

THE BULLETIN

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

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

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

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

The decisions are presented in the following way:

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

T. Markert

Director, Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

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

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

Established in 1990 as a partial agreement of 18 member states of the Council of Europe, the Commission in February 2002 became an enlarged agreement, comprising all 47 member States of the organisation and working with some other 14 countries from Africa, America, Asia and Europe.

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| Inter-American Court of Human Rights | J. Recinos |

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There was no relevant constitutional case-law during the reference period 1 January 2016 – 30 April 2016 for the following countries:

Armenia, Luxembourg.

Précis of important decisions of the reference period 1 January 2016 – 30 April 2016 will be published in the next edition, *Bulletin 2016/2*, for the following country:

Japan.

Albania

Constitutional Court

Important decisions

Identification: ALB-2016-1-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 24.02.2016 / **e)** 7/2015 / **f)** Laws and other rules having the force of law / **g)** *Fletore Zyrtare* (Official Gazette) / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Parliamentary minority, incompatibility, mandate / Parliamentary Assembly, competence, verification, legal criteria / Constitutional Court, competence exclusive, final interpretation.

Headnotes:

One of the exclusive competencies of the Constitutional Court is to interpret the Constitution. Only objectively unclear provisions or constitutional provisions whose application may be inconsistent are to be submitted for interpretation. The Assembly is the only body that can request the Constitutional Court to determine whether a deputy's activities during his or her mandate give rise to a conflict of interest. This competence of the Assembly is obligatory.

Summary:

I. A group of deputies of the Democratic Party requested the Assembly to use parliamentary procedures to revoke deputy Koço Kokëdhima's mandate, alleging he violated Article 70.2 and 70.3 of the Constitution by benefiting from public funds while in office. The Assembly refused the request, adopting decision no. 48/2015 "On not sending to the Constitutional Court the issue of finding the

incompatibility of deputy of Mr Koço Kokëdhima". Subsequently, the applicant (one fifth of the deputies of the Assembly) requested the Court to review the constitutionality of Koço Kokëdhima's mandate.

II. According to Article 70.3 of the Constitution, deputies may neither perform any profit-making activity that derives from the assets of the state or local government nor earn those assets. Article 70.4 stipulates that "For every violation of Article 70.3, on the motion of the Speaker of the Assembly or one tenth of its members, the Assembly decides to send the case to the Constitutional Court, which finds the incompatibility". Hence, the Assembly not only determines whether to initiate constitutional adjudication, but also initiates the appropriate parliamentary procedures for it (Assembly Speaker or one tenth of its members). The content of Article 70.4 of the Constitution is also reflected in Article 66.3 of Law no. 8577 dated 10 February 2000 "On the organisation and functioning of the Constitutional Court of the Republic of Albania". That is, the Assembly may submit a request for incompatibility with the Court, so long as the mandate of the deputy continues. The Assembly's decision-making, under Article 70.4 of the Constitution, is to give that subject legitimacy to initiate a constitutional adjudication for a finding of incompatibility of the deputy' mandate. The applicant requested the Court to provide a final interpretation of Article 70 of the Constitution.

II. In light of the above constitutional standards and the circumstances of the concrete case, the Court assessed whether the application meets the preconditions for it to make a final interpretation of the contested constitutional provision.

According to Article 70.2 of the Constitution, deputies cannot simultaneously exercise any other state duty besides that of member of the Council of Ministers. According to Article 70.3 deputies may not perform any profit-making activity that derives from the assets of the state or local government nor may they obtain those assets.

When a group of deputies initiates the Court to provide the final interpretation of the Constitution, the basis of such action should be that there is more than one interpretation or different implementation of the Constitution and that such consequences require the Court to provide the final interpretation. The Court finds that the applicant did not present sufficient constitutional arguments for an interpretation of Article 70.2 and 70.3 of the Constitution, neither in the application nor in the plenary session.

The applicant has also asked the Court to interpret Article 70.4 of the Constitution. The Court finds that, according to Article 70.4 of the Constitution, only the

Assembly can initiate the review for violation of Article 70.3. This provision does not clarify the Assembly's discretion in this process, that is, whether the decision-making of the Assembly is only a formal step necessary to initiate a constitutional adjudication or it has the right to decide on the merits of the case. The lack of clarity led to a constitutional dispute between the parliamentary majority and the parliamentary minority, which hold different positions on the meaning of the provision. The resolution of the dispute that has arisen is also related to the manner in which the concrete constitutional provision is interpreted. One tenth of the deputies (a part of the parliamentary opposition) have requested the Assembly to request the review of the constitutionality of the deputy's mandate by the Constitutional Court. The latter (in exercising its main function as legislator also becomes the first interpreter of the constitutional norm) has taken the position that Article 70.4 of the Constitution does not oblige the Assembly to address the Court in every case. However, the Assembly is the organ that evaluates, case by case, whether the conditions exist to initiate a constitutional adjudication. The Assembly (the parliamentary majority) decided in plenary session, by Decision no. 48/2015, not to send the case to the Constitutional Court. Consequently, a group of deputies of the parliamentary minority turned to the Court directly, asking for a finding of incompatibility in the exercise of the mandate of the deputy, as well as an interpretation of Article 70.4 of the Constitution.

In evaluating this issue, the Court starts from the premise that a norm should be interpreted in the meaning that permits its application and not one that excludes it (*actus interpretandus est potius ut valeat quam ut pereat*). According to Article 70.4 of the Constitution, the Court is seized by the Assembly for every violation of Article 70.3 of the Constitution for the exercise of its competence to find incompatibility with the mandate of deputy. In the meaning of this provision, the drafters of the Constitution have provided for the intervention by the Court only for the finding of cases of incompatibility provided in Article 70.3 of the Constitution.

Based on a literal, systematic and teleological interpretation of this provision, the Court considered that it had been included in this process in order to eliminate decision-making of a political nature by the Assembly. Putting a constitutional court in motion only for the cases of verification of incompatibility according to Article 70.3 of the Constitution is considered an instrument of control against the legislative power that requires adjudication, something that is outside the entitlements and possibilities of the Assembly. If a different interpretation were to be given to that provision, the

intervention of the Constitutional Court would be formal, which would make it unnecessary and the decision-making of the Assembly would become impossible to be checked from the viewpoint of constitutionality.

In the meaning of the above, the Court determined that the drafters of the Constitution have raised the right of the parliamentary minority to a constitutional level (in this case one tenth of the deputies) in order to initiate proceedings before the Constitutional Court, as an expression of the exercise of its controlling power against the parliamentary majority. By giving it constitutional protection, the drafters of the Constitution have avoided the interference of the majority in the exercise of this right, as well as the discretion of the majority in its interpretation and assessment.

However, in the Court's assessment, the content of Article 70.4 of the Constitution has not entirely divested the Assembly from decision-making, but has restricted the space for evaluation, recognising only the verification of the legal-formal criteria for the initiation of the process. In such cases, the Assembly, through the Council on the Rules, Mandates and Immunity, verifies whether the submitted motion meets the legal-formal requirements (e.g., number of signing members, the existence of documentation and evidence supporting the submitted motion). The Assembly also verifies the moment of the deputy's receipt of the mandate, whether the motion meets the constitutional criteria provided in Article 70.3 of the Constitution to request the Constitutional Court's involvement, and ensures that the parliamentary procedure for voting on the motion in plenary session conforms with the provisions of its Rules of Procedure.

The Court judges that in such cases, the Assembly cannot put the motion submitted under discussion and cannot subject it to parliamentary debate, but its decision-making, as a collegial organ, is essential to set the Court into motion to express itself on the merits of the case. Without a decision of the parliamentary majority, the Court cannot examine such applications.

In these cases, the Assembly cannot enter into the merits of the case, that is, a judgment of whether the concrete actions claimed to have been carried out by the deputy are incompatible with his mandate. Otherwise, it would interfere in the competences that the drafters of the Constitution have assigned only to the Constitutional Court. In other words, although the verification and assessment of the legal-formal criteria of the case, that is, whether the deputy by his actions has violated the constitutional prohibition of

Article 70.3 of the Constitution, with the consequence of a finding of the invalidity of exercise of the mandate, is a question that belongs exclusively to the Constitutional Court.

For the above reasons, the Court concludes that any violation of Article 70.3 of the Constitution, when a finding of incompatibility with the mandate of deputy is sought, the Assembly is obliged to send the case to the Constitutional Court, which is the only organ with the competence of examining the case on its merits. In such cases, the space for evaluation left to the Assembly is related only to verifying the legal-formal criteria, respecting the parliamentary procedures provided in the Rules of Procedure of that organ.

Languages:

Albanian.



Armenia Constitutional Court

Statistical data

1 January 2016 – 30 April 2016

- 40 applications have been filed, including:
 - 10 applications filed by the President
 - 27 applications as individual complaints
 - 3 applications by domestic courts
- 29 cases have been admitted for review, including:
 - 10 applications on the compliance of obligations stipulated in international treaties with the Constitution
 - 19 cases concerning the constitutionality of certain provisions of laws, including:
 - 3 cases on the basis of the application of courts
 - 16 cases on the basis of individual complaints concerning the constitutionality of certain provisions of laws
- 19 cases heard and 18 decisions delivered, including:
 - 7 decisions on the compliance of obligations stipulated in international treaties with the Constitution
 - 12 decisions on the constitutionality of certain provisions of laws, including:
 - 10 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
 - 1 decision on the basis of the application filed by the Prosecutor General



Austria

Constitutional Court

Important decisions

Identification: AUT-2016-1-001

a) Austria / b) Constitutional Court / c) / d) 08.03.2016 / e) E 1477/2015 / f) / g) / h) CODICES (German).

Keywords of the systematic thesaurus:

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950**.
 3.17 General Principles – **Weighing of interests**.
 3.19 General Principles – **Margin of appreciation**.
 5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

Keywords of the alphabetical index:

Suicide, assisted.

Headnotes:

If the national authorities forbid the establishment of an association aimed at supporting assisted suicide, this may be considered to be necessary in a democratic society for the protection of health or morals as well as for the protection of the rights and freedoms of others within the meaning of Article 11.2 ECHR.

Summary:

I. The applicants gave notice to the competent authority of the establishment of an association named “*Letzte Hilfe – Verein für selbstbestimmtes Sterben*” (“Last resource – association for self-determined death”). According to the statutes of this association, one of its aims was to provide advice on suicide to members of age who suffer from an incurable, serious illness, are severely disabled or suffer from unbearable pain, at their explicit wish.

The competent authority, after consultation with the Ministry for Justice, prohibited the applicants from establishing this association. The reason for this decision was that the existence of such an association would run counter to Article 78 of the Penal Code, according to which involvement in suicide is prohibited and punishable by imprisonment of between six months and five years.

Under Article 12 of the Law on Associations of 2002, the establishment of an association is forbidden if the association would be unlawful in terms of its purpose, name or organisation.

II. The Constitutional Court recalled that administrative measures concerning the setting up of an association affect the core area of the right to freedom of association as enshrined in Article 11 ECHR. Therefore an interference with the exercise of this right will not be compatible with Article 11.2 ECHR unless it is prescribed by law and is necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

The applicants asserted that the legal ban on assisted suicide, because of which the establishment of the association was forbidden, is unconstitutional.

The Constitutional Court pointed out that a wide margin of appreciation is left to the State in determining the need for declaring certain types of conduct to be punishable offences. In this particular case, the Court did not find that this margin had been exceeded. In particular, it held that Article 78 of the Penal Code is in conformity with the right to respect for private life. In this context, the Court referred to the judgment of the European Court of Human Rights in *Pretty v. The United Kingdom* according to which “it is primarily for the State to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicide were relaxed or if exceptions were to be created”.

For the same reason, the State is also free to forbid the establishment of associations intended to assist in ending life. This interference in the right to freedom of association may be justified as necessary in a democratic society for the protection of health or morals as well as for the protection of the rights and freedoms of others and, accordingly, there is no violation of Article 11 ECHR.

Cross-references:

European Court of Human Rights:

- *Pretty v. The United Kingdom*, no. 2346/02, 29.04.2002, *Reports of Judgments and Decisions* 2002-III; *Bulletin* 2002/1 [ECH-2002-1-006].

Languages:

German.

*Identification:* AUT-2016-1-002

a) Austria / **b)** Constitutional Court / **c)** / **d)** 01.07.2016 / **e)** E 1477/2015 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

4.9.3.1 Institutions – Elections and instruments of direct democracy – Electoral system – **Method of voting.**

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

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

4.9.11.2 Institutions – Elections and instruments of direct democracy – Determination of votes – **Electoral reports.**

4.9.12 Institutions – Elections and instruments of direct democracy – **Proclamation of results.**

4.9.13 Institutions – Elections and instruments of direct democracy – **Judicial control.**

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

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

Keywords of the alphabetical index:

Election, leak, influence outcome / Election, vote, procedure, protocol / Election, voting, secrecy / Electoral law, infringement.

Headnotes:

The system of postal voting is in conformity with the constitutional principles of voting in person and secrecy of ballots. However, votes may only be handled and counted by the collegiate election boards, the representative composition of which is seen as a specific guarantee for a transparent and impartial carrying out of elections.

If state authorities transmit results of the vote count prior to the closing of the election, this runs counter to the principle of freedom of voting.

A challenge to an election must be allowed if proven infringements of legal provisions aiming to prevent manipulations affect a decisive number of votes, regardless of whether or not manipulations have actually occurred.

Summary:

I. Pursuant to Article 141 of the Federal Constitution, the Constitutional Court was requested to review the second round of the presidential elections of 22 May 2016. The complaint was made by the representative of the candidate defeated, Mr Norbert Hofer, claiming that the provisions regarding postal voting were unconstitutional, and that the election results had been affected by widespread irregularities.

II. In 1985, the Court had held that postal voting is contrary to the constitutional principles of secrecy of ballots and of voting in person. However, in 2007, the Constitution was amended to the effect that postal voting may take place. Therefore, postal voting must be seen as an exception to the principle of voting in person; as regards secrecy of ballots, the Constitution (as amended in 2007) must be interpreted as expecting the voter to assume greater responsibility for protecting the secrecy of his or her ballot.

When creating a legal structure specifying postal voting, the legislator must both try to comply with the constitutional principles of voting and make sure that the constitutional provisions allowing postal voting are not frustrated by complicated and impractical safety regulations.

The Court could not find that the legal provisions on postal voting go beyond what is absolutely necessary to enable this method of voting. In particular, the Constitution (as amended in 2007) cannot be interpreted in such a way as to allow postal voting only where voters are virtually not able to cast their vote in person at a polling station on election day. As a consequence, although voters are required to

specify a reason for requesting a voting card, these reasons need not be verified by the municipal authorities issuing the card.

Finally, the Court conceded that there may be a (theoretical) risk of voting cards being manipulated during delivery; this risk, however, does not affect the constitutionality of the law as such.

The Court recalled that legal provisions on elections aiming at preventing abuse or manipulation must be applied strictly in accordance with their wording. After testimony from about 90 witnesses had been heard, it turned out that irregularities in dealing with the postal ballots had occurred in several election districts:

According to Article 14a Act on the election of the Federal President (*Bundespräsidentenwahlgesetz*) (as amended in 2015), the head of the District Election Board, in the presence of the other members of the Board, shall examine whether the voting cards received are not damaged. If cards are found to be damaged, they shall be separated. Afterwards, the head of the District Election Board shall open the voting cards (not damaged), remove the inner envelopes containing the ballots and put them into a box. Finally, after having mixed these envelopes thoroughly, the District Election Board shall open the inner envelopes, remove the ballots and count them.

The Court insisted that any activities directly related to the counting of votes must be performed by the election board as a collegiate body, i.e., in the presence of all members of the board duly invited to take part in the board meeting. Under the relevant electoral law, all political parties are expressly entitled to nominate members of the boards. Therefore, this specific collegiate structure of the election authorities is meant to ensure transparency and impartiality in the establishment of the election result.

Auxiliary staff who are not members of the election board may support the board in performing its tasks, but they may only do so in the presence of the collegiate body of the board. By no means must they be allowed to count votes without being supervised.

The District Election Board, acting as a collegiate body, is also responsible for opening (ripping open) the voting cards. If voting cards have already been opened by unauthorised persons, it will no longer be possible to determine whether these cards may be included in the counting of votes.

The Court found that the said provisions (aiming to prevent manipulations) had not been complied with in fourteen election districts (Innsbruck-Land, Südoststeiermark, Villach, Villach-Land, Schwaz,

Wien-Umgebung, Hermagor, Wolfsberg, Freistadt, Bregenz, Kufstein, Graz-Umgebung, Leibnitz, Reutte). These infringements violated both the relevant electoral law and the constitutional principle of secrecy of ballots.

As the winner of the election, Mr Alexander Van der Bellen, had been elected by a very slim margin of some 30.000 votes, these irregularities (which concerned some 77.000 postal ballots, of which some 41.000 votes were for Mr Van der Bellen) may have had an influence on the election result.

In this context, the Court recalled that if it is proven that the law has been infringed to an extent that these infringements may have had an influence on the election result, it is of no relevance if manipulations have actually occurred or not.

The Court ruled that although the infringements of the law governing the postal voting system had occurred in some election districts only, the second round of the presidential elections had to be repeated in Austria altogether.

The reason for this ruling was that citizens who have applied for a voting card can exercise their voting right in various ways: by mail, but also in person at their own local polling station, at another polling station in their own district, or at a polling station in a district other than their own. As a result, the votes counted in the various election districts are mixed.

To give an example: If someone has applied for a voting card in Linz, but casts his or her vote in person in Salzburg, this vote counts as a valid vote cast in Salzburg. If the Court were to rule that the election has to be repeated in Linz only, the voter could again apply for a voting card, but may this time use it to cast his or her vote in person at his or her local polling station in Linz. In that case, the voter would have cast two valid votes: the first vote counted in Salzburg (because in this district the election is not repeated and the result remains valid) and the second valid vote counted at the repeat election in Linz.

However, one and the same person must be prevented from voting twice. Therefore, a repeat election only for postal voters, or only in certain election districts, had to be ruled out.

Finally, the Court also agreed with the applicant that the principle of freedom of voting had been violated by government bodies transmitting information received on the results of the count of votes to the Austrian Broadcasting Corporation (ORF), the Austrian Press Agency (APA), other media and research bodies before the closing of the election.

The Court noted that if such information is spread systematically, a situation may occur in which results of the count and reports thereon are leaked and disseminated rapidly, especially via social media. In the present case, the Austrian Press Agency had sent out a report, hours before the closing of the election, implying that Mr Hofer was likely to win the election and that a turnaround of the result was no longer considered probable.

In view of the close result of the election, reports on the probable outcome of the election, based on counting results transmitted by official bodies, may have had an influence on the election result.

For this reason as well, the runoff election of the Federal President had to be repeated in its entirety in all of Austria.

The Court made it clear that the Ministry of the Interior (which is in charge of carrying out federal elections) has to ensure that such infringements do not occur in future elections. Therefore, the practice of transmitting results of the count prior to the closing of the election is to be discontinued.

Languages:

German.



Azerbaijan Constitutional Court

Important decisions

Identification: AZE-2016-1-001

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 14.11.2014 / **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:

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

Keywords of the alphabetical index:

Labour code / Pension, workplace, legislation.

Headnotes:

Provisions of the legislation governing work pensions which specify that certain workers (and not others) will receive extra pensions (in line with their length of service) are not in breach of the principle of equality and of the inviolability of property.

Summary:

I. The Supreme Court took issue in its application to the Constitutional Court with certain aspects of the Law on Labour Pensions, pointing out in particular that Article 20b of this Law provides for additions to pensions for length of service for certain specified persons. These additions and the pension in itself represent the scale of the pension. Under Article 37.2 of the Law, payment of pension is to be carried out together with the additions and according to the rules on payment of pensions.

Article 37.3.4 provides that those persons indicated in Article 20.1.1, 20.1.10 and 20.1.14 of the Law on Labour Pensions will receive an additional 50% to their pension. In other cases the extra pension will be paid in full. Under Article 37.3.4, only those persons indicated in Article 20.1.5, 20.1.14, 20.1.18 and 20.1.20 of the Law (with a length of service of at least

25 years in these organisations) will receive the extra payment; it does not extend to persons working in other positions.

In the applicant's view, the rules governing the payment of additional pensions are out of line with certain provisions of Constitution, because they contravene the principle of equality before the law. Non-payment of additions to pensions leads to deprivation of earned property, which is in breach of the principle of inviolability of property enshrined in Article 29 of the Constitution.

II. The Plenum of the Constitutional Court observed that the right to social protection is one of the basic socio-economic rights fixed in the Constitution; under Article 38.1 of the Constitution, everyone has the right to social protection. Under Article 38.3, everyone is entitled to social protection once they have reached a specific age noted in the legislation. This right is reflected in the Universal Declaration of Human Rights and the International Covenant on Economic Social and Cultural Rights.

The Plenum of the Constitutional Court had noted in an earlier decision that, although the Constitution contains a guarantee that social rights will be protected in an identical order and on a par with other rights fixed in the Constitution (personal, economic, political and cultural), the ensuring and realisation of these rights has a number of specific characteristics. The rational realisation of social rights differs from other categories in that it is bound to the financial ability of the State.

The European Court of Human Rights has also observed on several occasions that "Article 1 Protocol 1 ECHR does not include a right to acquire property. It places no restriction on the Contracting States' freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme" (*Stec and others v. The United Kingdom*) and "the Court in fact excludes Article 1 Protocol 1 ECHR ... that consequently it applies only to a person's existing possessions and that it does not guarantee the right to acquire possessions whether on intestacy or through voluntary dispositions" (*Marckx v. Belgium*), and "if legislation of state did not provide the certain law, then the mentioned norm of Convention in itself did not provide any kind of pension or guarantee of right of receiving of pension in a certain rate" (*Maria Elisabeth Puricel v. Romania*).

