework in such a sensitive area must be formulated in a clear, foreseeable and unequivocal manner so as to remove, as far as possible, the occurrence of arbitrariness or abuse on the part of those charged with enforcing the legal provisions.

*Summary:*

I. The Advocate of the People notified the Constitutional Court of various concerns over provisions of Law amending and supplementing Government Emergency Ordinance no. 111/2011 on electronic communications. This piece of legislation regulated the registration of persons who use prepaid cards, the collection and storage of data for the users of communications services, the conditions under which specific technical operations are carried out, the responsibilities of the providers of electronic communications services and the enforcement of sanctions for the infringement of certain obligations laid down by law. Under the Ordinance, companies providing internet access points for the public are responsible both for the identification of the users connected to such access points and the storage of personal data for a period of six months starting from the time of its retention, obtained through the retention of the user's identification data or telephone number, through bank card payment or any other identification procedure which directly or indirectly ensures that the user's identity is known.

The applicant suggested that these provisions violated the constitutional provisions of Article 1.5 on the observance of law and the supremacy of the Constitution, of Article 26 on personal, family and private life, of Article 53.2 on the limitation of the exercise of certain rights or freedoms and of Article 147.4 on the effects of the Constitutional Court's decisions. It was indicated that the law did not regulate the objective criteria on which the period of personal data storage was to be established, in order to keep this to a minimum, nor did it provide sufficient guarantees in order to ensure efficient protection for the data against abuse and any access or illicit use of personal data.

II. The Court began with a review of a brief history of European and national legislation regarding the retention and storage of data generated or processed in relation to the supply of publicly available electronic communications services or public communications networks, along with a review of its case-law on this subject.

It noted that the purpose of the Ordinance legislation was the amendment of the general regulatory framework on electronic communications. However, the Ordinance went further, and supplemented the legislative framework on retention of data generated or processed by providers of public electronic communications networks and of publicly available electronic communications services regulated by Law no. 82/2012. It partially took over the legislative solutions set out in there but these no longer had effect, as that Law was held to be unconstitutional by Decision no. 440 of 8 July 2014, published in the Official Gazette Part I, no. 653 of 4 September 2014.

It had been noted that the impugned law made no amendments to the guarantees of the protection of the right to personal, family and private life, to secrecy of correspondence, and to citizens' expression of freedom. The grounds for the solution of unconstitutionality of Law no. 82/2012 were particularly justified in this case.

The law currently under review not only failed to establish any guarantees and technical security and operational measures, but also widened the duties incumbent on subjects of law who were obliged to retain and store the data generated or processed by providers of public electronic communications networks and publicly available electronic communications services. It imposed express obligations on companies providing internet access points to the public regarding the retention of users' identification data: the telephone number or the details of the communications service with advance and subsequent payment; surname, forename and personal identification code, series and number of the identity document, namely the issuing country for foreign persons; identification data obtained through bank card payment; any other identification procedure which, directly or indirectly, ensured that the user's identity would be known.

Retention obligations were doubled; data now had to be stored for a period of six months commencing from the time of its retention. Companies currently providing internet access points to the public include private companies, notably in the commercial and recreation sector such as coffee shops, restaurants, hotels and airports or public companies (public institutions catering for citizens directly and giving direct and rapid access to public information) as well

as town halls, education institutions, public libraries, health care facilities and theatres. The establishment of the obligation to retain and store personal data in the charge of such entities correlatively imposes the express regulation of adequate, well-established and unequivocal measures offering citizens the assurance that any personal data they have made available will be registered and stored under secure conditions. In this respect, the law is limited to establishing the measures of retention and storage of data, without amending and supplementing the legal provisions on the safeguards the State must have in place throughout the exercise of citizens' fundamental rights. However, the legal framework in such a sensitive area must be constructed in a clear, foreseeable and unequivocal manner so as to remove as far as possible the occurrence of arbitrariness or abuse on the part of those charged with enforcing the legal provisions. Likewise, the proviso that the identification is achieved through "any other identification procedure" which ensures directly or indirectly that the user's identity is known forms an imprecise regulation which could pave the way for abuse in the process of retention and storage of data by companies subject to these rules.

The Court also examined the Ordinance from the perspective of Article 53 of the Constitution under which certain restrictions on the exercise of certain rights or freedoms are permissible by law where they are needed to protect national security, public order, health and morality, citizens' rights and freedoms, in furtherance of criminal investigation or to ward off the consequences of a natural disaster or a serious catastrophe. Such restrictions can only be ordered where this is necessary within a democratic society and must be proportionate to the situation which has given rise to them. They must be enforceable in a non-discriminatory way and with no limitation on rights or freedoms.

The Court noted that, to the extent that the measures adopted by the law subject to constitutional review are not accurate and foreseeable, the interference of the State in the exercise of fundamental rights, although laid down by law, is not sufficiently clearly and rigorously formulated to offer confidence to citizens. The strict minimum required in a democratic society is not fully met and the proportionality of the measure is not ensured through the regulation of appropriate guarantees. It therefore held that the limitation on the exercise of such personal rights in terms of certain collective rights and public interests aiming at national security, public order or the prevention of crime interrupts the balance which needs to be struck correctly between individual interests and rights and those of society as a whole. This particular piece of legislation could not provide

sufficient safeguards for the efficient protection of data against abuse and unlawful access to or use of personal data.

The Court also noted that, in the case of the amendments relating to the purchase of electronic communications services with advance payment, the legislature had granted a period of twelve months during which users might choose to maintain the service and to fill in the standard form, under penalty of suspension of the service at the end of this period, for companies providing internet access points to public. The obligations of retention and storage of data occur on the date of entry into force of the regulatory act. The legislature has provided no transitional rule which would have allowed this latter group to comply with the new provisions, without affecting users' rights to access the internet within the period of grace made available.

Finally, the Court held that although the Constitution and case-law of the Constitutional Court do not rule out the preventive storage of traffic and location data, the method of obtaining and storing the data needed to identify users of electronic communications services by advance payment (i.e. users connected to internet access points) did not comply with the principle of proportionality and provided no safeguards to ensure the confidentiality of personal data. It impinged on the very essence of fundamental rights; on personal, family and private life and on secrecy of correspondence, as well as freedom of expression, namely the constitutional provisions of Articles 1.5, 26, 28, 30 and 53 of the Constitution.

It therefore voted unanimously to uphold the applicant's objection of unconstitutionality. Three Judges put forward a separate opinion.

#### *Cross-references:*

- no. 1258, 08.10.2009, *Monitorul Oficial al României*, Part I, no. 798, 23.11.2009;
- no. 440, 08.07.2014, *Monitorul Oficial al României* Part I, no. 653, 04.09.2014.

#### *Languages:*

Romanian.



#### *Identification: ROM-2014-3-007*

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 11.11.2014 / **e)** 641/2014 / **f)** Decision on the exception of unconstitutionality of the provisions of Articles 34.4, 345, 346.1 and 347 of Criminal Procedure Code / **g)** *Monitorul Oficial al României* (Official Gazette), 532, 17.07.2014 / **h)** CODICES (Romanian).

#### *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.**

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

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

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:*

Pre-trial proceedings, defence, rights.

#### *Headnotes:*

Proceedings in the Pre-Trial Chamber have a direct impact on the conduct and fairness of the proceedings that follow, including the trial itself, and could be decisive in proving the defendant's guilt or innocence. Rules governing such proceedings which do not allow the attendance of the prosecutor or the defendant, or the plaintiff and the defendant in civil cases, at proceedings conducted in closed session before the Judge of the Pre-Trial Chamber are unconstitutional. The lack of the right to be heard, the fact that evidence at this stage is submitted in writing by the defendant and answered in writing by the Prosecutor's Office, and that the Judge of the Pre-Trial Chamber may not adduce new evidence or require the submission of certain documents, as well as the lack of an oral hearing on these issues, violate the right to a fair trial, in terms of content, the right to be heard, oral proceedings and equality of arms.

#### *Summary:*

I. The Constitutional Court was asked to assess the constitutionality of Articles 344.4, 345, 346.1 and 347 of the Criminal Procedure Code, published in the Official Gazette Part I, no. 486 of 15 July 2010. These

provisions regulate proceedings in the Pre-Trial Chamber, a concept only recently introduced to Romanian criminal procedural law.

The applicants suggested that these provisions contravened Article 20 of the Constitution (international treaties on human rights), Article 21.3 (the right to a fair trial and to the settlement of the case within a reasonable period) and Article 24.1 on procedural safeguards. The provisions of Article 6 ECHR were also raised on the right to a fair trial.

The principle of the right to be heard is violated because the answer of the Prosecutor's Office to the applications and exceptions brought by the defendant is not communicated to him or her. Moreover, as the defendant has no access to the Memorandum of the Prosecutor's Office or to the applications or exceptions raised *ex officio* by the Court and because, under Article 345.3, the prosecutor may address any irregularities of the referral document without this being made available to the defendant, the equality of arms in criminal proceedings is violated. Similarly, the defendant is objectively prevented from effectively challenging the legality of certain evidence, as in order to prove it is unlawful, the adducing of other evidence is required. The issues which are the subject matter of the Pre-Trial Chamber are never subject to oral, adversarial hearing. This results in the violation of the right to a fair trial.

II. The Court began by noting the significance of the proceedings taking place in the Pre-Trial Chamber and their influence on subsequent proceedings. It observed that the rationale behind proceedings of the Pre-Trial Chamber is the verification of the jurisdiction and the legality of challenges to the Court, along with verification of the legality of evidence adduced and that of documents drawn up by the prosecution offices. The idea is that a decision is reached, at this stage, as to whether the proceedings are of a fair nature so that the case can proceed to the stage of settlement on its merits. Under Article 346.5 of the Criminal Procedure Code, evidence which has been rejected by the Judge at this stage cannot be taken into consideration for settlement on the merits.

It found that proceedings carried out in the Pre-Trial Chamber are highly significant and have a direct impact on the conduct and fairness of the subsequent proceedings, including the trial itself.

With regard to infringement of the principle of the right to be heard, as part of the principle of equality of arms and the right to a fair trial, the Court observed that under Article 344.4 of the Criminal Procedure Code, the Judge of the Pre-Trial Chamber communicates the

applications and exceptions raised by the defendant or those raised *ex officio* before the Prosecutor's Office, which can then answer in writing within ten days of communication. The Court noted that whilst the prosecution has access to this material submitted on the defendant's behalf, the defence is not entitled to receive either the exceptions raised *ex officio* by the court or the answer of the Prosecutor's Office. This means the defendant has no effective possibility of commenting on any material put forward by his or her opponent, or to submit applications and exceptions after having examined the indictment. Similar strictures apply to civil cases; plaintiffs and defendants in civil proceedings are excluded from proceedings of the Pre-Trial Chamber. The legislature has totally limited the ability of parties to be informed about and to debate the exceptions raised *ex officio* and the allegations of the Prosecutor's Office, placing them at a disadvantage by comparison to the prosecution.

The Court observed that the prosecutor has a limited role at the Pre Trial Chamber stage of proceedings. In terms of the purpose of proceedings of the Pre-Trial Chamber, the significance of evidence in the criminal trial, and the prosecutor's role therein, the Court had held, in its Decision no. 190 of 26 February 2008, published in the Official Gazette Part I, no. 213 of 20 March 2008 that the provisions of Article 131.1 of the Constitution may lead to organic or ordinary laws, but this result cannot lead to limitation of the content of the constitutional provision.

The Court then turned to infringement of the right to an oral or public hearing, as part of the right to a fair trial. It noted that the standard of protection as set out by the provisions of the European Convention on Human Rights and by the case-law of the European Court is minimal, and the Basic Law and the case-law of the Constitutional Court may provide a higher protection standard of rights. In terms of the provisions of Article 20.2 of the Constitution and of Article 53 ECHR, the Court has ruled that the procedural safeguards set out by Article 691 ECHR and by Article 21.3 of the Constitution are not only enforceable, in criminal matters, to proceedings on the merits of the dispute, but also to proceedings of the Pre-Trial Chamber, providing a stronger protection than that found in the European Convention on Human Rights.

The right to an oral hearing is also crucial; it encapsulates the right of the defendant in criminal proceedings, the defendant in civil matters (and the plaintiff too) to present themselves before the court. This principle ensures direct contact between the judge and the parties, which means the presentation of claims brought by parties is caused to be in

compliance with a certain order and the correct establishment of the facts is facilitated. However, under Articles 345, 346.1 and 347 of the Criminal Procedure Code, proceedings in the Pre-Trial Chamber are not carried out based on an oral hearing where the parties to proceedings may present their claims, but based on those submitted in writing by the defendant and on the answer of the Prosecutor's Office.

In terms of the parties' rights to a fair trial (particularly the right to be heard, an oral hearing and equality of arms), the Court pointed out that on the one hand, the evidence cannot be taken into consideration when the merits of the case are being settled, and on the other hand, the Judge of the Pre-Trial Chamber plays a key role in terms of the lawfulness of evidence being adduced and the accomplishment of the prosecution, being the only person who can deliberate on these issues. His or her conduct has a direct influence on the conduct and fairness of the trial itself, because once this is under way, the judge adjudicating on the merits can no longer rule on evidence that has been rejected or the lawfulness of evidence that has been allowed at pre-trial stage. Once the resolution he or she orders remains final, there is no longer a legal basis to allow the defendant to raise concerns over issues already examined at pre-trial stage.

It was also noted that the judge in the Pre-Trial Chamber is not allowed to adduce evidence in order to establish the legality of the evidence adduced at the prosecution stage, without the benefit of an adversarial hearing and the exercise of the right to be heard. The judge at this stage can only formally ascertain the legality of the evidence or the need to reject some of it. Yet the prosecutor collects and adduces evidence in favour of or to the detriment of the suspect or the defendant. If there is more than one defendant in the case, evidence to the advantage of one could be to the detriment of another.

Moreover, in some cases, the facts which have formed the basis of obtaining certain evidence are directly and implicitly relevant to the lawfulness of the evidence. The inability of the Judge of the Pre-Trial Chamber to adduce new evidence or require the submission of certain documents, as well as the lack of an oral hearing on these issues, may result in it being impossible to clarify the facts of the situation, which may have an implicit impact on the legal examination.

The Court found that proceedings in the Pre-Trial Chamber on the establishment of the legality of evidence adduced and on the conduct of the Prosecutor's Office has a direct influence on the settlement on the merits and may be decisive in

proving the defendant's guilt or innocence. It held that by regulating matters in this way, given the influence of these proceedings on subsequent stages of the trial, the legislature had violated the parties' right to a fair trial, the right to be heard, the right to an oral hearing and equality of arms.

It therefore unanimously voted to uphold in part the exception of unconstitutionality. It pronounced unconstitutional the provisions of Article 344.4 of the Criminal Procedure Code and the legislative solution in Articles 345.1 and 346.1 of the Criminal Procedure Code, according to which the Judge of the Pre-Trial Chamber adjudicates without the attendance of the prosecutor or the defendant. It also found unconstitutional the provisions of Article 347.3 of the Criminal Procedure Code in relation to those of Articles 344.4, 345.1 and 346 of the same Code.

#### Cross-references:

- no. 599, 21.10.2014, *Monitorul Oficial al României*, Part I, no. 551, 05.08.2010;
- no. 1.503, 18.11.2010, *Monitorul Oficial al României*, Part I, no. 8, 05.01.2011;
- no. 190, 26.02.2008, *Monitorul Oficial al României*, Part I, no. 213, 20.03.2008;
- no. 482, 09.11.2004, *Monitorul Oficial al României*, Part I, no. 1.200, 15.12.2004.

#### European Court of Human Rights:

- *Deweert v. Belgium*, no. 6903/75, 27.02.1980;
- *Eckle v. Germany*, no. 8130/78, 15.07.1982;
- *Engel and Others v. the Netherlands*, no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 08.06.1976;
- *Imbrioscia v. Switzerland*, no. 13972/88, 24.11.1993;
- *John Murray v. United Kingdom*, no. 18731/91, 08.02.1996;
- *Korellis v. Cyprus*, no. 60804/00, 03.12.2002;
- *Vera Fernández-Huidobro v. Spain*, no. 74181/01, 02.05.2007;
- *Borgers v. Belgium*, no. 12005/86, 30.10.1991;
- *Klimentyev v. Russia*, no. 46503/99, 23.05.2007;
- *Rowe and Davis v. United Kingdom*, no. 28901/95, 16.02.2000;
- *Brandstetter v. Austria*, no. 11170/84; 12876/87; 13468/87, 28.08.1991;
- *Tierce and Others v. San Marino*, no. 24954/94, 24971/94 and 24972/94, 25.07.2000;
- *Koottummel v. Austria*, no. 49616/06, 10.03.2010;
- *Schlumpf v. Switzerland*, no. 29002/06, 08.01.2009;
- *Igual Coll v. Spain*, no. 37496/04, 10.03.2009.

*Languages:*

Romanian.



## Russia Constitutional Court

### Important decisions

*Identification:* RUS-2014-3-005

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 23.09.2014 / **e)** 24 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), no. 226, 03.10.2014 / **h)** CODICES (Russian).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Unconventional sexual relations / Children / Censorship.

*Headnotes:*

The law against promoting “unconventional sexual relations” among minors is not unconstitutional.

*Summary:*

I. The appellants were ordered to pay a fine equivalent to 89 € for having promoted “unconventional sexual relations” among children. They consider that the law violates Article 29 of the Constitution, which guarantees freedom of expression.

II. The Court stated that the law does not criminalise homosexuality as such. The Constitution guarantees the equality of citizens before the law. Sexual orientation cannot be a criterion for restricting citizens’ rights. In addition, Article 21 of the Constitution protects the dignity of the individual, which cannot be diminished for any reason. Furthermore, there is no international treaty requiring recognition of same-sex couples.

Under the Constitution, the State is responsible for protecting motherhood and childhood. The law enacted by parliament was designed to “save children from the impact of information which might lead them into unconventional sexual practices, which would prevent them from building a family”.

According to the Court, the ban on speaking in public about “non-traditional sexual relations” does not amount to a form of censorship. This subject can be discussed in the press. The legislation prohibits or restricts the dissemination of information on sexual relations which might harm the health or psychological development of children.

#### *Languages:*

Russian.



#### *Identification:* RUS-2014-3-006

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 30.10.2014 / **e)** 26 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), no. 260, 14.11.2014 / **h)** CODICES (Russian).

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

4.6.9.1 Institutions – Executive bodies – The civil service – **Conditions of access.**

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

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

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

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

Compulsory military service.

#### *Headnotes:*

The performance of military service may be regarded as a “reputation requirement” for civil servants. However, legal provisions must specify the period for which persons who have failed to perform military service without a legitimate reason are barred from public service.

#### *Summary:*

I. The Constitutional Court of the Russian Federation asked for clarification of the restriction on access to public service for those who refuse to perform compulsory military service.

The case originated in an application from the Parliament of the Chechen Republic.

Amendments made in 2013 to the Public Service Act restricted access to public service for persons who fail to perform military service without a legitimate reason such as their state of health or the continuation of higher education. The provisions in question apply both to new entrants to the civil service and to civil servants already in office. In the Chechen Republic, however, there had been no call-up for military service for a long time. A small number of people were recently called up to perform military service. In view of these circumstances, the Parliament of the Chechen Republic made an application to the Constitutional Court.

The applicant considers that the impugned provisions violate the principles of freedom to work and equal access to public service. These provisions restrict human and civil rights. Furthermore, the impugned provisions are retrospective in nature and adversely affect the situation of existing civil servants.

They accordingly consider them to be contrary to Articles 6, 15, 17, 19, 32 (section 4), 37 (section 1) and 55 of the Constitution.

II. Owing to the nature of public service, existing and prospective civil servants may be asked to satisfy certain professional and moral requirements.

One of the key criteria should be respect for the State, the Constitution and the law. The performance of military service can therefore be regarded as a “reputation requirement” for civil servants. Failure to carry out this duty without a legitimate reason detracts from the authority of the public service. Generally, therefore, the impugned provisions are not inconsistent with the Constitution.

At the same time, the impugned provisions do not specify the period for which persons are barred from public service. The restriction is therefore more severe for them than the same measures applied to offenders.

Under the law, persons who have committed an administrative offence can be disqualified for up to 3 years, and persons who have committed a criminal

offence can be disqualified for up to 5 years. Even persons convicted of serious or very serious crimes are entitled to apply for jobs in the civil service once their criminal record has been expunged. The impugned provisions are of an indefinite nature. They are accordingly inconsistent with the constitutional requirements of reasonableness and fairness and the requirement that restrictions to rights and freedoms should be proportional. In this respect, therefore, they are unconstitutional. The federal legislature must make appropriate amendments in order to remove restrictions that are disproportionate in relation to citizens' rights.

### Languages:

Russian.



### Identification: RUS-2014-3-007

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 11.12.2014 / **e)** 32 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), no. 293, 24.12.2014 / **h)** CODICES (Russian).

### Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**  
 5.2.2 Fundamental Rights – Equality – **Criteria of distinction.**  
 5.3.15 Fundamental Rights – Civil and political rights – **Rights of victims of crime.**

### Keywords of the alphabetical index:

Fraud, sentences, equality / Sentences, equality.

### Headnotes:

The specification of criminal liability for specialised forms of fraud against the interests of businesses is not in itself unconstitutional. However, the impugned provision of the Criminal Code makes it possible to impose different sentences for similar acts of large-scale fraud in violation of the principle of equality. In this respect the impugned provision violates the Constitution.

### Summary:

I. The Constitutional Court delivered a decision requiring the legislature to eliminate the inequalities of treatment in the prosecution of fraud.

Amendments made to the Criminal Code in 2012 created new offences of fraud. Specialised forms of economic and financial fraud (relating to loans, insurance etc.) were added to the code. These new offences target entrepreneurs and employees of commercial organisations. The penalties for specialised fraud are less severe than for ordinary fraud.

An entrepreneur was prosecuted for defrauding his clients of nearly 7.5 million roubles (200 000 euros). Initially, his acts were classified as aggravated fraud (carrying a sentence of up to 10 years in prison). In the course of the trial, however, the public prosecutor asked for these acts to be reclassified as specialised economic and financial fraud (carrying a sentence of up to 5 years in prison). He explained his position by a change in criminal law. The victims challenged the public prosecutor's position based on the now more liberal criminal law. The judge suspended the proceedings and referred the question to the Constitutional Court of the Russian Federation for a preliminary ruling.

The trial judge who referred the question for a preliminary ruling considers that the impugned provision gives considerable unjustified advantages to entrepreneurs and employees of commercial organisations over ordinary citizens. In the trial judge's view, the penalties do not take account of the public danger which these "crimes" represent. The trial judge also considers that the impugned provision violates the rights of victims insofar as it restricts their right of access to the courts and to legal remedies. The trial judge accordingly considers that the legislative provision at issue is contrary to Articles 9 and 52 of the Constitution.

II. The legislature has the right to bring criminal legislation into line with new social realities. However, these reforms must comply with constitutional principles.

To be classified as economic fraud, an offence must satisfy two formal criteria. First, the offender must be an individual entrepreneur or a member of the managerial staff of a commercial organisation. Secondly, a person suspected of fraud can only be convicted on that charge if he has committed a deliberate breach of his contractual obligations. In all other cases, he can be prosecuted for "ordinary", and not "specialised", fraud.

The Court noted that large-scale fraud is a serious crime and that a similar act committed in the economic sphere is a less serious offence. An entrepreneur can therefore apply for parole and the removal of any conviction for this offence from his criminal record and can ask to benefit from a number of other “preferences” provided for in the Russian Criminal Code. The differences continue outside the criminal system (for example, restriction on participating in elections as a candidate).

In addition, the impugned provision does not allow for any individualisation of liability or for assessment of the damages caused to a particular victim. Neither does the impugned provision provide for any mitigating or aggravating circumstances.

The Constitutional Court held that the specification of criminal liability for specialised forms of fraud against the interests of businesses is not in itself unconstitutional. However, the impugned provision of the Criminal Code makes it possible to impose different sentences for similar acts of large-scale fraud in violation of the principle of equality. In this respect the impugned provision violates the Constitution.

Lastly, the Constitutional Court gave the legislature six months to eliminate the discrepancies with the basic law by adopting new economic crime provisions which satisfy constitutional requirements.

If the necessary reforms are not introduced by the deadline set, the provisions of Article 159-4 of the Criminal Code will be automatically null and void.

#### *Languages:*

Russian.



## Serbia Constitutional Court

### Important decisions

*Identification:* SRB-2014-3-004

**a)** Serbia / **b)** Constitutional Court / **c)** / **d)** 30.10.2014 / **e)** UŽ-6596/2011 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), 124/2014 / **h)** CODICES (English, Serbian).

*Keywords of the systematic thesaurus:*

5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum.**

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

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

*Keywords of the alphabetical index:*

Asylum, refusal / Asylum, subsidiary protection, standards / Asylum, seeker, return, life, danger.

*Headnotes:*

Before an asylum application is dismissed, a decision must be made as to whether the asylum seeker meets the requirements for being granted refuge or subsidiary protection; the reasons for rejecting an application for refuge do not have to be sufficient in each individual case for rejecting of subsidiary protection.

*Summary:*

I. O.I.O, a resident of an asylum centre, filed a constitutional appeal against the judgment of the Administrative Court, for violation of the right to a fair trial, right to trial within a reasonable time and right to refuge, guaranteed under Articles 32.1 and 57 of the Constitution, as well as for violation of Article 6 ECHR. The Administrative Court had rejected as ungrounded the applicant’s action against the decision of the Asylum Commission. The Asylum Commission had rejected his application for asylum as ungrounded.

The applicant alleged that he feared for his life if he was returned to Somalia, as he had been forcibly recruited, abused, forced to obey orders and seriously injured by the members of militant groups controlled by Al-Shabaab, that Mogadishu is extremely unsafe and that he belonged to a special social group and would be exposed to persecution and killed if returned to Somalia.

In his opinion, the Administrative Court should have held an oral hearing, in view of the complexity of the case, the absence of an interpreter in part of the proceedings and doubts over the trustworthiness of his statement, which the administrative bodies referred to and which were the decisive grounds for their decisions. The applicant also alleged that the Administrative Court did not rule on the case in full jurisdiction or grant him asylum within the scope of refugee protection, nor did it refer to the evidence of international organisations, states, non-governmental organisations and media.

II. The Constitutional Court noted that the Administrative Court, pursuant to the provisions of Article 33.2 of the Law on Administrative Disputes, had ruled without holding an oral hearing, assessing that the matter under dispute was such that it obviously did not require direct hearing of the parties and particular establishment of the factual circumstances. When decisions are being made on asylum applications, an oral hearing is held before an administrative body competent for asylum affairs, at which the facts relevant to the decision are established. Not holding an oral hearing does not automatically imply a violation of the right to a fair trial, particularly if the reasoning of the decision on the legality of the administrative proceedings contains the reasons for the conclusion that in the concrete case it was unnecessary to hold an oral hearing.

In terms of the suggestion that the Administrative Court did not take into consideration evidence from international organisations, states, non-governmental organisations and media, which confirmed a high level of violence in the applicant's country of origin, the Constitutional Court noted the duty incumbent on bodies deciding upon asylum applications to examine whether there is a possibility of granting another form of protection, in accordance with the law. For instance, subsidiary protection is a form of protection which Serbia grants to foreigners who, were they to be returned to their countries of origin, would be exposed to torture, inhuman and degrading treatment, or would find their lives, safety and freedom under threat from violence on a wider scale, caused by external aggression and internal armed conflict or massive violations of human rights (Article 2 of the Law on Asylum, hereinafter, the

“LoA”). Bodies deciding upon asylum applications are obliged to consider, *ex officio*, whether the conditions for granting subsidiary protection have been met, if a foreigner residing on Serbian territory does not meet the requirements for being granted the right to refuge (Article 4.2).

The Constitutional Court held that on the basis of Articles 2, 4.2 and 30.1.2 of the LoA, before an asylum application is turned down, consideration must be given as to whether the asylum seeker meets the requirements for being granted refuge or subsidiary protection. This means that the reasons for rejecting an application for refuge do not need, in each individual case, to be sufficient for rejecting subsidiary protection. Subsidiary protection is extended to foreigners where their liberty, safety or lives would be endangered by general violence caused by internal armed conflict if they returned to their country of origin. The first instance body should, therefore, have taken into consideration the reports of international organisations, non-governmental organisations dealing with human rights protection and other evidence in respect of the actual political and safety situation in Somalia, upon the basis of which it would have found that in this case, the requirements for granting subsidiary protection to the applicant had been met.

The Constitutional Court established that the reasoning of the decision of the Asylum Commission did not include constitutionally and legally acceptable reasons for the assessment that the applicant was not eligible for subsidiary protection under Article 4.2 of the LoA and that the failure of the Asylum Commission was not remedied by the Administrative Court. The applicant's right to a well-reasoned judicial decision, as an element of the right to a fair trial was breached, and the only way of removing the detrimental impact of the breach was for the Constitutional Court to overturn the Administrative Court's judgment and to order that a new decision be adopted in new proceedings.

The Constitutional Court dismissed as clearly ungrounded the complaints regarding a violation of the right to a fair trial within a reasonable time; the proceedings before administrative bodies and the Administrative Court lasted just over eight months.

The Constitutional Court dismissed as premature the complaints regarding violation of the right to refuge. The Constitutional Court cited its own case-law along with relevant case-law of the European Court of Human Rights: *Sufi and Elmi v. the United Kingdom*, 8319/07 and 11449/07, 28 June 2011 and *K.A.B. v. Sweden*, 34098/11, 5 September 2013, on the situation in Somalia. It noted, also, that the European

Court of Human Rights indicated to Serbia, under Rule 39 of the Rules of Court, that the applicant should not be deported from Serbia until further notice. The Constitutional Court concluded that in renewed proceedings the present situation in Somalia should be taken into account when assessing whether the conditions for granting the applicant subsidiary protection have been met.

#### *Cross-references:*

European Court of Human Rights:

- *Sufi and Elmi v. the United Kingdom*, 8319/07 and 11449/07, 28.06.2011;
- *K.A.B. v. Sweden*, 34098/11, 05.09.2013.

#### *Languages:*

English, Serbian.



## Slovakia

### Constitutional Court

#### Important decisions

*Identification:* SVK-2014-3-003

**a)** Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 28.10.2014 / **e)** PL. ÚS 24/14 / **f)** / **g)** / **h)** CODICES (Slovak).