The Plenum also noted that additions to pensions for length of service fall within the remit of Article 1 Protocol 1 ECHR on condition that all terms set out in the legislation on the receiving of pension are met.

The rationale behind Article 37.3.4 of the Law on Labour Pensions is that receipt of additional pensions at the rate of 50% for length of service by a number of persons who are working whilst receiving a pension is conditioned by leaving their official capacity. Non-payment of additional pensions to persons who are working whilst receiving pensions cannot be considered a violation of the principle of inviolability of property. The Plenum of the Constitutional Court also expressed the view that gradual improvement by the legislator of the rules surrounding additions to occupational pensions for long service rendered for those persons identified in Article 20.1.1-20.1.10 and 20.1.14-20.1.21 of the Law on Labour Pensions would serve to strengthen the stability and constancy in the activities of the government bodies specified in the above provisions.

Cross-references:

European Court of Human Rights:

- *Stec and others v. The United Kingdom*, nos. 65731/01, 65900/01, 12.04.2006, *Reports of Judgments and Decisions* 2006-VI;
- *Marckx v. Belgium*, no. 6833, 13.06.1979, Series A, no. 31;
- *Puricel v. Romania*, no. 20511/04, 14.06.2011.

Languages:

Azeri, English (translation by the Court).



Identification: AZE-2016-1-002

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 14.05.2015 / **e)** / **f)** / **g)** Azerbaijan, *Respublika, Khalq gazetesi, Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

4.10.4 Institutions – Public finances – **Currency**.

4.10.5 Institutions – Public finances – **Central bank**.

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

5.4.8 Fundamental Rights – Economic, social and cultural rights – **Freedom of contract**.

Keywords of the alphabetical index:

Loan, agreement, contract, obligations / Party, foreign person or legal entity / Currency / Payment, calculation, rate, term.

Headnotes:

There is a constitutional requirement that monetary obligations between Azerbaijani residents must be denominated in manats, but the requirement does not apply to obligations arising out of loan agreements. Where the payments under foreign currency denominated loans (principal and interest) are made in the parties' agreed currency, the loan may be repaid in manats at an exchange rate at the place and time of payment.

Summary:

I. The applicant (Commissioner for Human Rights) requested the Constitutional Court to consider whether provisions of Article 439.1, 439.2 and 439.7 of the Civil Code comply with Articles 19.III, 149.III and 149.VII of the Constitution, as well as Article 25 of the Constitutional Law "On Normative Legal Acts".

Article 439.1 of the Civil Code stipulates that "a monetary obligation shall be expressed in manats. If any of the parties is a foreign private person or legal entity, then the parties, if permitted by law, shall determine the obligation in foreign currency as well". Article 439.2 of the same Code states that "in the event the obligation determined in foreign currency has to be paid in the Republic of Azerbaijan, it will be paid in manats, except for the cases where payment in foreign currency is agreed", unless prohibited by Article 19.III of the Constitution. Article 439.2 of the Civil Code further specifies that if the payment will be made in Azerbaijan, it should be recalculated based on the exchange rate at the time and at the place of payment, in accordance with the provisions of Article 149.VII of the Constitution.

To the applicant, the aforementioned provisions contradict Article 439.7 of the Civil Code, which stipulates that the recalculation shall be carried out "in accordance with the exchange rate as of the time of the obligation". The inconsistency challenges Article 25.1 of the Constitutional Law "On Normative Legal Acts", which specifies that "normative legal acts should be coordinated intuitively, set up logically and be matched according to the technique needs of establishment of norm".

The applicant also requested the Court to interpret Article 439.7 of the Civil Code, particularly the meaning of "maturity" of the monthly interest payment on the loan agreement, to contain the payment according to the term of the loan agreement or "from the time of the commitment". The applicant interpreted them to mean the monthly interest on payment day, the payment day of the credit amount or the day to conclude the loan agreement. The applicant also requested the Court to interpret "exchange rate", specifically what constitutes the change in rate.

According to Article 19.1 of the Constitution, the currency is the manat. According to Part III of the same Article, "other monetary units besides the manat as a means of payment within the territory of the Republic of Azerbaijan are prohibited". The concept of "money" in the Law "On Banks" includes foreign currency. Thus, in accordance with the Law, the bank loan is cash lent for a certain amount of money secured or not secured, but must be repaid in accordance with the agreement for a certain period of time (with the right to extend the period) and with payment of interest rates (fees).

Article 136 of the Civil Code determines the ability of the items to be the subject of civil law relations. This Article is divided into three groups of items:

- Non-usable items;
- Limited civil circulation articles; and
- Civil circulation.

There are no restrictions on the circulation of foreign currency in both laws. This proves, according to the applicant, that in case of failure to repay the agreed foreign currency, the obligation may be alienated or passed from one person to another. According to Article 739.2 of the Code, any amount of money that is the subject of a loan agreement is called the "loan agreement".

II. Based on the above-mentioned provisions of the legislation, the Plenum of the Constitutional Court concluded that:

- a. Article 19.III of the Constitution implies that “means of payment” is the exchange of the work done, the service, sold merchandise and etc. for the payment, as well as the obligatory payments (taxes, social insurance, etc.);
- b. Manat along with a means of payment is considered to be goods, such as a physical object (Article 135.1 of the Civil Code);
- c. Foreign exchange as well as exchange of goods may pass freely from one person to another or alienated (Articles 135.1 and 136.1 of the Civil Code);
- d. Money made available for loan or deposit contracts (manat or foreign currency), besides being the subject of the contract, acts not as a means of payment, but rather as the property that should be returned (Article 739.1 of the Civil Code).

The Plenum of the Constitutional Court considered that, in view of these results, Article 439.1, 439.2 and 439.7 of the Civil Code should be assessed on the substance of the paragraphs. It was guided by Article 130.VI and 130.VII of the Constitution and Articles 52, 60, 62, 63, 65-67 and 69 of the Law “On Constitutional Court”.

The Court ruled that provisions Article 439.1 and 439.2 of the Civil Code do not conflict with the requirements of Article 19.III of the Constitution. According to Article 19 of the Constitution, “means of payment” means the exchange of the work done, the service, sold merchandise etc. for the payment, as well as the obligatory payments (taxes, social insurance, etc.). The provision of Article 439.1 of the Civil Code, specifically “the commitment of money should be specified in manats”, means that the subject of agreement of credit (loan) obligations could be also held in a foreign currency and are not subject to the same obligations.

In accordance with Article 439.2 of the Civil Code, the credit (loan) agreement on the principal and interest is paid, if agreed, on the loan agreement in the currency specified in the contract. In the absence of such a condition in the contract, the debtor has the right to pay the principal and interest on the loan based on the payment applicable exchange rate of manat.

Article 439.7 of the Civil Code shall apply to the obligations of the money in manats but this time, the provision “maturity” means the defined period of execution of the liability in the contract terms. The provision arising from the contract, namely “the obligation of the time”, means the time of conclusion of the contract. Taking into account the interests of the population, the extension of credit on loans in foreign currency, interest rates and the implementation of other appropriate measures for favourable conditions shall be carried out depending on the financial status of banks.

Languages:

Azeri, English (translation by the Court).



Belarus

Constitutional Court

Important decisions

Identification: BLR-2016-1-001

a) Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 12.04.2016 / **e)** D-1029/2016 / **f)** On making amendments and alterations to certain Laws of the Republic of Belarus / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 2/2016; www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law.**
 3.10 General Principles – **Certainty of the law.**
 5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation.**
 5.3.12 Fundamental Rights – Civil and political rights – **Security of the person.**

Keywords of the alphabetical index:

Movement, extremist.

Headnotes:

Legislation which expands the list of basic legislative concepts of extremist activity enshrined in the law complies with the state's constitutional duty to defend its independence and territorial integrity and to safeguard the rule of law.

Summary:

I. The process of preliminary review is mandatory for any law adopted by Parliament before it is signed by the President. Under review by the Constitutional Court in this case was the constitutional compliance of the Law on Making Amendments and Alterations to Certain Laws of the Republic of Belarus" (hereinafter, the "Law").

The rationale behind the Law was the need to improve the legal framework for combating extremist activity and ensuring national security. It made amendments and alterations to the Criminal and

Criminal Procedure Codes and legislation on "Mass Events in the Republic of Belarus" and on "Counteraction to Extremism".

II. The Constitutional Court noted that under the Constitution, the individual, his or her rights, freedoms and the guarantees to secure them are the supreme value and goal of the society and the State (Article 2.1 of the Constitution) and that safeguarding the rights and freedoms of citizens of the Republic of Belarus is the supreme goal of the State (Article 21.1 of the Constitution).

The Constitution guarantees universal freedom of thought and belief and free expression (Article 33.1 of the Constitution), freedom to hold assemblies, meetings, street marches, demonstrations and pickets that do not disturb law and order or violate the rights of other citizens (Article 35 of the Constitution) and it enshrines the universal right to freedom of association (Article 36.1 of the Constitution). The State guarantees the rights and freedoms of citizens enshrined in the Constitution and laws and specified by the State's international obligations (Article 21.3 of the Constitution). All are equal before the law and are entitled to equal protection of their rights and legitimate interests without discrimination (Article 22 of the Constitution). State bodies, officials and other persons who have been entrusted to exercise state functions must take the necessary measures to implement and protect personal rights and freedoms (Article 59 of the Constitution).

These constitutional provisions comply with international instruments on human rights, which declare the right of everyone to freedom of thought, conscience and religion, freedom of association, freedom of expression, but provide that any dissemination of ideas based on racial superiority or hatred, any incitement to discrimination or violence or to national, religious or social hatred or strife shall be prohibited by law.

The Law not only reflects the recommendations contained in international instruments, but also the positive foreign and domestic experience in combating extremist and other activities, which pose a threat to society. It is aimed at the further development of the constitutional provisions mentioned above and at the implementation of international legal obligations and recommendations.

According to the Constitutional Court, the expansion of the list of basic legislative concepts of extremist activity enshrined in the law is due to the high degree of danger to society posed by this phenomenon and it complies with the constitutional duty of the state to defend its independence and territorial integrity, its

constitutional system, to safeguard lawfulness and law and order (Article 1.3 of the Constitution), and to take all measures at its disposal to establish the domestic and international order necessary for the full exercise of the rights and freedoms of the citizens of the Republic of Belarus as specified by the Constitution (Article 59.1 of the Constitution). It also complies with the content of Resolution 1344 (2003) of the Parliamentary Assembly of the Council of Europe on the threat posed to democracy by extremist parties and movements in Europe.

The Constitutional Court noted that the judicial process of recognising certain materials and organisations as extremist is an additional safeguard for the rights and freedoms set out in Article 60 of the Constitution and complies with international legal standards of the administration of justice.

The Constitutional Court also drew the attention of the courts of general jurisdiction to the need to ensure the rule of law and constitutional provisions guaranteeing fundamental rights and freedoms of individuals when making such decisions and when dealing with specific criminal cases on extremist crimes. Criticism of actions of state or other officials is an integral part of a democratic state, and necessary for ensuring the openness of public bodies, improving their efficiency and safeguarding vital activities. Such criticism should not be considered as a manifestation of extremism, provided it does not overstep the line between freedom of thought and beliefs and their free expression (Article 33.1 of the Constitution) and the commission of unlawful acts specified by the Law.

The Constitutional Court confirmed the legal position expressed in previous decisions allowing proportionate restriction of the human rights and freedoms for reasons of necessity in the interest of the protection of constitutional values and to ensure the balance between constitutional human rights and freedoms and the interests of the state and society.

The alterations and addenda made to the rules of the Criminal Code by the Law have introduced measures of legislative regulation of criminal liability for different manifestations of extremism and other anti-social forms of behaviour. The Constitutional Court noted that these measures are proportionate to the degree of risks posed to society, they comply with the goals of protection of the constitutional system, they ensure the protection of the established legal order from criminal attacks, and comply with international legal standards in the field of counteraction to extremist and other illegal activities.

The Constitutional Court explained that the criminalisation of a wider range of offences related to extremist manifestations will allow for an appropriate response to the increased threat posed by this dangerous phenomenon. This follows directly from Article 5.3 of the Constitution, which prohibits the foundation and activities of political parties and other public associations with the aim of changing the constitutional system by force or conducting propaganda of war, social, ethnic, religious and racial hatred and Article 24.2, which stipulates that the State shall protect the life of the individual against any unlawful infringements.

Criminal and legal prohibitions on activities, such as the creation of an extremist unit and the funding of the activities of such an organisation, are being introduced in order to reinforce precautionary and preventive measures of state policy and the creation of a legal basis for the effective tackling of criminal activities of extremist units seeking to destabilise the domestic political situation and thus posing a threat to public order and national security.

In the Court's view, the introduction of criminal responsibility for these acts complies with the requirements of Article 23.1 of the Constitution and the provisions of international legal instruments stipulating that no restrictions may be placed on the exercise of generally recognised human rights and freedoms other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

The Constitutional Court noted the discretion enjoyed by the legislator when enacting legislation on criminal liability (Articles 97.1.2 and 98.1.1 of the Constitution) as well as on the basis of the State's obligation to take all available measures for the protection of constitutional values shall have the right to set at his discretion a criminal prohibition against socially dangerous acts and to determine the punishment for their violation. Such discretionary powers are an integral part of the public rule-making. The Constitutional Court observed that discretion does not mean the admissibility of arbitrary action and the right to take any decisions which are considered reasonable and justified by a state body or official. Legislators must act within the framework established by the constitutional principles and rules and take into account the need to maintain balance and proportionality of the constitutionally protected values, goals and interests, and not to allow one value to be substituted for another.

The Constitutional Court held that the Law is intended to provide an adequate response to actual threats of extremism and other dangerous activities and is aimed at further improvement of legislation in the field of combating these socially destructive phenomena on the basis of the principles and rules of the Constitution in order to protect the rights, freedoms and lawful interests of individuals, the constitutional system, the independence and territorial integrity of the Republic of Belarus and to ensure the security of society and the State.

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

Languages:

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



Identification: BLR-2016-1-002

a) Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 26.04.2016 / **e)** D-1030/2016 / **f)** On the Right to Appeal against Decisions of Tax Authorities and Actions or Inactions by their Officials / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 2/2016; www.kc.gov.by / **h)** CODICES (English, Belarusian, Russian).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 3.10 General Principles – **Certainty of the law**.
 3.12 General Principles – **Clarity and precision of legal provisions**.
 4.10.7.1 Institutions – Public finances – Taxation – **Principles**.
 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:

Tax, payment, right of appeal.

Headnotes:

Legislation which allowed some individuals but not others to appeal against decisions by the tax authorities and actions or lack of action by their officials which potentially affected their rights contained a legal gap and should be amended.

Summary:

I. The Constitutional Court was asked to examine a legal gap which the applicant in this matter considered to have arisen on the basis that individuals who are not taxpayers under the Tax Code do not have the right to appeal against decisions of tax authorities or actions or inactivity on the part of their officials that affect their rights.

II. The Constitutional Court proceeded from the following.

Article 60 of the Constitution stipulates the protection of rights and freedoms for all by a competent, independent and impartial court within the time limits specified by law.

The International Covenant on Civil and Political Rights provides that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law (Article 14); each State Party to the Covenant undertakes to develop the possibilities for judicial remedy (Article 2).

The Constitutional Court has repeatedly noted that the right to judicial protection is one of the fundamental human rights that are recognised and guaranteed in accordance with the universally recognised principles and rules of international law. The Republic of Belarus, in accordance with Article 8.1 of the Constitution, shall recognise the supremacy of the generally recognised principles of international law and ensure the compliance of laws therewith.

It follows from the analysis of the provisions of the Constitution and international legal instruments that the State must establish an appropriate mechanism for the exercise of the individual’s constitutional right to judicial protection which is fair, competent and effective.

The Constitution stipulates that the citizen shall assume responsibility before the State to discharge unwaveringly the duties imposed upon him or her by the Constitution (Article 2.2 of the Constitution); citizens shall contribute to funding public expenditure by means of state taxes, duties and other payments (Article 56 of the Constitution).

The Constitutional Court believes that the legislator, on the basis of these constitutional provisions and on the provisions of Articles 97.1.2 and 98.1.1 of the Constitution, has the to exercise the legal regulation of relations in the field of taxation at his discretion, including establishment of the procedure for appealing against decisions by tax authorities or actions or inaction by their officials.

In the “Message on Constitutional Legality in the Republic of Belarus in 2015,” the Constitutional Court noted that wide discretionary powers enjoyed by the legislator under the Constitution, in the regulation of certain social relations. However, in exercising his powers the legislator acts within the framework established by the constitutional principles and rules and must take into account the need to maintain balance and proportionality of the constitutionally protected values, goals and interests and not allow one value to be substituted for another.

Under Article 86.1.1 of the Tax Code, decisions by tax authorities and actions or lack of activity by their officials may be appealed before a superior tax authority or a higher official who is an immediate supervisor of the officials whose actions are being appealed or before the Court.

Under Article 85 of the Tax Code, the right to appeal against decisions of tax authorities belongs to payers or “other liable persons”. Under Article 13.1 of the Tax Code, payers include organisations and individuals who, in accordance with the legislation, are obliged to pay taxes and charges. Under Article 23 of the Tax Code, other liable individuals are fiscal agents, company shareholders, administrators and foreign organisations that are the source of income for the payer.

Analysis of the above provisions of the Tax Code would indicate that owners of the property of an organisation, founders, heads, (including former ones,) and other individuals whose rights and legitimate interests may have been violated by the decision of a tax authority or actions or lack of activity by their officials do not have a right to appeal.

The decision of a tax authority to charge additional amounts of taxes for the obligations of an indebted organisation does not just affect the rights and legitimate interests of taxpayers, but also other individuals who may be subject to subsidiary liability. The Constitutional Court therefore found that these individuals, in order to ensure the timely and effective protection of their rights and legitimate interests, should be entitled to appeal in the same way as taxpayers (“other liable persons”).

The Constitutional Court was of the opinion that the State is obliged to ensure the exercise of the constitutional right to address personal or collective appeals to state bodies (Article 40 of the Constitution) and access to justice for all (Article 60 of the Constitution) whose rights and legitimate interests are affected by decisions of the tax authorities or actions or inactivity by their officials.

The fact that the legislation does not provide for the right of individuals whose rights and legitimate interests are affected by a decision to appeal against it, limits their right to judicial protection, does not ensure the fair character of a court judgment and therefore does not maintain a balance of public-law and private-law interests. It does not ensure the supremacy of the constitutional rules guaranteeing the right to judicial protection, does not permit all interested parties to defend their rights and interests and it does not contribute to timely and effective redress of violated rights.

The current legal regulation may not be sufficient to ensure the full and effective judicial protection of the rights and freedoms as an essential element of the constitutional and legal system based on the principles of the supremacy of law and the State based on the rule of law. Reducing the judicial guarantees for the protection of individuals whose rights and interests may have been breached by the decisions of tax authorities, by comparison with those persons whose right to challenge such decisions is established by law, cannot be recognised as fair and proportionate to the constitutionally protected interests.

Under the Constitution, the State and all its bodies and officials are bound by the principle of the supremacy of the law and must operate within the confines of the Constitution and acts of legislation adopted in accordance therewith (Article 7.1 and 7.2 of the Constitution). The State must take all measures at its disposal to establish the domestic and international order necessary for the full exercise of the rights and freedoms of the citizens as specified by the Constitution. State bodies, officials and other persons who have been entrusted to exercise state functions must take the necessary measures to implement and protect personal rights and freedoms (Article 59.1 and 59.2 of the Constitution). The Constitutional Court accordingly deemed it necessary to eliminate a gap in the constitutional and legal regulation of the right to challenge the decisions of tax authorities, in that some people whose rights and legitimate interests could be affected by such decisions were not entitled to appeal.

The Constitutional Court suggested that the Council of Ministers should prepare a draft law on making alterations and addenda to the Tax Code and submit it to the House of Representatives of the National Assembly under the established procedure.

Languages:

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



Belgium Constitutional Court

Important decisions

Identification: BEL-2016-1-001

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 14.01.2016 / **e)** 2/2016 / **f)** / **g)** *Moniteur belge* (Official Gazette), 14.03.2016 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect**.
 3.19 General Principles – **Margin of appreciation**.
 5.2 Fundamental Rights – **Equality**.
 5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.
 5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent**.

Keywords of the alphabetical index:

Surname, freedom of choice / Surname, disagreement / Parent, name of child, right to choose / Surname, discrimination / Surname, tradition / Filiation, surname.

Headnotes:

Unlike the right to have a name, the right to give one's surname to one's child cannot be regarded as a fundamental right. When regulating the assignment of surnames, lawmakers therefore have broad discretionary power, provided that they respect the principle of equality and non-discrimination, combined with the right to respect for private and family life.

The decision by lawmakers to give preference to the parents' freedom to choose a child's surname makes it necessary to determine how a surname will be assigned if the parents disagree or do not make any choice. However, in deciding that the child must take the father's surname alone in this situation, lawmakers are treating the child's father and mother in a discriminatory fashion.

Summary:

I. The mother of a child and the Institute for the Equality of Women and Men filed two applications to have the Constitutional Court annul a provision of the law of 8 May 2014 amending the Civil Code in order to bring about equality between men and women regarding the way in which surnames are passed on to children and adoptees. This provision stipulates that where the parents disagree over the choice of the child's surname or where they do not make any choice, the father's surname will be assigned to the child.

In order to honour Belgium's international commitments, including the commitment to give women and men similar rights to pass on their surnames to children, the law of 8 May 2014 allows parents to choose the father's surname, the mother's surname, or a double-barrelled surname made up of these two surnames in the order determined by the parents. The lawmakers accordingly opted to allow parents freedom of choice rather than establishing a surname assignment system laid down by law, albeit with one limitation: children who are born to the same parents must have the same surname.

The lawmakers also considered the possibility that parents might disagree or fail to choose a surname. It was only this provision that was challenged before the Constitutional Court.

II. After holding that the right to pass on one's surname to a child cannot be regarded as a fundamental right, the Court noted that the decision taken by the lawmakers to give preference to the parents' freedom of choice makes it necessary to determine how a surname will be assigned where the parents disagree or do not make any choice, even if the lawmakers also sought to limit cases of disagreement by offering parents a wide choice. Lawmakers can be justified in determining the child's surname themselves in cases where there is disagreement or if no choice is made, rather than giving the courts discretionary power, since it is important to establish a child's surname at birth in a simple, swift and uniform way.

However, lawmakers cannot treat a child's father and mother differently in this regard, since this difference in treatment is based on the criterion of the sex of the parents. Only very strong considerations can justify differential treatment based solely on sex. The reasons cited by the lawmakers in the preparatory documents – tradition and a desire to make gradual progress – cannot be regarded as very strong considerations which justify

the disputed differential treatment. Furthermore, the disputed provision can give the father of a child a veto if the mother expresses a desire to give the child her own surname or a double-barrelled surname and if the father does not agree with this choice.

The Court therefore annulled the provision of the law of 8 May 2014 which provides that if the parents do not agree or fail to make any choice, the father's surname will be assigned to the child.

However, to avoid legal uncertainty, especially in view of the need to decide upon a child's surname at the time of birth, the Court left the annulled provision in force until 31 December 2016 while allowing the lawmakers to enact new rules.

Cross-references:

Constitutional Court:

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

Languages:

French, Dutch, German.



Identification: BEL-2016-1-002

a) Belgium / b) Constitutional Court / c) / d) 21.01.2016 / e) 7/2016 / f) / g) *Moniteur belge* (Official Gazette), 17.03.2016 / h) CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

- 5.2 Fundamental Rights – **Equality**.
- 5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.
- 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.
- 5.5.1 Fundamental Rights – Collective rights – **Right to the environment**.

Keywords of the alphabetical index:

Environment, protection, non-pecuniary damage / Environment, protection, organisation / Legal entity, defence of a collective interest, non-pecuniary damage / Damage, compensation, assessment / Damage, concrete assessment / Damage, assessment based on equitable principles.

Headnotes:

If Article 1382 of the Civil Code is interpreted as generally opposing awards of damages exceeding one euro where a non-pecuniary interest of a legal entity is interfered with due to obstruction of its collective purpose, an exception is made to the principles of concrete assessment and full compensation without objective and reasonable justification. Such a limitation would also disproportionately affect the interests of the environmental protection organisations concerned, which play an important role in safeguarding the right to the protection of a healthy environment, as recognised by the Constitution.

Summary:

I. The *tribunal correctionnel* of East Flanders, Ghent Division, referred a question to the Constitutional Court as to the conformity of Article 1382 of the Civil Code with the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution), whether or not combined with economic, cultural and social rights (Article 23 of the Constitution) and freedom of association (Article 27 of the Constitution) and the right of ownership guaranteed by Article 1 Protocol 1 ECHR, when this provision of the Civil Code is interpreted as precluding a legal entity, created and acting to defend a collective interest such as protection of the environment, from receiving, for harm done to its collective interest, non-pecuniary damages which exceed the token amount of one euro, while any natural person or legal entity is in principle entitled, for a similar harmful act, to compensation assessed in a concrete manner on the basis of full reparation of the damage suffered.

The case that was brought before the trial court concerned a legal entity whose purpose is environmental protection and which sued for damages as a civil party in criminal proceedings in order to seek compensation for harm done to the collective interest for which it had been set up, since damage had been done to some species of wild birds. The Court indicated that it would limit its analysis to this scenario.

The trial court ruled that the action brought by the organisation was admissible and held that this organisation could suffer non-pecuniary damage. The dispute and the preliminary question related solely to the assessment of damages.

II. In accordance with its usual case-law, the Court considered that it is generally for the trial court to interpret the provisions that it applies, provided that it does not do so in a manifestly erroneous fashion, which did not happen in this case. It therefore examined the difference in treatment raised in the preliminary question in the light of the trial court's reading of Article 1382 of the Civil Code. According to this interpretation, Article 1382 of the Civil Code precludes awards of non-pecuniary damages which exceed the token award of one euro in the event of harm done to a collective interest in respect of which an environmental protection organisation has been founded, since the harm affects parts of the environment which do not belong exclusively to anyone.

The Court firstly noted that there is an essential difference between individual citizens and an organisation in terms of bringing a civil action for damages concerning harm caused to parts of the environment which do not belong exclusively to anyone.

In principle, ordinary citizens have no direct or personal interest in bringing such an action. However, a legal entity which has been created for the specific purpose of protecting the environment can indeed suffer non-pecuniary damage and bring such an action.

The Court then noted that non-pecuniary damage suffered in this way is distinguished by the fact that it does not correspond to the actual ecological harm and that it can generally be difficult to assess with mathematical precision because it concerns losses which cannot be expressed in economic terms.

The Court then found that, according to Article 1382 of the Civil Code, courts are obliged to assess the harm caused by an unlawful act in a concrete manner and that they can resort to assessment based on equitable principles where it is impossible to assess the harm in any other manner. In this context, the situation of a legal entity is no different from that of a natural person who suffers non-pecuniary damage which likewise cannot be assessed with mathematical precision.

Although it is not possible to put a precise value on the loss suffered as a result of harm done to parts of the environment which do not belong to anyone, and

although the non-pecuniary damage suffered by the legal entity does not correspond to the actual ecological harm, it is not impossible for the courts to make a concrete assessment of the non-pecuniary damage suffered by the environmental protection organisation. Among other things, they can consider the statutory purposes of the organisation, the importance of its activities and the efforts that it makes to achieve its objectives. They can also take the seriousness of the environmental harm into account so as to assess the non-pecuniary compensation to be awarded to the organisation.

The Court concluded that, when interpreted in the manner specified by the trial court, Article 1382 of the Civil Code breaches Articles 10 and 11 of the Constitution. It noted in passing that a court, after analysing the harm in concrete terms, can indeed deem, in a particular case, that non-pecuniary damages in the amount of one euro are sufficient.

The Court then went on to state that the provision can be interpreted in a converse manner, making it consistent with Articles 10 and 11 of the Constitution, whether or not taken in conjunction with Articles 23 and 27 of the Constitution and Article 1 Protocol 1 ECHR.

The operative part of the judgment addressed both the finding of a breach and the finding of no breach in the light of one or the other interpretation.

Languages:

French, Dutch, German.



Identification: BEL-2016-1-003

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 03.02.2016 / **e)** 18/2016 / **f)** / **g)** *Moniteur belge* (Official Gazette), 25.03.2016 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
5.2 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 within wedlock, presumption / Filiation, legal presumption / Filiation, interests of the child / Paternity, right to challenge, child / Private life, balance between rights and interests / Family, family peace / Paternity, challenge by a child / Paternity, challenge, time-limit / Paternity, biological father / Identity, right, right to know one's descent.

Headnotes:

If an action to challenge paternity brought by a child who has allowed his *de facto* filial status to continue after learning that his mother's husband is not his biological father is dismissed due to the existence of this *de facto* status, this completely prevents the court from taking the interests of all parties concerned into account, which is contrary to the right to respect for private life (Article 22 of the Constitution and Article 8 ECHR).

In legal proceedings to determine filiation, the universal right to know one's filiation must, in principle, take precedence over the interests of family peace and of legal certainty of family ties.

Summary:

I. Two preliminary questions were referred to the Constitutional Court by the *Tribunal de première instance francophone de Bruxelles* [French-Language Court of First Instance of Brussels]. That court had been seized of a challenge to the paternity of the mother's husband brought by a child over the age of 22 and, in furtherance of this action, a paternity suit against the child's supposed biological father. In the context of the first of these actions, the Court was asked to determine whether Article 318 of the Civil Code is compatible with the right to respect for private life (Article 22 of the Constitution, possibly in conjunction with Article 8 ECHR) insofar as it absolutely bars a challenge to paternity when the child has been treated as the child of his legal father (a situation known as "*de facto* status" («*possession d'état*»)) and insofar as it forbids a child over the age of 22 to challenge the paternity of his mother's husband more than one year after he discovered that the man is not his father.

II. With reference to the case-law of the European Court of Human Rights, the Court pointed out that proceedings concerning the determination or challenging of paternity relate to private life because the issue of filiation touches upon important aspects of personal identity. Although lawmakers enjoy a certain degree of discretion when creating legal rules which lead to interference with private life, this discretion is not unlimited. They must strike a balance not only between the competing interests of the individual and society, but also between the conflicting interests of the persons concerned.

With regard to *de facto* status, the Constitutional Court confirmed its previous case-law according to which Article 318.1 of the Civil Code breaches Article 22 of the Constitution taken in conjunction with Article 8 ECHR, insofar as an action to challenge paternity which is brought by a child is not admissible if the child has *de facto* status vis-à-vis the husband of his mother. The fact that the child allowed this *de facto* status to continue after learning that the husband of his mother was not his biological father is immaterial. Any other ruling would completely prevent the courts from taking the interests of all parties concerned into account. The Court also stated that a child can have multiple reasons for not seeking to end his *de facto* status after learning that the husband of his mother is not his father.

With regard to the time-limit for bringing an action to challenge paternity, the Court found that where a child learns, several years before reaching the age of 22, that the husband of his mother is not his father, Article 318.2 of the Civil Code prevents him from challenging the presumption of paternity once he has reached the age of 22. In being prevented from challenging this presumption of paternity, the child is also prevented from bringing a paternity suit after he has reached this age.

The Court then stated that, according to the European Court of Human Rights, where lawmakers establish rules concerning filiation, they must take into account not only the rights of the interested parties, but also the nature of these rights. Where the right to an identity – which includes the right to know one's descent – is at issue, a thorough analysis is necessary to weigh the interests at stake. Even if a person has been able to develop his personality without being certain as to the identity of his biological father, it must be acknowledged that the interest that an individual may have in knowing his descent does not decrease over the years, quite the contrary. The European Court has also noted that a comparative analysis shows that in many States there is no time-limit by which a child must bring a paternity

suit, and that there is a trend towards affording the child greater protection.

In a legal action to determine filiation, therefore, the universal right to know one's descent must, in principle, take precedence over considerations of family peace and the legal certainty of family ties.

Even if there are or were family ties, Article 318.2 of the Civil Code interferes disproportionately with the child's right to respect for his private life due to the short statutory time-limit, which could deprive him of the possibility of bringing a case before a court that would take account of the established facts and the interests of all parties concerned.

The Constitutional Court added that if the child had been born out of wedlock and someone had acknowledged paternity, the child could have challenged this acknowledgement well beyond the age of 22, in accordance with Articles 330 and 331ter of the Civil Code. A child born in wedlock would be treated less favourably than a child born out of wedlock, and would therefore be discriminated against by comparison with the latter.

The Court concluded that Article 318.2 of the Civil Code breaches Article 22 of the Constitution, taken in conjunction with Article 8 ECHR, insofar as it sets a one-year time-limit, running from the discovery that the husband of his mother is not his father, within which a child over the age of 22 can bring an action to challenge paternity.

Cross-references:

Constitutional Court:

- no. 96/2011, 31.05.2011, *Bulletin* 2011/2 [BEL-2011-2-006];
- no. 30/2013, 07.03.2013, *Bulletin* 2013/1 [BEL-2013-1-003];
- no. 139/2014, 25.09.2014, *Bulletin* 2014/3 [BEL-2014-3-007].

Languages:

French, Dutch, German.



Identification: BEL-2016-1-004

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 17.03.2016 / **e)** 41/2016 / **f)** / **g)** *Moniteur belge* (Official Gazette), 02.06.2016 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.6.5.1 Constitutional Justice – Effects – Temporal effect – **Entry into force of decision.**

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

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

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

Keywords of the alphabetical index:

Law, amendment, transitional measure, reasonable expectations / Reasonable expectations, principle / Class action, consumers / Class action / Class action, conditions / Class action, recognised organisations / Constitution and treaty, combination / European Court of Human Rights, preliminary question / Law, deficiency, role of the courts / Omission, legislative.

Headnotes:

Where lawmakers decide to introduce a new regulation, it is for them to judge whether it is necessary or expedient to accompany it with transitional provisions.

It is not discriminatory that the new possibility of bringing a class action for breaches of certain European legal standards and specific laws governing consumer protection is at present limited.

Nor is it contrary to the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) that the right to bring a class action seeking redress should be reserved for approved organisations and a very specific public service.

However, it is contrary to the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), taken in conjunction with the provisions of European law, to deprive organisations in other Member States of this possibility. It is for the courts to remedy this deficiency by permitting class actions brought by such organisations.

Summary:

I. The Court was seized of an application for annulment concerning the law of 28 March 2014, whereby Belgium established for the first time a legal basis for class actions seeking redress for harm caused to a group of consumers by a business undertaking.

By adding class actions to the legal arsenal, the lawmakers sought to make access to justice easier for consumers, in the case of small claims, by grouping such complaints so that they can be dealt with together. Secondly, this new legal instrument could also strengthen compliance with laws and contracts in the field concerned, and would therefore help to foster healthy competition within the market.

II. In their first ground of appeal, the applicants criticised the law of 28 March 2014 for establishing discrimination, prohibited by Articles 10 and 11 of the Constitution, since class actions were possible only for collective harm suffered after this law entered into force (on 1 September 2014).

The Court replied that, in principle, it is for the lawmakers to judge, when they decide to introduce a new regulation, whether it is necessary or expedient to accompany it with transitional provisions. The constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) is only breached if there is differential treatment, without reasonable justification, on account of the transitional rules or the absence thereof, or if the principle of reasonable expectations is interfered with to an excessive degree. The Court concluded from a number of elements that the fact that the ambit of the disputed law excluded collective harm, the common cause of which pre-dated the law's entry into force was relevant to the aims pursued by the lawmakers. Furthermore, this exclusion is not disproportionate, according to the Court, since it remains possible to have recourse to other legal instruments and to bring other judicial proceedings.

In their second ground of appeal, the applicants criticised the fact that a class action is possible only in the event of a breach of specific laws or of provisions of European law which are listed exhaustively in the disputed law.

The Court replied that the lawmakers specifically covered the sector of consumer disputes, which they could reasonably consider to give rise to a very substantial proportion of the collective losses incurred. The Court also highlighted the fact that the disputed law partly responds to Recommendation 2013/396/EU of the European Commission of 11 June 2013 “on

common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law". In addition, the lawmakers opted for a gradual approach, and an assessment process will be implemented in order to adapt or expand the legislation. Furthermore, the Court considered that the balance struck by the lawmakers between the various interests at stake did not go beyond their margin of discretion in such a matter.

In their third ground of appeal, the applicants argued that only certain approved organisations and a public service can bring a class action as a representative of a group, to the exclusion of foreign organisations or officers of the courts, such as lawyers.

The Court noted that it appears from the parliamentary proceedings in relation to the disputed law that the lawmakers sought to guarantee the quality and effectiveness of this new procedure, thereby upholding consumer interests, that they wanted to avoid frivolous claims or those motivated by private gain, and that, based on foreign experience, they wished to prevent the risk of damages which could be deemed excessive. According to the Court's analysis, the lawmakers could reasonably have considered that it was important to confine the power to act as a representative of a group merely to those organisations and the public service concerned, due to the particular characteristics of class actions, to the degree of specialisation of these organisations and this public service, to the consumer protection goal pursued by these organisations or their statutory purpose, which must be directly relevant to the collective loss suffered, and to a desire not to inflate the number of such actions.

The suggestion made in each ground of appeal that a preliminary question be put to the European Court of Human Rights lacked a legal basis, in the opinion of the Court, and was therefore inadmissible.

Finally, the applicants criticised the fact that the approval which the organisations in question must possess in order to bring a class action would discriminate against organisations established in other Member States of the European Union, thereby breaching the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) and Article 23 of the Constitution, in conjunction with Article 56 of the Treaty on the Functioning of the European Union. The Court considered that the limitations with regard to approval and the objectives of the organisations in question infringe Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services

in the internal market and that this obstacle did not appear to be justified by reasons of public order, public safety, public health or environmental protection.

The Court decided that, since it did not allow representative entities from other Member States of the European Union and the European Economic Area which satisfy the criteria of point 4 of the aforementioned Recommendation 2013/396/EU, to act as the representative of a group, the disputed provision breached Articles 10 and 11 of the Constitution, taken in conjunction with Article 16 of the "Services" Directive.

The Court found that the incompatibility with the Constitution resulted from a legislative omission. It took the view that, since the finding regarding the omission was worded in sufficiently precise and complete terms, which allowed the disputed provision to be applied in accordance with the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), it was for the competent court, having regard to the criteria referred to in the European recommendation, to put a stop to the infringement of these provisions pending action by the lawmakers.

Languages:

French, Dutch, German.



Identification: BEL-2016-1-005

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 28.04.2016 / **e)** 57/2016 / **f)** / **g)** *Moniteur belge* (Official Gazette), 17.06.2016 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens**.
 5.3.29 Fundamental Rights – Civil and political rights – **Right to participate in public affairs**.
 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.
 5.5.1 Fundamental Rights – Collective rights – **Right to the environment**.

Keywords of the alphabetical index:

Environment, protection, ownership, right, restriction / Environment, protection, Aarhus Convention / Environment, right to protection of a healthy environment / Environment, territory, development, plans / Decision-making process, public participation / Property right, limitation / Equality between citizens in respect of public charges, general principle / Constitution and treaty, combination / Law, omission, role of the courts.

Headnotes:

To protect the environment, lawmakers can impose restrictions on property rights.

However, by virtue of the principle of equality between citizens in respect of public charges, an authority cannot, without granting compensation, impose charges which exceed those that must be borne by a private individual in the general interest. If necessary, the court shall assess whether compensation should be awarded.

The Court annulled the legislative provisions which did not provide for public participation in the development of plans concerning the environment (Aarhus Convention).

Summary:

I. Some heads of agricultural enterprises brought an action seeking annulment of the Decree of the Flemish Region of 9 May 2014 amending the nature and forests regulations. They feared that their land might be subject to nature conservation measures which would have detrimental effects on their activity and would limit their property rights without any entitlement to compensation.

The disputed provisions give effect to Directive 79/409/EEC of the Council of 2 April 1979 on the conservation of wild birds (the Birds Directive) and Directive 92/43/EEC of the Council of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive) and strengthen the regulatory framework for the protection of historic permanent grasslands.

II. In the Court's view, any interference with a property right must strike a fair balance between the imperatives of the general interest and those of the protection of the right to respect for property. There must be a reasonable relationship of proportionality between the means employed and the end that is pursued. The Court took account of the fact that the

Regions must guarantee the right to the protection of a healthy environment, which is enshrined in Article 23.3.4 of the Constitution.

The Court drew attention to the provisions of the Birds Directive and the Habitats Directive and also to the fact that, although the European Convention on Human Rights does not make explicit provision for the protection of nature, the European Court of Human Rights has held, in the first place, that economic imperatives and even certain fundamental rights, such as the right to property, should not be given primacy over considerations of environmental protection, and also, in the second place, that the protection of natural or cultural heritage does not release a State from its obligation to compensate interested parties where the interference with their property rights is excessive.

The Court also underlined the general legal principle of equality between citizens in respect of public charges: according to this principle, an authority cannot, without granting compensation, impose charges which exceed those that must be borne by a private individual in the general interest. It follows from this principle that the disproportionately harmful effects of a coercive measure which is lawful in itself, such as an easement on property in the public interest, must not be borne by the aggrieved parties, but must be distributed equally among members of the community.

The mere fact that an authority imposes restrictions on the right to property in the general interest does not, however, mean that it is obliged to pay compensation for this. Compensation is required only where and insofar as the effects of the public easement in the public interest or the restriction of the property rights of the group of citizens or institutions concerned exceed the charge which can be imposed in the general interest on a private individual.

The Court found that provision is made for compensation with regard to certain measures. The fact that this is not true of all measures does not prevent the courts from assessing whether, in the case of certain mandatory operations, by virtue of the principle of equality between citizens in respect of public charges, compensation must be granted.

The Court applied these principles to the disputed provisions and concluded that these provisions were not unconstitutional.

It also extended the scope of its review to include the Aarhus Convention of 25 June 1998 on access to information, public participation in decision-making and access to justice in environmental matters, which

requires public participation in the development of plans and programmes concerning the environment. It annulled several disputed provisions to the extent that they made no provision for public participation in the development of plans and programmes concerning the environment.

Languages:

French, Dutch, German.



Identification: BEL-2016-1-006

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 28.04.2016 / **e)** 62/2016 / **f)** / **g)** *Moniteur belge* (Official Gazette), 08.07.2016 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.4.9.2 Constitutional Justice – Procedure – Parties – **Interest**.
 2.2.1.6 Sources – Hierarchy – Hierarchy as between national and non-national Sources – **Law of the European Union/EU Law and domestic law**.
 4.10.2 Institutions – Public finances – **Budget**.
 5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.
 5.4 Fundamental Rights – **Economic, social and cultural rights**.

Keywords of the alphabetical index:

Annulment, application, admissibility, interest, capacity, citizen / Annulment, application, admissibility, interest, capacity, interest group / Annulment, application, admissibility, interest, capacity, voter / Annulment, application, admissibility, interest, direct interest / Annulment, application, admissibility, interest, *actio popularis* / European Union, law, primacy / Constitution, primacy, national identity / European Union, law, Constitution, relationship, national identity / Treaty, Stability Pact.

Headnotes:

A person or group only has an interest in the annulment of a law if he/it can be affected directly and unfavourably by the disputed provision.

An action brought by several citizens and non-profit organisations against the law whereby the Belgian Parliament ratified the 2012 European Stability Pact was inadmissible. The fact that austerity measures can be imposed on the basis of the Stability Pact is not sufficient to demonstrate a sufficiently individualised connection between the personal situation of the applicants and the provisions that they disputed.