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

1.3.4.6.1 Constitutional Justice – Jurisdiction – Types of litigation – Litigation in respect of referendums and other instruments of direct democracy – **Admissibility.**

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

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

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

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

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

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

Marriage, same-sex couple / Couple, same-sex, marriage, right / Couple, same-sex, adoption, right / Couple, same-sex, rights / Couple, same-sex, protection / Referendum, question, limit.

#### *Headnotes:*

The irrevocability of human rights means that the standard (level) of human rights as set in the constitutional text cannot be reduced. If the subject of a referendum would lead to the broadening of human rights, such a referendum would be constitutionally acceptable. If the subject of the referendum would reduce human rights to such a degree that it would jeopardise the nature of the rule of law, such a referendum would not be constitutionally acceptable.

### Summary:

I. In Slovakia, a referendum may be initiated by petition signed by at least 350,000 voters. The questions must relate to the public interest, but the subject of the referendum must not be basic rights and freedoms.

A referendum may be used to decide on crucial issues in the public interest (Article 93.2 of the Constitution). No issues of fundamental rights, freedoms, taxes, duties or national budgetary matters may be decided by a public referendum (Article 93.3 of the Constitution).

The Constitutional Court may review whether the subject (question) of the referendum conforms to the Constitution on the request of the President, who announces the referendum. In 2014, 408,000 voters asked the President to announce a referendum on the following questions:

1. Do you agree that the term marriage may not be used to designate any other form of cohabitation of persons other than the union between one man and one woman?
2. Do you agree that pairs or groups of persons of the same sex may not be allowed to adopt children and subsequently to bring them up?
3. Do you agree that no other form of cohabitation of persons other than marriage should be accorded the special protection, rights and obligations which are accorded solely to marriage and spouses by the legal order as at 1 March 2014 (especially recognition, registration and documentation as a union for living by public authority, or the possibility of a child's adoption by the other spouse of the child's parent)?
4. Do you agree that schools may not require children to attend lessons in the field of sexual behaviour or euthanasia, if their parents and the children themselves do not agree with the teaching content?

The President doubted whether the first question was in the public interest, because the Constitution had recently been amended in the same sense. Moreover the question relates to the right to privacy, which the President viewed from the perspective of European Court of Human Rights case-law.

The President questioned whether the second and third questions were admissible because they relate to the right to privacy (Article 19 of the Constitution) and the rights set out in Article 41.4 of the

Constitution (childcare and their upbringing shall be the right of parents; children shall have the right to parental care and upbringing). The President supported his arguments with European Court of Human Rights and European Court of Justice case-law. In his view, the third question was also imprecisely formulated.

Regarding the fourth question, the President opined that it involved a narrowing of the school curriculum, which might interfere with the essence of the right to education.

So the President asked the Court to review whether the questions were in conformity with Article 93.3 in connection with Articles 1.2, 7.5, 12.2, 19.2, 41.1, 41.4, 42.1 and Article 93.2 of the Constitution.

II. The Court stressed that this was the (very) first time it had reviewed the subject of the referendum within this particular competence. It referred to its case II. ÚS 31/97 (*Bulletin* 1997/2 [SVK-1997-2-005]; binding interpretation of the Constitution) in which the Court ruled that a request to amend the Constitution may be the subject of a referendum. The Court mentioned that a referendum has legal consequences, but the question whether the result of this referendum would lead to amending the Constitution was not relevant here. In this case the Court focused solely on the conformity of the subject of the referendum with the Constitution, but not the other aspects of the referendum.

The subject of a referendum must not be basic rights and freedoms. A wider interpretation of this norm might work against the functionality (purpose) of referenda. The Court considers as basic rights and freedoms also human rights treaties, not just the Constitution. The competence to review the subject of a referendum must be differentiated from the usual, abstract, judicial review of legal norms. The idea of prohibiting referenda about human rights is rooted in the protection of individuals and prevention of the risk of totalitarianism. Some countries protect freedoms even with the "*Ewigkeitsklausel*" (prohibition to amend certain articles of the Constitution).

In Slovakia, Article 12 of the Constitution guarantees the irrevocability of human rights and Article 93.3 of the Constitution has a similar purpose. The Court argued that this irrevocability means that the standard (level) of human rights as set in the constitutional text cannot be reduced. This implies that if the subject of a referendum would lead to broadening of human rights, such a referendum would be constitutionally acceptable. If the subject of the referendum would reduce human rights, such a referendum would not be constitutionally acceptable.

Question 1: The Court stated that the fact that marriage had been recently defined in the Constitution was clear evidence that the question was in the public interest. Specifically, Article 41.1 of the Constitution reads: "Marriage is a unique union between a man and a woman. The Slovak Republic comprehensively protects and cherishes marriage for its own good."

The Court added that there is no right to same-sex marriage according to the European Court of Human Rights. A positive answer to the first question in a valid referendum would strengthen the current constitutional definition of marriage. So there would be not be a reduction of the human rights standard from the point of view of the Constitution or from the point of view of European Court of Human Rights standards. So Question 1 was declared acceptable.

Question 2: The European Court of Human Rights case-law states that it is matter for the member states to determine whether they allow one member of non-married couples (whether homosexual or heterosexual) or a person in registered partnership to adopt a child of the other partner. However if they allow this for non-married heterosexual couples, then it is discrimination to completely exclude same-sex couples from adopting. The Family Code allows adoption by spouses or by a married stepparent, so adoption is in any case based on marriage, as in the European Court of Human Rights' *Gas and Dubois* case. From this point of view, the second question would not reduce the standard of the right to privacy (Article 19) in the sense intended by Article 93.3 of the Constitution. So Question 2 was declared acceptable.

Question 3: The Court opined that (nominally) this question has no gender connotation. It excludes all non-marriage cohabitations from particular "marriage" rights. These rights relate to the right to privacy. The Court realised that the legal order gives those particular rights also to other forms of cohabitation of persons (such as unmarried couples). From this point of view, the question was ambiguous. Also it might lead to reducing the standard of the right to privacy for other already-recognised forms of cohabitation of persons. So Question 3 was declared non-acceptable, that is not in conformity with Article 93.3 of the Constitution in connection with Article 19.2 of the Constitution.

Question 4: The Court argued that this question might produce a result leading to an acceptable balance between the interests of children on the one hand (Article 42.1 of the Constitution, whereby every person shall have the right to education) and interests of parents on the other (Article 41.4 of the

Constitution, whereby childcare and upbringing shall be the right of parents; Article 24.2 of the Constitution on religious freedom). The particular implementation of the result might raise constitutional dispute, but this is a matter of review of norms. So Question 4 was declared acceptable.

III. There were dissenting opinions. One judge argued that the whole methodology should have been different. Instead of the prohibition of reducing the standard of rights, just the criterion of "relating to basic rights" should have been used. From this point of view, he could accept only the fourth question. The reference criterion should have been not particular constitutional articles or Strasbourg case-law, but the constitution itself, i.e. constitutionality. He also cited the decision of Italian Constitutional Court – *Corte Costituzionale*, 45/2005, *Bulletin* 2005/1 [ITA-2005-1-001].

In his dissenting opinion another judge said that he would put more stress on normative consequences of referendum. He accepted the methodology based on prohibition of non-reduction of the standard of human rights, but he suggested that this standard should contain not just human rights but also principles of anti-discrimination, state governed by the rule of law, democracy and even the natural law approach. From this point of view, he could not allow the second question either.

#### *Supplementary information:*

The President announced the referendum in line with the decision of the Constitutional Court. It was held on 7 February 2015. Participation in the referendum amounted to 21.41% of all voters, so it was not valid. The reason is that Article 98.1 of the Constitution stipulates the results of the referendum shall be valid provided an absolute majority of eligible voters have participated and the issue has been decided by an absolute majority of votes.

#### *Cross-references:*

European Court of Human Rights:

- *Gas and Dubois v. France*, no. 25951/07, 15.06.2012.

Constitutional Court of Italy:

- no. 45/2005, 13.01.2005, *Bulletin* 2005/1 [ITA-2005-1-001].

*Languages:*

Slovak.



## Slovenia

### Constitutional Court

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#### Statistical data

1 September 2014 – 31 December 2014

In this period, the Constitutional Court held 25 sessions – 13 plenary and 12 in panels: 4 in the civil, 5 in the administrative, and 3 in the criminal panel. It received 66 new requests and petitions for the review of constitutionality/legality (U-I cases) and 327 constitutional complaints (Up cases).

In the same period, the Constitutional Court decided 109 cases in the field of the protection of constitutionality and legality, as well as 397 cases in the field of the protection of human rights and fundamental freedoms.

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas the orders of the Constitutional Court are not generally published in an official bulletin, but are notified to the participants in the proceedings.

However, the judgments and decisions are published and submitted to users:

- In an official annual collection (Slovene full text versions, including dissenting/concurring opinions, and English abstracts);
  - In the *Pravna Praksa* (Legal Practice Journal) (Slovene abstracts of decisions issued in the field of the protection of constitutionality and legality, with full-text version of the dissenting/concurring opinions);
  - On the website of the Constitutional Court (full text in Slovene, English abstracts and a selection of full texts): <http://www.us-rs.si>;
  - In the IUS-INFO legal information system on the Internet, full text in Slovene, available through <http://www.ius-software.si>;
  - In the CODICES database of the Venice Commission (a selection of cases in Slovene and English).
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## Important decisions

*Identification:* SLO-2014-3-011

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 21.02.2013 / **e)** Mp-1/12 / **f)** / **g)** *Uradni list RS* (Official Gazette), 18/13 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

*Keywords of the systematic thesaurus:*

4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members.**

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

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, control / Election, result, confirmation.

*Headnotes:*

The National Council can only refuse to confirm the election of one of its members due to doubts over their moral and ethical integrity on the basis of an appeal lodged before it and a finding of a sufficient irregularity. The National Council cannot adopt such a decision of its own motion; this would entail a violation of the right to vote.

*Summary:*

By Decision no. Mp-1/12, the Constitutional Court decided to confirm the election of a Member of the National Council (the upper house of the Slovene Parliament). The applicant was elected member of the National Council in the 2012 elections, but at its first session the National Council did not confirm his election, due to doubts over his moral and ethical integrity.

The Constitutional Court noted, in terms of the election of members of the National Council, the right to vote as guaranteed by Article 43.2 of the Constitution. Protection of this right is regulated by the National Council Act; the process of confirming the office of members of the National Council is carried out after the elections. During this process, it is possible to allege irregularities in the election process and in the determination of the results by filing appeal before the National Council.

The Constitutional Court found that a refusal to confirm the office of an elected member of the National Council could entail a refusal to recognise the officially determined election results. The National Council can only adopt such a decision as a result of the consideration of an appeal and a finding that irregularities had occurred during the elections which have affected the results or which have the potential to do so. If the elections are not challenged by an appeal, the election cannot be disputable. The Constitutional Court added that the establishment of a candidate's moral or ethical disputability is not a matter for the National Council's discretion.

The Constitutional Court concluded that the refusal to confirm the applicant's office had no basis in the Constitution or in the law and was arbitrary. It violated the passive right to vote of the elected candidate and the active right to vote of voters under Article 43.2 of the Constitution.

The Decision was adopted unanimously. Judge Petrič was disqualified from deciding in the case. Judge Sovdat submitted a concurring opinion.

*Languages:*

Slovenian, English (translation by the Court).



*Identification:* SLO-2014-3-012

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.11.2013 / **e)** U-I-146/12 / **f)** / **g)** *Uradni list RS* (Official Gazette), 107/13 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

*Keywords of the systematic thesaurus:*

2.1.1.3 Sources – Categories – Written rules – **Law of the European Union/EU Law.**

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

3.16 General Principles – **Proportionality.**

3.26 General Principles – **Fundamental principles of the Internal Market.**

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

5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age**.

*Keywords of the alphabetical index:*

Discrimination, justification / Dismissal on grounds of age / Employment, termination, discrimination.

*Headnotes:*

A measure whereby the employment contracts of civil servants are terminated due to their fulfilment of the statutory conditions for obtaining an old age pension entails discrimination on the grounds of age and sex. Discrimination on the grounds of age is admissible in this case; its objectives are to ensure sustainable public finances, establish a balanced age structure for civil servants, and prevent disputes over the ability of civil servants to perform their duties after a certain age. However, the discrimination on the grounds of sex pursues no legitimate objective.

*Summary:*

I. The Ombudsman for Human Rights challenged the constitutionality of a provision of the Fiscal Balance Act, to the effect that civil servants' employment contracts would be terminated upon fulfilment of the statutory conditions for obtaining an old-age pension.

II. The Constitutional Court reviewed the challenged regulation from several viewpoints, with the main emphasis on assessing whether it violated the prohibition of discrimination on the grounds of age or sex (Article 14.1 of the Constitution). The Constitutional Court noted first that the prohibition of discrimination is a universal principle of international law that is also regulated by European Union law. The Constitutional Court particularly highlighted Directive 2000/78/EC and Directive 2006/54/EC, which are implemented into the national legal order *inter alia* by the challenged provisions of the Fiscal Balance Act. The Court recalled that the primary and secondary legislation of the European Union and the case-law of the Court of Justice of the European Union must be taken into consideration when reviewing the constitutionality of national regulations which entail the implementation of European Union law. It also clarified the effects of Article 3a.3 of the Constitution, which determines the effect of European Union law in the internal legal order. The Constitutional Court therefore did not decide the case merely on the basis of national constitutional provisions. It also took into consideration European Union law and the relevant case-law of the Court of Justice of the European Union when adopting its decision.

The Constitutional Court reviewed the termination of employment contracts due to fulfilment of the conditions for obtaining an old-age pension in terms of discrimination on age grounds. This particular provision differentiates civil servants on grounds of age, as it only applies to older civil servants who have fulfilled such conditions. The Court recalled, however, that under European Union law and the case-law of the Court of Justice of the European Union such discrimination may be admissible if it pursues a legitimate objective and the means of implementation of such objective are appropriate and necessary.

The Constitutional Court was of the opinion that the main objective of the challenged measure was to ensure the sustainability of public finances; this is not *per se* a constitutionally admissible objective that could render discrimination on grounds of age admissible. However, the Court established that the regulation also aims to achieve two further objectives, namely the establishment of a balanced age structure of civil servants and the prevention of disputes over the ability of public servants to perform their duties after a certain age. These could represent constitutionally admissible objectives for differentiating civil servants on grounds of age. The Constitutional Court found the challenged measure to be appropriate and necessary in order to achieve the outlined objectives simultaneously and to the greatest extent possible. The measure is not disproportionate; those affected are entitled to the full amount of their old-age pension. Moreover, the challenged regulation did not introduce mandatory retirement; those affected are not prevented from finding new employment or continuing their professional activities elsewhere. The Constitutional Court therefore found that the regulation was not inconsistent with the prohibition of discrimination on grounds of age.

The Constitutional Court then proceeded to review the challenged measure in terms of discrimination on grounds of sex. Until 2019, when retirement conditions for men and women will be completely equal, the conditions for obtaining an old-age pension will be determined differently for men and women. Therefore, the measure of mandatory termination of employment contracts treated male and female civil servants differently, which entailed a violation of the prohibition of discrimination on grounds of sex. The Constitutional Court established that the interference with the right of female public servants to non-discriminatory treatment was already inadmissible because it was not supported by a constitutionally admissible objective. The measure was accordingly inconsistent with the prohibition of discrimination on grounds of sex. It required the legislature to remedy the established unconstitutionality and determined the manner of the implementation of the Decision which would remain in force until this was carried out.

III. The first and second points of the operative provisions of the Decision were adopted unanimously. The third and fourth points of the operative provisions were adopted by eight votes against one. Judge Jadek Pensa voted against. The Constitutional Court adopted the fifth point of the operative provisions by six votes against three. Judges Jadek Pensa, Korpič – Horvat, and Sovdat voted against. Judges Jadek Pensa, Korpič – Horvat, and Sovdat submitted dissenting opinions.

#### Languages:

Slovenian, English (translation by the Court).



#### Identification: SLO-2014-3-013

a) Slovenia / b) Constitutional Court / c) / d) 18.12.2013 / e) U-I-155/11 / f) / g) *Uradni list RS* (Official Gazette), 114/13 / h) *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

#### Keywords of the systematic thesaurus:

2.1.1.3 Sources – Categories – Written rules – **Law of the European Union/EU Law.**

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

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

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

5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**

5.3.13.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Suspensive effect of appeal.**

#### Keywords of the alphabetical index:

Asylum, refusal, right to appeal / Expulsion, remedy, effective / Expulsion, safe third country.

#### Headnotes:

A legal remedy against an order rejecting an application for international protection based on the application of the concept of a safe third country that does not suspend the possibility of enforcing such an order is inconsistent with the right to effective judicial protection and the right to effective legal remedy.

#### Summary:

I. The Ombudsman for Human Rights challenged the provisions of the International Protection Act that determined the concept of a safe third country, alleging that they did not enable respect for the principle of *non-refoulement*. This meant that these provisions were inconsistent with the Constitution, the Geneva Convention on the Status of Refugees of 1951 and Article 3 ECHR.

II. The Constitutional Court began by explaining that the principle of *non-refoulement* is contained in Article 18 of the Constitution (the prohibition of inhuman or degrading treatment). It stressed that that constitutional provision entails at least the same level of protection as is accorded to individuals by Article 3 ECHR and Article 33.1 of the Geneva Convention. As the challenged regulation entailed an implementing regulation, the Constitutional Court further noted that the relevant regulations of the European Union and the case-law of the Court of Justice of the European Union based thereon had to be taken into consideration when reviewing this case. It particularly stressed that in accordance with Article 78.1 TFEU, a common policy on asylum, subsidiary protection, and temporary protection should be developed, which, also with regard to the decisions of the Court of Justice of the European Union, must be in accordance with the Geneva Convention.

The Constitutional Court noted that states have the right to supervise the entry of foreigners into their territories, the issuing of permits for their residence, and expulsions or extraditions. A state's sovereignty, however, is limited by the obligation that the state may not remove, expel, or extradite an individual to a state where there is a serious risk that the person concerned could be subjected to inhuman treatment. The principle of *non-refoulement* ensures to applicants the right to enter and reside in the state in which they applied for protection and the right of access to fair and effective proceedings in which the competent authority will assess whether their removal, expulsion, or extradition could entail an infringement of this principle. The removal, expulsion, or extradition of an applicant to a third country without consideration of his or her application on the merits entails an infringement of

the principle of *non-refoulement*. The State may only act in such a manner in exceptional circumstances if it is convinced that the third country is safe. Only a state which has ratified the Geneva Convention and the European Convention on Human Rights and respects the supervisory mechanisms defined by both Conventions can be a safe third country.

The Constitutional Court clarified that the criteria for the assessment of the safety of a third country determined by the challenged provisions are consistent with the requirements stemming from the principle of *non-refoulement*. Therefore, the challenged provisions of the International Protection Act are not inconsistent with Article 18 of the Constitution.

The Constitutional Court, however, found that there were issues over certain provisions of the International Protection Act in terms of the principle of the clarity and precision of regulations (Article 2 of the Constitution), as they did not determine the legal position of applicants for international protection with sufficient clarity and certainty. This could result in differing application of the law and arbitrary conduct by the state authorities. In addition, the Constitutional Court emphasised the special importance of the human right determined by Article 18 of the Constitution and the irreparability of the consequences that would occur if an applicant were to be subjected to torture or inhuman treatment. It held that a legal remedy against an order rejecting an application for international protection based on the concept of a safe third country that does not suspend the possibility to enforce such an order is inconsistent with the right to effective judicial protection (the first paragraph of Article 23) and the right to an effective legal remedy (Article 25 of the Constitution).

III. Points 1 and 3 of the operative provisions of the Decision were adopted unanimously. Point 2 of the operative provisions was adopted by five votes against three. Judges Klampfer, Pogačar, and Deisinger voted against.

#### *Languages:*

Slovenian, English (translation by the Court).



#### *Identification:* SLO-2014-3-014

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 21.03.2014 / **e)** U-I-313/13 / **f)** / **g)** *Uradni list RS* (Official Gazette), 22/14 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

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

3.13 General Principles – **Legality**.  
4.8.7 Institutions – Federalism, regionalism and local self-government – **Budgetary and financial aspects**.  
4.10.7 Institutions – Public finances – **Taxation**.  
5.2 Fundamental Rights – **Equality**.

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

Real estate, value, appraisal / Tax, real estate / Tax, national / Tax, municipal.

#### *Headnotes:*

The principle of legality requires that the taxable base for real property tax is determined by law and the regulation of real property mass appraisal cannot be left entirely to implementing regulations.

Appropriate legal remedies have to be provided against decisions regarding the value of real property and thus the determination of the taxable base for payment of real property tax.

If different tax rates are determined for certain groups of real property, sound reasons must support such differentiation.

The real property tax is fundamentally a municipal tax. It must be regulated so that the principles of the financial and functional autonomy of municipalities are observed.

#### *Summary:*

I. Several requests and one petition had been filed, to review the constitutionality of the Real Property Tax Act.

II. In order to determine the taxable base, the challenged Act referred to the Real Property Mass Appraisal Act. The Constitutional Court also reviewed the constitutionality of the relevant provisions of that Act. The Constitutional Court began by assessing whether the determination of the taxable base was in conformity with the constitutional principle of legality when prescribing taxes (Article 147 of the Constitution).

It clarified that according to the Real Property Tax Act the taxable base for real property tax assessment was the appraised market value of the real property, which is determined in the procedure for the mass appraisal of real property. The formation of real property valuation models and the determination of methods of mass appraisal are key to this process. The Constitutional Court noted that the statutory regulation of real property valuation models determined by the Real Property Mass Appraisal Act did not determine in a sufficiently clear and precise manner the legal situation of those liable to the tax. It also left the determination of the content of the statutory regulation of real property mass appraisal methods, which should fall within the exclusive competence of the legislature, entirely to implementing regulations. Consequently, the relevant provisions were inconsistent with Article 147 of the Constitution.

The Constitutional Court further reviewed the different tax rates determined for certain groups of real property with regard to the right to equality before the law (Article 14.2 of the Constitution). It deemed that the legislator failed to demonstrate sound reasons for the determination of different tax rates for officially occupied residential real property in comparison with officially unoccupied residential real property and for real property pertaining to power plants in comparison with other commercial and industrial real property. Consequently, the relevant provisions of the Real Property Tax Act were inconsistent with Article 14.2. In addition, the Court held that the regulation of legal remedies determined by the Real Property Tax Act ensured only an ostensible right to appeal against the appraised market value of a real property, resulting in a "hollowing out" of the right to legal remedies determined by Article 25 of the Constitution.

The Constitutional Court also reviewed whether the regulation of the allocation and the division of the revenue from real property tax between the state and municipalities and the regulation of the authorisations of municipalities to manage the tax determined by the Real Property Tax Act were in conformity with the principles of the financial and functional autonomy of municipalities determined by Articles 9, 138, 140 and 142 of the Constitution and with Article 9 of the European Charter of Local Self-Government. It found that the division of the tax revenue between municipalities and the state as determined by the Real Property Tax Act was not in itself inconsistent with the Constitution; the part of the revenue from this tax that pertained to municipalities fulfilled the criteria required by the Constitution for defining municipalities' sources of funding. The real property tax is fundamentally a municipal tax and the bulk of the funds it generates should belong to municipalities. The relevant provision of the Real Property Tax Act was inconsistent with Article 140 of the Constitution.

The Constitutional Court was also of the opinion, with regard to the financial autonomy of municipalities when imposing local taxes, that municipalities should have sufficient latitude to allow them to manage the tax as their own source of financing municipal tasks in line with local circumstances. A regulation that allows municipalities to increase or decrease tax rates by 50% for reasons of spatial and economic policy, under additional statutory limitations, does not ensure sufficient authorisation to allow municipalities to perform their constitutional and statutory tasks efficiently with their own resources. Consequently, the regulation was inconsistent with Articles 140 and 142 of the Constitution. The Constitutional Court also highlighted that in the transitional period determined by the challenged Act, the revenue from the real property tax pertains in its entirety to the budget of the state. This caused municipalities to depend on the budget of the state. The regulation was accordingly out of line with the constitutionally guaranteed financial autonomy of municipalities determined by Article 142 of the Constitution.

As the fundamental provisions of the Real Property Tax Act, without which other provisions of the Act cannot be implemented, were inconsistent with the Constitution, the Court abrogated the Act in its entirety. It also established that the Real Property Mass Appraisal Act was inconsistent with the Constitution insofar as it referred to the mass appraisal of real property due to the taxation of real property. In order to prevent municipalities being deprived of part of their revenue pending the adoption of a new statutory regulation of taxation of real property, the Constitutional Court decided that in this period the regulations that had determined, before the Real Property Tax Act was passed, the obligation to pay certain municipal taxes (such as compensation for building land use and for the maintenance of forest roads and property tax) would be applied.

III. The decision was adopted unanimously. Judges Mozetič, Deisinger, Klampfer, Korpič – Horvat, Petrič, Sovdat, and Zobec submitted concurring opinions.

#### *Languages:*

Slovenian, English (translation by the Court).



# South Africa

## Constitutional Court

### Important decisions

*Identification:* RSA-2014-3-012

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 02.09.2014 / **e)** CCT 01/14 / **f)** South African Police Service v. Solidarity obo Barnard / **g)** www.constitutionalcourt.org.za/Archimages/22299.pdf / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces**.

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

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

5.2.2.2 Fundamental Rights – Equality – Criteria of distinction – **Race**.

5.2.3 Fundamental Rights – Equality – **Affirmative action**.

*Keywords of the alphabetical index:*

Affirmative action, employment equity plan, numerical target / Employee, police force / Employment, discrimination, quota / Police, officer, employment, discrimination.

*Headnotes:*

Where a restitutionary measure passes the test set by Section 9.2 of the Constitution, it will neither be unfair nor presumed to be unfair. A restitutionary measure will fall under this provision if it targets a particular class of people who have been susceptible to unfair discrimination; is designed to protect or advance that class; and promotes the achievement of equality. Courts retain their power to interrogate whether the measure at hand is a legitimate restitution measure within the scope of Section 9.2 of the Constitution.

The manner in which a properly adopted restitution measure was applied may be challenged. The implementation of a legitimate restitution measure must be rationally related to the terms and objects of the measure.

Designated employers must ensure that suitably qualified employees from designated groups are adequately represented in each working category of the designated employer. Beneficiaries of affirmative action must be equal to the task at hand in order not to sacrifice efficiency and competence at the altar of remedial employment. Designated employers may not adopt an Employment Equity Policy or practice that would establish an absolute barrier to the future or continued employment or promotion of people who are not from designated groups.

*Summary:*

I. In terms of the Employment Equity Act (Act), the South African Police Service (SAPS) is a designated employer, which is obliged to take affirmative action measures in accordance with an approved Employment Equity Plan (hereinafter, "EEP"). Ms Barnard, a white, South African woman, has been a member of the SAPS since 1989. In 2005 the National Commissioner of the SAPS advertised a position within the National Evaluation Service. Ms Barnard applied twice for this position. Each time, she was shortlisted, interviewed and recommended as the best suited candidate. Despite this, she was unsuccessful on each occasion. The National Commissioner's reasons were that appointing Ms Barnard would not enhance racial representivity at that particular salary level and that, since the post was not critical for service delivery, it was not necessary to fill the vacancy immediately.

Ms Barnard instituted an unfair discrimination claim in the Labour Court, which held in her favour. The Labour Court held that the National Commissioner's decision was not a fair and appropriate method of implementing the SAPS' EEP and that he had not given sufficient reasons for his decision and thus did not discharge the onus to establish that the decision was rational and fair.

On appeal, the Labour Appeal Court found in favour of the SAPS. It found that the implementation of restitutionary measures is not subject to an individual's right to equality in terms of Section 9.3 of the Constitution. The decision not to promote Ms Barnard was not unlawful because the National Commissioner was not obliged to fill the advertised post.

The Supreme Court of Appeal reversed the Labour Appeal Court's decision. It found that Ms Barnard was discriminated against on the listed ground of race and that the SAPS failed to rebut the presumption of unfairness.

Ms Barnard changed her approach. She did not argue that she suffered unfair discrimination on the basis of race, but submitted that the decision not to appoint her was injudicious and ought to be set aside. She accepted the EEP as a valid affirmative action measure but argued that the National Commissioner, in implementing this plan, attached undue weight to demographic equity at the expense of her personal competence and failed to furnish adequate reasons for his decision.

II. The Court granted the SAPS leave to appeal and upheld the appeal. The majority judgment, written by Moseneke ACJ, with whom six judges concurred, held that the SAPS EEP is a restitutionary measure contemplated in Section 9.2 of the Constitution and Section 6.2 of the Act. It held that the Supreme Court of Appeal misconceived the issues before it, as well as the controlling law. The Supreme Court of Appeal was obliged to examine the equality claim through the prism of Section 9.2 of the Constitution and Section 6.2 of the Act because the validity of the SAPS EEP was never under challenge by Ms Barnard. It also held that the other cause of action, the review of the National Commissioner's decision, was raised for the first time only on appeal – it was therefore not properly before the Court. It went on to find that, on the facts, this cause of action was in any event without merit.

III. In a concurring judgment, Cameron J, Froneman J and Majiedt AJ agreed with the outcome, but emphasised the possible infringement of dignity in the implementation of restitutionary measures, as well as the importance of giving adequate reasons for decisions. They agreed with the majority that Ms Barnard had not brought a review challenge. However, they found that it was necessary to adjudicate Ms Barnard's claim that the National Commissioner's decision was at odds with the Act. They held that the appropriate standard by which to evaluate this claim was fairness. In the application of that standard, the National Commissioner's reasons were important as the reasons provide evidence of whether the EEP was implemented fairly. The judgment held that the National Commissioner's reasons were sparse on why he thought service delivery was not a pressing concern and why he rejected Ms Barnard's application even though, as a woman, she is a member of a designated group. Ultimately, however, the judgment concluded that there was sufficient external evidence to show that the National Commissioner's decision was fair.

In another separate judgment, Van der Westhuizen J concurs with the outcome of the other judgments but tests the implementation of an affirmative measure differently. Relying on *Minister of Finance and Another v. Van Heerden* he finds that the decision not to appoint Ms Barnard, even though she is a woman and has therefore suffered past disadvantage, did not threaten the long-term constitutional vision of a non-sexist, non-racial society. In addition to an equality analysis, he measures the impact the implementation of an affirmative measure has on other rights. He considers the effect of the National Commissioner's decision on Ms Barnard's right to human dignity as well as on the public's right to safety and security through an effective police service. He finds that any impact on service delivery and on Ms Barnard's dignity is justifiable in the circumstances of this case.

In a separate concurring judgment (in which Moseneke ACJ concurred), Jafta J took the view that the Court should not determine the cause of action relating to the review of the National Commissioner's decision which led to Ms Barnard being overlooked for a promotion. He reasoned that the claim that was brought before the other courts was that of unfair discrimination and not the National Commissioner's decision, which amounted to a new cause of action.

#### *Supplementary information:*

Legal norms referred to:

- Section 9 of the Constitution of the Republic of South Africa, 1996;
- Sections 6 and 15 of Employment Equity Act 55 of 1998.

#### *Cross-references:*

Constitutional Court:

- *Minister of Finance and Another v. Van Heerden*, *Bulletin* 2004/2 [RSA-2004-2-007].

#### *Languages:*

English.



**Identification: RSA-2014-3-013**

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 03.10.2014 / **e)** CCT 185/13 / **f)** Country Cloud Trading CC v. MEC, Department of Infrastructure Development, Gauteng / **g)** www.constitutional.court.org.za/Archimages/22358.pdf / **h)** CODICES (English).

**Keywords of the systematic thesaurus:**

4.6.10.1.2 Institutions – Executive bodies – Liability – Legal liability – **Civil liability**.

**Keywords of the alphabetical index:**

Accountability, principle / Accountability, state / Commerce, risk, no compensation / Contract, interference, third party / Damages, liability.

**Headnotes:**

A decision by a party to a contract to cancel it, which has the effect of causing financial loss to a third party but does not constitute intentional interference with contractual relations between that third party and the other party to the contract, does not attract delictual liability.

In cases of pure economic loss, policy considerations militate against recognising a claim by a litigant who entered into a contract that presented a foreseeable substantial risk of loss that is inextricably linked to the promise of a large financial reward, especially where that litigant has alternative means of recovering the loss.

**Summary:**

I. In May 2006 the respondent, the Department of Infrastructure Development in Gauteng (Department), awarded a joint venture of four contractors a tender to build a clinic. In March 2008, before the completion of the clinic, three of the contractors withdrew, leaving iLima Projects (Pty) Ltd (iLima) the only contractor. The Head of the Department decided that the construction of the clinic was urgent and therefore awarded the contract for completing the clinic (the completion contract) to iLima without putting the contract out to tender again.

To begin construction, iLima needed immediate financial assistance and thus sought a loan of R12 million from the applicant, Country Cloud Trading CC (hereinafter, "Country Cloud"). It was agreed that iLima would repay the loan amount plus R8.5 million

in profit to Country Cloud. Country Cloud also obtained an undertaking from Tau Pride (Pty) Ltd, the Department's managing agent for the project, that the loan amount would be paid directly to Country Cloud when project funds from the Department were made available. However, the Department cancelled the completion contract in September 2008 before any payment was made. Thereafter, iLima went into liquidation, rendering it unable to repay its debt to Country Cloud.

The High Court found that the contract was not properly awarded to iLima and dismissed Country Cloud's claim on this narrow basis. On appeal, the Supreme Court of Appeal found that the contract was validly awarded. However, it concluded that the Department's act of cancellation was not wrongful – an essential requirement for a delictual claim – and dismissed Country Cloud's appeal.

II. The Constitutional Court granted Country Cloud leave to appeal but dismissed the appeal. In a unanimous judgment written by Khampepe J, the Court concluded that the Department's cancellation of the completion contract was not wrongful. It therefore did not fall into the recognised delictual category of intentional interference with contractual relations, as Country Cloud argued.

The Court rejected Country Cloud's contention that recognising its claim was necessary to promote state accountability. Instead, the Court held that policy considerations militated against the claim because Country Cloud had an alternate means of recovering the debt owed to it by iLima. Moreover, the substantial risk of loss that Country Cloud faced was both highly foreseeable and inextricably linked to the promise of a large financial reward it sought by lending the money.

**Cross-references:**

Constitutional Court:

- *Fourway Haulage SA (Pty) Ltd v. SA National Roads Agency Ltd* [2008] ZASCA 134;
- *Lee v. Minister for Correctional Services, Bulletin* 2012/3 [RSA-2012-3-022];
- *Loureiro and Others v. Imvula Quality Protection (Pty) Ltd, Bulletin* 2014/1 [RSA-2014-1-002];
- *Trustees for the Time Being of Two Oceans Aquarium Trust v. Kantey & Templer (Pty) Ltd* [2005] ZASCA 109.

**Languages:**

English.



### *Identification: RSA-2014-3-014*

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 30.10.2014 / **e)** CCT 02/14 / **f)** National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre and Another / **g)** [www.constitutionalcourt.org.za/Archimages/22411.pdf](http://www.constitutionalcourt.org.za/Archimages/22411.pdf) / **h)** CODICES (English).

### *Keywords of the systematic thesaurus:*

2.1.1.4.17 Sources – Categories – Written rules – International instruments – **Statute of the International Criminal Court of 1998.**

2.2.1.3 Sources – Hierarchy – Hierarchy as between national and non-national Sources – **Treaties and other domestic legal instruments.**

3.20 General Principles – **Reasonableness.**

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

4.7.1.2 Institutions – Judicial bodies – Jurisdiction – **Universal jurisdiction.**

4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces.**

4.16 Institutions – **International relations.**

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

### *Keywords of the alphabetical index:*

Customary international law, application / Treaty, domestication / Jurisdiction, universal, limiting principles / Investigative jurisdiction / Torture, committed abroad, investigation / Crime, international, committed abroad.

### *Headnotes:*

In terms of the Constitution, the Implementation of the Rome Statute of the International Criminal Court Act (hereinafter, the “ICC Act”) and international law, South Africa may, through universal jurisdiction, assert prescriptive and, to some degree, adjudicative jurisdiction to investigate allegations of torture committed elsewhere. Investigations can occur in the absence of the presence of a suspect. The investigation of international crimes committed outside South Africa is permissible only if the country with jurisdiction is unwilling or unable to prosecute and only if the investigation is confined to the territory of the investigating state.

Before assuming universal jurisdiction, decision makers must consider whether embarking on an investigation into an alleged international crime committed outside South Africa is reasonable and practicable in the circumstances of each particular case. Considerations include: whether the investigation is likely to lead to a prosecution and accordingly whether the alleged perpetrators are likely to be present in South Africa on their own or through an extradition request; the geographical proximity of South Africa to the place of the crime and the likelihood of the suspects being arrested for the purpose of prosecution; the prospects of gathering evidence needed to satisfy the elements of a crime; and the nature and the extent of the resources required for an effective investigation. In some instances a preliminary investigation to test the reasonableness of undertaking a full-blown investigation may be necessary.

### *Summary:*

I. In March 2007, a year before national elections in Zimbabwe, the Zimbabwean police, allegedly acting on instructions from the ruling political party, raided the headquarters of the main opposition party (hereinafter, “MDC”). During the raid, more than 100 people were taken into custody. These individuals were detained for several days and allegedly tortured by the Zimbabwean police. The detention and torture was allegedly part of a widespread and systematic attack on MDC officials and supporters in the run-up to the national elections.

The Southern African Human Rights Litigation Centre (hereinafter, “SALC”), the first respondent in this matter, compiled detailed evidence of the alleged torture. Concerned about the alleged collapse of the rule of law in Zimbabwe and the safety of the victims, in March 2008, SALC submitted a detailed dossier to the South African Priority Crimes Litigation Unit of the National Prosecuting Authority (hereinafter, “NPA”), requesting that the allegations of torture be investigated. The dossier detailed the alleged torture of members of the MDC by Zimbabwean officials who have been present in South Africa from time to time. The respondents, SALC and the Zimbabwe Exiles Forum (hereinafter, “ZEF”), were of the view that in terms of the ICC Act and South Africa’s international law obligations, the NPA and the South African Police Service (hereinafter, “SAPS”) have a duty to investigate international crimes. In June 2009, SALC and ZEF were informed by the Acting National Director of Public Prosecutions (hereinafter, “ANDPP”) that the SAPS did not intend to initiate an investigation.

SALC and ZEF applied to the North Gauteng High Court, Pretoria (High Court) for an order reviewing and setting aside the decision not to investigate. The High Court granted the order. The Supreme Court of Appeal dismissed an appeal by the National Commissioner of the SAPS (hereinafter, the "National Commissioner") and the ANDPP. Both the High Court and the Supreme Court of Appeal held that in terms of the ICC Act, the South African Police Service Act and the Constitution, the SAPS must investigate the allegations of torture.

The National Commissioner approached the Constitutional Court for leave to appeal. She submitted that international law principles of state sovereignty and complementarity and the need for the actual "presence" of an accused in South Africa before an investigation can commence entailed that the SAPS is unable to initiate an investigation into the alleged torture. The respondents submitted that presence is not a requirement to initiate an investigation but is necessary only for a prosecution. Seven *amici curiae* joined the proceedings, supporting the position of the respondents.

II. The Court, in a unanimous judgment, granted leave to appeal and dismissed the appeal. It concluded that the SAPS must investigate the complaint lodged. This was because, in terms of the Constitution, the ICC Act and international law obligations, the SAPS has a duty to investigate the alleged crimes against humanity of torture committed in Zimbabwe. In relation to presence, the Court held that the duty to combat torture travels beyond the borders of Zimbabwe and that South Africa may, through universal jurisdiction, assert prescriptive and, to some degree, adjudicative jurisdiction by investigating the allegations of torture as a precursor to taking a possible next step against the alleged perpetrators such as a prosecution or an extradition request. Accordingly, investigations can occur in the absence of the presence of a suspect.

### Supplementary information:

Legal norms referred to:

- Sections 35.3.e, 39.1.b, 179.2, 205.3, 231.4, 233 and 237 of the Constitution of the Republic of South Africa, 1996;
- African Charter on Human and Peoples' Rights, 27 June 1981;
- African Commission, Resolution on Ending Impunity in Africa and the Domestication and Implementation of the Rome Statute of the International Criminal Court, 5 December 2005;
- African Commission, Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, 17-23 October 2002;
- Convention against Torture and Other Cruel, Inhuman or Degrading Punishment, 10 December 1984;
- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948;
- Geneva Conventions I, II, III and IV;
- Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002;
- National Prosecuting Authority Act 32 of 1998;
- Prevention and Combating of Torture of Persons Act 13 of 2013;
- Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, recommended by UN General Assembly Resolution 55/89, 4 December 2000;
- Rome Statute of the International Criminal Court, 1 July 2002;
- SADC Protocol on Mutual Legal Assistance in Criminal Matters, 3 March 2002;
- South African Police Service Act 68 of 1995;
- United Nations (UN) General Assembly Resolution 2583, 15 December 1969;
- Vienna Convention on the Law of Treaties, 23 May 1969.

### Cross-references:

Constitutional Court:

- *Glenister v. President of the Republic of South Africa and Others*, Bulletin 2011/1 [RSA-2011-1-004];
- *Government of the Republic of Zimbabwe v. Fick and Others*, Bulletin 2013/2 [RSA-2013-2-018];
- *Mail & Guardian Media Ltd and Others v. Chipu NO and Others*, Bulletin 2013/3 [RSA-2013-3-022];
- *Mashinini and Another v. S* [2012] ZASCA 1;
- *S v. Basson*, Bulletin 2005/2 [RSA-2005-2-008];
- *S v. Makwanyane and Another*, Bulletin 1995/3 [RSA-1995-3-002];
- *A and Others v. Secretary of State for the Home Department* (no. 2) [2005] UKHL 71;
- Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v. Serbia and Montenegro*), 26.02.2007 (ICJ);
- Case concerning the Arrest Warrant of 11.04.2000 (*Democratic Republic of the Congo v. Belgium*), 14.02.2002 (ICJ);
- *Filártiga v. Peña-Irala* 630 F 2d 876 (2d Cir 1980);

- *Huri-Laws v. Nigeria* (2000) AHRLR 273 (ACHPR 2000);
- *Kiobel v. Royal Dutch Petroleum Co* 133 S Ct 1659 (2013);
- *Prosecutor v. Anto Furundzija (Trial Judgment)* IT-95-17 (ICTY);
- *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landžo (Appeals Chamber)* IT-96-21-A (ICTY);
- *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* (no. 3) [2000] 1 AC 147;
- *S.S. Lotus (France v. Turkey)* (1927) PCIJ Series A, no. 10.

### Languages:

English.



### Identification: RSA-2014-3-015

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 27.11.2014 / **e)** CCT 07/14, CCT 09/14 / **f)** Helen Suzman Foundation v. President of the Republic of South Africa and Others, *Glenister v. President of the Republic of South Africa and Others* / **g)** [www.constitutionalcourt.org.za/Archimages/22484.pdf](http://www.constitutionalcourt.org.za/Archimages/22484.pdf) / **h)** CODICES (English).

### Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.  
 3.20 General Principles – **Reasonableness**.  
 4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces**.  
 4.14 Institutions – **Activities and duties assigned to the State by the Constitution**.  
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state**.

### Keywords of the alphabetical index:

Police, accountability, political / Cabinet of Ministers, powers / Corruption, prevention / Corruption, eradication / Corruption, fight, police, entity, independence / Corruption, investigation / Corruption, perception, public / Police, administrative control / Police, legislation / Police, anti-corruption entity, independence / State, duty to protect fundamental rights and freedoms.

### Headnotes:

The Constitution imposes a positive obligation on the state, in accordance with its international law obligations, to establish and maintain an independent entity to combat, prevent and investigate corruption and national priority offences. Legislation must be enacted for this purpose.

The entity need not meet the standard of full judicial independence. It must, however, be adequately independent in terms of both its structure and operations. In order to determine whether an entity has the requisite degree of independence a public perception test is applied. What is required is that a reasonably informed and reasonable member of the public will have confidence in the entity's autonomy-protecting features.

Provisions of the relevant legislation that result in the establishment of a body that is insufficiently insulated from undue political influence and that does not therefore guarantee adequate functional, structural or operational independence are inconsistent with the state's constitutional obligation and consequently invalid.

### Summary:

I. In 2008 the state enacted legislation establishing an anti-corruption entity to be known as the Directorate for Priority Crime Investigations (hereinafter, the "DPCI"). This entity was to function under the authority of the South African National Police Service (hereinafter, the "SAPS") and report to a committee of Cabinet ministers. The Constitutional Court identified various constitutional defects in the legislation in *Glenister v. President of the Republic of South Africa and Others (Glenister II)* [RSA-2011-1-004]. Certain operational and structural attributes of independence were found to be lacking, including special job security for members of the unit, security of tenure for its head and operational independence from the executive, which had the power to directly manage the decisions and policies of the DPCI by way of the Ministerial Committee.

The South African Police Service Amendment Act 10 of 2012 (hereinafter, the "Act") was enacted in response to *Glenister II* to cure these defects. Mr Glenister and the Helen Suzman Foundation (hereinafter, the "HSF"), both acting in the public interest, separately challenged the constitutionality of this amended legislation. The High Court dismissed Mr Glenister's application to have the whole legislative scheme of the Act declared unconstitutional. The HSF achieved partial success.

Certain provisions of the Act were declared invalid. The High Court found that certain impugned provisions of the Act were inconsistent with the state's constitutional obligation to create a structurally and operationally independent anti-corruption unit.

The HSF contended that the High Court erred in not declaring various provisions unconstitutional to the extent that they undermined the adequacy of the institutional and functional independence of the DPCI. Specific areas of concern included: the renewability of the term of office, suspension and dismissal procedures and appointment criteria of the National Head of the DPCI and the possibility of undue political interference by the Minister of Police (hereinafter, the "Minister") through the implementation of policy guidelines governing the DPCI's jurisdiction. Mr Glenister persisted in his argument that the whole legislative scheme of the Act was unconstitutional. In the alternative, he aligned himself with the HSF's submissions.

The state parties opposed the confirmation of the order of invalidity and all other applications made by the applicants. They contended that the Act sufficiently insulates the DPCI from undue political interference. They also argued that the doctrine of separation of powers prevents a court from being overly prescriptive with regard to the legislative measures designed to fight corruption.

II. The Constitutional Court dismissed Mr Glenister's application for leave to appeal, but granted the HSF's application for leave to appeal. However, it dismissed the appeal against the High Court's refusal to declare certain sections unconstitutional and confirmed a substantial part of the High Court order holding that certain sections of the Act were unconstitutional and therefore invalid. This included: the provisions relating to the extension of tenure of the National Head of the DPCI; the ministerial policy guidelines which allowed for undue political interference in the operations of the DPCI and the power of the Minister to remove the Head of the entity. The Court struck out various words in each provision found to be unconstitutional in order to remedy the constitutional invalidity.

III. A separate judgment written by Cameron J and concurred in by Froneman J and Van der Westhuizen J, holds that the process for the National Head's appointment is not constitutionally compliant. It held that allowing a single member of the Cabinet to monopolise this power of appointment, in the absence of an express process of Parliamentary approval, jeopardises the DPCI's independence.

A separate judgment written by Froneman J and concurred in by Cameron J and Madlanga J, finds in Mr Glenister's favour on certain admissibility and costs issues. It concurs in the majority judgment, except for:

- i. the finding that the process of appointing the National Head is constitutionally compliant (where Froneman J concurs with Cameron J); and
- ii. its dismissal of Mr Glenister's application for leave to appeal with costs. It held that *Glenister II* did not foreclose either the constitutional challenge to the Act that Mr Glenister sought to bring or the leading of additional evidence to sustain that challenge. In respect of Mr Glenister's application, the judgment found that leave to appeal should have been granted, but conceded that the order in the majority judgment demonstrates that the productive co-existence of the constitutional duties of the Minister and the anti-corruption entity can be achieved without resorting to the more drastic relief Mr Glenister sought. Madlanga J's concurrence in this judgment does not extend to its concurrence in Cameron J's judgment.

A further separate judgment, written by Nkabinde J, concurs with the majority judgment but finds that the provision empowering the Minister to prescribe measures for the integrity testing of DPCI members is unconstitutional, as it failed to guide the exercise of that discretionary power or to inform those who could be adversely affected by the exercise of that power when and how they may seek relief.

In another separate judgment, Van der Westhuizen J concurs with the majority judgment except in the following respects:

- i. he concurs with Cameron J;
- ii. he concurs in part with Froneman J's separate judgment, in agreeing that Mr Glenister's application for leave to appeal should have been granted and certain of his evidence should not have been struck out; and
- iii. it departs from the majority judgment's conclusion that Mr Glenister's evidence is political posturing and holds that this is not a valid ground upon which to strike that evidence out.

#### *Supplementary information:*

Legal norms referred to:

- Sections 7.2, 73.2, 85.2.d, 167.5, 179, 193, 206 and 207 of the Constitution of the Republic of South Africa, 1996;

- Sections 16.2.h, 16.3, 17CA.15 and 17CA.16, 17D.1, 17DA.2, 17E.8, 17G, 17H, 17I, 17K and 24 of the South African Police Service Act 68 of 1995.

#### Cross-references:

#### Constitutional Court:

- *Dawood and Another v. Minister of Home Affairs and Others; Shalabi and Another v. Minister of Home Affairs and Others; Thomas and Another v. Minister of Home Affairs and Others*, *Bulletin* 2000/2 [RSA-2000-2-007];
- *Democratic Alliance v. President of the Republic of South Africa and Others*, *Bulletin* 2012/3 [RSA-2012-3-016];
- *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996, *Bulletin* 1996/3 [RSA-1996-3-020];
- *Glenister v. President of the Republic of South Africa and Others*, *Bulletin* 2011/1 [RSA-2011-1-004];
- *Hugh Glenister v. The President of the Republic of South Africa and Others* *Bulletin*, 2008/3 [RSA-2008-3-011];
- *Justice Alliance of South Africa v. President of the Republic of South Africa and Others*, *Freedom Under Law v. President of South Africa and Others*, *Centre for Applied Legal Studies and Another v. President of Republic of South Africa and Others*, *Bulletin* 2011/2 [RSA-2011-2-011];
- *Matatiele Municipality and Others v. the Republic of South Africa and Others (no. 1)*, *Bulletin* 2006/2 [RSA-2006-2-004];
- *Tatiana Malachi v. Cape Dance Academy International (Pty) Ltd and Others*, *Bulletin* 2010/2 [RSA-2010-2-007];
- *The Affordable Medicines Trust and Others v. Minister of Health and Others*, *Bulletin* 2005/1 [RSA-2005-1-002];
- *The New National Party of South Africa v. The Government of the Republic of South Africa and Others*, *Bulletin* 1999/1 [RSA-1999-1-003].

#### Languages:

English.



#### Identification: RSA-2014-3-016

a) South Africa / b) Constitutional Court / c) / d) 11.12.2014 / e) CCT 74/14 / f) H v. Fetal Assessment Centre / g) [www.constitutionalcourt.org.za/Archives/22484.pdf](http://www.constitutionalcourt.org.za/Archives/22484.pdf) / h) CODICES (English).

#### Keywords of the systematic thesaurus:

- 5.1.1.4.2 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Incapacitated.**
- 5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability.**
- 5.3.2 Fundamental Rights – Civil and political rights – **Right to life.**
- 5.3.4.1 Fundamental Rights – Civil and political rights – Right to physical and psychological integrity – **Scientific and medical treatment and experiments.**
- 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**
- 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

#### Keywords of the alphabetical index:

Termination of pregnancy, information session, prior, obligation / Child, best interest / Child, disabled, care, costs / Medical treatment, damage, compensation, limitation / Medical practitioner, duty of care, professional obligation / Nasciturus, protection, negligence.

#### Headnotes:

A child's best interests, which are of paramount importance in any matter concerning the child, are essential to determining whether a child's claim for "wrongful life" may exist.

A child's claim for "wrongful life" may in principle potentially exist. This involves complex factual and legal considerations that should not be decided on exception. It is necessary for the High Court to determine whether all the elements of a delict, namely harm, wrongfulness, negligence, causation and damages have been established, or whether a claim in another form may have to be developed to remedy any wrong that may have been committed. This decision must accord with constitutional rights and values, including the best interests of the child.

#### Summary:

I. In the Western Cape Division of the High Court, Cape Town (hereinafter, the "High Court"), H brought a claim for damages on behalf of her minor child due to

the Fetal Assessment Centre's (hereinafter, the "Centre") alleged negligent conduct. H claimed that she approached the Centre to assess the possible risk of certain congenital conditions. She contended that the Centre failed to interpret the results correctly and negligently failed to warn her of the high risk of her child being born with Down syndrome. She maintained that, had she been made aware of the high risk, she would have terminated the pregnancy. The child was born with Down syndrome and H claimed special and general damages on the child's behalf.

The High Court upheld an exception to a child's claim for damages against the Centre for allegedly misdiagnosing the child's high risk of Down syndrome, as being bad in law. (An exception is a procedure that tests, as a matter of law, the sustainability of a plaintiff's claim, without considering the evidence or going to trial.) South African law has previously recognised a claim by the mother for pre-natal misdiagnoses, but not by the child.

II. The Constitutional Court granted H leave to appeal. It also issued an anonymisation order to protect her identity as well as that of her family and child.

The Court found that the parties' arguments did not address the constitutional injunction that a child's best interests are of paramount importance in any matter concerning the child, which is essential to determining whether a child's claim for "wrongful life" may exist. In addition, the finding that a child's claim may be recognised involves complex factual and legal considerations which this Court is not best placed to evaluate. Accordingly, the Court held that it was not appropriate to make a final determination on the question of a child's "wrongful life" claim.

After considering the law in other jurisdictions, as well as the implications for the South African law of delict, the Court emphasised that the child's claim may in principle potentially exist. Whether it does and in what form must be decided by the High Court. The High Court should still determine whether all the elements of a delict, namely harm, wrongfulness, negligence, causation and damages have been established, or whether a claim in another form may have to be developed to remedy any wrong that may have been committed. This decision must accord with constitutional rights and values, including the best interests of the child. It was therefore wrong of the High Court to strike out the plaintiff's claim as being in principle unsustainable.

The Court replaced the order of the High Court with one directing H to amend the child's particulars of claim.

### Supplementary information:

Legal norms referred to:

- Sections 12.2.a, 28.2, 39.1 and 39.2 of the Constitution of the Republic of South Africa, 1996.

### Cross-references:

Constitutional Court:

- *Administrator, Natal v. Edouard* [1990] ZASCA 60;
- *Carmichele v. Minister of Safety and Security, Bulletin* 2001/2 [RSA-2001-2-010];
- *Country Cloud Trading CC v. MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28;
- *Friedman v. Glicksman* 1996 (1) SA 1134;
- *K v. Minister of Safety and Security, Bulletin* 2005/1 [RSA-2005-1-006];
- *Mukheiber v. Raath and Another* [1999] ZASCA 39;
- *Road Accident Fund v. Mtati* [2005] ZASCA 65;
- *Stewart and Another v. Botha and Another* [2008] ZASCA 84;
- *Harriton v. Stephens* [2006] HCA 15;
- HR 18 March 2005, *Nederlandse Jurisprudentie* 2006, 606 (*Kelly*);
- *McKay and Another v. Essex Area Health Authority and Another* [1982] QB 1166.

### Languages:

English.



### Identification: RSA-2014-3-017

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 12.12.2014 / **e)** CCT 72/14 / **f)** National Union of Metalworkers of South Africa v. Intervale (Pty) Ltd and Others / **g)** [www.constitutionalcourt.org.za/Archimages/22484.pdf](http://www.constitutionalcourt.org.za/Archimages/22484.pdf) / **h)** CODICES (English).

### Keywords of the systematic thesaurus:

2.1.1.1 Sources – Categories – Written rules – **National rules.**

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

2.1.3.1 Sources – Categories – Case-law – **Domestic case-law.**

2.3.7 Sources – Techniques of review – **Literal interpretation.**

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

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

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

*Keywords of the alphabetical index:*

Employment law, interpretation / Labour relations.

*Headnotes:*

Section 191 of the Labour Relations Act makes conciliation of labour disputes a precondition for adjudication by the Labour Court. Each employer involved in the dispute must be cited in the referral to conciliation. There is no substantial compliance with the statute unless each employer is cited. The Labour Court has no jurisdiction to join employers who were not cited in the referral to conciliation in later proceedings.

*Summary:*

I. The National Union of Metalworkers of South Africa (hereinafter, “NUMSA”), the applicant, represented employees who were dismissed after participating in a strike at an industrial site. These premises are shared by a number of engineering companies including Steinmüller Africa (Pty) Ltd (Steinmüller), Intervolve (Pty) Ltd (Intervolve) and BHR Piping Systems (Pty) Ltd (hereinafter, “BHR”). On behalf of the dismissed employees, NUMSA referred an unfair dismissal dispute to the appropriate bargaining council, but cited only Steinmüller as the employer when in reality some of the employees were employed by Intervolve and BHR. NUMSA attempted a second, late, referral that cited all three employers but this referral was not condoned. Seven months later, NUMSA took the first referral to the Labour Court along with an application to join Intervolve and BHR.

The Labour Court permitted the joinder of the additional employers. It found that the three companies shared Human Resources services and representation in the conciliation proceedings, operated out of the same premises and transferred employees between them without terminating

employment contracts and instituting new ones. Additionally, the dismissal letters to the employees were identical. The Labour Court thus held that the failure to refer the other two companies to conciliation was not fatal.

The Labour Appeal Court overturned that decision. It found that NUMSA had not complied with Section 191 of the Labour Relations Act (hereinafter, the “LRA”), which requires referral of a dispute to conciliation before it can be adjudicated in the Labour Court. As NUMSA did not timeously refer the dispute against Intervolve and BHR to conciliation, the Labour Court did not have jurisdiction to join the two additional employers.

II. In the majority judgment written by Cameron J, with whom five justices concurred, the Constitutional Court granted leave to appeal, but rejected NUMSA’s arguments and dismissed the appeal. It confirmed the Labour Appeal Court jurisprudence that Section 191 makes the referral to conciliation of a dismissal dispute a precondition to the Labour Court’s jurisdiction. NUMSA did not comply with this provision. The close association between the companies and the fact that Intervolve and BHR knew about the referral citing Steinmüller, were not sufficient. The purpose of the statutory provision is to put each employer party individually on notice that it may be liable to adverse legal consequences if the dispute involving it is not effectively conciliated. But the referral cited only Steinmüller as the sole target in the intended litigation. This sent out the opposite message to the other two companies.

III. In a concurring judgment, Zondo J concluded that the dismissal disputes between BHR and Intervolve and their employees were not referred to conciliation because they were separate disputes to the one involving Steinmüller. Therefore, these disputes could not be adjudicated by the Labour Court. There was no substantial compliance with Section 191 of the LRA. Zondo J agreed with the majority judgment that the appeal should be dismissed.

In a dissenting judgment, Nkabinde J, with Froneman J, Jafta J, Madlanga J and Van der Westhuizen J concurring, held that there had been substantial compliance with Section 191 of the LRA, when interpreted to give effect to the rights to fair labour practice and access to courts, together with the LRA’s primary object to promote effective resolution of labour disputes. Nkabinde J held that the interpretation the respondents advanced and the Labour Appeal Court accepted was formalistic because Steinmüller, Intervolve and BHR were aware of the dispute that NUMSA referred for conciliation.

She held that requiring strict compliance in the circumstances conflicts with the primary object of the LRA. As a result, she would have granted and upheld the appeal and reinstated the order of the Labour Court.

In a separate dissent, Froneman J, with Madlanga J and Nkabinde J concurring, agreed with most of the majority and concurring judgments' exposition of the law, but concurred in the judgment and outcome proposed by Nkabinde J. The majority judgment tilted the scale too far towards compliance with form rather than substance. The concerns regarding the mistake could have been adequately resolved by examining whether there was any practical prejudice because of non-compliance.

#### *Supplementary information:*

Legal norms referred to:

- Sections 34 and 39.2 of the Constitution of the Republic of South Africa, 1996;
- Section 191.1 and 191.3 of the Labour Relations Act 66 of 1995;
- Rule 22 of the Rules of the Labour Court.