The Stability Pact not only creates an inflexible budgetary framework, but it also entrusts certain powers to the institutions of the European Union, which is permitted by the Constitution. However, under no circumstances can there be any interference with the national identity inherent in the fundamental political and constitutional structures or with the fundamental values of the protection that the Constitution affords to legal persons.

Summary:

I. The Court was seized of applications against the law of 18 July 2013 approving the European Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union (Stability Pact). The Stability Pact was entered into by 25 of the 28 Member States of the European Union in order to stabilise the euro zone after the financial crisis. The contracting States undertook to pay attention to their budgetary position and limit their public debt.

A number of citizens and non-profit organisations asserted that they had an interest in bringing an action as citizens or interest groups. They feared that the strict budgetary objectives established in the Stability Pact would lead to the authorities no longer being able to fulfil in future their constitutional obligations in terms of fundamental social rights (Article 23 of the Constitution). Some applicants also stated that they had an interest as persons with the right to vote. They asserted that the ratification law reduced the parliaments' influence over budget policy and hence also the influence of voters.

II. The Court firstly observed that it could not effectively review the ratification law without examining the content of the relevant provisions of the Stability Pact as part of its analysis. It therefore had to take account of the fact that this was not a unilateral act of sovereignty, but a conventional norm whereby Belgium entered into an international legal commitment vis-à-vis other States.

The Court noted that a person or group only has an interest in the annulment of a law if he/it can be affected directly and unfavourably by the disputed

provision. An abstract interest which is no different from the interest that any person has in respect of the Constitution (cf. *actio popularis*) is not sufficient in and of itself. The fact that austerity measures can be imposed on the basis of the Stability Pact is not sufficient to demonstrate a sufficiently individualised connection between the personal situation of the applicants and the provisions that they disputed.

The Court reached the same conclusion with regard to parties who claimed to have an interest as representatives or members of a trade union organisation, a professional organisation, an interest group, a political party or a political movement. They could only be affected directly and unfavourably by measures intended to achieve set budgetary objectives.

In the Court's view, having an interest as a citizen or a person who has the right to vote is likewise not sufficient. The Court noted that the ratification law has no direct effect on the right to vote, but considered nonetheless whether the law interfered with any other aspect of the democratic rule of law which would be so essential that its protection must be in the interest of all citizens.

In the Court's view, Parliament is the only constitutional body empowered to set medium-term budgetary objectives. It can enter into such commitments in association with other States. This course of action may moreover be appropriate where the States in question share a common currency and where their economic policy is coordinated. When they ratify a treaty, however, lawmakers cannot interfere with guarantees laid down in the Constitution. Although the Stability Pact makes provision for detailed targets and deficit reduction, it leaves national parliaments entirely at liberty as to how they draw up and approve budgets. The treaty does not, therefore, interfere with the parliaments' sole competence to approve budgets on an annual basis, even if this competence is not unlimited, as the Court points out.

The Stability Pact does not merely create an inflexible budgetary framework; it also entrusts certain powers to the institutions of the European Union, which is permitted by the Constitution. However, under no circumstances can there be any interference with the national identity inherent in the fundamental political and constitutional structures or with the fundamental values of the protection that the Constitution affords to legal persons. In the Court's view, the disputed law does not interfere with any aspect of the democratic rule of law which would be so essential that its protection must be in the interest of all citizens.

The Court concluded that none of the applicants had an interest to the degree required for them to seek the annulment of the legislation. The Court therefore ruled that the applications for annulment were inadmissible.

Languages:

French, Dutch, German.



Brazil

Federal Supreme Court

Important decisions

Identification: BRA-2016-1-001

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 23.04.2015 / **e)** Extraordinary Appeal with Interlocutory Motion 652777 / **f)** Disclosure of salaries of civil servants / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 128, 01.07.2015 / **h)**.

Keywords of the systematic thesaurus:

5.3.12 Fundamental Rights – Civil and political rights – **Security of the person.**

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

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

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

Keywords of the alphabetical index:

Civil servant, remuneration / Civil servant, right and obligation / Data, personal, Internet / Data, personal, publicity, limited / Personal data, information of subject / Public office, holder, private life, right, restriction / Remuneration, gross / Transparency, administrative.

Headnotes:

The disclosure of civil servants' names and salaries, on websites maintained by the Public Administration, is legitimate. The Federal Constitution prioritises the principle of administrative transparency and exceptions are permitted solely where publication of information would constitute a violation of personal privacy or threaten State security. As the information published in this case related to civil servant's official duties, and given that other details concerning civil servants (e.g. address, identity documents) are not published, the disclosure of names and salaries does not constitute a violation of the constitutional right to private life.

Summary:

I. This case refers to an extraordinary appeal in which the Supreme Court discussed whether the disclosure of civil servants' names and salaries, on the official website of the Municipality of São Paulo, is legitimate.

The judge, in the first instance, determined the removal of a civil servant's name and salary from the official website, as well as a compensation for non-material damages, reasoning that the disclosure had no legal or constitutional basis. The judge considered legitimate only the disclosure of the salaries of each office, preserving civil servants' names, under penalty of violating the rights to privacy and individual safety.

The Municipality of São Paulo claimed that the first instance judgment constituted a violation of Articles 5.XIV; 5.XXXIII; 37, *caput* and Articles 3.II; 39.6; 31.3 and 163.V of the Federal Constitution, which concern the right to information, confidentiality, principles by which State organs must operate (e.g. legality, transparency), national development, the State's obligation to publish information on public salaries, publication of municipalities' accounts, and financial supervision of governmental entities. The Municipality argued that the disclosure was constitutional and based on the principles of publicity, information and transparency. It also pointed out that the disclosure of the salaries received by holders of public offices is a self-enforcing constitutional duty of the public administration. The Municipality asserted that salary levels are public information and are linked to the duties carried out by civil servants; therefore, the disclosure does not violate their personal privacy or private life. It also contended that the exposure of government spending allows a more effective oversight of government by society. It claimed also that the disclosure of these data does not feature among the secrecy exceptions established in the Constitution. Finally, the Municipality argued that, on the subject of access to information, the Constitution itself prioritises the public interest over the private interest of inviolability of privacy and safety of the individual.

II. The Supreme Court unanimously upheld the extraordinary appeal. The Court based the decision on the case SS 3902 AgR reasoning (*Agravo Regimental na Suspensão de Segurança 3902*). The Court highlighted that the case presented an apparent conflict between the principle of administrative transparency and the individual right to privacy and inviolability of private life. According to the Court, civil servants are ruled by the constitutional provision that everyone is entitled to receive from the public administration information concerning the private, collective or general interest. Information about

salary, offices, and organs where civil servants work are all of general interest and may be revealed. The duty of transparency is removed when secrecy is essential to society and State security. These exceptions were not applicable in this case. Thus, there was neither violation of personal privacy and private life nor any non-material damages justifying compensation since the data released refer to a civil servant holding public office. The possibility of threat to civil servants' personal security as well as to their family caused by nominal disclosure of their salary is diminished by the prohibition against revealing details such as the address and identity documents of public servants.

Finally, the Court in plenary issued a binding precedent with *erga omnes* effects: the disclosure of civil servants' names and corresponding salaries, on websites maintained by the Public Administration, is legitimate. The Court stressed that this understanding is in accordance with the Access to Information Federal Act (Law 12527/2011) that establishes the duty of governments to disclose information of general interest, produced or guarded by them, upon request or not, within their competence.

Supplementary information:

This case refers to binding precedent number 483: disclosure of civil servants' names and correspondent gross salaries on official websites.

- Articles 5.XIV; 5.XXXIII; 37, *caput* and Articles 3.II; 39.6; 31.3 and 163.V of the Federal Constitution;
- Law 12527/2001 (Information Access Federal Act).

Cross-references:

- SS 3902 AgR (*Agravo Regimental na Suspensão de Segurança* 3902).

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-1-002

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 10.06.2015 / **e)** Direct action of unconstitutionality 4815 / **f)** Biographies: previous authorisation and freedom of expression / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 018, 01.02.2016 / **h)**.

Keywords of the systematic thesaurus:

- 5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion.**
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
- 5.3.22 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.**
- 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**
- 5.4.20 Fundamental Rights – Economic, social and cultural rights – **Right to culture.**
- 5.4.22 Fundamental Rights – Economic, social and cultural rights – **Artistic freedom.**

Keywords of the alphabetical index:

Expression, artistic, freedom / Freedom of expression, aspect, individual, social / Freedom of expression, censorship, preventive, prohibition / Honour and dignity, defence / Information, access / Information, disclosure / Information, privacy, right / Media, censorship / Media, press, role in a democratic society / Media, public person, privacy, intrusion / Novel, biographical, dissemination and publication, ban.

Headnotes:

The consent of the main character of a biography, of supporting characters or their relatives (in the cases of deceased or missing people) is not indispensable to the publication of literary or audiovisual biographical works.

Summary:

I. The National Association of Books' Editors (ANEL, in the Portuguese acronym) filed a direct action of unconstitutionality against Articles 20 and 21 of the Civil Code (hereinafter, the "CC"), which establish the previous authorisation of the main character of a biography, of people presented as supporting

characters or their relatives as a condition to publish literary or audio-visual biographical works.

The applicant argued that such requirement is a non-governmental censorship and it violates the freedom of speech, the exercise of the free expression of thoughts and the right to information (Article 5.IV, 5.IX and 5.XIV of the Federal Constitution). The applicant alleged that public figures have limited privacy and intimacy, because their lives are part of events of public interest. It asserted that the indispensable consent discourages authors and harms the editorial market, once authorisations are negotiated under high values, converting information into merchandise. Furthermore, the distortions in stories that are only reported by its characters are serious, which compromise the historical accounts and the building of the national memory. The applicant warned that it did not intend to block the application of the rules of the CC, but to obtain an interpretation in accordance with the Federal Constitution (which saves the constitutionality of the statute), promoting conciliation between the fundamental rights of intimacy of the subjects of biographies and the prohibition of censorship.

The General-Attorney's office requested the denial of the claim. It argued that the freedom of speech and the right to information are limited by personal rights: right to privacy, to honour, to intimacy and to image (Article 5.X of the Federal Constitution). It argued that the consent of the subject of a biography is necessary, because he or she is the one able to examine the truth of the information and to appraise if the disclosure of a fact of his or her personal life is of interest to society.

The Supreme Court used its power to convene a public hearing on the matter, to enable the citizenry to express itself about the topic.

II. The Supreme Court, unanimously, granted the claim, in order to establish an interpretation of Articles 20 and 21 of the Civil Code in accordance with the Constitution, without nullifying the text of these provisions. Following the fundamental rights of freedom of thought and of its expression, freedom of artistic creation and of scientific output, the Court declared that the consent of the main character of a biography, of people presented as supporting characters or their relatives (in the cases of deceased or missing people) is not indispensable for the production of literary or audio-visual biographies.

The case concerned a false conflict of norms and the Court was requested to make the right to create biographical works, as an exercise of the freedom of expression, compatible with the inviolability of

intimacy, privacy, honour and image. The Court understood that the civil rule should not be amended, but it should be interpreted coherently with the constitutional text, using the method of balancing values. For this purpose, the Court considered that the Federal Constitution sets forth the freedom of thought and of its expression – as well as the freedom of intellectual, artistic, literary, scientific, and cultural activities – as fundamental rights and ensures the right to access of information and the freedom of academic research; hence, any form of censorship, governmental or non-governmental, is forbidden. Furthermore, the Federal Constitution ensures the inviolability of intimacy, privacy, honour and dignity of people, establishing forms of compensation if this inviolability is breached. The Court highlighted that biographies have a relevant social function to the knowledge of history and to the preservation of the national memory. The Court considered, as well, that a norm below the Constitution (the civil statute) could not restrict fundamental constitutional rights, even under the pretext that it would protect other rights ensured by the Constitution, such as the inviolability of private life.

In case of conflict between the individual and the collective interest, the Court opted to prioritise the collective interest. It concluded that the prerequisite of an authorisation to publish biographical works is an excessive restriction to the freedom of speech and the freedom of expression of thought of writers and to the right to information of citizens, being non-governmental censorship.

III. In a separate opinion, a concurring Justice stated that, even though Articles 20 and 21 of the CC prioritise the rights of personality over the freedom of speech, the latter right should be accorded priority, because it is a preferential liberty. This does not entail placing this right above other fundamental rights, something that is not allowed in the Brazilian legal system. The prevalence occurs because prior censorship or licensing is forbidden and because the freedom of speech is a precondition for the exercise of other fundamental rights, such as the right to take part in politics, the freedom of association and the right to assemble. Furthermore, the burden of reasoning must be transferred, that is, the person who wishes to hinder the freedom of speech is required to provide reasons for such restriction. The Justice asserted that any form of restriction on the freedom of speech must be analysed and avoided. Information illegally obtained or based on a lie could compromise the disclosure of a fact, but the courts can intervene afterwards. Finally, the Justice pointed out that the freedom of speech is not a guarantee of truth or fairness, but a guarantee of democracy, in the light of the importance of the free flow of ideas and the diversity of opinions.

In other separate opinions, concurring Justices stressed that the writer of a biography can request authorisation to publish his or her work, avoiding a possible later control by the courts. However, this request should be only a possibility. They warned that the exemption of consent does not allow the full use of the image or the private life of others, given the possibility for intervention by the courts in cases of abuse or overt untruth, as well as compensation for damages, the right to reply or to publish a new work with corrections.

The Justices underscored the existence of various versions of a historical fact; hence, an attempt to control biographies would amount to an attempt to control history. They recalled that only renowned figures would be the subject of a biography and that, as renown grows, privacy wanes. They considered that the biography after the authorisation is only publicity. Finally, they warned that biographies are not only exposed in books, but also in the internet. This fact makes easier the dissemination of apocryphal, offensive and non-authorised stories, with a global reach. As it is a complex issue, ways to restrain abuses must exist.

Supplementary information:

- Article 5.IV, 5.IX, 5.X and 5.XIV of the Federal Constitution;
- Articles 20 and 21 of the Civil Code.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-1-003

a) Brazil / **b)** Federal Supreme Court / **c)** Second Panel / **d)** 30.06.2015 / **e)** Extraordinary Appeal 1.354 / **f)** Extradition and dual-criminality principle (crime of arbitrary conduct against minor and parental kidnapping) / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 212, 23.10.2015 / **h)**

Keywords of the systematic thesaurus:

4.16 Institutions – **International relations.**

Keywords of the alphabetical index:

Extradition, condition / Parent having custody.

Headnotes:

The crime of arbitrary conduct against a minor, provided in the Swedish Criminal Code, does not match the crime of parental kidnapping, provided in the Brazilian Penal Code, since, in Brazilian law, the father can only commit such offence if temporarily or permanently deprived of custody of the child.

Summary:

I. This case refers to a request for extradition from the Swedish Government due to a warrant of arrest issued against a Swedish fugitive for having allegedly committed the crime of “arbitrary conduct against minor”. The fugitive brought his daughter to Brazil in June 2012, without the consent of the mother, with whom he shared the custody of the minor.

The defendant claimed there was a deficiency in the proceedings because the legal documents required by the Extradition Act (Law 8615/1980) were incomplete. He also sustained that his conduct is not defined as a crime, since he had custody of his daughter when he came to Brazil. Finally, he pointed out that the charge filed against him does not have a corresponding offence in Brazilian law and, therefore, does not comply with the dual criminality requirement.

II. The Second Panel of the Brazilian Supreme Court, by majority and delivering a *per curiam* opinion, rejected the extradition request. The Panel considered that the dual criminality requirement had not been fulfilled since the Brazilian law treats the fugitive conduct differently. The father could only commit the crime of parental kidnapping – a crime which would be, in theory, the correspondent in the Brazilian legislation – if he was temporarily or permanently deprived of parental rights, custody or guardianship (Article 249.1 of the Penal Code). At the time of the trip, the father held the custody of the child, although he shared it with the child's mother.

The Court emphasised that a lawsuit was filed against him before the Swedish Court and it led to the cancellation of the custody. However, this action was only filed when the minor was already in Brazil. Therefore, if there was a crime, according to the Brazilian law, it would be the denial of surrendering the child after the loss of custody. In this case, the crime would have occurred in Brazil and would be subject to the Brazilian law.

Finally, the Panel highlighted that the Brazilian Federal Government had filed a search and seizure action based on the Hague Convention (Convention on Civilian Aspects of International Child Abduction) and stressed that the denial of the extradition request would have no impact on that action.

III. In a dissenting opinion, the rapporteur justice granted the extradition request on the grounds that the fugitive had intentionally violated the joint custody established by the Swedish court. At the time of his trip to Brazil, the Judicial Court of Gothenburg, in February 2012, ruled that the child was to reside permanently with him, but expressly maintained the shared custody until the final decision of the custody process. For the rapporteur, such conduct matches the description of parental kidnapping, a criminal offence provided in Article 249.*caput* of the Brazilian Penal Code.

Supplementary information:

- Article 249.*caput* and 249.1 of the Brazilian Penal Code;
- Extradition Act (Law 8615/1980).

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-1-004

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 03.08.2015 / **e)** *Habeas corpus* 123108 / **f)** Principle of insignificance in criminal law and the case-by-case application / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 018, 01.02.2016 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Penalty, petty offence / Penalty, criminal, mitigation / Penalty, necessity, manifest disproportion / Prison, mitigated, situation / Sentence, consistent with the offender's personal situation / Sentence, criminal, penalty, mitigation.

Headnotes:

Recidivism does not, by itself, preclude a court from acknowledging the criminal insignificance of certain conduct, in the light of the circumstances of the case. As a general rule, a court shall order open conditions when determining prison sentences in the case it considers it possible to acknowledge the criminal insignificance of the conduct in theft, but understands that it is criminal or socially undesirable to apply the principle in the concrete case.

Summary:

I. This case refers to a petition for a *writ of habeas corpus* questioning the applicability of the principle of insignificance (which permits a court to narrowly apply the Criminal Code) in the crime of theft, when the offender is recidivist. The defendant was accused of stealing a pair of sandals, valued at R\$ 16.00, but the principle of insignificance was not applied due to recidivism.

II. The Supreme Court granted the order to change the defendants' prison conditions from semi-open to open. However, the Court stated that it was not possible to apply the principle of insignificance to overrule the defendants' conviction, as this would require a broad finding that goes beyond analysing the material result of the offence, also covering the recidivism or contumacy of the offender. It stated that, even though the stolen object had low value, identifying the meaninglessness of the offense involves assessment of the victim's economic conditions and consideration of the offender's recidivism. Such findings shall be made in each case, as the circumstances may vary significantly due to economic, social, and cultural differences within Brazil.

The Court stressed that the meaninglessness of theft is not only on the material result of the offence (i.e., the value of the stolen object), but in the offence itself. In this sense, civil default may cause superior damages to property, but it is not considered a criminal offence. In addition, analysing the value of the stolen object as a criterion to apply the principle requires analysing the victim's assets and the potential injury to it. A demonstration of this difference lies in the fact that, in cases of embezzlement (where the victim is the State), acts that cause injury up to R\$ 20,000 are considered insignificant. However, in cases of theft, even if the object has little value, it can be significant when compared to the economic conditions of the victim, or it may have significant sentimental value.

As to the recidivism, the Court stated that it is not itself considered part of the definition of the offence. However, it has to be taken into account to assess the insignificance of the conduct, which, once included, implies acknowledging that the offence is not defined as a crime. Furthermore, in case of contumacious defendants, the final conviction is not needed to apply the recidivism effects, named in these cases as contumacy; that is, cases in which the offender commits repeated insignificant thefts, he would never be convicted, as, being his first offence, he would be acquitted due to the insignificance applicability based on first offence, and so on, if the contumacy is disregarded.

In conclusion, the Court established the theses that recidivism does not hinder acknowledgment of the insignificance of the offence, which must be analysed in each case, and that the Court may order open prison conditions when determining prison sentences, whenever the principle of insignificance may be applicable, but it is neither criminal nor socially desirable to do so.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-1-005

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 13.08.2015 / **e)** Extraordinary Appeal 592581 / **f)** Jurisdiction of the Judiciary to determine the execution of construction works in prisons by the Executive / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 01.02.2016 / **h)**.

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
 4.7.1 Institutions – Judicial bodies – **Jurisdiction.**
 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.**
 5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**

Keywords of the alphabetical index:

Prisoner, right, violation, remedy / Prisoner, treatment, inadequate conditions.

Headnotes:

Courts may issue remedial orders to the State such as the execution of emergency construction in prison facilities in order to enforce the precept of dignity of the human person and to ensure respect of prisoners' physical and moral integrity, under Article 5.XLIX of the Federal Constitution. Such orders shall not be challenged under the limited resources principle or the separation of powers principle.

Summary:

I. This case refers to an extraordinary appeal which presents the question whether the judiciary may order the State to implement construction in prisons facilities aiming to fulfil the constitutional right that guarantees to prisoners the right to physical and moral integrity (Article 5.XLIX of the Federal Constitution).

In the first instance, the Prosecutor's Office obtained a positive decision in a public civil action filed in order to determine the execution of construction works, within six months, by the State of Rio Grande do Sul in the Uruguaiana State Prison (*Albergue Estadual de Uruguaiana*). However, the second instance overruled the decision on the grounds that the prisoners' right consists of a constitutional programmatic rule, which implies a general orientation to the State, and, therefore, this subject falls within the State's discretion. However, the Court acknowledged that the prison's conditions were indeed degrading. The Prosecutors' Office appealed against this decision.

II. The Brazilian Supreme Court, unanimously and according to the rapporteur judge's opinion, granted the appeal to affirm the first instance decision. The Court, also unanimously, settled the following legal rule with *erga omnes* effects: "Courts may issue remedial orders to the State such as the execution of emergency construction in prison facilities, to enforce the dignity of human person precept and ensure the respect to the prisoners' physical and moral integrity, under Article 5.XLIX of the Federal Constitution. The order shall not be objected under the limited resources principle or the separation of Powers".

Initially, the Court reported official data of agencies that promote inspections in prisons throughout the country, providing a picture of the current poor prison

conditions, especially overcrowding and appalling building facilities (electrical and hydraulic). The Court emphasised that such situation hinders the fulfilment of the sentence's purposes, considering that, in the rule of law, more than a consequence of the offence, the penalty aims at rehabilitating someone for their return to society. In addition, the current situation of the Brazilian prison system violates the principle of human dignity, whose central value in the Constitution allows the judiciary to intervene in order to ensure its minimum content.

The Court emphasised that prisoners' physical and moral integrity is a fundamental right of immediate applicability (not a public policy). Furthermore, the Brazilian legal system has a set of local and international rules that ensures several rights to prisoners. Accordingly, the principle of jurisdiction consideration – which states that injuries or threats to rights must be brought to the judiciary for judgment – imposes the intervention of Courts in order to restore the fundamental right violated.

The Court described the entire legal apparatus as an advantage to the Brazilian judicial branch from the perspective of comparative law. In the United States, the prison system reform was formed by the Supreme Court based on the Eighth Amendment. As there was no standardisation in this area (architecture definitions for the prisons, as adequate space, minimum power of light, etc.), judicial decisions formed a new doctrine to replace the policy of “hands off”.

Finally, the Court recorded that the official data of the Department of Justice demonstrate budget availability, at the federal level, in the main fund for modernisation and improvement of Brazilian prisons, which reveals a serious omission from the authorities responsible for the prison system.

Supplementary information:

This case refers to number 220 of general repercussion (i.e. within the system whereby the Court issues binding rules with *erga omnes* effects): whether the judiciary has competence to order the State to execute construction in prisons facilities in order to enforce prisoners' fundamental rights.

Cross-references:

- Article 5.XLIX of the Federal Constitution.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-1-006

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 20.08.2015 / **e)** Direct Action of Unconstitutionality 5240 / **f)** Custody Hearing (Presentation hearing) / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 01.02.2016 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.11 Sources – Categories – Written rules – International instruments – **American Convention on Human Rights of 1969.**

Keywords of the alphabetical index:

Hearing, right / Judicial review / Normative content, legal act, review.

Headnotes:

The internal rule issued by a Court of Appeals to regulate custody hearings within that body is constitutional, since it did not innovate in the legal system, but only explained existing the normative content of the Code of Criminal Procedure and the American Convention on Human Rights, enacted in Brazil. Conventions and human rights treaties ratified by Brazil have “supralegal” hierarchy and therefore have the power to override legislation in conflict with its precepts. Thus, when the American Convention on Human Rights provided for the prisoners' prompt presentation before a judge, it legitimised custody hearings across the country.

Summary:

I. The Association of Chief Police Officers of Brazil filed a direct action of unconstitutionality, with request for preliminary injunction, questioning whether it is legitimate to regulate custody hearings (prisoner's prompt presentation before a judge for those arrested in *flagrante delicto*) by means of an administrative rule.

In the case, the claimant questioned the Internal Joint Rule 3/2015 (*Provimento Conjunto 3/2015*) of the State Court of São Paulo and the General Internal Affairs of the State of São Paulo, which requires the presentation of the detained person, within 24 hours, before the competent judge, to attend a custody

hearing at that Court. The Association argued that the contested internal rule provides an innovation by introducing functional duties to police chiefs, exceeding the regulatory power of the Court. In this sense, it argued that the establishment of such rules could not be made through an administrative act and depended on federal law regulation, given the fact that the content concerns a procedural matter (Article 22.I and 22.V of the Constitution). It was emphasised that the American Convention on Human Rights (ACHR) has “supralegal” nature and, for this reason, it could not be the legal ground to the internal rule issuing. Finally, the claimant argued for the unconstitutionality of the internal rule, in the light of the principle of prohibition of excess and operational difficulties in implementing the hearings.

II. The Supreme Court, by majority, in accordance with the rapporteur judge’s opinion, did not hear the action concerning Articles 1, 3, 5, 6 and 7 of the Joint Internal Rule 3/2015, which only delineate, without exceeding the content, the provisions of the American Convention on Human Rights and the Criminal Procedural Code concerning the legal procedure of *habeas corpus* filed before the first instance. In the event, the Court concluded that any noncompliance between the regulation and the law should be resolved at the legal level.

With regard to Articles 2, 4, 8, 9, 10 and 11 of the Joint Internal Rule 3/2015, the Court heard the action and denied the request, on the grounds that the provisions convey internal organisational commands of the State Court of São Paulo, which is competent to issue its internal rules of organisation, under Article 96.I of the Federal Constitution. In such case, the rule is grounded on the Constitution itself, and the direct control of constitutionality is admissible. The Court emphasised that the contested rules clearly are of an administrative nature, determining how and when the implementation of the custody hearing will be held within the Court. Therefore, the principles of legality (Article 5.II of the Constitution) and of federal law reservation (Article 22.I of the Constitution) were not violated, neither was the principle of separation of powers (Article 2 of the Constitution), given that the rule only regulated provisions of the Convention and of Article 306.1 of the Criminal Procedural Code already enforced, without according new duties to police chiefs.

The Court stated that, although it was not possible to decide on the custody hearings, because the matter is part of the merit of the administrative act, which is a subject not heard by the Court, the effectiveness of custody hearings in reducing the population of pre-trial detainees in Brazil should be emphasised. The prompt presentation of the prisoner allows the judge to know, by the detainee himself, why he was

arrested and under what conditions he is imprisoned, which is closely linked to the fundamental guarantee of freedom and the constitutional remedy of *habeas corpus*. The Court noted that the American Convention on Human Rights, ratified by Brazil, had already established that the person arrested or detained should be quickly brought before the court (Article 7.5). In this sense, the Court reaffirmed its jurisprudence concerning the “supralegal” hierarchy of the Convention and treaties on human rights, which implies that all legislation in conflict with this provision has its effect suspended.

III. In a dissenting opinion, one of the Justices argued that the case could not be heard, on the grounds that the internal rule questioned is a normative act of secondary category, which is not subject to the direct control of unconstitutionality. On the merits, the Justice considered the rule unconstitutional as it innovated in the legal system, which is an area where the Federal Government has exclusive competence to regulate.

Cross-references:

- Articles 2; 5.II; 22.I and 96.I.b of the Federal Constitution;
- Article 306.1 of the Criminal Procedural Code;
- Article 7.5 of the American Convention on Human Rights of 1969;
- Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the Internal Joint Rule 3/2015 (*Provimento Conjunto 3/2015*) issued by the Presidency of the State Court of São Paulo and of the General Internal Affairs of the State of São Paulo.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-1-007

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 09.09.2015 / **e)** Preliminary injunction on a Claim of non-compliance with a Fundamental Precept 347 (ADPF 347 MC) / **f)** Brazilian prison system and state of unconstitutionality affairs / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 19.02.2016 / **h)**

*Keywords of the systematic thesaurus:*3.4 General Principles – **Separation of powers.**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.**5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.***Keywords of the alphabetical index:*

Prisoner, right, violation, remedy / Prisoner, treatment, inadequate conditions.

Headnotes:

The Brazilian prison system falls within the concept of “unconstitutional state of affairs”, considering the factual situation of the prisons that implies widespread violation of prisoners’ fundamental rights and due to persistent acts and omissions of public authorities. Reform of the prison system requires regulatory, administrative and budgetary measures.

Summary:

I. The Socialism and Freedom Party (PSOL, in the Brazilian initials) filed a Claim of Noncompliance with a Fundamental Precept (a subsidiary mechanism for challenging the constitutionality of State action), with a preliminary injunction, in order to acknowledge the “state of unconstitutional affairs” of the prison system and to impose broad normative, administrative and budgetary remedies to remedy the violation of prisoners’ fundamental rights.

The applicant stated that the request is based on the representation of the Clinic of Fundamental Rights of the Law School of the University of the State of Rio de Janeiro, which offered a report on the prison system. According to the applicant, the data demonstrates that the factual condition of prisons is incompatible with several constitutional provisions. It argued that such a situation results from acts and omissions of the three branches of government, involving the three levels of government (federal, state and municipal). Therefore, it requested the release of resources from the National Penitentiary Fund, the implementation of custody hearings and other measures related to Brazilian judges, especially the adoption of alternatives to pre-trial detention. On the merits, the claimant required the development of national, state and district plans by the Government, to be monitored by the Supreme Court, in order to overcome the unconstitutional situation.

II. The Supreme Court examined the injunction and partially granted the motions, by majority, in accordance with the rapporteur’s opinion. Unprecedentedly, the Court acknowledged the concept of an “unconstitutional state of affairs”, initially formulated by the Constitutional Court of Colombia, and stated that, although it is difficult to conceptualise such terminology, it may be identified from the opposite direction, i.e., acknowledging what doesn’t fall within that concept.

From this premise and considering the requirements stipulated by the Colombian Court – namely, widespread violation of fundamental rights, the inertia of public authorities and the need for joint action to overcome the problem – the prison system in Brazil fits into the frame of “unconstitutional state of affairs”.

According to the Court, the data about prisons’ lack of capacity, overcrowding in the cells and the poor condition of building installations (hydraulic and electrical) demonstrates this scenario. The prisoners’ situation implies violation of several constitutional provisions – especially those related to the dignity of the human person, the prohibition of inhuman or degrading treatment, and the prohibition on cruel penalties – and of domestic and international law. In addition, the penalty does not achieve the purpose of rehabilitation. On the contrary, the data shows high recidivism rates (around 70%), reflecting an increase in crime and social insecurity.

The Court pointed out that the responsibility for the widespread and permanent violation of prisoners’ fundamental rights cannot be attributed to a single public authority. In fact, it is a historical malfunction in the framework of the State, including the Federal Government, the states and the Federal District, and which encompasses the three branches, including the judiciary, given the high number of pre-trial prisons ordered. Therefore, the solution of the problem involves the coordinated action of all these entities.

In this context, the role of the Supreme Court is precisely to coordinate the actions of the bodies involved and to monitor the results. The Court stressed, however, that the competent bodies will choose the content of the actions to be monitored. Therefore, there is no offense to the separation of powers. The intervention of the Court is legitimised by the State’s failure to ensure minimum conditions for a dignified existence to prisoners. The Court highlighted that this group has no direct political representation – as the convicts have their political rights suspended while the criminal sentence is effective – nor does it form part of the political programme of the candidates, which reinforces the need for the Court’s intervention.

On these grounds, the Court ordered the release of the accumulated budget of the National Penitentiary Fund, which was established in order to promote improvements in the prison system. The Court also determined that judges and courts of Brazil perform custody hearings in up to ninety days, enabling the attendance of people arrested in *flagrante delicto* before the judge within 24 hours, counted from the time of arrest, as provided for in Articles 9.3 of the International Covenant on Civil and Political Rights and 7.5 ACHR signed by Brazil and thus incorporated into domestic law. The Court considered that the measure will entail the reduction of prison overcrowding and the decrease of spending on pre-trial custody.

On the other hand, the Court denied, by majority, the request in order to demand that judges expressly justify whenever alternative measures other than pre-trial custody are determined. The majority considered that such requirement is already included in the Code of Criminal Procedure and the Court's pronouncement on this regard would give rise to constitutional claims for noncompliance with its own decision.

Finally, considering the request on the merits about improvement plans, the Court, by majority and with no specific request to do so, determined the federal and state governments to provide information about their each prison's situation.

Supplementary information:

- Article 1.III of the Federal Constitution (human dignity);
- Article 5.III of the Federal Constitution (prohibition of torture and inhuman or degrading treatment);
- Article 5.XLVII.e of the Federal Constitution (prohibition of cruel penalties);
- Article 5.XLVIII of the Federal Constitution (ensures prisoners the right to physical and moral integrity);
- Article 9.3 of the Covenant on Civil and Political Rights;
- Article 7.5 of the American Convention on Human Rights.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-1-008

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 17.09.2015 / **e)** Direct action of unconstitutionality 4650 / **f)** Corporate donation to electoral campaigns / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 018, 01.02.2016 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Election, campaign for public office, financing, private / Election, campaign, financing, by legal person, prohibition.

Headnotes:

Legal provisions that allow corporate donations to electoral campaigns are unconstitutional since they do not neutralise the influence of economic power in the elections.

Summary:

I. The Federal Council of the Brazil Bar Association filed a direct action of unconstitutionality, questioning the constitutionality of corporate donations to parties and electoral campaigns, the limit proportional to income for donations made by natural persons (i.e. individuals) and the absence of limits on the use of the candidates' own resources in electoral campaigns. The applicant argued that the current rules violate democratic and republican principles as well as the principles of equality and proportionality, because they render electoral contests uneven for citizens who lack financial resources, favouring those who have more access to economic power. The Federal Attorney General, in defence of the rule, argued that the Federal Constitution does not establish a political funding model. Therefore, the choices made by lawmakers are legitimate, including financing by legal persons.

Given the interdisciplinary nature of the matter, the Supreme Court utilised its power to convene a public hearing on the matter. In the occasion, it was shown that there is an increasing influence of economic power over the political process as a result of a rise in electoral campaign spending. In 2002, candidates spent R\$ 798 million (R\$, the Brazilian currency), while, in 2012, the figures exceeded R\$ 4.5 billion, an increase of 471%. In Brazil, the expense would be of

R\$ 10.93 *per capita*; in France, R\$ 0.45; in the UK, R\$ 0.77; and in Germany, R\$ 2.21. As a proportion of GDP (Gross Domestic Product), Brazil is one of the countries that spends the most on electoral campaigns.

II. The Supreme Court, by majority, partially granted the request to declare the unconstitutionality of legal provisions that authorise corporate donations to electoral campaigns. The Court dismissed the claim regarding the limit proportional to income for donations made by individuals and the lack of limits on the use of the candidates' own resources.

Initially, the Court reported that campaign financing, as a subject that directly affects the interests of lawmakers, is more likely to a biased treatment at a parliamentary level. Thus, the expansive and particularistic role of the Court would be justifiable since it is not subject to these interests, so as to induce a constitutional dialogue, leading the debate between the State powers and society.

Furthermore, although the Federal Constitution does not have specific rules on the model of campaign financing, it establishes a regulatory framework that limits the discretionary power of lawmakers.

On the merits, the Court held that the exercise of citizenship, in the strict sense, presupposes three modalities of procedure: the right to vote; the right to stand for election; and the right to influence the formation of political will by the instruments of direct democracy. The rapporteur judge emphasised that such rules are inherent to individuals and therefore they could not be extended to companies, whose main purpose is obtaining profit. The Court pointed out that Article 14.9 of the Federal Constitution prohibits the influence of economic power over the elections and that the participation of legal entities may render campaign costs very expensive, without resulting in, on the other hand, the improvement of the political process.

The Court rejected the argument that donations from legal entities to campaigns and parties are a demonstration of their freedom of expression, because this kind of donation would favour the candidates who had links with major donors, making the electoral dispute excessively unequal. Moreover, it was verified that a single company donates to campaigns of leading candidates. This fact does not indicate an ideological preference of the legal entity. Regarding the claim that the flaws in the electoral financing by legal entities could be resolved by the supervision and transparency of donations, the Court stated that such methods do not eliminate the problems of the current system. Even if there were

more supervision, economic power would still have an important role in the electoral process.

III. In separate opinions, dissenting Justices argued that the Federal Constitution only prohibits the abusive influence of economic power over the elections. As they said, the fact that corporations do not vote could not restrain them from donating since many individuals, who are not entitled to vote, can also make donations. The dissenting Justices asserted that in Brazil corporate donations to electoral campaigns had been once forbidden, but the prohibition has not avoided the influence of economic power due to fraudulent donations. In this sense, the failure of the current electoral funding model would be in systematic breach of the rules.

Supplementary information:

- Article 14.9 of the Federal Constitution.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2016-1-009

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 29.09.2015 / **e)** *Habeas Corpus* 130152 / **f)** Substitution of preventive detention to house arrest in case of breastfeeding woman / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 018, 01.02.2016 / **h)**

Keywords of the systematic thesaurus:

5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial.**

Keywords of the alphabetical index:

Child, protection / Detention, pending trial, conditions / Motherhood, protection.

Headnotes:

It is possible to substitute preventive detention by house arrest, in the case of female defendants during

the breastfeeding period, in order to fulfil the constitutional right that ensures them conditions to stay with their children during this time.

Summary:

I. This case refers to a petition of *habeas corpus*, with preliminary injunction, filed by a female defendant during the breastfeeding period against the decision of the Superior Court of Justice that denied her previous petition for *habeas corpus*.

The defendant was detained in *flagrante delicto* for alleged drug trafficking. The first instance court, understanding that the requirements were fulfilled, determined the substitution of the detention to preventive. The defence filed a petition for *habeas corpus* in the Supreme Court, after both the second instance and the Superior Court of Justice had denied the request. Before the Supreme Court, the applicant pointed out that the requirements for the preventive detention had not been fulfilled, adding that the ground for the detention was generically based on the abstract seriousness of the crime. As such, it was illegal, given that, in case of conviction, the defendant will not necessarily be sentenced to a closed prison regime. The defence also asserted that the defendant was pregnant by the time of the arrest, spent the entire pregnancy preventively detained, and gave birth in jail. In conclusion, the petitioner requested the substitution of the preventive detention by house arrest so she could breastfeed.

II. The Second Panel of the Supreme Court, unanimously and according to the rapporteur judge, confirmed the preliminary injunction decision, sentencing the substitution of the preventive detention by house arrest. The Court highlighted that the Constitution (Articles 5.L and 6.*caput*) ensures to female defendants the means to be with their children during the breastfeeding period. In this sense, granting house arrest aims at enforcing such constitutional right and is legally grounded on the protection of motherhood and childhood, as well as on the dignity of the human person, prioritising the child's welfare during the breastfeeding phase.

Finally, the Court concluded that preventive detention did not fulfil the requirements of Article 312 of the Code of Criminal Procedure, since it was based mainly on the abstract seriousness of the offence, without any adjustment of the measure to the personal conditions of the defendant, including her situation as a first time offender.

Supplementary information:

- Article 312 of the Code of Criminal Procedure;
- Article 318.IV of the Code of Criminal Procedure;
- Articles 5.L and 6.*caput* of the Federal Constitution.

Languages:

Portuguese, English (translation by the Court).



Bulgaria

Constitutional Court

Important decisions

Identification: BUL-2016-1-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 07.07.2015 / **e)** 13/2014 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 55, 21.07.2015 / **h)** CODICES (Bulgarian).

Keywords of the systematic thesaurus:

1.1.1.2 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – **Independence.**

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

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

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

Keywords of the alphabetical index:

Independence, judiciary / Competence, Supreme Judicial Council.

Headnotes:

The Constitution specifies that the Supreme Judicial Council shall manage the judiciary and uphold the independence of judges, prosecutors and investigating officers so that they can perform their functions, protecting the rights and legitimate interests of citizens, corporate entities and the State.

The Supreme Judicial Council's administration activity shall ensure the efficient performance of its Constitution-assigned functions in relation to the personnel, budget and organisation. The assignment of this activity to institutions outside the judiciary would violate the principles of the separation of powers and judicial independence.

Summary:

I. A panel of the Supreme Administrative Court requested the Constitutional Court to review the constitutionality of sentence two of Article 16.1 of the Judiciary Act. The panel challenged that the contested provision entrusting the Supreme Judicial

Council (hereinafter, "SJC") with the administration of the judiciary's proceedings conflicts with sentence one of Article 117.2 of the Constitution, which stipulates that the judiciary shall be independent of all the other powers. Further, the panel claimed that Article 16 of the Judiciary Act was inconsistent with Article 130.6 of the Constitution, as the provisions on the SJC's powers make no mention of functions to be performed so as to organise the judiciary's operations and to direct its activities.

II. The Constitutional Court dismissed the request on the following grounds:

Principle of judicial independence and the separation of powers

Each of the three powers in the Constitution exercises its prerogatives. Therefore, the mechanism of interaction between and among them precludes enforcement of actions or prescription of acts that might divest the institutions of their constitutionally guaranteed independence and discretion to exercise their prerogatives.

The Constitution expressly underscores that independence is the most essential trait of the judiciary. The functional independence of any judicial authority requires measures to rule out dependencies on and prescriptions or instructions by state institutions or political entities in law enforcement in any specific case. Functional independence guarantees that a conviction is freely formed and based on the law and evidence gathered for the case.

Functional independence encompasses, *inter alia*, court activities that do not involve the dispensation of justice but court administration, such as authorising or prohibiting the use of wireless tapes, the contract of civil marriage between juveniles, the disposition of the assets of mentally incapable persons, etc. The judge must refer to the applicable law.

Concerning the Supreme Judicial Council and the administration of the judiciary

While the Constitution does not expressly define the legal status of the SJC, it describes the Council as the authority that manages the judiciary. An earlier decision of the Constitutional Court defines the SJC as: "... a new institution that is modelled on an institution in some European states to be installed in the state organisation of the Republic of Bulgaria. By definition the SJC is an arm of the judiciary. The SJC prerogatives make it clear that it is not a body that administers justice, it is a supreme administrative body that manages the constituents of the judiciary...".

A review of the evolution of the Constitution and legislation shows a steady trend whereby the SJC prerogatives have been extended to clarify its role as a body that manages the judiciary. This trend justified the fourth amendment to the Constitution in 2007. The justification indicates, "... in contrast to the provisions so far new provisions are proposed whose purpose is, first and foremost, to underscore the role of the SJC as a body that takes the major decisions about the management of the judiciary...". The Constitutional Court has, on several occasions, defined the SJC as a body of administration and the arms of the judiciary, as it is comprised of bodies that are managed and subject to the SJC acts.