#### *Cross-references:*

Constitutional Court:

- *African Christian Democratic Party v. Electoral Commission and Others*, Bulletin 2005/3 [RSA-2005-3-016];
- *Maharaj and Others v. Rampersad* 1964 (4) SA 638 (A);
- *National Union of Metalworkers of South Africa v. Driveline Technologies (Pty) Ltd and Another*, [1999] ZALC 157; 2000 (4) SA 645 (LAC).

#### *Languages:*

English.



## Sweden

### Supreme Administrative Court

#### Important decisions

*Identification:* SWE-2014-3-001

**a)** Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 20.06.2013 / **e)** 7936-11 / **f)** / **g)** HFD 2013 ref. 42 / **h)**.

*Keywords of the systematic thesaurus:*

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.  
5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty**.

*Keywords of the alphabetical index:*

Prison, sentence, execution / Parole, conditional / Prisoner, carrying out sentence in home country / Prisoner, parole, conditional, period extension.

*Headnotes:*

An extension of the period until a prisoner is eligible for conditional parole due to the transfer of the prisoner to Sweden is disproportionate, violating Article 5.1 ECHR.

*Summary:*

I. In this case, a Finnish court had sentenced a Swedish citizen to seven years in prison. According to Finnish law, he could, if certain criteria were met, be granted conditional parole after serving half of the sentence. The person requested that the sentence be executed in Sweden, which was approved. After the transfer to Sweden, the Swedish Prison and Probation Service decided in accordance with Swedish law that conditional parole may be granted to him at the earliest when two thirds of the sentence had been served. This meant that he could be granted conditional parole in Sweden, at the earliest, 14 months later than he would have been if he had served his sentence in Finland.

II. The Supreme Administrative Court determined that Swedish rules apply to the execution of the Finnish sentence, including Swedish rules regarding conditional parole. The Court declared, however, that the transfer in question must also be compatible with the European Convention on Human Rights.

Regarding the case-law of the European Court of Human Rights (*Szabó v. Sweden* and *Csozszánszki v. Sweden*; judgments of 27 June 2006), the Court noted that a prolongation of the actual prison time when executing a foreign court sentence may conflict with Article 5 ECHR.

Considering the actual prison time was prolonged by one third and the person at the time of the transfer had less than three months left until expected conditional parole in Finland, the Supreme Administrative Court found that the Swedish prolongation was disproportionate.

#### Cross-references:

European Court of Human Rights:

- *Csozszánszki v. Sweden*, no. 22318/02, 26.10.2004;
- *Szabó v. Sweden*, no. 28578/03, 27.06.2006.

#### Languages:

Swedish.



#### Identification: SWE-2014-3-002

**a)** Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 29.10.2013 / **e)** 658-660-13 / **f)** / **g)** HFD 2013 ref. 71 / **h)**.

#### Keywords of the systematic thesaurus:

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

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

#### Keywords of the alphabetical index:

*Ne bis in idem*, tax offence / Tax offence, surcharges / Tax offence, criminal punishment / Tax offence, indictment, retrial.

#### Headnotes:

The Swedish system of tax surcharges and tax offences is incompatible with the right not to be tried or punished twice for the same offence if the proceedings are founded on identical factual circumstances. Accordingly, a criminal indictment for a tax offence constitutes a procedural hindrance against imposing tax surcharges based on the same submission of incorrect information.

#### Summary:

I. In this case, a person had been indicted for, *inter alia*, aggravated tax offences based on submitting incorrect information in his tax returns. Shortly after the indictment, the Swedish Tax Agency imposed tax surcharges based on the same submission of incorrect information.

II. The Supreme Administrative Court referred to relevant case-law in 2009. In that case, the Court examined tax surcharges that had been imposed on a person following a criminal conviction for a tax offence. The Court concluded that the Swedish system conformed to the European Convention on Human Rights and that there had been no violation of the prohibition of double punishment under Article 4 Protocol 7 ECHR (RÅ 2009 ref. 94).

With regard to the recent case-law of the European Court of Human Rights and the Court of Justice of the European Union, the Court overturned its previous conclusions by a plenary decision. The Court concluded in the case at hand that the decision by the Tax Agency to impose tax surcharges violated Article 4 Protocol 7 ECHR. The appeal made against the Tax Agency's decision was accordingly granted and the surcharges set aside.

#### Supplementary information:

The Supreme Administrative Court granted a retrial in the case where the Tax Agency had imposed tax surcharges on a person based on the same submission of incorrect information that had earlier led to an indictment for tax offences (1112-13 and 1113-13, 05.06.2014).

*Cross-references:*

Supreme Administrative Court:

- RÅ 2009 ref. 94.

*Languages:*

Swedish.

*Identification:* SWE-2014-3-003

a) Sweden / b) Supreme Administrative Court / c) / d) 08.11.2013 / e) 4496-12 / f) / g) HFD 2013 ref. 72 / h).

*Keywords of the systematic thesaurus:*

- 3.3 General Principles – **Democracy**.
- 3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature**.
- 5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion**.
- 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.
- 5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.
- 5.3.41.3 Fundamental Rights – Civil and political rights – Electoral rights – **Freedom of voting**.

*Keywords of the alphabetical index:*

Election, Jehovah's Witnesses, participation / Government grant, democratic values, precondition / Election, vote, obligation / Religion, State, neutrality.

*Headnotes:*

The fact that a religious community, due to its faith, recommends its members to avoid participation in general elections does not in itself mean that the community opposes democratic governance. On these grounds, the community cannot be excluded from government grants.

*Summary:*

I. The Supreme Administrative Court can, under certain circumstances, examine whether a decision made by the government contravenes an article of law. This institution is known as the legal review. A prerequisite for legal review is that the decision involves an examination of the individual's civil rights or obligations as referred to in Article 6.1 ECHR.

The Government rejected Jehovah's Witnesses' application for government grants, since the community recommends its members not to participate in general elections. The Government opined that the community did not meet the requirement of fundamental democratic values, which is a prerequisite for receiving governmental grants, according to the relevant article of law.

II. The Supreme Administrative Court found that general and equal voting rights are a part of the fundamental principles of a democratic society. However, the fact that citizens can be expected to use their right to participate in the governance of their country does not incorporate an obligation for them to do so.

In regard to the freedom of religion and the case-law of the European Court of Human Rights, the Court held that the state must be neutral when making decisions about government grants for religious communities.

A religious community that, due to its faith, recommends its members to avoid participation in general elections can therefore not be excluded from government grants on this ground.

The Government's decision was considered unlawful and was revoked.

*Languages:*

Swedish.



*Identification:* SWE-2014-3-004

a) Sweden / b) Supreme Administrative Court / c) / d) 19.02.2014 / e) 3004-12 / f) / g) RÅ 2014 ref. 12 / h).

*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.**

*Keywords of the alphabetical index:*

Trial, reasonable time, remedy, efficient / Social security, sickness, benefit, travel abroad, permission / Social security, sickness, benefit, repayment, monies unduly paid.

*Headnotes:*

In the case of a violation of the right to trial within a reasonable time as guaranteed by Article 6 ECHR, the most effective way to compensate the person concerned for the violation is to reduce the claim against the person concerned when this can be executed in the case already before the court.

When deciding by which amount a repayment claim should be reduced, the length of the delay is the most important factor. However, the nature of the case and its importance for the individual can also be considered.

*Summary:*

I. A person who was receiving sickness benefit from the Swedish Social Insurance Agency went to Russia for several months. According to Swedish law, if a person wants to keep the sickness benefit while traveling abroad, he or she must ask permission from the Social Insurance Agency before leaving Sweden.

The person concerned had not asked permission. As such, the Social Insurance Agency therefore decided that the sickness benefit must be repaid. The person requested that the Social Insurance Agency would reconsider its decision. Twenty-two months later the Social Insurance Agency decided not to change its decision. After an unsuccessful appeal to the Administrative Court, the Administrative Court of Appeal found that the proceedings at the Social Insurance Agency had taken so long that it constituted a violation of the right to trial within a reasonable time. The Administrative Court of Appeal therefore reduced the claim by half (from 40 000 SEK to 20 000 SEK).

II. The person concerned and the Social Insurance Agency both made an appeal to the Supreme Administrative Court, which took eleven months to decide that leave to appeal should be granted.

The Court then found that the lengthy proceedings, both at the Social Insurance Agency and the judicial proceedings, constituted a violation of the right to trial within reasonable time as guaranteed by Article 6 ECHR. The Administrative Court of Appeal expressed that the most effective way to compensate the person concerned for the violation was to reduce the claim against her, as it could be executed in the case that was already before the court.

The Court saw no legal obstacles to this solution. The Court pronounced that the length of the delay is the most important factor, when deciding which amount the repayment claim should be reduced. However, the nature of the case and its importance for the individual can also be considered. In this case, the Court found that the reduction by 20 000 SEK, granted by the Administrative Court of Appeal, constituted fair compensation for the violation.

*Languages:*

Swedish.

*Identification:* SWE-2014-3-005

a) Sweden / b) Supreme Administrative Court / c) / d) 19.06.2014 / e) 7110-13 and 7111-13 / f) / g) RÅ 2014 ref. 43 / h).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Tax offence, surcharges / Tax offence, acquittal, consequence for procedure on tax surcharges.

*Headnotes:*

When tax surcharges have been imposed before a person was indicted for tax offences, based on the same submission of incorrect information and the indictment have led to acquittal by a legally binding judgment, while the proceedings concerning tax surcharges were still not finished, the tax surcharges are set aside.

*Summary:*

I. The Swedish Tax Agency used its discretion to assess a person's income during 2007 and 2008 and to impose tax surcharges. The person appealed the decisions. While the case was dealt with by the Administrative Court of Appeal, the person was indicted for tax offences based on the same submission of incorrect information. He was acquitted by a legally binding judgment in the district court.

II. The Supreme Administrative Court found that it follows from Article 4.1 Protocol 7 ECHR and from the jurisprudence of the European Court of Human Rights that the proceedings concerning tax surcharges must be discontinued. This was achieved by setting aside the tax surcharges.

*Languages:*

Swedish.

*Headnotes:*

Tax surcharges are based on the same submission of incorrect information as an indictment and the criminal proceeding is still going on when the Tax Agency decides to impose tax surcharges, tax surcharges are set aside.

*Summary:*

I. The person concerned was indicted for tax offences, *inter alia* for transactions related to the sale of real estate. The indictment was later adjusted, so that the sale was not included. The Swedish Tax Agency decided to impose tax surcharges regarding the sale of real estate.

II. The Supreme Administrative Court found that the tax surcharges were based on the same submission of incorrect information as the indictment and that the criminal proceeding were still going on when the Tax Agency decided to impose tax surcharges. The Tax Agency did therefore not have the right to impose tax surcharges, even though the part of the indictment concerning the sale of real estate was never tried by the district court. The tax surcharges were set aside.

*Languages:*

Swedish.



*Identification:* SWE-2014-3-006

**a)** Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 09.10.2014 / **e)** 3468-3470-13 / **f)** / **g)** RÅ 2014 ref. 65 / **h)**.

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Tax offence, surcharges / Tax offence, indictment, change / Tax offence, real estate.

# Switzerland

## Federal Court

### Important decisions

*Identification:* SUI-2014-3-006

**a)** Switzerland / **b)** Federal Court / **c)** Second Social Law Chamber / **d)** 15.09.2014 / **e)** 9C\_810/2013 / **f)** A. v. Bern Canton Compensation Fund / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 140 I 305 / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

2.3.9 Sources – Techniques of review – **Teleological interpretation.**

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

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

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

*Keywords of the alphabetical index:*

Leave, parental / Father / Allowance, parental / Allowance in respect of parental leave / Allowance, welfare, state / Gender equality, insurance.

*Headnotes:*

Article 16b of the Federal Act on loss of earnings allowances (LAPG); Article 8 of the Federal Constitution (equal treatment); Article 8 and Article 14 ECHR; paternity allowance.

According to the clear legal text and the legislator's explicit intent, fathers cannot infer an entitlement to loss of earnings compensation from Article 16b LAPG.

Article 16b LAPG does not embody the concept of parental leave as it exists in other European countries, but exclusively settles mothers' entitlement to a postnatal allowance. There is no discrimination contrary to law – also in the light of the case-law of the European Court of Human Rights.

Apportionment of the entitlement between the two parents would require a legal basis and that already accounts for its absence from the existing regulations

(entitlement for 14 weeks), because such apportionment would be incompatible with Article 4 of ILO Convention no. 183 on maternity protection, scheduled for ratification, which secures to women the right to not less than 14 weeks of irreducible maternity leave.

*Summary:*

A few weeks after the birth of his son, the applicant lodged an application for parental allowance in respect of six weeks' paternity leave. The Bern Canton compensation fund denied any entitlement to loss of earnings compensation, and the related appeal was dismissed by the administrative court of Bern Canton. The Federal Court dismissed the appeal.

Since 2005, maternity leave of at least 14 weeks has been set out in the Code of Obligations (Article 329f CO) and in the Act on loss of earnings allowances (Article 16b ff. LAPG). According to the latter, any woman under compulsory pension insurance for the 9 months preceding delivery, who has engaged in gainful activity for at least 5 months during this period and is an employee at the date of delivery, is entitled to a daily allowance of 80% of the average income received before her entitlement to the allowance began.

The applicant submitted that the grant of paid maternity leave was founded on both biological and social considerations. The first 8 weeks of maternity leave (confinement) were granted for compelling biological reasons which could justify unequal treatment. Conversely, from the 9<sup>th</sup> to the 14<sup>th</sup> week, entitlement to leave and to the woman's allowance was no longer granted for compelling biological reasons but in order to establish a bond with the infant, hence for social reasons. The Labour Act (LTr) clearly demarcated these two parts: whereas Article 35a.3 LTr laid down a prohibition on working for 8 weeks in order to protect the health of women giving birth, every mother was free to forgo the remainder of the leave entitlement as from the 9<sup>th</sup> week and to resume her gainful activity, thereby forfeiting her right to the allowance. The applicant considered that as from the 9<sup>th</sup> week, maternity leave became parental leave for practical purposes and that it must be gender-neutral. Thus the mother's sole entitlement to this leave was contrary to equal treatment (Article 8.3 of the Constitution), the right to respect for private and family life (Article 13.1 of the Constitution) and the European Convention on Human Rights (Article 14 in conjunction with Article 8 ECHR).

Under Article 8.3 of the Constitution, all state authorities are required to treat women and men equally and to ensure social equality of the sexes. According to the case-law of the Federal Court,

differentiated treatment is lawful if biological differences absolutely preclude equal treatment. The traditional allocation of roles cannot justify unequal treatment.

Under Article 190 of the Constitution, the Federal Court must apply the federal laws and international law. It may nevertheless verify the constitutionality of a federal law and invite the legislator to amend the impugned provision by a decision prompting amendment.

The law must be interpreted firstly according to the letter, the meaning and the aim sought, by a teleological method. If several interpretations were possible, the one most consistent with the constitutional principles should be chosen; however, this interpretation had its limitations in that a new social insurance entitlement could not be created against the clear intent of the legislator.

The wording of Article 16b LAPG was clear and unequivocal: only women are entitled to maternity allowance. The parliamentary proceedings plainly showed that the purpose of the law as envisaged by the legislator precluded the possibility for fathers to infer a right to leave and to an allowance because of the birth of their child, even if leave for family reasons disadvantaged them in practice owing to their gender. This inequality was consciously intended by the legislator.

The Federal Court observed that the regulations founded on gender were lawful for the first 8 weeks after delivery for biological reasons, which the applicant did not contest, but that he could derive no entitlement to a maternity allowance from Article 16 LAPG. It referred to a judgment of 1994 by which it had dismissed the appeal of a father concerning his application for 14 weeks' paid paternity leave, on the ground that such regulations, which are able to help break down the traditional conception of roles and foster gender equality, were the cantonal legislator's responsibility. It moreover left open the question how long maternity leave could be recognised as biologically justified.

As to compliance with the European Convention on Human Rights, the Federal Court cited the Court's case-law and noted that states providing for parental leave must grant it to both parents without discrimination. However, it observed that the leave settled by the Swiss legal system was incontestably intended to protect the mother and was not a parental leave, which was apparent not only from the legislator's intent but also from its 14 week duration; this duration corresponded to the minimum term of protection of the mother prescribed by the European

Union, whereas parental leave in all other European states lasted distinctly longer. Thus there was no discrimination within the meaning of Articles 8 and 14 ECHR. Moreover, apportionment of the leave between the parents would be incompatible with Article 4 of Convention no. 183 of the International Labour Organisation (ILO) on maternity protection, scheduled for ratification, prescribing 14 weeks minimum of irreducible maternity leave.

#### *Languages:*

German.



#### *Identification: SUI-2014-3-007*

**a)** Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 01.10.2014 / **e)** 1C\_518/2013 / **f)** Geneva Socialist Party and others v. Council of State of Geneva Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 140 I 381 / **h)** CODICES (French).

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

3.13 General Principles – **Legality**.  
 3.16 General Principles – **Proportionality**.  
 3.18 General Principles – **General interest**.  
 4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces**.  
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.  
 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

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

Agent, undercover / Judicial enquiry, prior / Police officer, undercover / Police, law on the police / Surveillance, secret, measure.

#### *Headnotes:*

Article 13.1 of the Federal Constitution (protection of the private sphere); Article 8 ECHR; Geneva Canton Police Act; preventive observation, secret preventive investigations and undercover enquiry; protection of the private sphere.

Description of preventive observation, secret preventive investigations and undercover enquiry within the meaning of the Geneva Canton Police Act.

These three measures constitute a breach of the protection of the private sphere, albeit with an adequate legal basis. However, they do not comply with the principle of proportionality in the strict sense as they fail to provide for subsequent disclosure to the person under observation (grounds, method and duration), carrying a right of appeal; this right to information after the event may nevertheless be qualified by exceptions. As with preventive observation, an authorisation must furthermore be requested of the prosecution department or of a court for secret preventive investigations where these last more than one month; in case of undercover enquiry, a court's permission is necessary when the measure is put into operation.

### *Summary:*

The Parliament of Geneva Canton enacted a law amending the Police Act (LPol), promulgated by the government at the end of the time allowed for referendum. Entitled "Prior measures", this amendment distinguishes three measures:

1. Preventive observation (Article 21A LPol) is a surveillance measure which occurs before the commission of an offence i.e. before criminal proceedings are instituted, in order to stop offences from being committed. It applies to a given person or thing and extends over a fairly long period, or at least must have been planned for a certain duration. It is conceivable only in places freely accessible to the public, and audio or video recordings of it can be made. By contrast with secret preventive investigations and undercover enquiry, there is no provision for direct contact between the observer and the targeted person. Beyond 30 days, authorisation is needed from the duty prosecutor.

2. Secret preventive investigations (Article 21B LPol) are defined as a milder form of secret investigation, less invasive and in principle far more selective. These are to enable police detectives, not acting under assumed names but without making themselves known in their official capacity to the persons with whom they come into contact, to establish where relevant that offences were about to be committed. Article 21B LPol thus constitutes the legal basis which the police currently lack for carrying out targeted operations to discover the commission of crimes or offences. It is therefore concerned with aiding arrests "in the act". Drug trafficking is especially where such an investigative measure may be deployed. As with secret observation, there must be strong indications that an offence may be committed. Additional

considerations include the actual or probable failure of other investigative methods.

3. Undercover enquiry, provided for in Article 22 LPol, presupposes the intervention of an "undercover agent" who has a false identity. The police are able to carry out undercover enquiry operations prior to the commission of an offence. The conditions for a secret measure of this kind are, firstly, probable commission of a serious or specific offence and, secondly, actual or probable failure of other investigative methods (subsidiarity clause).

The Geneva Socialist Party, the Geneva "Greens" Party and some private individuals filed a public law appeal and asked that Articles 21A.2, 21B and 22 LPol be set aside. The Federal Court allowed the appeal.

Under Article 13.1 of the Constitution, echoing Article 8 ECHR, everyone is entitled to respect for his private and family life, home, correspondence and the relations which it establishes through the post and telecommunications. Paragraph 2 of this provision stipulates that everyone is entitled to be protected against wrongful use of data concerning him. Article 13 of the Constitution protects the private sphere in a broad sense, taking in protection of personal data. These refer to the identity, the social relations and the intimate acts of every natural person, honour and reputation and especially all information relating to a person which is not accessible to the public, in particular information on the files of civil, criminal or administrative procedures, which would damage his social standing. In the field of data protection, the right to self-determination in respect of personal information, enshrined in the Constitution, guarantees that the individual in principle retains control of data concerning him, irrespective of the actual degree of sensitiveness of the information in question.

Articles 21B and 22 LPol were found to constitute infringements of the protection of the private sphere since they involved the secret intervention of the police in areas covered by the private sphere, in particular social relations, communication with others and self-determination. The same applied to audio or video recording of data on the public street, their storage and processing as provided by Article 21A.2 LPol. Pursuant to Article 36 of the Constitution, any restriction of a fundamental right must have a legal foundation, be justified by a public interest, and proportionate to the aim sought.

The applicants did not dispute the existence of a public interest. Regarding the principle of compliance with the law, the requirement of weight of legislation

was not absolute since the legislator could not be ordered to refrain completely from resorting to general concepts involving a necessary degree of interpretation, and it did not presuppose that a catalogue of offences be itemised. Moreover, the fact that preventive investigations were reserved in this instance for crimes and offences and not plain misdemeanours already constituted a limitation on police activity. The case-law furthermore acknowledged that to a certain extent the imprecision of the statutes could be offset by procedural guarantees. The infringement of the private sphere caused by the impugned provisions thus had an adequate legal basis.

The principle of proportionality required that a restrictive measure be calculated to achieve the expected results and that these are unattainable by a less incisive measure; in addition, it forbade any limitation exceeding the aim sought and required that this be reasonably related to the jeopardised public or private interests. As regards the right to keep order, which governs state activity in the framework of the monopoly on legitimate violence, the principle of proportionality, also embedded in Article 5.2 of the Constitution, was of special importance.

From this standpoint, preventive observation was calculated to achieve the expected result, that is keeping public order and preventing offences, and had a subsidiarity clause. As the interference with fundamental rights was slight, and it was a short-term measure, the fact that the secret preventive observation was conducted without authorisation for 30 days was not contrary to the principle of proportionality. As to compliance with the principle of proportionality in the strict sense, that is a reasonable relationship between the aim sought and the jeopardised private interests, a balance had to be struck between the right to the private sphere and the need to provide for preventive observation in order to protect society. A means of providing a guarantee to guard against possible abuse and to be able to supervise the work of the police was to inform the person concerned after the event of the surveillance undergone by him or her and enable him or her to appeal. This right to information after the event could nevertheless embody exceptions to preserve the effectiveness and confidentiality of the measures taken. The interference with the private sphere brought about by Article 21A.2 LPol infringed the principle of proportionality in the strict sense, as it failed to provide for subsequent disclosure to the person under observation, and this provision should be set aside.

Regarding secret preventive investigations, these were calculated to achieve the expected result and carried a subsidiarity clause. As to compliance with

the principle of proportionality in the strict sense, keeping public order and preventing offences could justify an encroachment on the private sphere. In order to prevent encroachments on the private sphere from remaining secret as to duration, it was necessary to provide for authorisation by the prosecution department or by a court where the secret preventive investigations lasted more than 30 days. Such prior authorisation was intended to verify, in the specific case, the public interest pursued together with the proportionality of the requested measure. Besides, for the same reasons as were stated for preventive observation, provision should be made for disclosure after the event of the grounds, the method and the duration of the investigations conducted on the person concerned. This right to information after the event could nevertheless embody exceptions in order to safeguard the effectiveness and confidentiality of the measures taken. The interference with the private sphere caused by Article 21B LPol was not in accordance with the principle of proportionality and so it was appropriate to set aside this provision.

Finally, with regard to undercover enquiry, it was capable of achieving the expected result, namely preservation of public order and prevention of offences. Recourse was had to undercover enquiry only "if other measures of information-seeking or enquiry have not succeeded, would have no prospect of succeeding, or would be unduly difficult". Undercover enquiry was moreover conditioned by "the gravity or specificity of the offence". The rule of expediency was thus expressed in the Act. As to proportionality in the strict sense, keeping public order and preventing offences could justify this encroachment on the private sphere. The authorisation of an independent judge was nevertheless required if particulars were to be fabricated or altered to create a false identity. Subjection to a judge's authorisation was a way of making Article 22 LPol conform to the Constitution, a solution found in several other cantonal acts on the police. Moreover, the Geneva legislator must provide for disclosure after the event of the grounds, method and duration of the undercover enquiry, coupled with a right of appeal. Article 22 LPol did not afford an adequate guarantee against abuses and must therefore be set aside.

#### *Languages:*

French.



## “The former Yugoslav Republic of Macedonia” Constitutional Court

### Important decisions

*Identification:* MKD-2014-3-005

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 09.04.2014 / e) U.br.111/2012 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 94/2014 / h) CODICES (Macedonian, English).

*Keywords of the systematic thesaurus:*

4.6.9.2.1 Institutions – Executive bodies – The civil service – Reasons for exclusion – **Lustration**.

*Keywords of the alphabetical index:*

Lustration, law.

*Headnotes:*

Adopted in 2012, the new lustration law – the Law on the Establishment of a Condition for Restriction on Performance of a Public Office, Access to Documents, and Disclosure of the Collaboration with the State Security Bodies (Official Gazette, no. 86/2012) – is not contrary to the Constitution.

*Summary:*

I. The applicants, four individuals and one NGO, requested the constitutional review of the so-called new lustration law, adopted after the Constitutional Court repealed many of the provisions of the former Law on lustration. They raised issues with the Law on the Establishment of a Condition for Restriction on Performance of a Public Office, Access to Documents, and Disclosure of the Collaboration with the State Security Bodies (“Official Gazette”, no. 86/2012) (hereinafter, the “Lustration Law”), and requested review in its entirety, together with selected articles of the Law.

The applicants argued that the Lustration Law violated several constitutional provisions and principles. They include violations of the rule of law

and division of powers into legislative, executive and judicial, which are fundamental values of the constitutional order of the country, the principle of equality of the citizens before the Constitution and the provision on legal protection against individual legal acts. They also claimed that the new Lustration Law violated fundamental rights and freedoms. The applicants pointed to the safety and secrecy of personal data and the protection from violation of personal integrity, respect and protection of the privacy of personal and family life, dignity and reputation, the right to judicial protection of the legality of the individual acts of the state administration and the constitutional guarantee that freedoms and rights of the citizens can be limited only in cases stipulated by the Constitution.

The applicants referred to previous decisions of the Constitutional Court – Decisions U. no. 42/2008 and U. no. 77/2008 of 24 March 2010 (*Bulletin* 2010/1 [MKD-2010-1-002]). In these decisions, the Constitutional Court repealed several provisions of the previous Lustration Law, which were the same or similar to the provisions of the new Lustration Law. The petitioners asked the Court to consider the application of the lustration process after the adoption of the Constitution on persons who were former public servants. They claimed that the obligatory lustration of the members of political parties, non-governmental organisations, religious communities and journalists are provisions from the former Law on Lustration, which the Constitutional Court found unconstitutional and had repealed. The repeated regulation of these provisions with the disputed Law does not conform to the Constitution and the above-mentioned decisions of the Constitutional Court.

II. After reviewing the case, the Constitutional Court rejected the petitioners’ arguments as groundless and found that the disputed Law as a whole and its separate provisions do not raise an issue of conformity with the Constitution.

According to the Court, the disputed Law does not contain provisions that violate or limit the basic freedoms and rights of citizens, but it is based exactly on the principles of the rule of law, legal safety and the protection of citizens’ freedoms and rights.

The establishment of the condition to restrict the performance of a public office aims at protecting the basic freedoms and rights of the citizens from being violated due to ideological or political reasons. It does not imply interference with the constitutional guarantee for uninterrupted performance of the function stipulated by Article 23 of the Constitution.

The Court decided that in compliance with the constitutional provisions, the legislator possesses the right to create and establish the legal regulation with regards to the timeframe of the lustration process. The legislator's therefore assessed that the Law should be valid up to the moment of the adoption of the Law on Free Access to Public Information (2006), because it cannot be accepted that the change of the system was conducted immediately after the adoption of the Constitution in 1991 or that democracy took over immediately in the country, since a certain period of time must pass before the changes of the system begin to function. Namely, according to the Court, the reforms in the judicial system and the other segments were not conducted with the adoption of the 1991 Constitution. The Constitution was the subject of many amendments that took place for over a decade and more after the adoption of the Constitution, which also shows the long-term process of harmonisation of the societal structure and the process of democratisation itself.

According to the Court, the Law enables transparent and efficient implementation of the lustration process, the regulation of which is an exclusive competence of the legislator.

It is the right of the legislator to determine and clearly and concretely establish the range of persons this Law refers to. This Law lustrates persons who have individual guilt. It is not guilt in criminal law terms, but in terms of not respecting human rights and violating them, regardless of whether it is a general violation of human rights or in a more concrete, specific range of activities envisaged by the Lustration Law (collecting data, information, files, etc.) that breached human rights for political and ideological reasons.

In the Court's view, the concrete law does not regulate or establish a general and special prevention. It introduces the fulfilment of an additional condition to perform the public functions, which requires loyalty from the holders of those functions towards the system and the constitutional principles it is based on. This includes the rule of law, division of powers and the protection of human rights.

According to the Court, disputed Article 3 of the Law does not limit the basic rights of the individual and the citizen. This is because the establishment of special conditions does not imply discrimination. The reason is that all the rights in the Constitution are not absolute, apart from the ones explicitly named as such. All other rights can be limited, for the benefit of a greater goal, in order to reach a public interest. In this case, it is securing democracy and democratic values.

Disputed articles of the Law regarding the publication on the Commission's web site of the decision that determines collaboration with the state security bodies, before the commencement of a procedure before the Administrative Court, are not contrary to the Constitution. This is because, in this concrete case, the decision is brought in a procedure before a state administrative body, in which the right to appeal or other form of legal protection is regulated by law, in the sense of Amendment XXI to the Constitution.