Given the description as the body that manages the judiciary, the SJC should be able to exercise prerogatives for its functioning and be provided conditions and settings to enable it to respectively facilitate the activity of the judicial bodies to perform their constitutionally assigned duty to protect the rights and legitimate interests of the citizens, corporate entities and the State. Being structurally and organisationally standalone arms of the judiciary to apply various ways and means to carry out the activity, it was imperative to have in place a special institution, namely the SJC, to guide, direct and manage the organisational activity of any of the bodies included in the structures of the judiciary and to co-ordinate the interaction of these bodies.

Staffing of the judiciary is extremely important. The process comprises of the selection, appointment, dismissal and disciplinary sanctions. In general, the process includes the career development of the judges, prosecutors and investigating officers who exercise the prerogatives of the judiciary. Typical management functions such as direction, organisation, administration, co-ordination and control are observed as the SJC engages in these activities and draws up and spends the judiciary's autonomous budget. In the Constitutional Court's understanding, the administration should not be viewed as a specific prerogative of one institution or another; it should be seen as a more general category manifested in any of the forms of State power with its specific characteristics. Therefore, there exists no legal definition, at a constitutional level, of the notion "administration" whose substance is described by the competence as provided to the relevant State institutions.

To take the view that the Constitution restrains the SJC from exercising solely and exclusively the prerogatives that are expressly enumerated in Article 130.6 and 130.7 means that the managerial functions required to exercise these prerogatives will be assigned to institutions other than those of the judiciary. Thus, the principles of the separation of

powers and independence of the judiciary will be infringed upon.

The judiciary is a State power and the arms of the judiciary, the SJC included, are State institutions. The exercise of judicial power by its arms should be seen as a component of the running of the State. However, the administration of the judiciary has distinctive features compared to the government administration.

The administration of the judiciary, a function that is performed by the SJC, does not employ a *modus operandi* for the judiciary structures that is identical to the one used for the Executive structures. Furthermore, though the SJC is the authority that manages the judiciary, it is not a body that may perform the functions of the judiciary relevant to the protection of the rights and legitimate interests of the citizens, corporate entities and the State. Hence there is no subordination in the SJC-judiciary authorities' relationship in their capacity as State authorities, as judges dispense justice and prosecutors supervise to make sure that the law is abided by and the investigating officers investigate criminal cases. The principle of functional independence (Article 117.2 of the Constitution) as applied in the verification of facts and in the interpretation and enforcement of the law shall preclude any possibility for the SJC to give the judicial authorities orders, commands or instructions, respectively, to direct and oversee these authorities and control their rulings.

By the contested provision of sentence two of Article 16.1 of the Judiciary Act, the legislator has expressly removed the part of the judicial authorities' activities potentially affecting their functional independence (i.e., activities termed as dispensation of justice and oversight to ensure law abidance from the province of the SJC's administration). Thus protection is extended over the independence of the SJC judges, prosecutors and investigating officers. Therefore, the Constitutional Court ruled that the contested part of Article 16 of the Judiciary Act's was not discordant with Article 117.2 of the Constitution.

Article 130.6 of the Constitution provides for the SJC's key prerogatives concerning the construction of the judiciary in line with the principle of the separation of powers. By virtue of constitutionally delegated power, the legislator has made a primary law that clarifies the SJC's work, which are summarised as personnel, disciplinary, organisational, budgetary/financial, managerial and controlling activities. For the purpose of execution, it is only natural for the legal framework to provide for executive prerogatives not provided for in the Constitution, but pertaining directly to and deriving from the prerogatives set out in Article 130.6 and 130.7 of the Constitution.

Direction and control are likewise elements of the administration of the SJC. The Constitutional Court's Interpretative Decision no. 9/2014 recognised that the SJC shall have the power to pass sub delegated legislation as it performs its constitutionally assigned functions as per Article 130.6 of the Constitution and the passage of such legislation is a typical decision-making activity, which does not impinge on the judiciary authorities' functional independence. The control that the SJC exercises has to ensure the efficiency of the dispensation of justice, e.g., hand down court rulings within a reasonable time. The findings of control are needed for the SJC to make fair decisions on its constitutionally granted powers pertaining to the career development and disciplinary liability of the judges, prosecutors and investigating officers.

Languages:

Bulgarian.



Identification: BUL-2016-1-002

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 29.09.2015 / **e)** 4/2015 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 78, 09.10.2015 / **h)** CODICES (Bulgarian).

Keywords of the systematic thesaurus:

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

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

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

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

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

Keywords of the alphabetical index:

Ratification Act, constitutionality, amendment / Republic, parliamentary / Law-making, voting procedure, prior consent / Bill, amendment, proposal, supplement.

Headnotes:

The National Assembly shall not amend an international agreement by a ratification act. The passage of the bill by the first vote “as a whole and in principle” precludes proposed amendments and supplements regarding the bill’s underlying elements within the framework of the second vote procedure. It is not binding for the decision to approve an act by two votes within one sitting to be taken before the first vote. However, such *modus operandi* should not be detrimental to the pluralism of opinions and more specifically, should not curtail the right of a Member of Parliament to propose amendments and supplements to the bill debated. To check an act that ratifies an international agreement for compliance with the Constitution is to see to both – the formal ratification requirements and the text of the agreement in question.

Summary:

I. A group of Members of Parliament challenged the constitutionality of the Ratification Act (hereinafter, the “Act”) for the Dealer Agreement and the Agency Agreement between the Republic of Bulgaria (“issuer”) and several corporate entities (“organisers”, “dealers”, “agents” and “underwriters”) under the Global Medium-Term Note (GMTN) Programme of the Republic of Bulgaria for bond issues worth 8 billion Euros.

During the vote on the challenged Act, the Members of Parliament asserted they were deprived of the opportunity to introduce changes to the bill, which was approved by the first vote. The deprivation violated the principles of the rule of law, political pluralism and the parliamentary form of state government as well as the constitutional requirement that the National Assembly shall exercise legislative power. Further it was insisted that the decision to vote twice within a single sitting should be taken by the National Assembly before the first vote. A reason was given to the effect that the ratified international agreement had been concluded in the absence of the National Assembly’s prior consent that the Constitution requires.

II. The Constitutional Court dismissed the challenge based on the following reasons:

Members of Parliaments’ right to propose texts between the first and the second vote of a bill.

The law-making process is subject to the imperative rule that submitted bills shall be debated and passed by two voting processes. Usually these two voting

processes are defined as “crucial phases” to make a bill an act. On its part, the codification of the required second vote pre-sets the conclusion that between the two votes on any bill that has been approved “as a whole and in principle”, the Constitution guarantees each and every Member of Parliament the right to propose amendments and supplements to the bill. The same holds true of the ratification acts, as they are legal acts too, though their content is more particular.

However, the bill to ratify an international agreement shall not amend the text of the agreement upon approval of a proposed text on second reading. This rule is justified because of the way in which international agreements are concluded and the effect of such agreements. Moreover, proposed changes may be other than technical. Other amendments and supplements may also be proposed. Examples vary. Specifically, whenever the terms and conditions of an international agreement allow for reservations, the proposed text of the bill may be amended or supplemented. When amendments or supplements are proposed, they should not distort the international agreement’s text.

The Members of Parliament’s right to propose amendments and supplements to a bill between the first and the second vote of a bill is restrained by the very logic of the legislative process. In other words, the proposed amendments or supplements that a Member of Parliament may introduce shall conform to the stage of progress of the legislative process, i.e. the stage of the first or of the second vote.

In the case under discussion here, all three propositions made after the bill’s approval by the first vote concern a problem of principle inasmuch as they are relevant to key parameters and the subject of the ratification bill to be addressed by the first vote. Therefore, it is wrong to allege that the Members of Parliament were deprived of the right to propose an amendment or a supplement during the passage of the challenged ratification act. The approval of the ratification bill on first voting “as a whole and in principle” leaves no chance to propose amendments or supplements that may refer to the bill’s underlying elements within the framework of the bill’s second vote procedure.

Timing of the decision to discuss and enact a bill by two votes taken at a single sitting

The Constitution provides for an exception where the National Assembly may resolve that both votes be taken at a single sitting. The National Assembly’s Standing Orders make this option contingent on the provision that it shall only apply if, during the

deliberations on the bill, no amendments or supplements have been proposed. The wording of this constitutional provision leads to the conclusion that the National Assembly is authorised to judge whether or not to decide to take both votes in the same sitting and when to make the decision. The kind of bill, e.g. a ratification act; the nature of the change, e.g. clerical only; the absence of proposed amendments or supplements in the course of the first vote, etc. do not have the characteristics of absolute conditions that may predetermine decision-making. Yet the Constitution reads that the passage of bills by two votes that are taken at a single sitting shall be by exception only. In other words, the application of sentence two of Article 88.1 of the Constitution – precisely because it should be “by exception” – shall be made contingent on a similar decision to the effect that other constitutionally enshrined values, principles and rules shall not be infringed upon. In an earlier decision of the Constitutional Court, it determined that such an option should not restrain the pluralism of opinions in the National Assembly and, in particular, should not curtail the right of a Member of Parliament to introduce proposed amendments or supplements to a bill under debate. Thus in this context, the Constitutional Court opines that no definite point in time can be fixed when a decision of this sort would guarantee that the decision complies with the Constitution. To make the decision contingent on a requirement to take it, especially before the first vote of the bill, might also affect the pluralism of opinions in the National Assembly and curtail a Member of Parliament’s right to propose amendments or supplements to a bill debated. The decision is not just a matter of the National Assembly’s freedom of judgment; in addition, the decision is always concrete so as to guarantee the pluralism of opinion.

The National Assembly should give its consent to conclude sovereign loan agreements, that the ratification should correlate with the consent and that the ratification instrument should be checked for compliance with the Constitution.

The challenged Act before the Constitutional Court ratifies two dealer agreements and a deed of covenant. The agreement has the features of a loan by the issue of bonds, known also as a bond issue agreement. It is subject to Article 84.9 of the Constitution, which stipulates that the National Assembly shall grant its consent to conclude government loan agreements and shall grant it in advance.

What is special in the case concerned is that the loan is not a one-off loan, in other words, the agreement does not involve a onetime operation. As the case stands, a number of agreements are involved where the assets and liabilities will be valid over a fixed

period of time. With such performing agreements, the Republic of Bulgaria has already exercised its right to issue bonds worth a negotiated sum and shall be free, by a fixed date in the future, to issue bonds again, up to the maximum negotiated amount.

Prior consent is a general power that the National Assembly enjoys and therefore does not constitute a requirement to ratify international agreements that imply government debt. As elsewhere, the legislator's consent to conclude a definite agreement is treated as part of the system to maintain the balance between the legislator and the executive. An element of the requirement that external debts incurred by the Republic of Bulgaria be transparent to the public is to be in line with Article 84.9 of the Constitution. For that reason, consent granted is not a formality, less so a power, which must be exercised or else is optional whereon it shall slip out of constitutional control.

Prior consent to conclude a loan agreement is a standalone power of the National Assembly with respect to the right to ratify an international agreement, which imposes financial obligations on the State (Article 85.1.4 of the Constitution). Besides the different subject that the two powers possess, they have a legal action of their own in domestic and international law. Therefore, it is not appropriate to term the one power general and the other power specific.

Moreover, inasmuch as conclusions are drawn about the balance between the consent under Article 84.9 of the Constitution and the ratification, they cannot be exercised if they do not comply with the existing legal regime. For an international government loan agreement to be approved by the Council of Ministers, it is expressly required to attach the National Assembly's prior consent to enter into the agreement to the report that substantiates the agreement. By doing so and if ratification follows, the consent subject to Article 84.9 of the Constitution will be recognised. The consent to conclude deeds of covenant under which the Government promises to make payments on external debt is part of a procedure that closes with the ratification, provided ratification is required.

The two powers should not be treated as absolutely unrelated to each other. It is beyond doubt that the National Assembly, being the legislator, is free to condition its consent on the ratification of the agreement concluded. Such a practice invites yet another important conclusion, namely, that there should be no reason to refrain from a debate on consent to be granted to work out an external

sovereign debt agreement whenever a ratification act, which is seen as unconstitutional, is challenged.

In the Constitutional Court's view, the constitutionality of any act that ratifies an international agreement may be reviewed, as the Court has jurisdiction to pronounce on any petition to establish the unconstitutionality of laws and other acts. It is of no relevance whether the purpose of the ratification is to give the State's consent to enter into an international agreement or, in the context of Article 5.4 of the Constitution, the ratification acts in its capacity as an instrument that ensures an international agreement becomes a part of the domestic legislation.

Whenever a ratification act is checked for compliance with the Constitution, in particular when the act allows the State to enter into a certain agreement (e.g., international agreement in the strict sense of the word or an agreement governed by private law and made with a party that is a foreign person), this verification covers, in addition to the formal ratification-related requirements, the specific agreement. Inasmuch as ratification is the acceptance of an agreement to be entered into, the verification cannot ignore the text of the agreement. Inconsistency, if any, of an international agreement with the Constitution is not to be tolerated given the fact that the underlying postulation is that the Constitution shall reign supreme. Therefore whenever the Constitutional Court is approached, invoking Article 149.1.2 of the Constitution, with a challenge of a legally ratified international agreement, it is inappropriate to insist that the only relevant question is how the agreement was adopted and that the question of what has been agreed is irrelevant. The argument that the compliance of international agreements with the Constitution can be ensured, but prior to their ratification (Article 149.1.4 of the Constitution), is weak where a text to make such verification binding is missing. Moreover, such control *ex ante* is unacceptable especially if it is to be exercised over agreements that are governed by private law. After all, as the Constitution itself allows amending or denouncing ratified international agreements according to the procedure specified in the agreements (Article 85.3 of the Constitution), there should be no reason against amendments or denouncements based on a Constitutional Court decision. The National Assembly will have to approve texts to address the legal implications of a Constitutional Court decision that declares amendments or denouncements unconstitutional, just as it will have to enact legislation that is intended to amend or denounce such agreements or, to the extent possible, to adopt appropriate reserves.

As the case stands, the Dealer Agreement, the Agency Agreement and the Deed of Covenant that have been ratified by the challenged Act with the Constitutional Court were signed on 6 February 2015. As a foregoing move, a National Assembly's decision of 19 November [2014] sanctioned preparations to incur external sovereign debt amounting up to BGN 3,000,000,000 in 2014. Almost in parallel, Article 68 of the 2014 State Budget Act of the Republic of Bulgaria was amended to give the Council of Ministers the legitimate right to incur external sovereign debt to a ceiling of BGN 6,900,000,000 and to take action to prepare for incurring external sovereign debt subject to subsequent ratification in 2015. This course of action was put into the 2015 State Budget Act of the Republic of Bulgaria. Given the facts, it should be assumed that the National Assembly has given its prior consent [to the Government] to enter into an international sovereign loan agreement. The consent as per Article 84.9 of the Constitution may be worded in the form of a decision, however, drawing on *argumentum a fortiori* (argument based on stronger reason), it may equally be codified.

Languages:

Bulgarian.



Canada Supreme Court

Important decisions

Identification: CAN-2016-1-001

a) Canada / **b)** Supreme Court / **c)** / **d)** 15.04.2016 / **e)** 35982 / **f)** R. v. Lloyd / **g)** *Canada Supreme Court Reports* (Official Digest), 2016 SCC 13, [2016] 1 S.C.R. 130 / **h)** <http://scc.lexum.org/en/index.html>; [2016] S.C.J. no. 13 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.1 Sources – Categories – Written rules – **National rules**.
3.16 General Principles – **Proportionality**.
5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.

Keywords of the alphabetical index:

Drug, possession and trafficking, criminal offence / Sentence, minimum, mandatory / Discretionary power, court.

Headnotes:

Under Section 12 of the Canadian Charter of Rights and Freedoms, “[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment”. The mandatory minimum sentence of one year of imprisonment imposed by Section 5.3.a.i.D of the Controlled Drugs and Substances Act (hereinafter, the “CDSA”) violates Section 12 of the Charter and is not justified under Section 1, because it could constitute cruel and unusual punishment in reasonably foreseeable cases.

Summary:

I. The accused was convicted of possessing drugs for the purpose of trafficking. Because he had a recent prior conviction for a similar offence, he was subject to a mandatory minimum sentence of one year of imprisonment, pursuant to Section 5.3.a.i.D of the CDSA. Section 5.3.a.i.D provides a minimum sentence of one year of imprisonment for trafficking

or possession for the purpose of trafficking in a Schedule I or II drug, where the offender has been convicted of any drug offence (except possession) within the previous 10 years. The provincial court judge declared the provision contrary to Section 12 of the Charter and not justified under Section 1. The accused was sentenced to one year of imprisonment. The Court of Appeal allowed the Crown's appeal, set aside the declaration of unconstitutionality and increased the sentence to 18 months.

II. A majority of six judges of the Supreme Court of Canada allowed the appeal. The majority held that while the accused conceded that a one-year sentence of imprisonment would not be grossly disproportionate as applied to him, it could in other reasonably foreseeable cases. That was the problem in *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773. Again, in the present case, the mandatory minimum sentence provision covers a wide range of potential conduct.

At one end of the range of conduct caught by the mandatory minimum sentence provision stands a professional drug dealer who engages in the business of dangerous drugs for profit, who is in possession of a large amount of drugs, and who has been convicted many times for similar offences. At the other end of the range stands the addict who is charged for sharing a small amount of drugs with a friend or spouse, and finds himself sentenced to a year in prison because of a single conviction for sharing marijuana in a social occasion nine years before. Most Canadians would be shocked to find that such a person could be sent to prison for one year, according to the majority.

Another foreseeable situation caught by the law is where a drug addict with a prior conviction for trafficking is convicted of a second offence. In both cases, he was only trafficking in order to support his own addiction. Between conviction and the sentencing he attends rehabilitation and conquers his addiction. He comes to court asking for a short sentence that will allow him to resume a healthy and productive life. Under the law, the judge has no choice but to sentence him to a year in prison. Such a sentence would also be grossly disproportionate to what is fit in the circumstances and would shock the conscience of Canadians.

According to the majority, the reality is that mandatory minimum sentence provisions that apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are constitutionally vulnerable. This is because such provisions will almost inevitably include an acceptable reasonable hypothetical for which the mandatory

minimum will be found unconstitutional. If Parliament hopes to maintain mandatory minimum sentences for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit that mandatory minimum sentences. In the alternative, Parliament could provide for judicial discretion to allow for a lesser sentence where the mandatory minimum would be grossly disproportionate and would constitute cruel and unusual punishment.

Insofar as Section 5.3.a.i.D of the CDSA requires a one-year mandatory minimum sentence of imprisonment, it violates the guarantee against cruel and unusual punishment in Section 12 of the Charter. This violation is not justified under Section 1. Parliament's objective of combatting the distribution of illicit drugs is important. This objective is rationally connected to the imposition of a one-year mandatory minimum sentence under Section 5.3.a.i.D. However, the provision does not minimally impair the Section 12 right.

Finally, according to the majority, the provincial court judge's determination of the appropriate sentence is entitled to deference. The provincial court judge identified the appropriate sentencing range as 12 to 18 months. Applying a number of mitigating factors, he sentenced the accused to 12 months. Even if the provincial court judge had erred in stating the range, the Court of Appeal would not have been entitled to intervene. It did not establish that a 12-month sentence in this case was demonstrably unfit.

III. The three dissenting judges, however, held that the one-year mandatory minimum sentence in Section 5.3.a.i.D of the CDSA does not infringe Section 12 of the Charter. Given the extremely high threshold that must be met before a Section 12 infringement will be found, the Court has struck down mandatory minimums only twice since the Charter's enactment. This is simply not one of those rare cases. The mandatory minimum here is limited. It applies only to trafficking offences (not when the drugs are for personal use). It applies only to specific narcotics (Schedule I and II drugs) in specific quantities (of certain Schedule II drugs). And it applies only to certain repeat offenders. Thus, the minimum here does not cover a wide range of conduct. It is, rather, carefully tailored to catch only harmful and blameworthy conduct. The gross disproportionality test that has developed under Section 12 of the Charter is a difficult standard to meet, and it is not met in either of the sharing or rehabilitation scenarios described by the majority.

There was agreement with the majority's analysis on the jurisdiction of the provincial court judge as well as the majority's decision to restore the 12-month sentence.

Cross-references:

Supreme Court:

- *R. v. Nur*, 14.04.2015, *Bulletin* 2015/1 [CAN-2015-1-003].

Languages:

English, French (translation by the Court).



Identification: CAN-2016-1-002

a) Canada / **b)** Supreme Court / **c)** / **d)** 15.04.2016 / **e)** 36162 / **f)** *R. v. Safarzadeh-Markhali* / **g)** *Canada Supreme Court Reports* (Official Digest), 2016 SCC 14, [2016] 1 S.C.R. 180 / **h)** <http://scc.lexum.org/en/index.html>; [2016] S.C.J. no. 14 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

- 2.1.1.1 Sources – Categories – Written rules – **National rules.**
- 2.2.2 Sources – Hierarchy – **Hierarchy as between national sources.**
- 3.16 General Principles – **Proportionality.**
- 3.17 General Principles – **Weighing of interests.**
- 5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**

Keywords of the alphabetical index:

Constitutional right, Charter of rights and freedoms, violation / Criminal Code, unconstitutionality, declaration / Pre-sentence custody, credit / Right to liberty, minimum impairment / Public security, enhancing / Liberty, deprivation, unnecessary.

Headnotes:

Denying the possibility of awarding “enhanced” credit to certain offenders for time spent in pre-sentence

custody, if they were denied bail on the basis of their prior criminal record, violates such offenders’ liberty rights under Section 7 of the Canadian Charter of Rights and Freedoms by requiring them to serve more time in prison than they would have otherwise. This curtails liberty in a way that is overbroad, and does not conform to the principles of fundamental justice. While enhancing public safety and security is a pressing and substantial objective, the challenged provision is neither minimally impairing nor proportionate.

Summary:

I. Mr Safarzadeh-Markhali was arrested and charged with several offences. At his bail hearing, the bail judge made an endorsement that Mr Safarzadeh-Markhali’s detention was warranted primarily because of his criminal record. At sentencing, this endorsement made Mr Safarzadeh-Markhali ineligible to receive any enhanced credit for the pre-sentence custody that followed, pursuant to Section 719.3.1 of the Criminal Code.

Sentencing courts have historically given enhanced credit for time spent in pre-sentence custody, typically at a rate of two days for every day of detention. Parliament amended the Criminal Code to provide for a general expectation of one day of credit for every day spent in pre-sentence custody and, if the circumstances justify it, for an enhanced credit to a maximum of one and a half days. However, pursuant to Section 719.3.1, there is no enhanced credit if the offender was denied bail primarily on the basis of a prior conviction. The sentencing judge and the Court of Appeal held that the restrictions on enhanced credit in Section 719.3.1 were unconstitutional; the Crown appealed.

II. In a unanimous decision, the Supreme Court of Canada dismissed the appeal. While the appeal was moot as regards Mr Safarzadeh-Markhali, given his deportation to Iran, the Court was of the view that it was still important to determine the question of the constitutionality of the challenged provision. The Court declared the relevant portion of Section 719.3.1 unconstitutional, because its effect is to deprive some persons of liberty for reasons unrelated to its purpose, which does not conform to the principles of fundamental justice.

Section 719.3.1 of the Criminal Code violates Section 7 of the Canadian Charter of Rights and Freedoms because it imposes longer periods of custody on offenders who come within its ambit. The provision is overbroad because it catches people in ways that have nothing to do with the legislative purpose of Section 719.3.1, which is to enhance

public safety and security. It is a principle of fundamental justice that a law that deprives a person of life, liberty, or security of the person must not do so in a way that is overbroad. In this case, the provision at issue captures people it was not intended to capture: offenders who do not pose a threat to public safety or security.

The violation of Section 7 is not justified under Section 1 of the Charter. While the challenged provision is rationally connected to its purpose of enhancing public safety and security, it is neither minimally impairing nor proportionate. Alternative and more reasonable means of achieving its purposes were open to Parliament. The benefit to public safety by increasing access to rehabilitation programs is not trivial but the law's overbreadth means that offenders who have neither committed violent offences nor present a risk to public safety will be unnecessarily deprived of liberty.

The Court therefore declared the challenged portion of Section 719.3.1 of the Criminal Code to be unconstitutional and of no force and effect.

The Court also found that the Court of Appeal erred in declaring proportionality in the sentencing process to be a principle of fundamental justice under Section 7 of the Charter. The principles and purposes for determining a fit sentence, enumerated in Section 718 of the Criminal Code and provisions that follow – including the fundamental principle of proportionality in Section 718.1 – do not have constitutional status. The constitutional dimension of proportionality in sentencing is the prohibition of grossly disproportionate sentences in Section 12 of the Charter. The standard imposed by Section 7 with respect to sentencing is the same as it is under Section 12.

Languages:

English, French (translation by the Court).



Croatia Constitutional Court

Important decisions

Identification: CRO-2016-1-001

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 09.01.2016 / **e)** U-III-3676/2015 / **f)** / **g)** *Narodne novine* (Official Gazette), 21/16 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

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

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

3.18 General Principles – **General interest.**

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

Keywords of the alphabetical index:

Misdemeanour proceedings, indictment proposal, effect / Lease, contract, extension, conditions.

Headnotes:

According to the impugned legal provisions, misdemeanour proceedings brought against a hunting-land lessee give rise to an absolute and blanket legal barrier against the issuance of consent or extension of a lease contract on the lease of common hunting grounds with regard to that hunting-land lessee, notwithstanding the fact that the competent court had not yet rendered a final judgment to establish the lessee's misdemeanour liability.

The impugned legal condition constitutes an uncontrollable and effective means of abuse and an "automatic" prohibition to extend a lease contract with a particular hunting-land lessee on the lease of common hunting grounds under the disguise of the principle of legality and requirement of compliance. The legal condition that opens up such manifest possibilities of abuse does not conform to the requirements that may be derived for law-making from the rule of law.

The effects of an indictment proposal for a misdemeanour offence may not be deemed equal to the legal effects of a final and effective court decision on (proven) guilt for a committed misdemeanour offence.

Summary:

I. On the proposal of several hunting societies and associations, the Constitutional Court instituted proceedings to review whether Article 30.4 of the Hunting Act (hereinafter, the "Act") complies with the Constitution. It also considered whether to repeal the part of the Act that read: "provided that in the previous period no statements of claim were filed for the misdemeanour offences referred to in Article 96.1, subparagraphs 1, 2, 3, 5, 7, 9, 10, 11, 13, 14, Article 97.1, subparagraphs 1, 2, 3, 4, 5, 6, and Article 98.1, subparagraphs 6, 7, 10, 11, 12, 13 of this Act".

In the first three paragraphs, Article 30 of the Act regulates the manner and conditions for concluding a lease contract for common hunting grounds. The impugned paragraph 4 (in conjunction with the non-impugned paragraph 5) regulates the mechanism of extending such a contract.

To extend a lease contract for common hunting grounds, a hunting-land lessee must file a request for the contract's extension with the county or the City of Zagreb, at the earliest in the previous hunting year and latest, 120 days before the contract expires. The decision to extend the contract is made by the competent county or City of Zagreb authority (hereinafter, the "competent authorities") within 90 days before the expiration of the contract. The competent authority may extend it for the same period (10 hunting years), previously obtaining the consent of the competent ministry to the filed request, provided that in the previous period no statements of claim were filed against that hunting-land lessee (applicant) for the listed misdemeanour offences (see the second sentence of this summary).

The applicants considered that Article 30.4 of the Act was not in conformity with Article 4 of the Constitution (principle of separation of powers), Article 14.2 of the Constitution (equality of all before the law), Article 28 of the Constitution (presumption of innocence) and Article 29.1 of the Constitution (right to a fair trial).

II. After considering the applicant's request for a constitutional review, the Constitutional Court found that Article 3 of the Constitution (rule of law) and Article 28 of the Constitution (presumption of innocence) applied in this case.

Examining the legislator's justification to amend the impugned part of Article 30.4 of the Act, the Constitutional Court established that the Government, as the proponent of the amendment, failed to justify the proposed amendment. The Court found this unacceptable also because this was not just a technical amendment. It was a structural, normative intervention that significantly changes the very scope of the mechanism of extending a lease contract for common hunting grounds. The changes are both in terms of the extent of the authority of the competent authorities to make decisions of public interest about this in specific cases, and in terms of the objective legal possibility of applying this mechanism in practice.

The impugned legal condition for extending the lease contract effectively prohibits the competent authorities from giving consent or from extending a lease contract unless this condition is fulfilled.

More specifically, the legislator should have separated the misdemeanour proceedings against a hunting-land lessee (applicant) from the criterion for assessing the expediency and appropriateness of extending a contract based on the public interest and the specific circumstances of each particular case. By not doing so, the legislator raised the misdemeanour proceeding against a hunting-land lessee (applicant) to the level of an absolute and blanket legal barrier for issuing consent or for extending the lease contract on the lease of common hunting grounds to that hunting-land lessee. In addition, at the time, the competent court had not yet rendered a final judgment to establish whether the misdemeanour liability of the hunting-land lessee, existed or not.

It can be concluded that the competent authorities must proceed in the same manner (i.e., prohibit the lease of common hunting grounds) if a person committed a misdemeanour offence or an indictment proposal has been preferred against this person for a misdemeanour offence. This means that the legislator has equalised the legal consequences of preferring an indictment proposal for a misdemeanour offence against a hunting-land lessee by third persons. The legal consequences are derived from the fact that the offender actually committed the misdemeanour offence established by a final and effective court judgment (by which a misdemeanour sanction was imposed).

The Constitutional Court held that, by doing so, the impugned part of Article 30.4 of the Act may be abused. This is most evident when third persons prefer unfounded indictment proposal for misdemeanours against hunting-land lessees because a hunting-land lessee is "eliminated" from the procedure to extend his or her lease contract on common hunting grounds.

For the above reasons, the Constitutional Court held that the impugned legal condition prescribed by Article 30.4 of the Act, the fulfilling of which is also connected with a blanket legal prohibition of extending a lease contract for common hunting grounds, does not conform with Article 3 of the Constitution, specifically the rule of law as the highest value of the constitutional order.

Furthermore, the presumption of innocence (Article 28 of the Constitution) is prescribed by the Misdemeanour Act as the fundamental determinant of misdemeanour law. As long as such general legal rules on the nature of misdemeanour offences are in force, the Constitutional Court holds that the effects of an indictment proposal for a misdemeanour offence must not be placed on an equal footing with the legal effects of a final and effective court decision on the (proven) guilt of a hunting-land lessee for a committed misdemeanour offence. Therefore, the existence of an indictment proposal for a misdemeanour offence against a hunting-land lessee (applicant) cannot be raised to the level of an absolute and blanket legal prohibition to issue consent to such a hunting-land lessee or to extend his or her lease contract on common hunting grounds. Namely, without a final and an effective court judgment on the established misdemeanour liability of the hunting-land lessee (applicant), the availability of an indictment proposal must be and must remain only one of the criteria used by the competent authorities to assess the expediency and appropriateness of extending the lease contract from the aspect of protecting and promoting public interest in light of the particular circumstances of each specific case.

For the above reasons, the Constitutional Court held that the impugned legal condition for the prohibition of extending a lease contract for common hunting grounds, prescribed by Article 30.4 of the Act, does not conform to Article 28 of the Constitution.

Cross-references:

Constitutional Court:

- no. U-I-5345/2012 *et al*, 23.12.2014.

Languages:

Croatian, English.



Identification: CRO-2016-1-002

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 09.02.2016 / **e)** U-III-5989/2013 / **f)** / **g)** *Narodne novine* (Official Gazette), 25/16 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 3.10 General Principles – **Certainty of the law**.
 3.13 General Principles – **Legality**.
 5.2 Fundamental Rights – **Equality**.
 5.3.13.18 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Reasoning**.
 5.3.38.3 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Social law**.

Keywords of the alphabetical index:

Administrative Court, control / Administrative proceedings / Law, interpretation, formalistic, consequences / Law, aggregate effect of several laws / Law, reflex effect / Retroactivity, suspension, salary compensation / Remuneration, leave to care for a child with disabilities / Remuneration, retroactive suspension.

Headnotes:

If one law is applicable in a specific case, but the common effects of this and other laws directly affect the legal rights or obligations of the parties, then the competent bodies, including courts, must interpret the applicable legislation in its entirety, based on the common impact raised by the parties in light of specific circumstances of the case. The competent bodies' decisions must not lead to an unreasonable and objectively unjustified outcome for the parties themselves and especially not violate their constitutional rights or the objective values of the Croatian constitutional order.

Legal certainty – in conjunction with the principle of supremacy of the law – implies that the law is created to be applied in practice to specific life situations. Although an abstract evaluation of the legislation itself is important for the realisation of the principle of the rule of law, the categorical nature of objective law in no way means that legal rules may be applied to specific life situations in such an inflexible, mechanical or blind manner that it becomes impossible to respect the imperatives of reason and fairness. If such is the case, this will constitute excessive formalism contrary to the Constitution.

Summary:

I. The applicant filed a constitutional complaint against a judgment of the Administrative Court in Rijeka and the rulings of the competent administrative body, the Croatian Institute for Health Insurance (hereinafter, the "CIHI"), of second and first instance.

In the impugned first-instance ruling, the payment of the applicant's salary compensation was retroactively suspended while she was exercising her right to leave of absence in order to care for a child with serious developmental disorders (hereinafter, "salary compensation during child care"). The suspension of payment of 18 months in arrears followed the retroactively established termination of the employer's craft business, due to his disability retirement, where the applicant had been employed.

Namely, since 25 July 2007 the applicant had been employed with the employer-craftsman, and on these grounds, she was also the beneficiary of mandatory health insurance.

The employer-craftsman deregistered the applicant's employment on 30 May 2012.

However, the official records of insured persons of the CIHI show that the applicant of the constitutional complaint had been insured on the grounds of employment with the employer-craftsman from 25 July 2007 to 4 November 2010, since, due to the retroactive establishment of the day when her employer's craft business had been terminated, her employment ceased on 4 November 2010 (18 months before it was deregistered).

The applicant's appeal against the first-instance ruling was denied by the impugned second-instance ruling, and the applicant's statement of claim to pronounce the second-instance and first-instance rulings of CIHI null and void was rejected by the impugned judgment of the Administrative Court in Rijeka.

In her constitutional complaint, the applicant pointed out violations of her constitutional rights guaranteed in Article 14.2 of the Constitution (equality of all before the law) in conjunction with Article 48.1 of the Constitution (right of ownership) and Article 19.2 of the Constitution (judicial review of the legality of individual acts of administrative authorities), Article 62 of the Constitution (the state protecting maternity, children and youth) and Article 90.5 of the Constitution (for specific justified reasons, only some provisions of the Constitution may have a retroactive effect).

II. The Constitutional Court considered the applicant's constitutional complaint from the aspect of Article 19.2 of the Constitution in conjunction with Article 29.1 of the Constitution, which guarantee a fair trial in administrative disputes concerning the legality of an administrative act. The Court also considered the applicability of Article 48.1 of the Constitution, because the amount of salary compensation that the applicant received after 4 November 2010, while she was caring for the child, was the applicant's assets. The mentioned constitutional rights were also viewed by the Court in the light of the rule of law (legal certainty and predictability), as the highest value of the constitutional order established by Article 3 of the Constitution, of which an inherent part is the principle of legality of the activities of the administration (Article 19.1 of the Constitution).

The outcome of the case at hand was the consequence of the decisions of two competent bodies and concerned two different administrative matters of two different parties on the basis of two laws: the Maternity and Parental Benefits Act (hereinafter, the "MPBA") and the Trades and Crafts Act (hereinafter, the "TCA").

In this case, the applicant was not the addressee of the TCA. This was her employer-craftsman. The TCA had only a reflective, but nevertheless direct, effect on the outcome of the procedure conducted by the CIHI concerning the applicant's administrative matter.

The MPBA recognised the right to a salary only for a parent with a child with serious developmental disorders, who is employed or self-employed (Article 24.a in conjunction with Article 23.1) and the salary compensation was paid from State Budget funds (Article 24.b). Pursuant to this Act, the termination of the employment relation for such a parent meant also the loss of that right. The MPBA did not foresee the possibility of a retroactive termination of employment for such a parent. However, the reflective effect of the TCA on such a parent opened up such a possibility.

Namely, the second sentence of Article 37.2 TCA prescribes that a craft business may not be deregistered retroactively, unless the craftsman is granted the right to disability pension, and then the termination of the craft business by means of its deregistration is established on the day when the decision granting the right to disability pension becomes final and effective.

At the same time, the TCA did not foresee the possibility of the reflective effect of Article 37.2 TCA on the recognised legal rights of third persons, when the exercise of these rights directly depends, arises,

or is connected with the date of termination of the craft business (as in the case of the termination of employment and with legal rights arising from the employee's employment relation with such an employer-craftsman, as was clearly shown by this case).

It can be concluded that these two laws have had a joint effect on the applicant's right to salary compensation for the care of her child, due to which CIHI, as the competent body, had the constitutional duty to interpret these laws so that their effects do not violate the applicant's constitutional rights. The CIHI had to resolve the applicant's case in light of both laws, so as to acknowledge their different legitimate goals aimed at different addressees, to apply the principles of proportionality and legitimate expectations to the applicant's case, and to examine whether the applicant in the specific circumstances of the case at hand bears an excessive burden.

Instead, the CIHI resolved the applicant's case in an extremely selective and formalistic manner, limiting itself solely to strictly applying the MPBA, and ignoring the reflective effect of the TCA.

With regard to the impugned judgment, the Administrative Court in Rijeka accepted the interpretation of the CIHI and also the joint effects of the two laws on the individual legal situation of the applicant, as a completely acceptable default solution. The Administrative Court in Rijeka accepted without reservations that "the termination of a craft business is established by the competent office of state administration in the county, and not by the CIHI", so that the CIHI "is not authorised to establish a different date for the termination of the craft business". From that day, retroactively, on the basis of the law itself, "her right to leave of absence to care for her child was suspended and also the right to financial remuneration" because the rights referred to in the MPBA "may not be exercised unless the requirements prescribed by these special legal provisions are met".

The Constitutional Court found that both the CIHI and the Administrative Court in Rijeka adopted an excessively formal and inflexible approach to the applicable law. They neglected the general principles of the Croatian legal order based on the rule of law and the protection of particular constitutional rights of individuals, as well as the unfair, unjustified, unreasonable, even oppressive joint effects that the two laws have on the applicant's individual legal situation. The Administrative Court in Rijeka did not even attempt to interpret the applicable provisions of the two laws in the light of the particular circumstances of the case at hand, by contextualising

their application. It ignored its own constitutional obligation not to allow, either in a legal or factual way, a legal benefit that benefits a disabled employer-craftsman to have a reflective, harmful effect on the legal situation of a third party (in the case at hand, the applicant as employee), by retroactively abolishing already granted and exercised legal rights.

The Constitutional Court recalled the general legal principle that retroactivity is not desirable in civil and administrative law if it has negative effects on the rights and legal interests of individuals.

The Constitutional Court found that the impugned judgment of the Administrative Court in Rijeka violated the applicant's constitutional right to a fair trial in an administrative dispute concerning the legality of an administrative act (Article 19.2 of the Constitution in conjunction with Article 29.1 of the Constitution).

The Court established that the impugned administrative acts of the CIHI violate, in particular, the legitimate expectation of the applicant, guaranteed by Article 48.1 of the Constitution, that her right to salary compensation while exercising her right to leave of absence in order to care for a child with serious developmental disorders would be recognised pursuant to a decision of the CIHI. Alternatively, it should be recognised for as long as she exercises this right on the grounds of an employment relation, and on which right the benefit granted to her employer-craftsman for the termination of his craft business to be retroactively recognised should not have a negative effect, and neither should the employer's benefit have such an effect on the duration of the applicant's employment relation.

The Constitutional Court established that:

- the amount of salary compensation during the exercise of the right to leave of absence in order to care for a child with serious developmental disorders, which the applicant received until the deregistration of her employment on 30 May 2012, shall be considered the applicant's lawfully received assets protected by Article 48.1 of the Constitution; and
- the competent bodies are obliged to ensure for the applicant (at her request if the filing of a request is a legal requirement) all the legal rights pertaining to her and which arise from her status as parent of a child with serious developmental disorders, counting from 30 May 2012.

Finally, the Court emphasised that the applicant must not suffer other harmful consequences that would arise from the decisions adopted by the application of the TCA, and which concern the applicant's employer-craftsman. They include the prohibition of possible harmful effects occurring for the applicant's rights arising from employment until the day of deregistration, 30 May 2012, and the rights pertaining to her as part of the system of mandatory health insurance, counting from 30 May 2012.

Languages:

Croatian, English.



Identification: CRO-2016-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 01.03.2016 / **e)** U-III-5694/2013 / **f)** / **g)** *Narodne novine* (Official Gazette), 27/16 / **h)** CODICES (Croatian).

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.**
- 3.22 General Principles – **Prohibition of arbitrariness.**
- 4.7.9 Institutions – Judicial bodies – **Administrative courts.**
- 5.3.13.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Scope.**
- 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:

Administrative Court, control / Administrative proceedings, fairness / Time-limit, administrative procedural-law / Time-limit, administrative substantive-law / Time-limit, calculation / Time-limit, right, condition.

Headnotes:

The rule of law applies to administrative activities (Article 19.1 of the Constitution). Individuals possess the right to legal certainty, which is implicitly included in the right to a fair trial guaranteed separately by Article 29.1 and in conjunction with Article 19 of the Constitution.

The practical importance of correctly differentiating substantive-law and procedural-law deadlines in administrative law is significant, impacting the individual legal positions of the parties in administrative proceedings.

Summary:

I. The applicant filed a constitutional complaint against a judgment of the Administrative Court in Osijek and the ruling of the competent administrative body of the second and first instance (hereinafter, “impugned rulings”). The administrative proceedings took place in the first instance from 1997 to 2011. Filing the request at the first-instance administrative body, the applicant asserted the right to compensation for confiscated property by the Yugoslav communist authorities (seized from the previous owners or their legal inheritors in the first hereditary line of succession). The property was then transferred into general national property, state, social or cooperative property through confiscation, nationalisation, agrarian reform and other regulations and manners set out by law (hereinafter, “request”). These requests were filed in different legislative periods when the Act on Compensation for Property Confiscated was still valid during the Yugoslav Communist Rule.

The applicant filed the request to be granted the right to compensation for the seized property on 7 January 2003, the first working day after two non-working days. The applicant interpreted the deadline for filing the request referred to in Article 7.1 of the Act on Amendments to the Act on Compensation for Property Confiscated during the Yugoslav Communist Rule of 2002 (hereinafter, “AA AC/02”) to be of a substantive-law nature. Therefore, the rule referred to in Article 101.2 of the General Administrative Procedure Act of 1991 (hereinafter, “GAPA/91”), which applies to procedural-law deadlines, does not apply to it. The competent administrative bodies of first and second instance, however, dismissed the applicant's request as untimely. The Administrative Court upheld the decision by a final judgment, stating that the same legal stance had also been taken by the High Administrative Court of the Republic of Croatia (hereinafter, “HACRC”).

In her constitutional complaint, the applicant stated that her request had been filed within the deadline, because the last day of the deadline prescribed by Article 7 AA AC/02 fell on Sunday, 5 January 2003, and 6 January 2003, which was the holiday of the Epiphany. Hence, her request had been filed on the first working day thereafter, 7 January 2003. She considered that her constitutional right to a fair trial, guaranteed by Article 29.1 in conjunction with Article 29.2 of the Constitution, had been violated (judicial review of the legality of individual acts of administrative bodies). She also invoked a violation of Article 5 of the Constitution, which, in the circumstances of the case at hand, is related to the principle of legality in the activity of the administration referred to in Article 19.1 of the Constitution.