The articles of the Law that stipulate the application of the additional condition for the performance of a public office for persons who conduct party functions in political parties, who are members in religious communities and groups, as well as for members of civil organisations do not exceed the constitutional limits for freedom of citizens to exercise and protect their political, economic, social, cultural and other rights and convictions. They also do not violate the constitutional division between the church, the religious communities and groups and the state. This is because the submission of such statement is not obligatory, but voluntarily. As such, in this case, it cannot be accepted that the state was involved in the work of the above-mentioned organisations.

III. Judge Natasha Gaber Damjanovska disagreed with the majority and submitted a separate opinion, which is attached to the Decision.

#### *Languages:*

Macedonian, English (translation by the Court).



#### *Identification:* MKD-2014-3-006

**a)** “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 08.10.2014 / **e)** U.br.137/2013 / **f)** / **g)** Court's web site: www.ustavensud.mk / **h)** CODICES (Macedonian, English).

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

3.17 General Principles – **Weighing of interests.**  
5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**

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

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

*Keywords of the alphabetical index:*

Abortion / Abortion, access / Abortion, condition / Abortion, consent, certificate / Abortion, counselling / Abortion, minor, consent.

*Headnotes:*

Legal regulation of the procedure for terminating pregnancy does not violate the constitutional right of citizens to freely decide on procreation (Article 41 of the Constitution).

*Summary:*

I. Several NGOs and one individual asked the Court to review the constitutionality of the Law on Termination of Pregnancy (Official Gazette, nos. 87/2013, 164/2013 and 144/2014). They argued that it violated the right of women to decide freely on procreation (Article 41 of the Constitution) and created possibilities for the State to interfere with the exercise of this right. They also claimed that provisions of the Law violated the right of a woman freely to decide about her life, physical integrity and health. They added that it created administrative impediments and complicated procedures (requirement for written request by a woman for an abortion, mandatory counselling before the intervention, introduction of time limits, obtaining approvals for abortion, high penalties for medical doctors etc.). It restricted their access to abortion and rendered this right ineffective in practice.

The applicants claimed that the Law was also contrary to several international human rights instruments, including the UN Convention of the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of Persons with Disabilities.

II. The Court disagreed with the applicants, finding the Law to be in accordance with the Constitution. The findings of the Court may be summarised as follows:

In the interest of protecting the health of women, regulations must be set regarding the requirements to perform pregnancy termination, the approval procedure for termination of pregnancy and the conditions that health institutions must meet to conduct the procedure for terminating a pregnancy.

Underage pregnant women and women deprived of their legal capacity, enjoy special protection. Therefore the requirement of written consent from the parent or the guardian of the pregnant woman does not violate the Constitution. Article 9 of the Constitution is not violated because minors and legally incapacitated women are not in the same legal position as other women with full legal capacity who are able to assume all risks of termination or continuation of pregnancy.

The legislator's general principle not to allow termination of pregnancy after the tenth week of pregnancy or before the expiry of one year from the previous pregnancy and its exceptions, are in line with the Constitution because the aim is to protect the health of the woman.

The disputed provision of the Law that allows termination of pregnancy after the tenth week of the date of conception in special circumstances (such as pregnancy that is the result of rape, incest, abuse of power, etc.), only if it is determined that it will not lead to serious health issues or to immediate risk to the life of the pregnant woman, is an expression of the state's care for women's health. A medical specialist shall determine whether the circumstance constitute a risk to women's health.

The written requirement by the woman to terminate her pregnancy does not violate the dignity of women. It is only evidence of a woman's clearly expressed will to terminate the pregnancy and represents an initial act for the commencement of the abortion procedure.

The authorisation of the Minister of Health to regulate the pre-abortion counselling by sub-statutory legal act, has sufficient legal basis in law and does not violate the principle of the separation of powers.

Mandatory pre-abortion counselling of pregnant women does not create inequality between pregnant women and other patients. The reason is that, under the Law on Protection of Patients, the pregnant woman may, at her own risk, refuse information about her own health condition, in which case the physician determines whether the patient has refused counselling. The inability to conduct counselling because of the personal choice of the woman, according to the Court, is not subject to criminal liability. The duty to conduct pre-abortion counselling should be viewed in terms of the need to strengthen the responsibility of healthcare professionals and to introduce professional standards in healthcare in the context of evidence-based medicine.

The obligation to keep records for performed abortions does not violate the privacy of the woman because, in accordance with regulations to protect the rights of patients, these data are kept only for medical and administrative purposes and are not published.

Pregnancy is a specific medical condition not considered an illness. Therefore pregnant women are not in the same legal position as other patients who suffer from illnesses. Therefore, the requirement for a written request for termination of pregnancy (as opposed to other medical interventions which are conducted without such a formal request) does not raise the issue of discrimination.

The offences introduced by the disputed provisions of the Law on Termination of Pregnancy may be committed only by medical doctors, the director of the medical institution or the medical institution as a legal person. Therefore, they are specific offences, different from the offence – Illegal termination of pregnancy – from Article 129 of the Criminal Code, which can be committed by any person. The legislator has the constitutional authority, other than the Criminal Code, to establish criminal offences and penalties for such offenses.

III. Judge Natasha Gaber Damjanovska disagreed with the majority and submitted a separate opinion, which is attached to the Decision.

#### *Languages:*

Macedonian, English (translation by the Court).



#### *Identification:* MKD-2014-3-007

**a)** “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 08.10.2014 / **e)** U.br.30/2014 / **f)** / **g)** Court’s web site: www.ustavensud.mk / **h)** CODICES (Macedonian, English).

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

3.18 General Principles – **General interest.**

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

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

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

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

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

Vaccination, compulsory / Health, public / School enrolment.

#### *Headnotes:*

The obligation to undergo obligatory vaccination is a permissible restriction on an individual's fundamental rights because it is necessary to protect public health and the rights and freedoms of others.

#### *Summary:*

I. The applicant asked the Constitutional Court to assess the constitutionality of the relevant provisions of the Law on Protection against Infectious Diseases (Official Gazette, nos. 66/2004, 139/2008 and 99/2009). This Law provided for mandatory vaccination of children for certain contagious diseases and imposed fines on their parents who fail to meet such an obligation. The applicant also challenged the Law on Primary Education (Official Gazette, nos. 103/2008, 33/2010, 116/2010, 156/2010, 18/2011, 42/2011, 51/2011, 6/2012, 100/2012, 24/2013 and 41/2014) because it required parents to submit their child's medical certificate for vaccination as a condition for his or her enrolment in the first grade.

The applicant invoked constitutional principles of the rule of law, certainty and clarity of the law, equality and non-discrimination. He claimed that the disputed provisions violated the right to freedom, physical and moral integrity of the person and the right to education.

II. The findings of the Court may be summarised as follows:

Mandatory vaccination is a permissible limitation on the individual's right to decide freely and voluntarily about all actions relating to his or her own health and body, the right to protection of physical integrity and voluntary medical treatment because it is necessary to protect public health and the rights and freedoms of others.

Under the Constitution, the State is obliged to provide special care and protect children, especially in the field of health protection (Article 42 of the Constitution). Citizens have the right and the duty to protect and promote their own health and the health of others (Article 39 of the Constitution). By providing mandatory vaccination, the legislator acted in accordance with the obligation to provide for all, especially for children, the necessary preventive health measures that guarantee the highest possible level of health.

Regular vaccination is one of the specific measures to protect against infectious diseases. Mandatory vaccination is established only for certain infectious diseases and for certain age groups of children according to the calendar for immunisation. Regular vaccination not only protects the person vaccinated, but also creates collective immunity among the population that prevents infectious diseases. The protection of the child's health and the child's right to health, in the opinion of the Court, justifies the denial of the parents' freedom of choice, because the child's right to health outweighs the parents' freedom of choice.

The Court determined that the benefits of mandatory vaccinations and its effects on the health of individuals and members of the wider community go beyond the interference of the constitutional rights of individuals and therefore is not an excessive measure.

Also, the introduction of fines for the failure to meet the obligation for mandatory vaccination does not raise the issue of constitutionality. The legislator possesses the right to determine the penal policy and to prescribe penal sanctions for breach of legal obligations.

Making the enrolment of children in primary school conditional upon presentation of medical certificate for immunisation is not discriminatory and does not violate the right to education.

Therefore, the Court found that the legislation on mandatory vaccination does not infringe on the constitutional rights and freedoms of citizens and does not raise the issue of its constitutionality.

### *Languages:*

Macedonian, English (translation by the Court).



## Turkey Constitutional Court

### Important decisions

*Identification:* TUR-2014-3-004

**a)** Turkey / **b)** Constitutional Court / **c)** General Assembly / **d)** 25.06.2014 / **e)** 2014/256 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 05.07.2014, 29051 / **h)** CODICES (English, Turkish).

*Keywords of the systematic thesaurus:*

3.13 General Principles – **Legality**.  
3.16 General Principles – **Proportionality**.  
3.17 General Principles – **Weighing of interests**.  
5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion**.  
5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.

*Keywords of the alphabetical index:*

Religion, headscarf, symbol, discrimination / Limitation of right, justification / Limitation of right, public order.

*Headnotes:*

Restrictions imposed on a lawyer wearing a headscarf because of her religious belief constituted a violation of her freedom of religion and conscience and put her in a disadvantageous position vis-à-vis those lawyers who do not wear a headscarf.

*Summary:*

I. The applicant is a lawyer registered at the Ankara Bar. Subsequent to the decision of the Supreme Administrative Court (*Danıştay*) to suspend the enforcement of the word "bareheaded" in the Code of Conducts which was adopted by the Turkish Bar Associations in 1971, the applicant began attending hearings, wearing a headscarf.

At a hearing dated 11 December 2013, the judge adjourned the case to another day on the ground that lawyers could not attend hearing by wearing headscarves in accordance with the Bangalore

Principles of Judicial Conduct, the Code of Conduct of the Council of Bars and Law Societies of Europe, the decisions of the European Court of Human Rights and the Constitutional Court to the effect that the headscarf was a strong religious and political symbol contrary to secularism. The judge instructed the applicant's client to appoint another lawyer until the next hearing.

The applicant claimed that since there existed no rule prohibiting her from following hearings while wearing a headscarf, the impugned interim decision to the contrary was in breach of, *inter alia*, her freedom of religion and conscience in Article 24 of the Constitution and the prohibition of discrimination in Article 10 of the Constitution. The applicant argued that she was wearing a headscarf because of her religious belief and that it was discriminatory as other lawyers who did not wear headscarves could attend hearings whereas she could not if wearing a headscarf.

II. The Constitutional Court underlined that it may be decided by adherents of a religion whether a conduct was a requirement of a particular religion or belief. Additionally, the opinions of the relevant religious authorities may also be taken into account.

In this regard, the Constitutional Court considered that wearing a headscarf fell under the scope of Article 24 of the Constitution, and that State actions which put restrictions on where to use the right to wear a headscarf as an expression of religious belief and how to do this constituted an interference with an individual's right to manifest of her or his religion.

The Court then examined the compliance of the intervention with "the principle of limitation by a law" or "the principle of lawfulness" which has a more restrictive meaning in Turkish Law than the concept of the European Court of Human Rights of "being prescribed by law".

In the light of the decision of the Supreme Administrative Court, the Constitutional Court however found that there was not any accessible, foreseeable and precise provision of law which restricted the applicant's freedom of religion and belief that would prevent arbitrary behaviour of the State institutions. In the mentioned decision, the Supreme Administrative Court decided that the word "bareheaded" in the Code of Conduct had no basis in the superior legal norm, namely the Law on Lawyers, and exceeded the purpose of this law. The Supreme Administrative Court had further noted that Article 49 of the Law on Lawyers did not grant the Union of Bar Associations the power to place restrictions on wearing a headscarf.

The Constitutional Court concluded that there was no legal basis of interference with the applicant's freedom of religion, and that there was no need to examine compliance with the principles of pursuing a legitimate aim and being necessary in a democratic society as the interference failed to meet the principle of lawfulness. The Court accordingly found, with a majority vote, a violation of the applicant's freedom of religion and belief under Article 24 of the Constitution.

In the first place, the Constitutional Court considered that the complaint of discrimination constituted an important aspect of the individual application and that the case should be also examined from the standpoint of principle of equality or the prohibition of discrimination under Article 10 of the Constitution.

The Court underlined that even though all female lawyers were required to be bareheaded at the hearings, this negatively affected the applicant, who used a headscarf as a form of abiding by the exigencies of her religious belief. Therefore, pressing social needs to ban the applicant from hearings solely because of her headscarf should be demonstrated. Such an intervention must pursue the aims of "protecting the rights and freedom of others" and "maintaining public order".

The Constitutional Court noted that separate concrete facts could not be put forward in the interim decision concerning how the applicant's headscarf prevented others enjoying their rights and freedoms, and that it was not established what measures were taken before restricting a fundamental right or freedom. It was accordingly concluded that it was not proportionate to prohibit the applicant from attending a hearing while wearing a headscarf.

Having regard to the foregoing, the Constitutional Court found that the applicant was put in a disadvantageous position vis-à-vis those who did not wear a headscarf, and that Article 10 of the Constitution in conjunction with Article 24 of the Constitution was breached.

Second, the Constitutional Court decided to send the file to the relevant court in order to remedy the violation and its consequences. Given that it would constitute just satisfaction, the applicant's request for non-pecuniary compensation was not awarded.

#### *Languages:*

Turkish.



*Identification:* TUR-2014-3-005

**a)** Turkey / **b)** Constitutional Court / **c)** General Assembly / **d)** 18.06.2014 / **e)** 2013/7800 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 05.07.2014, 29051 / **h)** CODICES (English, Turkish).

*Keywords of the systematic thesaurus:*

1.4.6.1 Constitutional Justice – Procedure – Grounds – **Time-limits.**

5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial.**

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

5.3.13.28 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to examine witnesses.**

*Keywords of the alphabetical index:*

Constitutional complaint, scope, *ratione temporis* / Witness, examination, right of defence.

*Headnotes:*

The subsequent examination of the applicants' objections to their detention pending trial cannot bring their complaint into the jurisdiction of the Constitutional Court if the detention itself ended out of the temporal scope of the individual complaint.

To rely on evidence against whose reliability there is substantial counter evidence and not to hear crucial witnesses is in breach of the right to a reasoned decision and to examine or have examined witnesses.

*Summary:*

I. The applicants were convicted for attempting to overthrow the government or to prevent it from functioning, which was upheld by the Court of Cassation.

In the course of the proceedings, the applicants presented expert reports and some experts were heard at the hearings. In these private reports and opinions, it was argued that digital data in certain

CDs, a hard disk and a flash memory on which their conviction was based had been fictitiously created and that there had been manipulation of this data. They further asserted that in relation to the contradictions in the creation dates of the CDs and documents in them, there was no update in the metadata information (which was about the creation date of a document).

The first-instance court however relied on expert reports which had been taken by the public prosecution at the stage of investigation, namely a report of the Scientific and Technological Research Council of Turkey and three other reports. The first-instance court dismissed requests of the applicants for another expert examination to be carried out on the digital data, which was at the centre of the proceedings, considering that they related to a question which could be resolved through general or legal information supposed to be known by a judge.

The first-instance court had not taken into account the above-mentioned private expert reports and opinions insofar as they concerned certain changes on the digital data, explaining that it also accepted the existence of these changes. For the rest, the trial court concluded that the reports and opinions lacked impartiality since they should have been left to the discretion to the court. On the other hand, the Assize Court underlined that the digital data was not the sole evidence for the applicants' convictions but it also had regard to other evidence. In its reasoning, the court further referred to the possibility that contradictions in the creation dates may have been deliberately formed by the suspects in order to exploit them in case of potential investigations in the future. The first-instance court then noted that these kinds of documents were not the ones giving rise to the conviction, they were not many in number and were not in the nature of affecting outcome of the trial.

Before the trial court, the applicants further asked Hilmi Özkök, the former Chief of General Staff and Aytaç Yalman, the Land Forces Commander to be heard. In view of the nature of the offences attributed to the applicants, the court took the view that these witnesses would not have any bearing on its finding and their request was not appropriate for the purpose sought by the applicants. The court concluded that the request had been made in order to form a public pressure on it. Consequently, the first-instance court refused this witness evidence.

Before the Constitutional Court, the applicants complained that their detention pending proceedings violated the right to liberty and security.

Secondly, the applicants argued that even though the private expert reports and opinions established manipulations and contradictions in the digital data, they were not taken into account by the first-instance court and the Court of Cassation without sufficient reasoning being provided.

Finally, the applicants claimed that the refusal of their request for witness evidence from the former Chief of General Staff and Land Forces Commander, who were said to have prevented the completion of the alleged coup, was in breach of their right to fair trial.

II. First, as regards the applicants' complaint about their detention, the Constitutional Court underlined that it could only examine individual applications to be lodged against actions and decisions which became final after the date of 23 September 2012. Therefore, given that the applicants' detention ended on 21 September 2012 with the delivery of the first-instance court's judgment, their complaint was found inadmissible as being incompatible *ratione temporis*. The Constitutional Court underlined that the subsequent examination of the applicants' objections to their detention pending appeal, which was after their conviction by the trial court, could not bring their complaint into its power in terms of time.

Second, concerning the applicants' complaints regarding the unfairness of the proceedings, the Constitutional Court noted that failing to provide a relevant and sufficient reply to a matter crucial to the outcome of a case or to leave a fundamental argument pertaining to procedure or substance unanswered could lead to a violation of the right to fair trial.

The Constitutional Court then considered that the trial courts had not explained how the creation dates of the documents preceded those of the CDs in which they were found. Moreover, it found that, although the private reports and opinions suggested that there was no update in the metadata information of the invoked documents, the courts did not give any reasoning about this argumentation. The Constitutional Court also considered that some defence evidence was not assessed in the judgment and no explanation was provided about not relying on certain expert reports.

Given the existence of the expert reports and opinions, which raised serious doubts about the reliability of the digital data, the Constitutional Court found the reasoning of the first-instance court's judgment, based to a substantial extent on the digital data and its contents, could not be considered in the nature of satisfying the requirements of justice, and as sufficient and reasonable. Therefore, the Constitutional Court found a violation of the right to a reasoned decision.

In addition, the Constitutional Court further found a breach of the principle of equality of arms. In this regard, the Constitutional Court noted that the first-instance court had regard only to expert reports provided by the Public Prosecutor's Office, disregarded expert reports and opinions and had rejected the applicants' request for another expert report about the digital data without providing a sufficient reasoning.

With regard to the rejection of the applicants' request for witness statements to be taken, the Constitutional Court underlined that in order for a fair trial to take place, the parties should be provided with appropriate means including witness statements to present and have their evidence examined. The Constitutional Court did not find reasonable the reasoning of the first-instance court that statements of the two witnesses would not have any bearing on the judgment, given that it was argued in the reports and opinions that the digital data was open to external interference and there were inconsistencies therein. The Constitutional Court further refused the public pressure reasoning, noting that this kind of request could only be assessed in an objective manner in the light of its effect on the proceedings.

The Constitutional Court concluded that the denial of the witness evidence was incompatible with the principle of adversarial proceedings and that of the right to have witnesses be called and heard. It therefore found an additional violation of the right to a fair trial on this ground.

Third, in view of the foregoing findings of violations, the Constitutional Court decided that a copy of the judgment was to be sent to the relevant court for retrial in order for the violations and their consequences to be remedied.

#### *Languages:*

Turkish.



*Identification:* TUR-2014-3-006

a) Turkey / b) Constitutional Court / c) General Assembly / d) 25.06.2014 / e) 2013/409 / f) / g) *Resmi Gazete* (Official Gazette), 06.07.2014, 29052 / h) CODICES (English, Turkish).

*Keywords of the systematic thesaurus:*

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

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:*

Censorship, ban / Freedom of expression, violence, praise / Media, freedom of the written press / Terrorist, act, support.

*Headnotes:*

Expression by a member or leader of a banned organisation of her or his thoughts and opinions alone does not justify an interference with her or his freedom to express and disseminate thoughts and opinions. Even though Article 141.4 of the Constitution requires courts to provide reasoning for their decisions, this obligation cannot be interpreted to oblige them to reply in detail to every argument of the parties.

*Summary:*

I. The applicant was the writer of a book titled *The Kurdistan Revolution Manifesto, Kurdish Problem and Democratic Nation Solution (Defending Kurds in the Grip of Cultural Genocide)* (hereinafter, “the book”). The İstanbul Chief Public Prosecutor’s Office took a prosecution against the book on the ground that it contained declarations and propaganda of the PKK (Kurdistan Workers’ Party) terrorist organisation. On the basis of search warrants issued by İstanbul Magistrates’ Courts, copies and parts of the book were seized from two printing houses.

Furthermore, as requested by the Chief Public Prosecutor’s Office, on 21 September 2012 the İstanbul Second Court (empowered by Article 10 of the Anti-Terror Law) issued a decision requiring confiscation of the impugned book. The court based its judgment on the fact that it was written by the applicant who had been sentenced for founding and leading an armed terrorist organisation, that a region

encompassing certain territories of Iraq, Iran and Turkey was separated and highlighted with writings on the cover of the book, and that the propaganda of the PKK armed terrorist organisation was made in some pages.

On 9 October 2012 the İstanbul Third Court rejected the applicant’s request for repealing the seizure order, having regard to the quality and nature of the offence, the existence of facts leading to a strong suspicion of commission of the offence, the current state of evidence and continuation of grounds for seizure, the existing situation of the evidence and the lack of a change in the reasons for seizure. The applicant’s objection to this decision was dismissed on 16 November 2012.

On the basis of the decision of seizure, 635 copies of the book were confiscated at an address and 632 of them were destroyed.

On 19 March 2013 the Diyarbakır Chief Public Prosecutor’s Office gave a decision of non-prosecution in respect of the publishing coordinator, editor and the person preparing the book for publication since a criminal case could not be instituted within a six-month time limit as required by the Press Law. It is understood that no criminal investigation or case was brought against the applicant due to having written the book.

The applicant complained that seizure of the book at the stage of printing was an interference with his freedom of thought and opinion, and that the decisions of seizure were devoid of reasoning. The applicant argued that the said intervention aimed at blocking the access of the Turkish public to information and science since publication of and reading by the public of the book and other books of similar contents were one of the requirements of a democratic society.

II. The Constitutional Court decided that the application should be examined from the standpoint of freedom of expression and dissemination of thought under Article 26 of the Constitution but not freedom of thought and opinion under Article 25, in view of the fact that the subject matter was the collection and seizure of the book, written by the applicant. Furthermore, given that Article 28 of the Constitution includes provisions governing collection, seizure and confiscation of publications, it was also decided to carry out an assessment under this article.

First, the Court concluded that collection, seizure and destruction of the book amounted to an interference with the applicant’s two freedoms laid down in Articles 26 and 28 of the Constitution.

Second, it was considered that the requirement of lawfulness was met since the decisions of seizure were based on Article 25 of the Press Law, and secondly that the interference had a legitimate aim, serving the maintenance of national security and public order, prevention of offence and punishment of offenders within the context of fight against the activities of the PKK.

Thirdly, the Court examined whether it was complied with the requirements of being necessary in a democratic society and proportionality.

The Constitutional Court noted that the criterion of the democratic society should be interpreted on the basis of pluralism, tolerance and open mindedness. In this context, where a limitation disables the exercise of a right or freedom or disproportionately hinders its exercise by impairing the very essence of it or where the balance between the means and objective of the limitation could breach the principle of proportionality, it will be against a democratic society.

As regards the latter criterion, the Constitutional Court held that it would examine whether the means employed to achieve the targeted aim were suitable, necessary and proportionate.

The Court underlined that expression by a member or leader of a banned organisation of her or his thoughts and opinions alone did not justify an interference with her or his freedom to express and disseminate thoughts and opinions. When it comes to the second reasoning of the İstanbul Second Court, the classification or depiction of a certain part of the Turkish territory as "Kurdistan" was assessed together with the expressions used in the book and the special circumstances under which the book was published. Furthermore, referring to the fact that the applicant also asked for resort to peaceful means, the Constitutional Court decided to examine whether certain pages of the book contained a "call to violence", "call to armed riot" and "call to insurgency" in the light of other opinions expressed in the book.

Subsequently, the Constitutional Court concluded that having assessed the book as a whole, it could not be suggested that it praised violence or incited individuals to adopt terrorist methods, in other words, to hatred, vengeance, armed resistance or the use of violence.

It was accordingly found that in view of the grounds relied on for the seizure of the book, the interference with the applicant's freedom of expression or dissemination of thought and freedom of press was not necessary in a democratic society and not proportionate. Additionally, the Constitutional Court

considered disproportionate the collection of the copies in accordance with the decision of seizure and even destruction of some of them without procedures envisaged in the relevant law having complied with.

Having regard to the above-mentioned observations, the Constitutional Court decided that the applicant's freedoms as guaranteed under Articles 26 and 28 of the Constitution were breached.

First, the Constitutional Court noted that even though Article 141.4 of the Constitution required the courts to provide reasoning for their decisions, this obligation could not be interpreted to oblige them to reply in detail to every argument.

Therefore, further referring to the provisional nature of the seizure measure, the Court found sufficient the reasoning laid down by the first-instance court in the decision of seizure and in the decision of the court of objection, but mentioning that more substantial and convincing reasoning would have been desirable.

The Constitutional Court consequently found a violation of the applicant's right to a fair hearing under Article 36 of the Constitution.

Second, the Court decided to send a copy of its judgment to the relevant Chief Public Prosecutor's Office so as to order the return of all the seized copies and other forms of the book to their owners. Since the applicant withdrew its request for pecuniary and non-pecuniary compensation, the Constitutional Court saw no reason to render a decision on this matter.

#### *Languages:*

Turkish.



# Ukraine

## Constitutional Court

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### Important decisions

*Identification:* UKR-2014-3-007

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 23.12.2014 / **e)** 7-rp/2014 / **f)** on the official interpretation of Article 13.1 of the Law on compulsory insurance of civil and legal liability of motor transport vehicles owners / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), /2014 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Insurance, compulsory, vehicle owners / Traffic accident, victim, compensation, fund / Handicapped person, vehicle, insurance, obligation.

*Headnotes:*

Provisions of the legislation on the compulsory insurance of the civil and legal liability of motor transport vehicle owners should be understood as reading that transport vehicles belonging to combatants, disabled war veterans and disabled persons within Group I are motor transport vehicles which are in possession of the persons described above, whether they own them on the basis of ownership rights or on any other legal basis.

They are exempt from compulsory insurance of civil and legal liability on the territory of Ukraine and injured persons shall have the right to indemnification of damages resulting from road traffic accidents caused by persons mentioned above at the expense of the Motor Bureau from the victim protection fund.

*Summary:*

I. Citizen V.Bozhko, the applicant in this matter, asked the Constitutional Court for an official interpretation of the provisions of Article 13.1 of the Law on Compulsory Insurance of Civil and Legal Liability of Motor Transport Vehicle Owners no. 1961-IV, 1 July 2004 (hereinafter Law no. 1961). Under this provision, combatants and disabled war veterans as defined by the law, disabled persons within Group I who personally drive transport vehicles belonging to them, as well as persons driving transport vehicles belonging to a disabled person within Group I in his or her presence are exempted from compulsory insurance of civil and legal liability on the territory of Ukraine; the indemnification of losses from road traffic accidents caused by persons in the above categories will fall within the remit of the Motor (Transport) Insurance Bureau (hereinafter, the “Motor Bureau”).

An interpretation was requested of the content of the notion “belonging” of transport vehicles to combatants, disabled war veterans, disabled persons of Group I and its types along with an interpretation as to whether the provisions of Article 13.1 of Law no. 1961 applied to persons driving transport vehicles on the basis of a power of attorney, and whether the Motor Bureau would be obliged to indemnify damages caused by a traffic accident in such cases.

II. The Constitutional Court began by observing that under the Constitution, everyone has the right to own, use and dispose of their property but the use of the property must not harm the rights, freedoms and dignity of citizens or the interests of society. See Article 41.1 and 41.7.

The causes and general characteristics of reparations for losses, particularly those caused by a source of increased risk, are provided for in Articles 1166, 1167 and 1187 of the Civil Code. Under Article 1187.2 of the Code, damage caused by a source of increased danger shall be indemnified by the person who owns, on an appropriate legal basis (right to ownership, contract, lease or other property right), a transport vehicle, the use, storage or maintenance of which causes an increased risk.

Persons who have suffered damage as a result of a traffic accident in cases specified by the law are entitled to reparations. Protection of this right, in the case of insurance events, envisaged by contracts of insurance or under the law, ensures the civil and legal institution of insurance.

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Law no. 1961 is a special law which regulates legal relationships in the sphere of compulsory insurance of civil and legal liability of motor transport vehicle owners. The law determines that persons whose liability is considered to be insured are the insurers along with other persons who legitimately own the equipped transport vehicle, i.e. the vehicle specified in the valid contract of compulsory insurance of civil and legal liability provided this is exploited by the persons whose liability is insured (Article 1.1.4 and 1.1.7).

One of the tasks of the Motor Bureau is to make payments from centralised insurance reserve funds of compensation and indemnification under the conditions stipulated by Law no. 1961; in the case of damages by persons covered by Article 13.1 of the Law, the Motor Bureau will indemnify the damage at the expense of the victim protection fund (Articles 39.2.1 and 41.1.r of Law no. 1961).

The Constitutional Court also noted that in the case of combatants and disabled war veterans, as defined by the law, disabled persons in Group I, the conditions for their insurance shall be that they themselves drive the transport vehicles they possess. For disabled persons of Group I one of the conditions is also the driving of their vehicles by another person in their presence. Consequently, persons listed in Article 13.1 of Law no. 1961 are exempt from compulsory insurance of civil and legal liability on the territory of Ukraine and injured persons shall have the right to reparation of damages resulting from traffic accidents caused by persons mentioned above at the expense of the Motor Bureau from the victim protection fund.

Analysis of the provisions of Article 13 of Law no. 1961 indicates that one of the obligatory conditions for the indemnification of damages from a traffic accident caused by persons mentioned in Article 13.2 is driving a transport vehicle belonging to persons on the basis of an ownership right. For those cited in Article 13.1, the condition is the driving of a motor vehicle on the basis of an ownership title and any other legal basis, such as contract or lease.

The Constitutional Court drew attention to the fact that due to the amendments in the wording of Law no. 1961, the provision concerning a power of attorney for driving a transport vehicle was excluded from the list of legal grounds which prove that somebody is a legitimate owner (user) of a motor transport vehicle. The issue of the institute of a power of attorney regarding the obligation of the Motor Bureau to indemnify damages resulting from a road traffic accident did not therefore require interpretation.

III. Judges M.Melnyk and I.Slidenko attached a dissenting opinion.

*Languages:*

Ukrainian.



# United States of America

## Supreme Court

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### Important decisions

*Identification:* USA-2014-3-007

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 15.12.2014 / **e)** 12-696 / **f)** Heien v. North Carolina / **g)** 135 *Supreme Court Reporter* 530 (2014) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.20 General Principles – **Reasonableness**.  
 5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty**.  
 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:*

Seizure, law enforcement / Stop, traffic / Suspicion, reasonable.

*Headnotes:*

A police officer's stop of a vehicle for a suspected violation of law constitutes a "seizure" of the vehicle's occupants that must be in accordance with the constitutional protection against unreasonable searches and seizures.

The constitutional prohibition against unreasonable searches and seizures does not require government officials to be perfect, but instead allows them to make some mistakes in enforcing the law for the protection of the community, so long as their acts in questions are reasonable.

For a traffic stop to satisfy the constitutional requirement that a such a seizure be reasonable, the police officer in question must hold a "reasonable suspicion" – that is, a particularised and objective basis for suspecting that the particular person was violating the law.

A police officer's suspicion that a particular person is violating the law and therefore may be subject to a search or seizure may be constitutionally permissible,

even though the suspicion is based on a mistake of fact or a mistake of law, but only if his or her mistake was objectively reasonable.

The constitutional prohibition against unreasonable searches and seizures tolerates an officer's mistake as to facts or law if the mistake is reasonable; however, in assessing the reasonableness of a search or seizure, a court should not examine the particular officer's subjective understanding of the facts or law.

The government cannot impose criminal liability based on a mistaken understanding of the law; however, it does not follow from this that a police officer's mistake of law cannot justify an investigatory stop.

*Summary:*

I. On a highway in the State of North Carolina, Police Sergeant Matt Darisse observed that an automobile was being driven while only one of its two brake lights was working. He stopped the automobile and issued a warning ticket to the driver for the broken brake light. Meanwhile, however, because of the suspicious conduct by the driver and a passenger, he also asked if he could search the vehicle. The passenger, Nicholas Heien, who was the owner of the automobile, consented. Sergeant Darisse conducted a search and found a bag containing cocaine. He arrested the driver and Heien.

The State charged Heien with attempted trafficking in cocaine. Heien moved to suppress the evidence seized from the car, on the grounds that the stop and search had violated the Fourth Amendment of the United States Constitution, which states in part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...". The Fourth Amendment is applied to the States through the Due Process Clause in the Fourteenth Amendment to the U.S. Constitution. The trial court denied the suppression motion, concluding that the faulty brake light had given Sergeant Darisse reasonable suspicion to initiate the stop. Heien pleaded guilty but reserved his right to appeal the court's suppression decision.

The North Carolina Court of Appeals reversed the trial court's decision. The Court of Appeals interpreted the text of the relevant provision of the North Carolina vehicle code to require only one working brake light. Therefore, Sergeant Darisse's justification for the traffic stop was objectively unreasonable and the stop violated the Fourth Amendment.

The North Carolina Supreme Court reversed the decision of the Court of Appeals. The State had not sought review of the Court of Appeals' interpretation of the vehicle code, and therefore the Supreme Court assumed that the faulty brake light was not a statutory violation. However, the Supreme Court concluded that, for several reasons, Sergeant Darisse could reasonably have applied a different interpretation of the relevant vehicle code provision.

II. The Supreme Court of the United States agreed to review the decision of the North Carolina Supreme Court and it affirmed that court's decision.

The U.S. Supreme Court first noted that an officer's traffic stop for a suspected violation of law is a "seizure" of the occupants of the vehicle that must be in accordance with the Fourth Amendment's protection against unreasonable searches and seizures. The Fourth Amendment does not require government officials to be perfect, but instead allows them to make some mistakes. In order to justify a traffic stop, a police officer must hold a "reasonable suspicion" – that is, a particularised and objective basis for suspecting that the particular person was violating the law.

The question presented in the instant case, according to the Court, was whether reasonable suspicion may be based on a police officer's mistaken understanding of law. The Court's case law recognises that searches and seizures based on mistakes of fact can be reasonable, but whether a mistake of law also may be the basis for reasonable suspicion was a question of first impression for the Court.

The Court concluded that there was no reason, under the Fourth Amendment's text or the Court's precedents, to distinguish in this context between mistakes of fact and mistakes of law. Reasonable suspicion arises from the combination of an officer's understanding of the facts and his or her understanding of the relevant law. An officer may be reasonably mistaken on either ground.

At the same time, the Court emphasised, the Fourth Amendment tolerates only reasonable mistakes. Those mistakes, whether of fact or of law, must be objectively reasonable, and a court should not examine the subjective understanding of the particular officer in question. Therefore, the Court stated, its decision does not discourage officers from learning the law. Police officers cannot gain a Fourth Amendment advantage through sloppy study of the laws that they are obliged to enforce.

The Court rejected the contention that because law-breakers are subject to the maxim that "ignorance of

the law is no excuse," it is unfair to let police officers get away with mistakes of law. Instead, the Court noted that while an individual indeed cannot generally escape criminal liability based on a mistaken understanding of the law, neither may the government impose criminal liability based on a mistaken understanding of the law. However, it does not follow from this that such a mistake cannot justify an investigatory stop.

Turning to the specific facts in the instant case, the Court concluded that the officer's error of law was reasonable. The statute in question had never been construed by North Carolina's appellate courts and Sergeant Darisse could reasonably have concluded that the relevant statutory text required both brake lights to be in working order. Therefore, because the mistake of law was reasonable, there was reasonable suspicion justifying the stop.

III. Two Justices authored separate opinions. Justice Kagan wrote a concurring opinion that Justice Ginsburg joined, and Justice Sotomayor wrote a dissenting opinion.

*Languages:*

English.



# Inter-American Court of Human Rights

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## Important decisions

*Identification:* IAC-2014-3-007

**a)** Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 25.11.2013 / **e)** Series C. 272 / **f)** Pacheco Tineo Family v. Bolivia / **g)** / **h)** CODICES (English, Spanish).

*Keywords of the systematic thesaurus:*

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

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

5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum.**

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

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

*Keywords of the alphabetical index:*

Asylum, seeker, *refoulement* / Foreigner, *refoulement*, danger / Foreigner, expulsion, interview, prior.

*Headnotes:*

In certain cases in which migratory authorities take decisions that affect fundamental rights, such as personal liberty, in proceedings such as those that may result in the expulsion or deportation of aliens, the State cannot issue punitive administrative or judicial decisions without respecting certain minimum guarantees, the content of which is substantially the same as those established in Article 8.2 ACHR, and so they are applicable as appropriate.

Under the inter-American system, the right of any alien, and not only refugees or asylees, to non-*refoulement* is recognised, when his life, integrity and/or freedom are in danger of being violated, whatsoever his legal status or migratory situation in

the country where he is. Consequently, when an alien alleges before a State that he will be in danger if he is returned, the competent authorities of that State must, at the very least, interview that person and make a prior or preliminary assessment, in order to determine whether or not this danger exists if he or she is deported. This entails respecting said minimum guarantees, as part of the opportunity to explain the reasons why he or she should not be expelled and, if this danger is verified, he or she should not be returned to his country of origin or the one where the danger exists.

Once a State has declared refugee status, this protects the person to whom this has been recognised beyond the borders of that State, so that other States that the said person enters must take into account this status when adopting any measure of a migratory character in his regard and, consequently, guarantee a duty of special care in the verification of this status and in the measures that it may adopt.

Asylum seekers cannot be turned back at the border or expelled without an adequate and individualised analysis of their application. Before returning anyone, States must ensure that the person who requests asylum is able to access appropriate international protection by means of fair and efficient asylum proceedings in the country to which they would be expelling him. States also have the obligation not to return or deport a person who requests asylum where there is a possibility that he may risk persecution, or to a country from which he may be returned to the country where he or she suffered this risk (the so-called “indirect *refoulement*”).

The right to seek and to receive asylum established in Article 22.7 ACHR, read in conjunction with Articles 8 and 25 ACHR, ensures that the person applying for refugee status must be heard by the State to which he or she applies, with due guarantees and in the corresponding proceeding. Consequently, in proceedings relating to a request for recognition of refugee status or in proceedings that may lead to the expulsion or deportation of an applicant for this status or of a refugee, owing to the nature of the rights that could be affected by an erroneous determination of the danger or an unfavourable answer, the guarantees of due process are applicable, as appropriate, to this type of proceeding, which is usually of an administrative character. Thus, any proceeding relating to the determination of the refugee status of a person entails an assessment and decision on the possible risk of affecting his most basic rights, such as life, and personal integrity and liberty. In this way, even if States may determine the proceedings and authorities to implement that right, in

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application of the principles of non-discrimination and due process they must ensure predictable proceedings, as well as coherence and objectivity in decision-making at each stage of the proceedings to avoid arbitrary or decisions.

Asylum seekers must have access to proceedings to determine this status that permit a proper examination of their request in keeping with the guarantees contained in the American Convention and in other applicable international instruments, which, in cases such as this one, entail the following obligations for the States:

- a. they must guarantee the applicant the necessary facilities, including the services of a competent interpreter and access to legal assistance and representation, in order to submit their request to authorities. Thus, the applicant must receive the necessary guidance concerning the procedure to be followed, in words and in a way that he can understand and, if appropriate, he should be given the opportunity to contact a UNHCR representative;
- b. the request must be examined, objectively, within the framework of the relevant procedure, by a competent and clearly identified authority, and requires a personal interview;
- c. the decisions adopted by the competent organs must be duly and expressly founded;
- d. in order to protect the rights of applicants who may be in danger, all stages of the asylum procedure must respect the protection of the applicant's personal information and the application, and the principle of confidentiality;
- e. if the applicant is denied refugee status, he should be provided with information on how to file an appeal under the prevailing system and granted a reasonable period for this; and
- f. the appeal for review must suspend proceedings and must allow the applicant to remain in the country until the competent authority has adopted the required decision, and even while the decision is being appealed, unless it can be shown that the request is manifestly unfounded.

Article 19 ACHR, in addition to granting a special protection to the rights recognised therein, establishes a State obligation to respect and ensure the rights recognised to children in other applicable international instruments, such as Articles 12 and 22 of the Convention on the Rights of the Child. The special protection derived from Article 19 should be extended to the judicial or administrative proceedings in which a decision is taken on a child's rights, which entails a more rigorous protection of Articles 8 and 25 ACHR. Furthermore, the Court has already established in other cases that there is a relationship

between the right to be heard and the best interests of the child, and it is this relationship that governs the essential role of children in all decisions that affect their life.

The right of children to express their opinions and to play a significant role is also important in the context of asylum proceedings, the scope of which may depend on whether the child is an applicant, regardless of whether or not the child is accompanied and/or separated from his or her parents or the persons responsible for taking care of him or her.

When the applicant for refugee status is a child, the principles contained in the Convention on the Rights of the Child must guide both the substantive and the procedural aspects of the decision on the child's request for refugee status. Thus, when children are the applicants, they must enjoy specific procedural and probative guarantees to ensure that fair decisions are taken when deciding their requests for refugee status, which requires the establishment and implementation of proceedings that are appropriate and safe for children and of an environment that creates trust at all stage of the asylum procedure. Also, and under this same principle, if the main applicant is excluded from refugee status, the family members have the right to have their own requests evaluated independently. In addition, if an applicant for refugee status receives protection, other members of the family, particularly the children, may receive the same treatment or benefit from that recognition, based on the principle of family unification. In the proceeding to decide refugee status, the applicant's family members may be heard, even if there are children among them. In each case, it is for the authorities to evaluate the need to hear them based on the contents of the application.

In certain circumstances, the separation of children from their parents may endanger their development and survival, which must be ensured by the State as established in Article 19 ACHR and in Article 6 of the Convention on the Rights of the Child, especially by the protection of the family and the absence of illegal and arbitrary interference in the family life of children, because the family plays an essential role in their development. Also, the participation of children acquires special relevance in the case of proceedings that may be of a punitive nature, in relation to an infringement of the immigration regime, opened against migrant children or against their family, their parents, representatives, or those accompanying them, because this type of proceeding may lead to the separation of the family and the subsequent impairment of the child's well-being, regardless of whether the separation occurs in the State that expels them or in the State to which they are expelled.

### Summary:

I. The events of this case refer to the return of the Pacheco Tineo family from Bolivia to Peru on 24 February 2001, as a consequence of the summary rejection of an application for recognition of refugee status in Bolivia and the Bolivian immigration authorities' summary decision to expel the family, despite its knowledge that the family had apparently obtained refugee status in Chile. The Pacheco Tineo family entered Bolivia on 19 February 2001. The Bolivian immigration authorities did not allow the family, including three children, an opportunity to set out the reasons for their application and did not serve notice of its decisions. Furthermore, in their decision to expel the family, Bolivian authorities did not evaluate which state would be appropriate for the purpose of receiving its members. Furthermore, despite that the State of Chile had authorised the family to enter into that country, the latter were unexpectedly expelled to Peru and handed over to Peruvian authorities.

On 21 February 2012, the Inter-American Commission on Human Rights submitted the case to the Court's jurisdiction, alleging violations to Articles 5, 8, 19, 22.7, 22.8 and 25 ACHR, in relation to Article 1.1 ACHR.

II. On the merits, the Court found violations to the rights to seek and receive asylum, and the principle of *non-refoulement*, as well as the rights to judicial guarantees and protection, contained in Articles 22.7, 22.8, 8 and 25 ACHR with its relation to Article 1.1 ACHR, to the detriment of all the victims, as well as to the rights of children and family rights contained in Articles 19 and 17 ACHR, to the detriment of the three children that belonged to the Pacheco Tineo Family. It further declared violations to Article 5.1 ACHR in detriment of the members of the aforementioned family.

The Court determined that the State had violated Articles 22.7, 22.8, 8 and 25 ACHR given that on 21 February 2001, the Bolivian National Commission for Refugees declined to consider Mr Rumaldo Pacheco's request, nor did it allow for him to express the reasons of his irregular entry to the country, nor his reasons for seeking asylum, thus, refusing to evaluate whether his life and liberty were endangered in Peru.

The Court further declared that the State had violated Article 22.7 and 22.8 ACHR, given that Bolivia immediately initiated procedures to expel the victims from their territory without giving them the opportunity to argue their case against expulsion, nor were the latter correctly notified of any procedure of expulsion

from the country. Moreover, there was no evaluation of which country was appropriate for their expulsion or of the possible risks that person could have suffered within Peru. Further, the family was not given the opportunity of appealing the decision.

The Court also determined that the retention of the victims' documents and Fredesvinda Tineo's illegal and arbitrary detention generated suffering, anxiety and frustration in the family members. Additionally, the lack of information regarding their requests, along with their expulsion, constituted a violation to their moral and psychological integrity, recognised under Article 5.1 ACHR.

Finally, the Court declared that the children expelled in the case were not considered as parties in these procedures, and the State failed to take their best interests, as well as the principles of *non-refoulement* and family unity, into account when deciding their migratory status. Instead, their rights were made to depend on the determination of the rights of their parents. This constituted a violation of Articles 19 and 17 ACHR, along with Articles 8.1, 22.7, 22.8, 25 and 1.1 ACHR.

Accordingly, the Court ordered, *inter alia*, that the State implement permanent educational programs for the formation of public officials that work in Bolivia's Migration Offices and any other official that has contact with migrants and asylum seekers, and that it pay due compensation for the material and moral damages suffered by the victims.

### Languages:

Spanish, English.



### Identification: IAC-2014-3-008

**a)** Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 26.11.2013 / **e)** Series C 274 / **f)** Osorio Rivera and Family v. Peru / **g)** / **h)** CODICES (English, Spanish).

### Keywords of the systematic thesaurus:

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

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

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

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

5.3.13.3.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – **“Natural judge”/Tribunal established by law.**

*Keywords of the alphabetical index:*

Enforced disappearance, elements / Enforced disappearance, investigation, obligation / Victim, family member / Enforced disappearance, whereabouts, refusal to reveal.

*Headnotes:*

Enforced disappearance has a permanent or continuing nature and violates multiple norms. Its concurrent and constituent elements are:

- a. the deprivation of liberty;
- b. the direct intervention of State agents or their acquiescence; and
- c. the refusal to acknowledge the detention and to reveal the fate or the whereabouts of the person concerned. These multiple violations continue while the whereabouts of the victim are unknown or his remains have not been found. Consequently, States have the corresponding obligation to investigate enforced disappearances and to punish those responsible pursuant to the obligations derived from the American Convention of Human Rights and the Inter-American Convention on Forced Disappearance of Persons.

When analysing an alleged enforced disappearance, the deprivation of liberty should only be understood as the beginning of a complex violation that is prolonged over time until the victim's fate and his or her whereabouts are known. In this regard, the way in which the deprivation of liberty is carried out is unimportant for the purposes of the characterisation of an enforced disappearance; in other words, any form of deprivation of liberty meets this first requirement.

A certificate of release from detention does not provide sufficient evidence of the actual release, because the production of false documents seeking to certify a release is common in different countries and was verified in Peru at the time of the events.

With relation to the State's compliance with their obligation to investigate enforced disappearances diligently, an acquittal may be taken into consideration as a factor to evaluate the State's responsibility or the scope of this responsibility, but does not constitute per se a factor to affirm the absence of the State's international responsibility, given the difference in the evidentiary standards or requirements in criminal trials and under international human rights law.

A national context that includes the existence of a systematic pattern of human rights violations can be used to prove the existence of a specific human rights violation. The reports of truth or historical clarifications commissions have a special probative value as relevant evidence.

A refusal to acknowledge the deprivation of liberty and to reveal the fate or whereabouts of the victim can occur when State authorities indicate that the victim has been released without providing information on his whereabouts.

The fact that a disappearance takes place in the context of a pattern of selective enforced disappearances, leads to the conclusion that it placed the victim in a serious situation of vulnerability and risk of suffering irreparable harm to his personal integrity and life. It is then reasonable to presume that the victim suffered treatment contrary to the dignity inherent in the human being while he was in the custody of the State. The foregoing constitutes a violation of Article 5.1 and 5.2 ACHR, in relation to Article 1.1 ACHR.

The acts involved in a disappearance bear no relationship to the military discipline or mission. The standard that human rights violations should be investigated and prosecuted under the ordinary jurisdiction does not arise from the gravity of the violations, but rather from their very nature and from the rights protected.

*Summary:*

I. On 30 April 1991, Mr Jeremias Osorio Rivera was victim of an enforced disappearance that continued as of the date of publication of the decision by the Inter American Court. Mr Osorio Rivera was deprived from his liberty on 28 April 1991 along with his cousin, due to a fight between them. On 30 April 1991, Mr Osorio was taken with his head covered and hands tied to the Cajatambo Counter-subversive base. This was the last time his family ever saw him. On 2 May 1991, Mr Osorio's brothers were told that he had been released on 30 April 1991, but no information about his whereabouts has been

available. All of this occurred in the context of a state of emergency applicable to the region and of the execution of the “Palmira Operation”, which allowed military forces to control internal security in the region in order to capture terrorists.

On 10 June 2012, the Inter American Commission on Human Rights filed a claim against the Republic of Peru alleging violations of Articles 3, 4, 5.1, 5.2, 7, 8.1 and 25.1 ACHR, in relation to Articles 1.1 and 2 ACHR, and of Articles I and III of the Inter American Convention on Forced Disappearances of Persons. Likewise, the Commission requested that the Court order the State to adopt measures of reparation.

II. On the merits, the Court found that Peru violated Articles 3, 4, 5.1, 5.2 and 7 ACHR, with relation to Articles 1.1 and 2 ACHR, as well as Articles I and III of the Inter American Convention on Forced Disappearances of Persons, given that the Court understood that Mr Jeremias Osorio had been forcefully disappeared.

The Court determined that Mr Osorio’s enforced disappearance started on 28 April 1991, when he was deprived from his liberty by military officers. It used the Truth and Reconciliation Commission’s report (CVR for its initials in Spanish) to assert that his disappearance was related to a systematic State practice during the armed conflict existent in Peru, applicable to the place of Mr Osorio’s disappearance, and consistent with the *modus operandi* existent in other enforced disappearances. Finally, the Court determined that the State’s affirmation that Mr Osorio was freed, without giving information as to his fate, is equivalent to a refusal by the State to give information about his whereabouts.

Furthermore, Peru was held responsible for violating Articles 8.1 and 25.1 ACHR. The enforced disappearance of Mr Osorio was investigated in the regular jurisdiction between May 1991 and July 1992; in a military jurisdiction between July 1992 and October 1996; and then by a specialised forum between 2004 and 2013. The Court asserted that the investigation carried out in military forum violated the right to be tried in the appropriate jurisdiction, since investigations concerning human rights violations should be investigated in a regular forum. Moreover, the Court also determined that the other investigations violated the State’s obligation to investigate human rights violations effectively and with due diligence.

The Court further declared Peru’s international responsibility for violating the right to access to the truth about Mr Osorio’s whereabouts to his family members. It also declared that Peru was responsible for the lack of investigation during the period of time

in which amnesty laws applied in Peru. The Court further indicated that as long as Article 320 of the Peruvian criminal code does not adequately contemplate enforced disappearances, it continues to violate Article 2 ACHR and III of the Inter American Convention on Forced Disappearances of Persons.

The Court finally held Peru responsible for the violation of Mr Osorio’s family’s right to personal integrity, established in Article 5 ACHR, for the extreme pain and suffering caused by the State derived from Mr Osorio’s disappearance and the further lack of information about his fate.

Accordingly, the Court ordered that the State:

1. open and conduct the necessary investigations and proceedings, within a reasonable time, in order to establish the truth of the facts, as well as to identify and punish, as appropriate, those responsible for the enforced disappearance of Mr Osorio;
2. conduct a genuine search, making every effort to discover the whereabouts of Mr Osorio;
3. provide medical and psychological or psychiatric treatment to the victims that request it;
4. organise a public act acknowledging international responsibility;
5. grant several of the victims a scholarship in a Peruvian public establishment mutually agreed upon between each child of Mr Osorio and the State of Peru;
6. adopt the necessary measures to reform its criminal laws in order to define the offense of enforced disappearances of persons in a way compatible with international parameters;
7. implement permanent programs on human rights and international humanitarian law in the training schools of the Armed Forces;
8. and pay the amounts identified in the decision as pecuniary and non-pecuniary damages.

*Languages:*

Spanish, English.



# Court of Justice of the European Union

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## Important decisions

*Identification:* ECJ-2014-3-018

**a)** European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 01.03.2011 / **e)** C-236/09 / **f)** Association Belge des Consommateurs Test-Achats ASBL and others v. Conseil des ministres / **g)** Reports, I-00773 (ECLI:EU:C:2011:100) / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

2.2.3 Sources – Hierarchy – **Hierarchy between sources of Community law.**

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

*Keywords of the alphabetical index:*

Insurance, life insurance, premium / Equality, principle, derogation, validity over time.

*Headnotes:*

Article 5.2 of Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services is invalid with effect from 21 December 2012.

It is not disputed that the purpose of Directive 2004/113 in the insurance services sector is, as is reflected in Article 5.1 of that directive, the application of unisex rules on premiums and benefits. Recital 18 in the preamble to Directive 2004/113 expressly states that, in order to guarantee equal treatment between men and women, the criteria of sex as an actuarial factor must not result in differences in premiums and benefits for insured individuals. Recital 19 in the preamble to that directive describes the option granted to Member States not to apply the rule of unisex premiums and benefits as an option to permit 'exemptions'. Accordingly, Directive 2004/113 is based on the premiss that, for the purposes of applying the principle of equal treatment for men and women,

enshrined in Articles 21 and 23 of the Charter, the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable.

Article 5.2 of Directive 2004/113, which enables the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of the directive, and is incompatible with Articles 21 and 23 of the Charter of Fundamental Rights of the European Union. That provision must therefore be considered to be invalid upon the expiry of an appropriate transitional period.

*Summary:*

I. The *Association belge des Consommateurs Test-Achats ASBL* and two individuals brought an action before the Belgian Constitutional Court for annulment of the Belgian law transposing the Directive. It is within the context of that action that the Belgian Court asked the Court of Justice to assess the validity of the derogation provided for in the Directive in the light of higher-ranking legal rules and, in particular, in the light of the principle of equality for men and women enshrined in EU law.

In transposing, in the law of 21 December 2007, Directive 2004/113 implementing equal treatment between men and women in the access to and supply of goods and services, the Belgian legislature made use of the possibility provided for in Article 5.2 of that Directive enabling it to derogate from the principle of equality, and as a result the applicants' complaints also applied to this provision of the Directive.

II. The Court first points out that, under Article 8 TFEU, the European Union is to aim, in all its activities, to eliminate inequalities and to promote equality between men and women. In the progressive achievement of that equality, it is for the EU legislature to determine, having regard to the development of economic and social conditions within the European Union, precisely when action must be taken. Thus it was – the Court states – that the EU legislature provided in the Directive that the differences in premiums and benefits arising from the criteria of sex as a factor in the calculation thereof must be abolished by 21 December 2007 at the latest. However, as the use of actuarial factors related to sex was widespread in the provision of insurance services at the time when the Directive was adopted, it was permissible for the legislature to implement the rule of unisex premiums and benefits gradually, with appropriate transitional periods.

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In that regard, the Court notes that the Directive derogates from the general rule of unisex premiums and benefits established by the Directive, by granting Member States the option of deciding, before 21 December 2007, to permit proportionate differences in individuals' premiums and benefits where, on the basis of relevant and accurate actuarial and statistical data, sex is used as a determining factor in the assessment of risks.

Any decision to make use of that option is to be reviewed five years after 21 December 2007, account being taken of a Commission report, but, ultimately, given that the Directive is silent as to the length of time during which those differences may continue to be applied, Member States which have made use of the option are permitted to allow insurers to apply the unequal treatment without any temporal limitation.

Accordingly, the Court states, there is a risk that EU law may permit the derogation from the equal treatment of men and women, provided for by the Directive, to persist indefinitely. A provision which thus enables the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits works against the achievement of the objective of equal treatment between men and women and must be considered to be invalid upon the expiry of an appropriate transitional period.

Consequently, the Court rules that, in the insurance services sector, the derogation from the general rule of unisex premiums and benefits is invalid with effect from 21 December 2012.

#### *Languages:*

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



#### *Identification:* ECJ-2014-3-019

**a)** European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 08.03.2011 / **e)** C-34/09 / **f)** Ruiz Zambrano v. Office national de l'emploi (ONEm) / **g)** Reports, I-01177 (ECLI:EU:C:2011:124) / **h)** CODICES (English, French).

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

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

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

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

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

European Union, citizenship of a State of the Union / Citizenship of the Union / Parent, foreigner / European Union, citizenship, rights attached, deprivation, national measure.

#### *Headnotes:*

Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

Citizenship of the Union is intended to be the fundamental status of nationals of the Member States. Such a refusal would lead to a situation in which those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

### Summary:

I. Mr Ruiz Zambrano and his wife, both Columbian nationals, applied for asylum in Belgium invoking the civil war in Columbia. The Belgian authorities refused to grant them refugee status and ordered them to leave Belgium.

While the couple continued to reside in Belgium while waiting for their applications to have their residence situation regularised, Mr Ruiz Zambrano's wife gave birth to two children who acquired Belgian nationality.

Although he did not hold a work permit, Mr Ruiz Zambrano signed an employment contract for an unlimited period to work full-time with a company established in Belgium. Consequently, at the time of the birth of his first child to hold Belgian nationality, he had sufficient resources from his working activities to provide for his family. Through his work, statutory deductions made for social security and the payment of employer contributions.

Mr Ruiz Zambrano then had a number of periods of unemployment and accordingly applied for unemployment benefit. Those applications were refused because, in the view of the Belgian authorities, he did not comply with the foreigners' residence requirements under Belgian legislation and he was not entitled to work in Belgium.

Mr and Mrs Ruiz Zambrano also lodged an application to take up residence in Belgium, in their capacity as ascendants of a Belgian national. The Belgian authorities rejected that application, however, taking the view that they had intentionally omitted to take the necessary steps with the Columbian authorities to have their children recognised as Columbian nationals, precisely in order to regularise their own residence in Belgium.

Mr Ruiz Zambrano brought legal proceedings challenging the decisions refusing his applications for residence and unemployment benefit on the ground that, as an ascendant of minor Belgian children, he is entitled to reside and work in Belgium.

The *Tribunal du travail de Bruxelles* (Employment Tribunal, Brussels) (Belgium), before which the proceedings challenging the rejection decisions were brought, asked the Court of Justice whether Mr Ruiz Zambrano may rely on European Union law to reside and work in Belgium. By that question, the Belgian Court asks whether European Union law is applicable in the present case, even though Mr Ruiz Zambrano's children have never exercised their right of free movement within the territory of the Member States.

II. By its judgment today, the Court observes that while a Member State has sole jurisdiction to lay down the conditions for the acquisition of the nationality of that Member State, it is common ground that Mr Ruiz Zambrano's children were born in Belgium and have acquired Belgian nationality. They accordingly enjoy the status of citizens of the European Union, which is intended to be the fundamental status of nationals of the Member States.

In those circumstances, European Union law precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.

It must be assumed that such a refusal would lead to a situation where those children would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to the parents, they would risk not having sufficient resources to provide for themselves and their family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those children would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

In those circumstances, the Court states that European Union law precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

### Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



*Identification:* ECJ-2014-3-020

**a)** European Union / **b)** Court of Justice of the European Union / **c)** Third Chamber / **d)** 08.03.2011 / **e)** C-434/09 / **f)** Shirley McCarthy v. Secretary of State for the Home Department / **g)** Reports, I-03375 (ECLI:EU:C:2011:277) / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Right of free movement and residence, citizenship of the Union, spouse, foreigner.

*Headnotes:*

Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.

The situation of a Union citizen who has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation. As a national of at least one Member State, a person enjoys the status of a Union citizen under Article 20.1 TFEU and may therefore rely on the rights pertaining to that status, including against his Member State of origin, in particular the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States.

However, the failure, by the authorities of the Member State of which a citizen has nationality and residence, to take into account the nationality of another Member

State which that citizen also holds, when deciding on an application for a right of residence under European Union law brought by that citizen, does not mean that measures have been applied that have the effect of depriving the interested party of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States. Accordingly, in such a context, the factor that a national possesses, in addition to the nationality of the Member State where he resides, the nationality of another Member State is not sufficient, in itself, for a finding that the situation of the person concerned is covered by Article 21 TFEU, as that situation has no factor linking it with any of the situations governed by Union law and the situation is confined in all relevant respects within a single Member State.

*Summary:*

I. Shirley McCarthy, a national of the United Kingdom, is also an Irish national. She was born in the United Kingdom and has always resided there, without ever having exercised her right to move and reside freely within the territory of other EU Member States.

Following her marriage to a Jamaican national, Mrs McCarthy applied for an Irish passport for the first time and obtained it. She then applied to the British authorities for a residence permit, as an Irish national wishing to reside in the United Kingdom under European Union law. Her husband applied for a residence document as the spouse of a Union citizen. Those applications were refused on the ground that Mrs McCarthy could not base her residence on European Union law and invoke that law to regularise the residence of her spouse, since she had never exercised her right to move and reside in Member States other than the United Kingdom.

The Supreme Court of the United Kingdom, before which the case was brought, asked the Court of Justice whether Mrs McCarthy can also invoke the rules of European Union law designed to facilitate the movement of persons within the territory of the Member States.

II. The Court states, first, that the directive relating to freedom of movement for persons determines how and under what conditions European citizens can exercise their right to freedom of movement within the territory of the Member States. Accordingly, the directive concerns the travel or residence of a person in a Member State other than that of which he is a national.

In this regard, the Court recalls that under a principle of international law, reaffirmed in the European Convention on Human Rights, Union citizens residing in the Member State of which they are a national – such as Mrs McCarthy – enjoy an unconditional right of residence in that State. The Court therefore finds that the directive cannot apply to such persons.

Similarly, the Court notes that the fact that a Union citizen is a national of more than one Member State does not mean that he has made use of his right of freedom of movement. Thus, the Court finds that the directive is not applicable to Mrs McCarthy's situation. With regard to Mrs McCarthy's husband, the Court finds that as he is not the spouse of a national of a Member State who has exercised her right to freedom of movement, he also cannot benefit from the rights conferred by the directive.

The Court then recalls that a person – such as Mrs McCarthy – who is a national of at least one Member State enjoys the status of a Union citizen and may, therefore, rely on the rights pertaining to that status, including against her Member State of origin, in particular the right to move and reside within the territory of the Member States. However, the failure by the national authorities to take into account the Irish nationality of Mrs McCarthy for the purposes of granting her a right of residence in the United Kingdom in no way affects her right to remain in the United Kingdom or to move and reside freely within the territory of the Member States. Likewise, the national decision does not have the effect of depriving Mrs McCarthy of the genuine enjoyment of the substance of the other rights associated with her status as a Union citizen.

Consequently, the Court rules that, in the absence of national measures that have the effect of depriving her of the genuine enjoyment of the substance of the rights arising by virtue of her status as a Union citizen or of impeding the exercise of her right to move and reside freely within the territory of the Member States, the situation of Mrs McCarthy has no connection with European Union law and is covered exclusively by national law. In these circumstances, Mrs McCarthy cannot base her residence in the United Kingdom on rights associated with European citizenship.

#### *Languages:*

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



#### *Identification:* ECJ-2014-3-021

**a)** European Union / **b)** Court of Justice of the European Union / **c)** First Chamber / **d)** 28.04.2011 / **e)** C-61/11 PPU / **f)** Hassen El Dridi / **g)** Reports, I-03015 (ECLI:EU:C:2011:268) / **h)** CODICES (English, French).

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

2.2.1.6.4 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – **Secondary Community legislation and domestic non-constitutional instruments.**

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

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

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

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

Order to leave, non-execution, sentence of imprisonment / Directive on return, stricter standards, prohibition / Removal, procedure.

#### *Headnotes:*

Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals, in particular Articles 15 and 16 thereof, must be interpreted as precluding a Member State's legislation which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.

#### *Summary:*

I. Mr El Dridi, a third-country national, entered Italy illegally. In 2004 a deportation decree was issued against him, on the basis of which an order to leave the national territory within five days was issued in 2010. The reasons given for that order were that he had no identification documents, no means of transport were available and it was not possible for him to be accommodated temporarily at a detention centre as no

places were available. As he did not comply with that order, Mr El Dridi was sentenced by the District Court, Trento (Italy) to one year's imprisonment.

The Appeal Court, Trento, before which he appealed, asks the Court of Justice whether the Directive on the return of illegally staying third-country nationals ('the Directive on return') precludes national rules which provide for a prison sentence to be imposed on an illegally staying foreign national on the sole ground that he remains, without valid grounds, on the national territory, contrary to an order to leave that territory within a given period.

The Court of Justice granted the referring court's request for the reference for a preliminary ruling to be dealt with under the urgent procedure, as Mr El Dridi is being held in custody.

II. It observes, first of all, that the Directive on return establishes common standards and procedures with a view to implementing an effective removal and repatriation policy for persons with respect for their fundamental rights and their dignity. Member States may not depart from those standards and procedures by applying stricter standards. That directive sets out specifically the procedure to be applied to the return of illegally staying foreign nationals and fixes the sequential order of the different stages of that procedure.

The first stage consists in the adoption of a return decision. As part of that stage, priority must be given to the possibility of a voluntary departure, with a period of between seven and 30 days normally being granted to that end to the person concerned. If the voluntary departure has not taken place within that period, the Directive then requires the Member States to proceed with forced removal using the least coercive measures possible.

It is only where the removal risks being jeopardised by the conduct of the person concerned that the Member State may hold that person in detention. Under the Directive on return, that detention must be for as short a period as possible, is to be reviewed at reasonable intervals of time and is to be ended when it appears that a reasonable prospect of removal no longer exists; it cannot exceed 18 months. Furthermore, the persons concerned are to be placed in a specialised centre and, in any event, to be kept separated from ordinary prisoners.

The Directive thus provides for a gradation of the measures to be taken in order to enforce the return decision and for the principle of proportionality to be observed at each stage of the procedure. That gradation goes from the measure which allows the

person concerned the most freedom, namely, the grant of a period for voluntary departure, to the most serious constraining measure allowed under the directive under a forced removal procedure, namely, detention in a specialised centre.

The Directive therefore pursues the objective of limiting the maximum duration of detention in the context of the return procedure and of ensuring the observance of illegally staying third-country nationals' fundamental rights. In that regard the Court of Justice takes account of, *inter alia*, the case-law of the European Court of Human Rights.

The Court observes, next, that the Directive on return has not been transposed into Italian law and states that, in such a situation, the provisions of a directive which are, so far as their subject-matter is concerned, unconditional and sufficiently precise, as is true of Articles 15 and 16 of the Directive on return, may be relied on by individuals against the Member State which has failed to transpose them. In that regard the Court considers that the Italian removal procedure differs significantly from that provided for by that directive.

The Court further observes that, although in principle criminal legislation is a matter for which the Member States are responsible, and although the Directive allows them to adopt measures, including criminal measures, for cases where coercive measures have not led to removal, the Member States must in any event adjust their legislation in order to ensure compliance with European Union law. Thus they may not apply rules, even criminal rules, which are liable to jeopardise the achievement of the objectives pursued by a directive and deprive it of its effectiveness.

The Court considers therefore that the Member States may not, in order to remedy the failure of coercive measures adopted in order to effect a forced removal, provide for a custodial sentence, such as that provided for by the national legislation at issue in the main proceedings, on the sole ground that a third-country national continues to stay illegally on the territory of a Member State after an order to leave the national territory was notified to him and the period granted in that order has expired. Those States must continue their efforts to enforce the return decision, which continues to produce its effects.

Such a custodial sentence, due *inter alia* to its conditions and methods of application, risks jeopardising the attainment of the objective pursued by the Directive, namely, the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals in a manner in keeping with fundamental rights.

It is therefore for the referring court, which is called upon to apply and give full effect to provisions of European Union law, to refuse to apply any national provision which is contrary to the result of the Directive (including a provision providing for a prison sentence of between one and four years) and to take account of the principle of the retroactive application of the more lenient penalty, which forms part of the constitutional traditions common to the Member States.

#### *Languages:*

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



#### *Identification:* ECJ-2014-3-022

**a)** European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 10.05.2011 / **e)** C-147/08 / **f)** Jürgen Römer v. Freie und Hansestadt Hamburg / **g)** Reports, 03591 (ECLI:EU:C:2011:286) / **h)** CODICES (English, French).

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

1.4.3 Constitutional Justice – Procedure – **Time-limits for instituting proceedings.**

2.2.1.6.5 Sources – Hierarchy – Hierarchy as between national and non-national Sources – Law of the European Union/EU Law and domestic law – **Direct effect, primacy and the uniform application of EU Law.**

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

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

Marriage, partnership, identical obligation / Retirement pension, supplementary / Right of appeal, time limit / Directive, period for transposing, expiry.

#### *Headnotes:*

1. Directive 2000/78 establishing a general framework for equal treatment in employment and occupation is to be interpreted as meaning that supplementary

retirement pensions, such as those paid by a public employer to former employees and their survivors on the basis of national law, which constitute pay within the meaning of Article 157 TFEU do not fall outside the material scope of the Directive on account either of Article 3.3 thereof or of recital 22 in the preamble thereto.

2. Article 1 in conjunction with Articles 2 and 3.1.c of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation preclude a provision of national law, under which a pensioner who has entered into a registered life partnership receives a supplementary retirement pension lower than that granted to a married, not permanently separated, pensioner, if:

- in the Member State concerned, marriage is reserved to persons of different gender and exists alongside a registered life partnership which is reserved to persons of the same gender, and
- there is direct discrimination on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension. It is for the referring court to assess the comparability, focusing on the respective rights and obligations of spouses and persons in a registered life partnership, as they are governed within the corresponding institutions, that are relevant taking account of the purpose of and the conditions for the grant of the benefit in question.

3. Should a national provision constitute discrimination within the meaning of Article 2 of Directive 2000/78, the right to equal treatment could be claimed by an individual at the earliest after the expiry of the period for transposing the Directive, and it would not be necessary to wait for that provision to be made consistent with Union law by the national legislature.

#### *Summary:*

I. Jürgen Römer worked for the *Freie und Hansestadt Hamburg* (the City of Hamburg, Germany) as an administrative employee from 1950 until he became incapacitated for work on 31 May 1990. From 1969, he lived continuously with his companion, Mr U, with whom he entered into a civil partnership in accordance with the German Law of 16 February 2001 on registered life partnerships. Mr Römer informed his former employer of this by letter of 16 October 2001.

He subsequently requested a recalculation of the amount of his supplementary retirement pension on the basis of the more favourable tax category applicable to married pensioners. The City of Hamburg refused to apply the more favourable tax category.

Since Mr Römer took the view that he is entitled to be treated as a married, not permanently separated, pensioner for the calculation of his pension and that that right results from Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, he brought a case before the *Arbeitsgericht Hamburg* (Labour Court of Hamburg, Germany). That court has referred questions to the Court of Justice concerning the interpretation of the general principles and provisions of European Union law on discrimination on grounds of sexual orientation in employment and occupation.

II. The Court first notes that supplementary retirement pensions – such as that at issue in this case – fall within the scope of Directive 2000/78.

Next, the Court recalls, first, that a finding of discrimination on the grounds of sexual orientation requires that the situations in question be comparable in a specific and concrete manner in the light of the benefit concerned. The Court points out in that regard that the German Law on registered life partnerships established, for persons of the same gender, life partnership, having chosen not to permit those persons to enter into marriage, which remains solely open to persons of different gender. The main remaining difference is the fact that marriage presupposes that the spouses are of different gender, whereas registered life partnership presupposes that the partners are of the same gender.

In the present case, entitlement to the supplementary retirement pension presupposes not only that the partner is married, but also that he is not permanently separated from his spouse, since that pension aims to provide a replacement income to benefit the recipient and, indirectly, the persons who live with him. In that regard, the Court emphasises that the German law on registered life partnerships provides that life partners have duties towards each other to support and care for one another and to contribute adequately to the common needs of the partnership by their work and from their property, as is the case between spouses during their life together. Therefore, according to the Court, the same obligations are incumbent on both registered life partners and married spouses. It follows that the two situations are thus comparable.

Second, the Court observes that as regards the criterion of less favourable treatment on the grounds of sexual orientation, it is apparent that Mr Römer's pension would have been increased if he had married instead of entering into a registered life partnership with a man. In addition, the increased benefit is not linked to the income of the parties to the union, to the existence of children or to other factors such as those

relating to the spouse's financial needs. In addition, the Court notes that the contributions payable by Mr Römer in relation to his pension were wholly unaffected by his marital status, since he was required to contribute to the pension costs by paying a contribution equal to that of his married colleagues.

Finally, as regards the effects of discrimination on the ground of sexual orientation, the Court indicates, first, that by reason of the primacy of European Union law, the right to equal treatment can be claimed by an individual against a local authority and it is not necessary to wait for that provision to be made consistent with that law by the national legislature. Second, the Court indicates that the right to equal treatment can be claimed by an individual only after the time-limit for transposing the Directive, namely from 3 December 2003.

#### *Cross-references:*

- C-267/06, *Maruko*, 01.04.2008, *Reports* I-1757;
- C-144/04, *Mangold*, 22.11.2005, *Reports* I-9981.

#### *Languages:*

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



#### *Identification:* ECJ-2014-3-023

**a)** European Union / **b)** Court of Justice of the European Union / **c)** Fourth Chamber / **d)** 12.05.2011 / **e)** C-391/09 / **f)** *Runevič-Vardyn and Wardyn* / **g)** *Reports*, I-03787 (ECLI:EU:C:2011:291) / **h)** CODICES (English, French).

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

5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin**.  
5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status**.

*Keywords of the alphabetical index:*

Civil status, family name, spelling / Marriage certificate, amendment, denial / Language, national protection, legitimate aim / Family name, transcription, denial, serious inconvenience / Right of movement.

*Headnotes:*

1. Article 21 TFEU must be interpreted as not precluding the competent authorities of a Member State from refusing, pursuant to national rules which provide that a person's surnames and forenames may be entered on the certificates of civil status of that State only in a form which complies with the rules governing the spelling of the official national language, to amend, on the birth certificate and marriage certificate of one of its nationals, the surname and forename of that person in accordance with the spelling rules of another Member State.

The fact that a person's surname and forename cannot be changed and entered in documents relating to civil status issued by that person's Member State of origin except using the characters of the language of that latter Member State cannot constitute treatment that is less favourable than that which he enjoyed before availing himself of the opportunities offered by the Treaty in relation to free movement of persons and hence is not liable to deter him from exercising the rights of movement recognised in Article 21 TFEU.

2. Article 21 TFEU must be interpreted as not precluding the competent authorities of a Member State from refusing, pursuant to national rules which provide that a person's surname and forenames may be entered on the certificates of civil status of that State only in a form which complies with the rules governing the spelling of the official national language, to amend the joint surname of a married couple who are citizens of the Union, as it appears on the certificates of civil status issued by the Member State of origin of one of those citizens, in a form which complies with the spelling rules of that latter State, on condition that that refusal does not give rise, for those Union citizens, to serious inconvenience at administrative, professional and private levels, this being a matter which it is for the national court to decide. If that proves to be the case, it is also for that court to determine whether the refusal to make the amendment is necessary for the protection of the interests which the national rules are designed to secure and is proportionate to the legitimate aim pursued.

The objective pursued by such rules, designed to protect the official national language by imposing the rules which govern the spelling of that language, constitutes, in principle, a legitimate objective capable of justifying restrictions on the rights of freedom of movement and residence provided for in Article 21 TFEU and may be taken into account when legitimate interests are weighed against the rights conferred by European Union law.

3. Article 21 TFEU must be interpreted as not precluding the competent authorities of a Member State from refusing, pursuant to national rules which provide that a person's surname and forenames may be entered on the certificates of civil status of that State only in a form which complies with the rules governing the spelling of the official national language, to amend the marriage certificate of a citizen of the Union who is a national of another Member State in such a way that the forenames of that citizen are entered on that certificate with diacritical marks as they were entered on the certificates of civil status issued by his Member State of origin and in a form which complies with the rules governing the spelling of the official national language of that latter State.

*Summary:*

I. Mrs Malgožata Runevič-Vardyn submitted a request to the Vilnius Civil Registry Division for her forename and surname, as they appear on her birth certificate, to be changed to 'Małgorzata Runiewicz' and for her forename and surname, as they appear on her marriage certificate, to be changed to 'Małgorzata Runiewicz-Wardyn'. Following the refusal of that request, the couple brought an action before the *Vilniaus miesto 1 apylinkės teismas* (First District Court of the City of Vilnius, Lithuania).

That court now asks the Court of Justice whether EU law precludes rules of a Member State which require that surnames and forenames of individuals be entered on the certificates of civil status of that State in a form which complies with the spelling rules of the official national language.

II. The Court of Justice states, first of all, that the Racial Equality Directive does not apply to Mr and Mrs Wardyn's situation because the scope of that directive does not cover national rules governing the manner in which surnames and forenames are to be entered on certificates of civil status.

Furthermore, as regards the Treaty provisions concerning citizenship of the Union, the Court points out that although, as European Union law stands at present, the rules governing the form in which a

person's surname and forename are entered on certificates of civil status are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with European Union law, and in particular with the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States.

The Court gives a ruling on Mrs Malgožata Runevič-Vardyn's request that her forename and maiden name be amended on the Lithuanian birth and marriage certificates. Thus, when a citizen of the Union moves to another Member State and subsequently marries a national of that other State, the fact that the surname which that citizen had prior to marriage, and her forename, cannot be amended and entered in documents relating to civil status issued by her Member State of origin except using the characters of the language of that latter Member State cannot constitute treatment that is less favourable than that which she enjoyed before she availed herself of the right of free movement.

With regard to the couple's request that the addition of Mr Wardyn's surname to his wife's maiden name on the Lithuanian marriage certificate be amended (to Wardyn instead of Vardyn), the Court does not exclude the possibility that refusal to make such a change might cause inconvenience for those concerned. However, such a refusal cannot constitute a restriction of the freedoms recognised by the Treaty unless it is liable to cause 'serious inconvenience' to those concerned at administrative, professional and private levels.

With regard to Mr Wardyn's request for his forenames to be entered on the Lithuanian marriage certificate in a form which complies with the rules governing Polish spelling, namely, as 'Łukasz Paweł', (and not Lukasz Pawel), the Court notes that the discrepancy between the forms in which the names are entered in Lithuanian and in Polish lies in the omission of the diacritical marks, which are not used in the Lithuanian language. The Court points out in this regard that diacritical marks are frequently omitted in many daily actions for technical reasons. Also, for people who are unfamiliar with a foreign language the significance of diacritical marks is often misunderstood. It is therefore unlikely that the omission of such marks could, in itself, cause actual and serious inconvenience for the person concerned such as to give rise to doubts as to the identity of, and the authenticity of the documents submitted by, that person.

### *Languages:*

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



### *Identification: ECJ-2014-3-024*

**a)** European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 07.07.2011 / **e)** C-101/10 / **f)** Gentcho Pavlov and Gregor Famira v. Ausschuss der Rechtsanwaltskammer Wien / **g)** Reports, I-05951 (ECLI:EU:C:2011:462) / **h)** CODICES (English, French).

### *Keywords of the systematic thesaurus:*

4.7.15.1.4 Institutions – Judicial bodies – Legal assistance and representation of parties – The Bar – **Status of members of the Bar.**

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

### *Keywords of the alphabetical index:*

International agreement, association agreement / Lawyer, access to exercise of the profession, conditions.

### *Headnotes:*

The principle of non-discrimination laid down in the first indent of Article 38.1 of the Europe Agreement establishing an association between the European Communities and their Member States, on the one part, and the Republic of Bulgaria, on the other part, must be interpreted as not having precluded, before the accession of the Republic of Bulgaria to the European Union, legislation of a Member State under which a Bulgarian national, because of a nationality condition laid down by that legislation, was unable to obtain inclusion on the list of trainee lawyers and, consequently, to obtain a certificate of entitlement to appear in court.

Nothing in the Association Agreement in question allows it to be deduced from the first indent of Article 38.1, or from other provisions of the

Agreement, that the contracting parties intended to eliminate all discrimination based on nationality as regards access to regulated professions by Bulgarian nationals. It must also be borne in mind that that provision appears in Title IV, Chapter I of the Agreement, 'Movement of workers', while regulated professions are mentioned in Article 47 of the Agreement, which appears in Chapter II, and which deals with access to regulated professions without imposing an obligation not to discriminate on grounds of nationality.

Inclusion on the list of trainee lawyers, which is a condition of access to the regulated profession of lawyer, therefore cannot be regarded as a working condition within the meaning of the first indent of Article 38.1.

### *Summary:*

I. The dispute in the main proceedings was between a Bulgarian national, Mr Pavlov, a holder of an Austrian residence permit and an employment permit and the Committee of the Vienna Chamber of Lawyers. The latter had rejected Mr Pavlov's application to be included on the list of trainee lawyers and to be issued a certificate of entitlement to appear in court. According to that Committee, at the time of his application, Mr Pavlov was neither a national of a member state of the Union nor a national of a state party to the Agreement on the European Economic Area nor a Swiss national and consequently did not fulfil the conditions laid down in Austrian legislation.

Mr Pavlov's appeal against this decision had been rejected by the *Oberste Berufungs- und Disziplarkommission* (the Supreme Appeals and Disciplinary Board for lawyers). Having stipulated that the profession of lawyer was a regulated profession and that that regulation also affected trainee lawyers, the court had held that under the Association Agreement with the Republic of Bulgaria, discrimination was prohibited only with regard to working conditions, and that, with regard to access to regulated professions, the States parties to the Agreement retained the possibility of introducing restrictions.

The *Oberste Berufungs- und Disziplarkommission* asked the Court of Justice whether a Bulgarian national, whose application, prior to Bulgaria's accession to the European Union, to be included on the list of trainee lawyers had been rejected, had suffered discrimination on the ground of nationality prohibited by Article 38.1 of the Europe Agreement establishing an association between the European Communities and their Member States, on the one part, and the Republic of Bulgaria, on the other part.

II. Having pointed out that inclusion on the list of trainee lawyers did indeed constitute a condition of access to the regulated profession of lawyer in Austria, the Court of Justice held that the prohibition of discrimination based on nationality in the first indent of Article 38.1 of the Association Agreement with the Republic of Bulgaria did not extend to the rules of access to such a profession.

The Court added that it was for the referring tribunal to ascertain whether possession of a residence permit and an employment permit constituted under national law decisions that in themselves allowed access to the profession of lawyer.

### *Languages:*

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



### *Identification:* ECJ-2014-3-025

**a)** European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 25.10.2011 / **e)** C-109/10 P / **f)** Solvay v. European Commission / **g)** Reports, I-10329 (ECLI:EU:C:2011:686) / **h)** CODICES (English, French).

### *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.**

5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right of access to the file.**

### *Keywords of the alphabetical index:*

Defence, relevant documents / Access to the file, belated / Annulment of decision, effect.

### *Headnotes:*

1. The right of access to the file means that the Commission must provide the undertaking concerned

with the opportunity of examining all the documents in the investigation that might be relevant for its defence. Those documents comprise both inculpatory and exculpatory evidence, with the exception of business secrets of other undertakings, internal documents of the Commission and other confidential information.

Infringement of the right of access to the Commission's file during the procedure prior to adoption of a decision can, in principle, cause the decision to be annulled if the rights of defence of the undertaking concerned have been infringed. In such a case, the infringement is not remedied by the mere fact that access was made possible during the judicial proceedings. As the examination undertaken by the General Court is limited to review of the pleas in law put forward, it has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure. Moreover, belated disclosure of documents in the file does not return the undertaking which has brought the action against the Commission decision to the situation in which it would have been if it had been able to rely on those documents in presenting its written and oral observations to the Commission.

When access to the file, and particularly to exculpatory documents, is granted at the stage of the judicial proceedings, the undertaking concerned has to show, not that if it had had access to the non-disclosed documents the Commission decision would have been different in content, but only that those documents could have been useful for its defence.

2. When, following the annulment of a decision penalising undertakings which have infringed Article 81.1 EC because of a procedural defect concerning exclusively the procedures governing its final adoption by the College of Commissioners, the Commission is to adopt a fresh decision, with substantially the same content and based on the same objections, it is not required to conduct a new hearing of the undertakings concerned.

However, the same is not true when the adoption of the first decision is affected by a defect, that is to say, an infringement of the rights of the defence due to the Commission's failing to give the undertaking concerned, during the procedure leading to adoption of the first decision, sufficient access to the documents and in particular to the documents likely to be useful to the undertaking's defence, a defect arising well before that procedural irregularity. By adopting, in such circumstances, the same decision as that which had been annulled on the basis of that procedural defect without opening a new administrative proceeding in the context of which it

would have heard the undertaking concerned after giving it access to the file, the Commission infringes the rights of defence of that undertaking.

### *Summary:*

I. The Belgian company, Solvay SA, was fined €20 million for abuse of its dominant position and €3 million for its participation in a pricing agreement with one of its competitors.

Solvay brought two separate actions before the General Court for annulment of the new decisions adopted by the Commission in 2000, or for reduction of the fines imposed on it. Solvay pleaded, in particular, breach of its right of access to the file since it had not been sent all the documents on which the Commission based its allegation of an infringement.

By judgments of 17 December 2009, the General Court dismissed those actions in so far as they sought annulment of the decisions at issue.

Solvay appealed both judgments of the General Court before the Court of Justice.

II. The Court notes, first, that the right of access to the file means that the Commission must provide the undertaking concerned with the opportunity to examine all the documents in the investigation file that might be relevant for its defence. Infringement of the right of access to the file during the procedure prior to adoption of a decision can, in principle, cause the decision to be annulled if the rights of the defence have been infringed.

In the present case, the Court points out that it cannot be excluded that Solvay could have found in the missing sub-files evidence originating from other undertakings which would have enabled it to offer an interpretation of the facts different from the interpretation adopted by the Commission, which could have been of use for its defence.

Accordingly, the Court finds that the General Court erred in law in concluding that the fact that Solvay had not had access to all the documents in the file did not constitute an infringement of the rights of the defence.

As regards the hearing of the undertaking concerned before the Commission adopts a decision, the Court states that this forms part of the rights of the defence and that it must therefore be examined in relation to the specific circumstances of each particular case.

The Court explains that, where – following the annulment of a decision because of a procedural defect relating exclusively to the procedures governing its final adoption by the College of Commissioners – the Commission is to adopt a fresh decision, with substantially the same content and based on the same objections, it is not required to conduct a new hearing of the undertakings concerned.

However, the Court finds that, in the present case, the question of the hearing of Solvay cannot be separated from the issue of access to the file. In that connection, the Court points out that, during the administrative proceeding which led to the adoption of the first decisions in 1990, the Commission had not granted Solvay access to all the documents in its file. Yet, despite those circumstances and notwithstanding the importance placed by the case-law of the Court of Justice and the General Court on access to the file, the Commission proceeded to adopt decisions which were the same as those which had been annulled owing to the lack of proper authentication, without opening a new administrative proceeding in which it would have had to hear Solvay after granting it access to the file.

In consequence, the Court sets aside the judgments of the General Court and, on the merits, annuls the decisions of the Commission.

#### *Languages:*

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



## European Court of Human Rights

### Important decisions

*Identification:* ECH-2014-3-007

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 16.09.2014 / **e)** 29750/09 / **f)** Hassan v. the United Kingdom / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

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

2.1.1.4.3 Sources – Categories – Written rules – International instruments – **Geneva Conventions of 1949.**

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

2.1.1.4.10 Sources – Categories – Written rules – International instruments – **Vienna Convention on the Law of Treaties of 1969.**

2.2 Sources – **Hierarchy.**

4.18 Institutions – **State of emergency and emergency powers.**

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

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

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

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

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

*Keywords of the alphabetical index:*

Jurisdiction, territorial, scope / International humanitarian law, human right, scope of application / Wartime, detention, human right, application / Wartime, detention, review, competent body, impartiality.

*Headnotes:*

By reason of the coexistence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of Article 5.1 ECHR should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions.

*Summary:*

I. In March 2003 a coalition of armed forces led by the United States of America invaded Iraq. After occupying the region of Basrah, the British army started arresting high-ranking members of the ruling Ba'ath Party and the applicant, a senior member of the party, went into hiding leaving his brother Tarek behind to protect the family home in Umm Qasr. On the morning of 23 April 2003 a British Army unit came to the applicant's house hoping to arrest him. According to their records, they found Tarek Hassan in the house armed with an AK-47 machine gun and arrested him on suspicion of being a combatant or a civilian posing a threat to security. He was taken later that day to Camp Bucca, a detention facility in Iraq operated by the United States. Parts of the camp were also used by the United Kingdom to detain and interrogate detainees. Following interrogation by both United States and United Kingdom authorities, Tarek Hassan was deemed to be of no intelligence value and, according to the records, was released on or around 2 May 2003 at a drop-off point in Umm Qasr. His body was discovered, bearing marks of torture and execution, some 700 kilometres away in early September 2003.

In 2007 the applicant brought proceedings in the English administrative court, but these were dismissed on the grounds that Camp Bucca was a military establishment of the United States rather than the United Kingdom.

In his application to the European Court of Human Rights, the applicant alleged that his brother was arrested and detained by British forces in Iraq

and subsequently found dead in unexplained circumstances. He complained under Article 5.1, 5.2, 5.3 and 5.4 ECHR that the arrest and detention were arbitrary and unlawful and lacking in procedural safeguards and under Articles 2, 3 and 5 ECHR that the United Kingdom authorities had failed to carry out an investigation into the circumstances of the detention, ill-treatment and death.

II. Articles 2 and 3 ECHR: There was no evidence to suggest that Tarek Hassan had been ill-treated while in detention such as to give rise to an obligation under Article 3 ECHR to carry out an official investigation. Nor was there any evidence that the United Kingdom authorities were responsible in any way, directly or indirectly, for his death, which had occurred some four months after his release from Camp Bucca, in a distant part of the country not controlled by United Kingdom forces. In the absence of any evidence of the involvement of United Kingdom State agents in the death, or even of any evidence that the death occurred within territory controlled by the United Kingdom, no obligation to investigate under Article 2 ECHR could arise. This part of the application was therefore declared inadmissible.

Article 5.1, 5.2, 5.3 and 5.4 ECHR:

## a. Jurisdiction

i. Period between capture by British troops and admission to Camp Bucca: Tarek Hassan was within the physical power and control of the United Kingdom soldiers and therefore fell within United Kingdom jurisdiction. The Court rejected the Government's argument that jurisdiction should not apply in the active hostilities phase of an international armed conflict, where the agents of the Contracting State were operating in territory of which they were not the occupying power, and where the conduct of the State should instead be subject to the requirements of international humanitarian law. In the Court's view, such a conclusion was inconsistent with its own case-law and with the case-law of the International Court of Justice holding that international human rights law and international humanitarian law could apply concurrently.

ii. Period after admission to Camp Bucca: The Court did not accept the Government's argument that jurisdiction should be excluded for the period following Tarek Hassan's admission to Camp Bucca as it involved a transfer of custody from the United Kingdom to the United States. Tarek Hassan was admitted to the Camp as a United Kingdom prisoner. Shortly after his admission, he was taken to a compound entirely controlled by United Kingdom

forces. Under the Memorandum of Understanding between the United Kingdom, United States and Australian Governments relating to the transfer of custody of detainees it was the United Kingdom which had responsibility for the classification of United Kingdom detainees under the Third and Fourth Geneva Conventions and for deciding whether they should be released. While it was true that certain operational aspects relating to Tarek Hassan's detention at Camp Bucca were transferred to United States forces (such as escorting him to and from the compound and guarding him elsewhere in the camp) the United Kingdom had retained authority and control over all aspects of the detention relevant to the applicant's complaints under Article 5 ECHR.

Tarek Hassan had thus been within the jurisdiction of the United Kingdom from the moment of his capture on 23 April 2003 until his release, most probably at Umm Qasr on 2 May 2003.

b. Merits: There were important differences of context and purpose between arrests carried out during peacetime and the arrest of a combatant in the course of an armed conflict. Detention under the powers provided for in the Third and Fourth Geneva Conventions was not congruent with any of the permitted grounds of deprivation of liberty set out in subparagraphs (a) to (f) of Article 5.1 ECHR.

The United Kingdom had not lodged any formal request under Article 15 ECHR (derogation in time of emergency) allowing it to derogate from its obligations under Article 5 ECHR in respect of its operations in Iraq. Instead, the Government had in their submissions requested the Court to disapply United Kingdom's obligations under Article 5 ECHR or in some other way interpret them in the light of the powers of detention available to it under international humanitarian law.

The starting point for the Court's examination was its constant practice of interpreting the European Convention on Human Rights in the light of the 1969 Vienna Convention on the Law of Treaties, Article 31.3 of which made it necessary when interpreting a treaty to take into account:

- a. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and
- c. any relevant rules of international law applicable in the relations between the parties.

As to Article 31.3.a, there had been no subsequent agreement between the Contracting States as to the interpretation of Article 5 ECHR in situations of international armed conflict. However, as regards Article 31.3.b, the Court had previously stated that a consistent practice on the part of the Contracting States, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention. The practice of the Contracting States was not to derogate from their obligations under Article 5 ECHR in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts. That practice was mirrored by State practice in relation to the International Covenant for the Protection of Civil and Political Rights.

As to the criterion contained in Article 31.3.c, the Court reiterated that the Convention had to be interpreted in harmony with other rules of international law, including the rules of international humanitarian law. The Court had to endeavour to interpret and apply the European Convention on Human Rights in a manner which was consistent with the framework under international law delineated by the International Court of Justice. Accordingly, the lack of a formal derogation under Article 15 ECHR did not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 ECHR in the applicant's case.

Nonetheless, even in situations of international armed conflict, the safeguards under the European Convention on Human Rights continued to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the co-existence of the safeguards provided by international humanitarian law and by the European Convention on Human Rights in time of armed conflict, the grounds of permitted deprivation of liberty set out under subparagraphs (a) to (f) should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. The Court was mindful of the fact that internment in peacetime did not fall within the scheme of deprivation of liberty governed by Article 5 ECHR without the exercise of the power of derogation under Article 15 ECHR. It could only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security were accepted features of international humanitarian law, that Article 5 ECHR could be interpreted as permitting the exercise of such broad powers.

As with the grounds of permitted detention set out in those subparagraphs, deprivation of liberty pursuant to powers under international humanitarian law had to be “lawful” to preclude a violation of Article 5.1 ECHR. That meant that detention had to comply with the rules of international humanitarian law, and most importantly, that it should be in keeping with the fundamental purpose of Article 5.1 ECHR, which was to protect the individual from arbitrariness.

As regards procedural safeguards, the Court considered that, in relation to detention taking place during an international armed conflict, Article 5.2 and 5.4 ECHR must also be interpreted in a manner which takes into account the context and the applicable rules of international humanitarian law. Articles 43 and 78 of the Fourth Geneva Convention provide that internment “shall be subject to periodical review, if possible every six months, by a competent body”. Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent “court” in the sense generally required by Article 5.4 ECHR, nonetheless, if the Contracting State is to comply with its obligations under Article 5.4 ECHR in this context, the “competent body” should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay. Article 5.3 ECHR, however, had no application in the present case since Tarek Hassan was not detained in accordance with the provisions of Article 5.1.c ECHR.

Turning to the facts of the applicant’s case, the Court considered that the United Kingdom authorities had had reason to believe that Tarek Hassan, who was found by British troops armed and on the roof of his brother’s house, where other weapons and documents of military intelligence value had been retrieved, might be either a person who should be detained as a prisoner of war or whose internment was necessary for imperative reasons of security, both of which provided a legitimate ground for capture and detention under the Third and Fourth Geneva Conventions. Almost immediately following his admission to Camp Bucca, he had been subject to a screening process in the form of two interviews by United States and United Kingdom military intelligence officers, which had led to his being cleared for release since it was established that he was a civilian who did not pose a threat to security. The evidence pointed to his having been physically released from the Camp shortly thereafter.

Against this background, it would appear that Tarek Hassan’s capture and detention was consistent with the powers available to the United Kingdom under the Third and Fourth Geneva Conventions, and was not arbitrary. Moreover, in the light of his clearance for release and physical release within a few days of being brought to the Camp, it was unnecessary for the Court to examine whether the screening process constituted an adequate safeguard to protect against arbitrary detention. Finally, it would appear from the context and the questions that Tarek Hassan was asked during the two screening interviews that the reason for his detention would have been apparent to him. Therefore, the Court found no violation of Article 5 ECHR.

#### *Cross-references:*

International Court of Justice:

- Advisory Opinion on The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 09.07.2004, *Records* 2004.

European Court of Human Rights:

- *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, 07.07.2011, *Reports of Judgments and Decisions* 2011;
- *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, 07.07.2011, *Reports of Judgments and Decisions* 2011.

#### *Languages:*

English, French.



#### *Identification:* ECH-2014-3-008

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 03.10.2014 / **e)** 12738/10 / **f)** *Jeunesse v. the Netherlands* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

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

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

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

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

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

*Keywords of the alphabetical index:*

Residence permit, issue, circumstance, exceptional / Child, best interest / Citizenship, original / Criminal record, absence / Family ties / Social ties / Cultural ties / Residence, toleration, length / Residence, denial, consequences, evaluation / Resettlement, hardship.

*Headnotes:*

When family life is started at a time when the persons involved are aware that the immigration status of one of them is such that the persistence of that family life within the host State would from the outset be precarious, the removal of the non-national family member constitutes a violation of Article 8 ECHR only in exceptional circumstances. Such circumstances existed in the present case.

*Summary:*

I. The applicant, a Surinamese national, entered the Netherlands in 1997 on a tourist visa and continued to reside there after her visa expired. She married a Dutch national and they had three children. The applicant applied for a residence permit on several occasions, but her requests were dismissed as she did not hold a provisional residence visa issued by the Netherlands mission in her country of origin. In 2010 she spent four months in detention pending deportation. She was eventually released because she was pregnant.

II. The Court recalled its well-established Case-Law that, when family life was started at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious, the removal of the non-national family member would constitute a violation of Article 8 ECHR only in exceptional circumstances. The applicant's situation in the respondent State had been irregular since she had overstayed her tourist visa. Having made numerous unsuccessful attempts to regularise her residence status in the Netherlands, she had been aware – well before she commenced her family life in that country – of the precariousness of her situation.

As to the existence of exceptional circumstances, all the members of the applicant's family were Dutch nationals entitled to enjoy family life with each other in the Netherlands. Moreover, the applicant's position was not comparable to that of other potential migrants in that she had been born a Dutch national but had lost that nationality involuntarily in 1975 when Suriname became independent. Her address had always been known to the domestic authorities, who had tolerated her presence in the country for 16 years. Such a lengthy period had actually enabled her to establish and develop strong family, social and cultural ties in the Netherlands. The Court further noted that the applicant did not have a criminal record and that settling in Suriname would entail hardship for her family. Nor had the domestic authorities paid enough attention to the best interest of the applicant's children and the impact of the decision to deny their mother a residence permit. They had also failed to take account of or assess evidence as to the practicality, feasibility and proportionality of denying her residence in the Netherlands. Viewing these factors cumulatively, the Court concluded that the circumstances of the applicant's case were indeed exceptional. Accordingly, a fair balance had not been struck between the personal interests of the applicant and her family in maintaining their family life in the Netherlands and the public order interests of the Government in controlling migration. Therefore, there has been a violation of Article 8 ECHR.

*Cross-references:*

European Court of Human Rights:

- *Nunez v. Norway*, no. 55597/09, 28.06.2011.

*Languages:*

English, French.



*Identification:* ECH-2014-3-009

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 04.11.2014 / **e)** 29217/12 / **f)** *Tarakhel v. Switzerland* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Expulsion, receiving state, assurances / Foreigner, expulsion, danger of ill treatment / Foreigner, expulsion, right to family life.

*Headnotes:*

The requirement of “special protection” of asylum seekers is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability. This applies even when the children seeking asylum are accompanied by their parents. National authorities intending to issue a removal order under the Dublin II Regulation must therefore obtain assurances that on arrival in the State of destination the persons concerned will be received in facilities and in conditions adapted to the age of the children and that the family unit will be kept together; otherwise, the removal order is liable to be in breach of Article 3 ECHR.

*Summary:*

I. The applicants, a married couple and their six minor children, are Afghan nationals who live in Switzerland. The couple and their five oldest children landed on the Italian coast in July 2011 and were immediately subjected to the EURODAC identification procedure (taking of photographs and fingerprints). The applicants subsequently travelled to Austria and, later, to Switzerland, where they applied for asylum. However, their application was refused on the grounds that, under the Dublin II Regulation, it should be dealt with by the Italian authorities. The Swiss authorities therefore ordered the applicants’ removal to Italy. The appeals lodged by the applicants against that measure were dismissed. In their application to the European Court, the applicants contended that their deportation from Switzerland to Italy would be in breach of their rights under Article 3 ECHR.

II. In the present case the Court had to ascertain whether, in view of the overall situation with regard to the reception arrangements for asylum seekers in Italy and the applicants’ specific situation, substantial grounds had been shown for believing that the applicants would be at risk of treatment contrary to Article 3 ECHR if they were returned to Italy. The

Court considered it necessary to follow an approach similar to that which it had adopted in its judgment in *M.S.S. v. Belgium and Greece* [GC], in which it had examined the applicant’s individual situation in the light of the overall situation prevailing in Greece at the relevant time.

a. Overall situation with regard to the reception arrangements for asylum seekers in Italy – In its decision in the case of *Mohammed Hussein and Others v. the Netherlands and Italy*, the Court had observed that the Recommendations of the Office of the United Nations High Commissioner for Refugees (hereinafter, “UNHCR”) and the report of the Commissioner for Human Rights, both published in 2012, referred to a number of failures relating, in particular, to the slowness of the identification procedure, the inadequate capacity of the reception facilities and the living conditions in the available facilities.

b. Capacity of the reception facilities for asylum seekers – The number of places reportedly fell far short of what was needed. Hence, without entering into the debate as to the accuracy of the available figures, the Court noted the glaring discrepancy between the number of asylum applications made in the first six months of 2013 (14,184) and the number of places available in the refugee reception facilities belonging to the SPRAR network (9,630 places).

c. Living conditions in the available facilities – While it had observed a degree of deterioration in reception conditions, and a problem of overcrowding in the reception centres for asylum seekers (hereinafter, “CARAs”), UNHCR had not referred to situations of widespread violence or insalubrious conditions, and had even welcomed the efforts undertaken by the Italian authorities to improve reception conditions for asylum seekers. The Human Rights Commissioner, in his 2012 report, had also noted the existence of problems in “some of the reception facilities”. Lastly, at the hearing before the European Court, the Italian Government had confirmed that violent incidents had occurred in the CARA shortly before the applicants’ arrival but had denied that the families of asylum seekers were systematically separated, stating that this occurred only in a few cases and for very short periods, notably during the identification procedures.

Hence, the current situation in Italy could in no way be compared to the situation in Greece at the time of the *M.S.S.* judgment, cited above, where the Court had noted in particular that there were fewer than 1,000 places in reception centres to accommodate tens of thousands of asylum seekers and that the conditions of the most extreme poverty described by the applicant existed on a large scale.

While the structure and overall situation of the reception arrangements in Italy could not therefore in themselves act as a bar to all removals of asylum seekers to that country, the data and information set out above nevertheless raised serious doubts as to the current capacities of the system. Accordingly, the possibility that a significant number of asylum seekers might be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, could not be dismissed as unfounded.

d. The applicants' individual situation – Just as the overall situation of asylum seekers in Italy was not comparable to that of asylum seekers in Greece as analysed in the *M.S.S.* judgment, the specific situation of the applicants in the present case was different from that of the applicant in *M.S.S.* Whereas the former were taken charge of immediately by the Italian authorities, the latter had first been placed in detention and then left to fend for himself, without any means of subsistence.

In the present case, in view of the current situation regarding the reception system in Italy, the possibility that a significant number of asylum seekers removed to that country might be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, was not unfounded. It was therefore incumbent on the Swiss authorities to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants would be received in facilities and in conditions adapted to the age of the children, and that the family would be kept together.

According to the Italian Government, families with children were regarded as a particularly vulnerable category and were normally taken charge of within the SPRAR network. This system apparently guaranteed them accommodation, food, health care, Italian classes, referral to social services, legal advice, vocational training, apprenticeships and help in finding their own accommodation. However, in their written and oral observations the Italian Government had not provided any further details on the specific conditions in which the authorities would take charge of the applicants.

It was true that at the hearing of 12 February 2014 the Swiss Government had stated that the Federal Migration Office (FMO) had been informed by the Italian authorities that, if the applicants were returned to Italy, they would be accommodated in one of the facilities funded by the European Refugee Fund (ERF). Nevertheless, in the absence of detailed and reliable information concerning the specific facility, the physical reception conditions and the preservation

of the family unit, the Swiss authorities did not possess sufficient assurances that, if returned to Italy, the applicants would be taken charge of in a manner adapted to the age of the children.

It followed that, were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 ECHR.

The Court therefore found that the applicants' expulsion would constitute a violation of Article 3 ECHR.

European Court of Human Rights:

- *Mohammed Hussein and Others v. the Netherlands and Italy*, no. 27725/10, 02.04.2013;
- *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21.01.2011, *Special Bulletin – Inter-Court Relations* [ECH-2011-C-001].

*Languages:*

English, French.



*Identification:* ECH-2014-3-010

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 20.11.2014 / **e)** 47708/08 / **f)** *Jaloud v. the Netherlands* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

- 1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**
- 5.3.2 Fundamental Rights – Civil and political rights – **Right to life.**

*Keywords of the alphabetical index:*

Jurisdiction, territorial, scope / Armed forces, control, competence / Armed forces, use abroad / Right to life, investigation, effective.

*Headnotes:*

The fact of executing a decision or an order given by an authority of a foreign State was not in itself sufficient to relieve a Contracting State of its obligations under the European Convention on Human Rights. A State was not divested of extra-territorial "jurisdiction" solely by dint of having accepted the operational control of a foreign commanding officer where the formulation of essential policy, including the rules on the use of force, remained within its reserved domain.

*Summary:*

I. From July 2003 until March 2005 Netherlands troops participated in the Stabilisation Force in Iraq (hereinafter, "SFIR") in battalion strength. They were stationed in south-eastern Iraq as part of Multinational Division South-East (MND-SE), which was under the command of an officer of the armed forces of the United Kingdom. The participation of Netherlands forces in MND-SE was governed by a Memorandum of Understanding between the United Kingdom and the Kingdom of the Netherlands to which Rules of Engagement were appended. Both documents were classified "confidential".

The applicant is the father of an Iraqi national who died in April 2004 from bullet wounds received when the car in which he was travelling as a passenger was shot at after passing a vehicle checkpoint at speed. The checkpoint was manned at the time by members of the Iraqi Civil Defence Corps (ICDC) who had been joined by a patrol of Netherlands soldiers who had arrived after the checkpoint had come under fire from another vehicle a few minutes before the incident in which the applicant's son was killed. One of the Netherlands servicemen admitted to having fired several rounds at the car in which the applicant's son was travelling, but claimed to have done so in self-defence, believing himself to have been under fire from the vehicle. Following an investigation by the Royal Military Constabulary (a branch of the Netherlands armed forces), the military public prosecutor concluded that the applicant's son had presumably been hit by an Iraqi bullet and that the Netherlands serviceman had been acting in self-defence. He therefore closed the investigation. That decision was upheld by the Military Chamber of the Court of Appeal, which found that the serviceman had reacted to friendly fire, mistaking it for fire from inside the car. In the circumstances, he had acted within the confines of his instructions and the decision not to prosecute him could stand.

In his application to the European Court, the applicant complained under Article 2 ECHR that the investigation was not sufficiently independent or insufficiently effective.

II. Article 1 ECHR (jurisdiction): The Government raised a preliminary objection that the complaints did not come within the territorial jurisdiction of the Netherlands since authority lay elsewhere: either with the United States and the United Kingdom as the designated "occupying powers" under United Nations Security Council Resolution 1483, or with the United Kingdom alone as the "lead nation" in south-eastern Iraq, holding command over the Netherlands contingent of SFIR.

Rejecting that argument, the Court observed that the fact of executing a decision or an order given by an authority of a foreign State was not in itself sufficient to relieve a Contracting State of its obligations under the European Convention on Human Rights. The Netherlands were not divested of "jurisdiction" solely by dint of having accepted the operational control of a United Kingdom commanding officer. Although the forces of nations other than the "lead nations" took their day-to-day orders from foreign commanders, the formulation of essential policy – including, within the limits agreed in the form of Rules of Engagement appended to the relevant Memoranda of Understanding, the drawing up of distinct rules on the use of force – remained the reserved domain of the individual States who had supplied forces. The Netherlands assumed responsibility for providing security in the area where their troops were stationed, to the exclusion of other participating States, and retained full command over its contingent there. Nor was it relevant that the checkpoint where the shooting happened was nominally manned by ICDC personnel, as the ICDC was supervised by and subordinate to officers from the coalition forces. The Netherlands troops had thus not been at the disposal of any foreign power or under the exclusive direction or control of any other State.

The fatal shooting had taken place at a checkpoint manned by personnel under the command and direct supervision of a Netherlands army officer which had been set up in the execution of SFIR's mission under United Nations Security Council Resolution 1483. It had thus occurred within the "jurisdiction" of the Netherlands.

Article 2 ECHR (procedural aspect): The Court did not accept the applicant's allegation that the investigation had not been sufficiently independent. There was no evidence to show that the fact that the Royal Military Constabulary unit which had undertaken the initial investigation had shared their

living quarters with the army personnel allegedly responsible for the death had in itself affected its independence to the point of impairing the quality of its investigations. Nor did the fact that the public prosecutor had relied to a large extent on the reports by the Royal Military Constabulary raise an issue as public prosecutors inevitably relied on the police for information and support. As to the inclusion of a serving military officer as a judge of the Military Chamber of the Court of Appeal which upheld the decision not to prosecute the Netherlands army officer who had fired at the car, the Court noted that the chamber had been composed of two civilian members of the Court of Appeal and one military member. The military member was a senior officer qualified for judicial office who was not subject to military authority and discipline and whose functional independence and impartiality were the same as those of civilian judges. The Military Chamber had thus offered sufficient guarantees of independence for the purposes of Article 2 ECHR.

However, as regards the effectiveness of the investigation, the Court found that it had been characterised by a number of shortcomings. Notably, the Military Chamber of the Court of Appeal had confined itself to establishing that the officer who had fired the shots had acted in self-defence, mistakenly reacting to friendly fire from across the road, without addressing certain aspects relevant to the question of the proportionality of the force used, in particular, whether more shots had been fired than necessary and whether the firing had ceased as soon as the situation had allowed. Documents containing information potentially relevant to those questions had not been made available to the Military Chamber at the time. In particular, an official record of statements from the ICDC personnel who had been guarding the checkpoint at the time of the shooting and a list of the names of ICDC personnel who had fired their weapons had not been added to the case file.

Moreover, there had been a delay of more than six hours after the incident before the officer who had fired the shots was questioned. While there was no suggestion of foul play, the mere fact that no appropriate steps had been taken to reduce the risk of him colluding with other witnesses amounted to a shortcoming in the adequacy of the investigation. As regards the autopsy, it had been carried out without any qualified Netherlands official being present. The pathologist's report was extremely brief, lacked detail and did not include any pictures. Finally, fragments of metal identified as bullet fragments taken from the body – potentially important material evidence – were not stored or examined in proper conditions and had subsequently gone missing in unknown circumstances.

In summary, the investigation into the circumstances surrounding the death had failed to meet the standards required by Article 2 ECHR in that documents containing important information were not made available to the judicial authorities and the applicant; no precautions were taken to prevent the officer who fired the shots from colluding, before he was questioned, with other witnesses; no attempt was made to carry out the autopsy under conditions befitting an investigation into the possible criminal responsibility of an agent of the State, and the resulting report was inadequate; and important material evidence was mislaid in unknown circumstances. It could not be said that these failings were inevitable, even in the particularly difficult conditions that had prevailed in Iraq at the relevant time. Therefore, the Court found a violation of Article 2 ECHR.

#### *Cross-references:*

European Court of Human Rights:

- *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, 07.07.2011, *Reports of Judgments and Decisions* 2011;
- *Hassan v. the United Kingdom* [GC], no. 29750/09, 16.09.2014, *Reports of Judgments and Decisions* 2014.

#### *Languages:*

English, French.





## **Systematic thesaurus (V22) \***

\* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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<sup>1</sup> This chapter – as the Systematic Thesaurus in general – should be used sparingly, as the keywords therein should only be used if a relevant procedural question is discussed by the Court. This chapter is therefore not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only look for decisions in this chapter, the subject of which is also the keyword.

<sup>2</sup> Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

<sup>3</sup> For example, rules of procedure.

<sup>4</sup> For example, age, education, experience, seniority, moral character, citizenship.

<sup>5</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>6</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>7</sup> Vice-presidents, presidents of chambers or of sections, etc.

<sup>8</sup> For example, State Counsel, prosecutors, etc.

<sup>9</sup> (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

<sup>10</sup> For example, assessors, office members.

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<sup>11</sup> (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

<sup>12</sup> Including questions on the interim exercise of the functions of the Head of State.

<sup>13</sup> Referrals of preliminary questions in particular.

<sup>14</sup> Enactment required by law to be reviewed by the Court.

<sup>15</sup> Review *ultra petita*.

<sup>16</sup> Horizontal distribution of powers.

<sup>17</sup> Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

<sup>18</sup> Decentralised authorities (municipalities, provinces, etc.).

<sup>19</sup> For questions other than jurisdiction, see 4.9.

<sup>20</sup> Including other consultations. For questions other than jurisdiction, see 4.9.

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<sup>22</sup> As understood in private international law.

<sup>23</sup> Including constitutional laws.

<sup>24</sup> For example, organic laws.

<sup>25</sup> Local authorities, municipalities, provinces, departments, etc.

<sup>26</sup> Or: functional decentralisation (public bodies exercising delegated powers).

<sup>27</sup> Political questions.

<sup>28</sup> Unconstitutionality by omission.

<sup>29</sup> Including language issues relating to procedure, deliberations, decisions, etc.

<sup>30</sup> For the withdrawal of proceedings, see also 1.4.10.4.

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<sup>31</sup> Pleadings, final submissions, notes, etc.

<sup>32</sup> May be used in combination with Chapter 1.2. Types of claim.

<sup>33</sup> For the withdrawal of the originating document, see also 1.4.5.

- 
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<sup>34</sup> Comprises court fees, postage costs, advance of expenses and lawyers' fees.

<sup>35</sup> For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

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<sup>36</sup> Only for issues concerning applicability and not simple application.

<sup>37</sup> This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

<sup>38</sup> Including its Protocols.

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<sup>39</sup> Presumption of constitutionality, double construction rule.

<sup>40</sup> Including the principle of a multi-party system.

<sup>41</sup> Includes the principle of social justice.

<sup>42</sup> See also 4.8.

<sup>43</sup> Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

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<sup>44</sup> Including maintaining confidence and legitimate expectations.

<sup>45</sup> Principle according to which general sub-statutory acts must be based on and in conformity with the law.

<sup>46</sup> Prohibition of punishment without proper legal base.

<sup>47</sup> Including compelling public interest.

<sup>48</sup> Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

<sup>49</sup> Including questions of treason/high crimes.

<sup>50</sup> Including prohibition on monopolies.

<sup>51</sup> For sincere co-operation and subsidiarity see 4.17.2.1 and 4.17.2.2, respectively.

<sup>52</sup> Including the body responsible for revising or amending the Constitution.

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<sup>54</sup> For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

<sup>55</sup> For example, the granting of pardons.

<sup>56</sup> For regional and local authorities, see Chapter 4.8.

<sup>57</sup> Bicameral, monocameral, special competence of each assembly, etc.

<sup>58</sup> Including specialised powers of each legislative body and reserved powers of the legislature.

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<sup>61</sup> Obligation on the legislative body to use the full scope of its powers.

<sup>62</sup> Representative/imperative mandates.

<sup>63</sup> Including the convening, duration, publicity and agenda of sessions.

<sup>64</sup> Including their creation, composition and terms of reference.

<sup>65</sup> State budgetary contribution, other sources, etc.

<sup>66</sup> For the publication of laws, see 3.15.

<sup>67</sup> For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

<sup>68</sup> For local authorities, see 4.8.

<sup>69</sup> Derived directly from the Constitution.

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<sup>70</sup> See also 4.8.

<sup>71</sup> The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

<sup>72</sup> Civil servants, administrators, etc.

<sup>73</sup> Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

<sup>74</sup> Other than the body delivering the decision summarised here.

<sup>75</sup> Positive and negative conflicts.

<sup>76</sup> Notwithstanding the question to which to branch of state power the prosecutor belongs.

<sup>77</sup> For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

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<sup>78</sup> Comprises the Court of Auditors in so far as it exercises judicial power.

<sup>79</sup> See also 3.6.

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<sup>82</sup> Organs of control and supervision.

<sup>83</sup> Including other consultations.

<sup>84</sup> For questions of jurisdiction, see keyword 1.3.4.6.

<sup>85</sup> Proportional, majority, preferential, single-member constituencies, etc.

<sup>86</sup> For example, *Panachage*, voting for whole list or part of list, blank votes.

<sup>87</sup> For aspects related to fundamental rights, see 5.3.41.2.

<sup>88</sup> For the creation of political parties, see 4.5.10.1.

<sup>89</sup> For example, names of parties, order of presentation, logo, emblem or question in a referendum.

<sup>90</sup> Tracts, letters, press, radio and television, posters, nominations, etc.

<sup>91</sup> For the access of media to information, see 5.3.23, 5.3.24, in combination with 5.3.41.

<sup>92</sup> Impartiality of electoral authorities, incidents, disturbances.

<sup>93</sup> For example, signatures on electoral rolls, stamps, crossing out of names on list.

<sup>94</sup> For example, in person, proxy vote, postal vote, electronic vote.

<sup>95</sup> This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.

<sup>96</sup> For example, Auditor-General.

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<sup>97</sup> Includes ownership in undertakings by the state, regions or municipalities.

<sup>98</sup> Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

<sup>99</sup> For example, Court of Auditors.

<sup>100</sup> The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

<sup>101</sup> *Staatszielbestimmungen*.

<sup>102</sup> Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

<sup>103</sup> Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

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<sup>105</sup> For rights of the child, see 5.3.44.

<sup>106</sup> The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

<sup>107</sup> Includes questions of the suspension of rights. See also 4.18.

<sup>108</sup> Including all questions of non-discrimination.

<sup>109</sup> Taxes and other duties towards the state.

<sup>110</sup> "One person, one vote".

<sup>111</sup> According to the European Convention on Nationality of 1997, ETS no. 166, "'nationality' means the legal bond between a person and a state and does not indicate the person's ethnic origin" (Article 2) and "... with regard to the effects of the Convention, the terms 'nationality' and 'citizenship' are synonymous" (paragraph 23, Explanatory Memorandum).

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<sup>112</sup> For example, discrimination between married and single persons.

<sup>113</sup> This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

<sup>114</sup> Detention by police.

<sup>115</sup> Including questions related to the granting of passports or other travel documents.

<sup>116</sup> May include questions of expulsion and extradition.

<sup>117</sup> Including the right of access to a tribunal established by law; for questions related to the establishment of extraordinary courts, see also keyword 4.7.12.

<sup>118</sup> In the meaning of Article 6.1 of the European Convention on Human Rights.

<sup>119</sup> This keyword covers the right of appeal to a court.

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<sup>121</sup> Including challenging of a judge.

<sup>122</sup> Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

<sup>123</sup> This keyword also includes the right to freely communicate information.

<sup>124</sup> Militia, conscientious objection, etc.

<sup>125</sup> Aspects of the use of names are included either here or under "Right to private life".

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126

Including compensation issues.

127

This keyword also covers "Freedom of work".

128

This should also cover the term freedom of enterprise.

129

Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

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## **Keywords of the alphabetical index \***

\* The précis presented in this Bulletin are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

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