The assessment concerning the untimely filing of the request raised the question whether the deadline was a procedural or substantive-law nature. The distinction is significant as it determines the expiration of this deadline, considering the last day of the deadline fell on Sunday, 5 January 2003 (a non-working day), and 6 January 2003 was a public holiday (also a non-working day).

Article 7.1 AA AC/02 prescribed that the request had to be filed within six months from the coming into force of AA AC/02.

At the relevant time (2003), the deadlines in administrative procedure law (procedural-law deadlines) were regulated in Title VI (in Articles 99-102) GAPA/91. Similar provisions are also included in Title V (Articles 79-82) of the General Administrative Procedure Act of 2009 (hereinafter, "GAPA/09").

Article 101.2 GAPA/91 prescribed that if the last day of the deadline fell on a public holiday, a Sunday or a day when the body is not working, the deadline would expire on the next working day thereafter. Article 81.2 GAPA/09 prescribed nearly the same rule.

II. The deadline prescribed by Article 7.1 AA AC/02 was a fundamental issue underlying the applicant's administrative procedure and the administrative dispute. In that light, the Constitutional Court reviewed an applicable case law concerning the acceptability of the HACRC's legal interpretation accepted by the administrative courts and the competent administrative bodies. In the aforementioned case, the deadlines for filing the request to be granted the right to compensation for the seized property were deemed a substantive-law nature. The deadlines are referenced in Article 65 of the Act on Compensation for Property Confiscated during the Yugoslav Communist Rule of 1996 (hereinafter, "AC/96") and Article 7 AA AC/02. The Constitutional

Court also found that the applicable law had not been interpreted and applied arbitrarily.

After examining the HACRC's reasoning, the Constitutional Court established they were neither relevant nor sufficient to sustain such a finding. Furthermore, the Court established that these deadlines were classic procedural-law preclusive deadlines in the meaning of Article 99.1 GAPA/91, which applied the rule referenced in Article 101.2 GAPA/91. The Constitutional Court had to reconsider the constitutionality of the HACRC's legal interpretation that the deadlines gave rise to a substantive-law nature.

The Constitutional Court found that this legal interpretation would significantly change the legal meaning of substantive-law deadlines in administrative law. Additionally, it would blur their differentiation from procedural-law deadlines, which would distort their morphology and in practice, threaten the legal certainty of the calculation of deadlines for filing requests with administrative bodies.

When making these conclusions, the Constitutional Court was guided by the requirements arising from the principle of legal certainty of the objective legal order as well as of parties in administrative and administrative court procedures.

The Court took the following general legal positions:

- Both Articles 65 AC/96 and 7 AA AC/02 deal with a typical and usual procedural-law deadline in administrative law of a preclusive character, which leads to the cessation of procedural authority to institute administrative proceedings for missing the deadline to file a request to be granted the right to compensation for seized property; and
- Article 101.2 GAPA/91 (Article 81.2 GAPA/09) is applied to the calculation of the expiration of the deadline for filing the request to be granted the right to compensation for seized property in the meaning of Articles 65 AC/96 and 7 AA AC/02.

The Constitutional Court found the administrative bodies' and the administrative court's decision arbitrary from the aspect of legal certainty as an inextricable part of the rule of law (Article 3 of the Constitution). The rule of law (also) relies on the principle of legality in the activities of the administration (Article 19.1 of the Constitution). The highest value of the constitutional order appears in legal situations in the form of a specific constitutional right to legal certainty, which is implicitly included in

the right to a fair trial (Article 29.1 of the Constitution in conjunction with Article 19 of the Constitution).

Applying the above general legal positions to the specific case, the Constitutional Court established that the deadline referenced in Article 7 AA AC/02 had expired on 7 January 2003, that is, at the end of the working day following two non-working days, 5 and 6 January 2003 (a Sunday and a public holiday).

The Constitutional Court ruled also that the effects of the HACRC's legal position concerning the substantive-law nature of the deadline, which was also accepted by the competent administrative bodies and the Administrative Court in Osijek and directly applied in the applicant's case, violated the applicant's right to a fair trial (Article 29.1 of the Constitution in conjunction with Article 19 of the Constitution).

Until the rendering of this decision, the Constitutional Court had rejected applicants' constitutional complaints in two similar cases, based on the HACRC's interpretation on the substantive-law nature of the deadline was constitutionally acceptable.

The Constitutional Court assessed the circumstances of these cases, the matter of the dispute, and the character of the legal issue raised in them. The Court also considered the real possibilities of correcting the harmful effects that – in comparison with the applicant of the constitutional complaint in the case at hand – these applicants suffered, as well as other applicants whose requests referred to in Article 7 AA AC/02 had been dismissed as untimely, because they had been filed on 7 January 2003. The Constitutional Court held it would apply Article 31.4-5 of the Constitutional Act on the Constitutional Court to these cases, according to which the Constitutional Court may determine to which body it will delegate the execution of its decision and the manner of its execution.

The Constitutional Court declared in the operative part of this decision that: all the requests to be granted the right to compensation for seized property filed with the competent administrative body on 7 January 2003 pursuant to Article 7.1 AA AC/02 shall be timely. The Constitutional Court added that the previous owners or their legal successor in the first hereditary line of succession, who had filed requests with the competent administrative body on 7 January 2003 to find that their requests were dismissed for being untimely, have the right to resubmit the request within six months, counting from the first day following the publication of this decision in the Official Gazette.

The Constitutional Court delegated the execution of this decision to the competent administrative bodies and administrative courts.

Languages:

Croatian, English.



Costa Rica

Supreme Court of Justice

Important decisions

Identification: CRC-2016-1-001

a) Costa Rica / **b)** Supreme Court of Justice / **c)** Constitutional Chamber / **d)** 22.04.2015 / **e)** 05613/15 / **f)** / **g)** *Boletín Judicial* (Judicial Bulletin), no. 149, 03.08.2015 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

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

5.4.9 Fundamental Rights – Economic, social and cultural rights – **Right of access to the public service.**

Keywords of the alphabetical index:

Citizenship, categories / Naturalisation, public office, restriction.

Headnotes:

Title II of the Constitution does not distinguish between nationals by birth or those that acquire nationality through the naturalisation process. The Costa Rican constitutional forefathers instituted no differences among these two types of nationals, establishing for them the same rights and duties, as equals. Article 18 of the Constitution states “Costa Ricans must observe the Constitution and the laws, serve and defend the country and contribute to the public expenses”.

Discretion to create a different legal treatment between born or naturalised citizens only pertains to the constitutional forefathers or if approved by a constitutional amendment.

Beyond these regulated limitations established on the rights of naturalised citizens, the ordinary legislators are constitutionally prohibited from restricting the right to hold public office.

Summary:

I. On 27 January 2014, the Procurator General of the Republic filed an action of unconstitutionality before to the Constitutional Chamber to strike down legislation contained in the Organic Law of the Procurator General’s Office that restricts the office of the Procurators to Costa Rican-born citizens.

The Procurator General of the Republic filed the case pursuant to Article 75.3 of the Law of the Constitutional Jurisdiction which provides for the Comptroller General of the Republic, the Procurator General of the Republic, the Prosecutor General of the Republic, and the Ombudsman to have direct access to the Constitutional Chamber.

The Procurator General argued that the impugned legislation burdened all naturalised attorneys interested in having access to a Procurators office, as they were excluded by their condition of being naturalised Costa Ricans. Moreover, for those within the institution, it blocked all professional promotion expectations within an administrative career.

II. The Constitutional Chamber observed that a 1995 amendment to the Constitution repealed the possibility of naturalised citizens to lose their Costa Rican nationality if they left the country for more than six consecutive years, save for any demonstrable ties to the country during that same period. Moreover, the Chamber observed those cases where the Constitutional forefathers did distinguish among born and naturalised citizens. Only Costa Rican born citizens can serve as President and/or Vice-President of the Legislative Assembly, in the Executive branch, or as President of the Supreme Court of Justice and of the Supreme Electoral Tribunal. On other cases such restrictions where leaner, naturalised Costa Rican citizen were required to wait twelve months after obtaining the respective certificate of naturalisation before voting in elections and ten years before they could become a congressman or Justice of the Supreme Court.

Even though its citizenship treatment in the Constitution is unequal, this does not translate into two classes of citizenship. The Court concludes that the constitutional forefathers did not authorise the legislators to add more restrictions to naturalised citizens than those already incorporated to the Constitution. Relying on a 1994 precedent number 6780 (see below under Cross-references), the Constitutional Chamber argued that the interpretation of the consequences of naturalisation set forth by the constitutional forefathers had to be interpreted restrictively; some of them are political in nature and limit access to certain public offices.

Therefore, bearing in mind the principle of equality, if these restrictions were written in the Constitution they could not be interpreted extensively. The Chamber reaffirmed the equal status treatment of all citizens that ordinary legislators had to respect. The ordinary legislation can establish differences between foreigners and citizens, but not between born and nationalised citizen.

The Constitutional Chamber concluded that the requirement contained in the legislation to limit holders of a Procurator position to be limited to Costa Rican born citizens impinged access to other Costa Ricans, naturalised citizens, and was therefore unconstitutional.

III. In a note added to the decision, Justice Rueda Leal clarifies his stance reaffirming his legal position in the instant case to reject differences between Costa Ricans, however in relation to another case decided the same day, he argues that a similar legal treatment banning foreigners from working in the judiciary was also unconstitutional, as the law did not discriminate specifically between relevant positions of the administration of justice.

Cross-references:

Constitutional Chamber:

- Decision no. 1994-06780, 22.11.1994.

In that decision, the Constitutional Chamber declared unconstitutional an interpretation of the Article 3.a of the Extradition Law that protects Costa Rican born or naturalised citizens from being expelled out the country. It reaffirmed the right established in Article 32 of the Constitution that says "No Costa Rican may be compelled to abandon the national territory".

The Constitutional Chamber ruled this practice unconstitutional and concluded that the only lawful moment to extradite a citizen would be after the Costa Rican nationality was revoked.

Languages:

Spanish.



Czech Republic Constitutional Court

Statistical data

1 January 2016 – 30 April 2016

- Judgments of the Plenary Court: 5
- Judgments of panels: 73
- Other decisions of the Plenary Court: 7
- Other decisions of panels: 1 322
- Other procedural decisions: 40
- Total: 1 447

Important decisions

Identification: CZE-2016-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** First Panel / **d)** 19.01.2016 / **e)** I. ÚS 750/15 / **f)** Disciplinary fine for insulting statements about a judge made in a written filing / **g)** *Sbírka nálezů a usnesení* (Court's Collection) / **h)** <http://nalus.usoud.cz>; CODICES (Czech).

Keywords of the systematic thesaurus:

- 3.16 General Principles – **Proportionality**.
- 4.7.2 Institutions – Judicial bodies – **Procedure**.
- 4.7.4.1.1 Institutions – Judicial bodies – Organisation – Members – **Qualifications**.
- 4.7.4.1.2 Institutions – Judicial bodies – Organisation – Members – **Appointment**.
- 4.7.4.1.5 Institutions – Judicial bodies – Organisation – Members – **End of office**.
- 5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality**.
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

Keywords of the alphabetical index:

Court, wrongful criticism, protection / Freedom of expression, holder of rights / Judge, defamation.

Headnotes:

It is unacceptable for parties to proceedings and their attorneys to attack judges with vulgar or unsubstantiated statements simply because they have reservations about their actions in the proceeding.

Summary:

I. The applicant had been the general representative of a father in proceedings on the custody of minor children. During the hearing, he objected that the magistrate was biased; he was subsequently called on by a resolution to justify the statement. The written justification of the objection of bias was found by the district court to be grossly insulting under Article 53.1 of the Civil Procedure Code, and the applicant was given a disciplinary fine of CZK 50,000 by the contested resolution. The appeals court agreed with the first level court's conclusion that the applicant's filing was grossly insulting, but in deliberations on the amount of the disciplinary fine it took into account the assets of the person in question (an old-age pensioner with an income of CZK 8,193) and reduced the disciplinary fine to CZK 25,000. The applicant contested both decisions through a constitutional complaint.

II. The Constitutional Court pointed out, with reference to its case-law and that of the European Court of Human Rights, the general principles for possible restriction of the freedom of speech in particular in the case of "hybrid statements" (statements combining a factual basis and an element of evaluation), for which it is necessary to determine to what degree they have a factual basis and whether they are exaggerated, in view of the demonstrated factual basis. The Constitutional Court noted that consideration should be given to the question of who was being targeted by the criticism, who was making the criticism, in what forum and in what way.

In the Constitutional Court's opinion, it was to the applicant's advantage that he acted in the position of a general representative (who"), placing him in a similar position to an attorney, whose statements before a court are accorded special protection. However, such representatives are also subject to a requirement of professional conduct and control of their emotions before the court, especially because they are not party to the proceedings (who are personally affected by the matter).

The present matter did not involve public criticism ("where"), as the criticism was made in correspondence with the court. However, it speaks against the applicant that he criticised a specific person, the judge ("against whom"), not the judicial branch as such, or a court decision. Most of the applicant's statements were not concerned with the judge's professional actions; they were directed at her private and family life ("what"). Moreover, the applicant's statements were in writing ("format"), so this was not spontaneous speech, which, because of its immediacy and possible impulsiveness, enjoys greater protection.

As regards the statements concerning the judge's alleged bad mental health, the Constitutional Court pointed out that such criticism must be based on objective grounds. The applicant provided no objective justification. Therefore, the Constitutional Court concluded that the his statements concerning the judge's mental health and deviant behaviour did not have sufficient support in a factual basis, and were so insulting that they amounted to excessive speech, which does not enjoy constitutional law protection under Article 17 of the Charter of Fundamental Rights and Freedoms and Article 10 ECHR.

In conclusion, the Constitutional Court also added that the applicant's statements obviously exceeded the bounds of generally recognised good manners, and were themselves sufficient to discredit the person of the deciding judge. Under the case-law of the European Court of Human Rights, such pejorative, vulgar expressions are protected only in exceptional cases, for example if they are provoked by similarly or equally sharp statements on the part of the judge directed at the party to the proceedings or his legal representatives [the "retaliatory" function of freedom of speech].

III. The judge rapporteur in the case was Kateřina Šimáčková. No judge filed a dissenting opinion.

Languages:

Czech.



Identification: CZE-2016-1-002

a) Czech Republic / b) Constitutional Court / c) Second Panel / d) 19.01.2016 / e) II. ÚS 3436/14 / f) Right to effective investigation of a crime / g) *Sbírka nálezů a usnesení* (Court's Collection) / h) <http://nalus.usoud.cz>; CODICES (Czech).

Keywords of the systematic thesaurus:

4.7.4.3 Institutions – Judicial bodies – Organisation – **Prosecutors / State counsel.**

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

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

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

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

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

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

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

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

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

Keywords of the alphabetical index:

Crime, suspicion / Extortion, serious / Forced labour, prohibition / Investigation, effective.

Headnotes:

The fundamental right of persons who report a crime to its effective investigation requires that law enforcement bodies take into account in their investigation the scope, nature and gravity of the reported crime, the number of persons reporting it or their nationality, and investigate the reported crime properly and without unnecessary delays. Effective investigation does not guarantee a particular result of the investigation; only that the body in question followed proper procedures.

Summary:

I. The applicants in this matter, persons who had reported a crime, claimed that the police body and state prosecutor's office suspended a suspicion of

commission of a crime, alleged to have been committed by the accused entrepreneurs, who concluded written contracts with them for the performance of forestry work, although they knew that they would not pay them the agreed wages. The applicants alleged that they were the victims of the crime of human trafficking, or, in the alternative, fraud; they described being held in unbearable conditions in remote locations in the forest, having to work 12 to 14 hours a day, seven days a week, they were threatened with physical liquidation if they did not continue the work, and were systematically humiliated. The applicants alleged that the investigation was conducted arbitrarily, as the law enforcement bodies divided the matter between individual departments of the Police of the Czech Republic, which did not co-operate with each other and had no organised leadership. Eventually, the District Directorate of the Police of the Czech Republic for Prague IV was found to have jurisdiction by place and subject matter; it passed the case to the same directorate in Prague I, which suspended it *ad acta*, and the state prosecutor's office subsequently denied the complaint as being unjustified. The applicants argued that there was scarce justification for these decisions and several fundamental factual circumstances were overlooked.

II. The Constitutional Court has already stated in its case-law that a criminal proceeding is a relationship between the perpetrator and the state, and there is no constitutionally guaranteed right for a third party (the party reporting the crime or a victim) to have another person prosecuted and convicted. At the same time, the state has a clear obligation to ensure the protection of fundamental rights, *inter alia* through effective criminal proceedings (Judgment file no. I. ÚS 3196/12). Intervention by the Constitutional Court is also appropriate in exceptional situations, with more serious crimes, when simply addressing them through civil law means would be inadequate.

In this case, the Constitutional Court found that the above-mentioned conditions for intervention existed in the context of the particular circumstances of the case. Apart from the fact that the applicants reported the exceptionally serious crime of human trafficking (Article 168 of the Criminal Code), a very high number of persons sought protection. Moreover, the incorrect procedures by the law enforcement bodies could conflict with the international obligations of the Czech Republic (Article 1.2 of the Constitution) that concern effective protection of human freedom and dignity; these violations could have taken place over a lengthy period, on a greater scale, and with whole groups of people.

The Constitutional Court identified arbitrariness in the simple fact of the focus of the bodies concerned on the question of whether fraud occurred, whilst completely ruling out a more serious legal category from their deliberations. Suspicion of commission of serious organised crime arose from the testimony of several dozen people, so the police body and the state prosecutor *de facto* refused to address the claims raised by the people reporting a crime.

The Constitutional Court did not agree with the opinion of the Organised Crime Unit (hereinafter, the "OCU") that a legal classification under Article 168 of the Criminal Code (the crime of human trafficking) can be ruled out if, for example, the victims "could always leave the job". It pointed to the fact that in these cases the actual opportunity for the victim to leave the place of work is illusory, because the victim is put under pressure in ways other than direct supervision and direct violence (through indebtedness, threats, or the victims' inability to travel to leave). As regards the OCU's suspicion, stated in the assessment of the file materials, that the crimes of fraud, extortion and threatening danger could have taken place, the law enforcement bodies did not address this legal classification in any way during the criminal proceedings.

The Constitutional Court also had serious reservations about the manner in which the police body handled the reports from the labour inspectorate. It considered the manner in which the state prosecutor, in the decision to suspend the case, to be inadequate and purely formal; it did not correspond to the scope, nature, or seriousness gravity of the suspicions being investigated that the matter was quite inorganically split between several police bodies, albeit within the various regional directorates of the Police of the Czech Republic. Finally, it concluded that the case suffered considerable delays.

The Constitutional Court therefore concluded that the contested decisions of the Police of the Czech Republic and the District State Prosecutor's Office made impossible the effective investigation of criminal activity and violated the applicants' rights under Articles 8.1, 9 and 10.1 of the Charter of Fundamental Rights and Freedoms, along with Articles 4.1, 4.2 and 5.1 ECHR. It granted the applicants' petition and annulled the contested decisions. The constitutional complaint of a further group of victims is addressed in Judgment file no. II. ÚS 3626/13.

III. The judge rapporteur in the case was Vojtěch Šimíček. No judge filed a dissenting opinion.

Languages:

Czech.



Identification: CZE-2016-1-003

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Panel / **d)** 12.04.2016 / **e)** IV. ÚS 3035/15 / **f)** Hospital charges for father attending his child's birth / **g)** *Sbírka nálezů a usnesení* (Court's Collection) / **h)** <http://nalus.usoud.cz>; CODICES (Czech).

Keywords of the systematic thesaurus:

5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings**.
5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

Keywords of the alphabetical index:

Child, birth, parent, right / Health service, fee.

Headnotes:

Hospitals may not charge fathers simply for attending the birth of their children. The right to attend the birth of one's child may not be conditioned by contribution to common costs of running the hospital. However, a reasonable charge may be imposed for specific services, subject to the father's consent, which exceed the statutory obligations.

Summary:

I. The applicant is a father who was charged 500 CZK (19 EUR) by a hospital for attending the birth of his child. He filed an action against the hospital, alleging that the hospital unjustly enriched itself by charging him for the common costs, covering a one-time garment and shoes plus training, and for a small profit. The first instance court dismissed the action in part. The applicant lodged a constitutional complaint, alleging that his right to family life was breached.

II. The Constitutional Court found that the applicant's right to fair trial had been breached as the lower court dismissed his action for unjust enrichment despite the hospital's sweeping justification for the charge. The enjoyment of the right to attend the birth of one's child may not be conditioned by contribution to common costs of running the hospital, such as one-time garment and shoes. The first-instance court did not examine the extent of the training, its content and necessity. The decision was also surprising as the court relied on a different legal qualification than the one brought by the applicant without previous notification of the modification to the parties of the proceedings.

The Constitutional Court noted that the charge was a regular private law fee, albeit imposed in relation to a public law service. It held that hospitals may not charge fathers for their mere attending the birth of their children. Such charges may be imposed only for services going beyond statutory obligations of hospitals and fathers (or any other persons in similar situation) must first be consulted. Such charges must be reasonable and foreseeable. Failure to pay in advance must not affect the right to attend the birth.

III. The judge rapporteur in the case was Jaromír Jirsa. No judge filed a dissenting opinion.

Languages:

Czech.



Estonia

Supreme Court

Important decisions

Identification: EST-2016-1-001

a) Estonia / **b)** Supreme Court / **c)** *en banc* / **d)** 12.04.2011 / **e)** 3-2-1-62-10 / **f)** / **g)** www.riigiteataja.ee/akt/121042011016 / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Access to courts, limitations / Court fee, excessive cost.

Headnotes:

The objective that in an action, at least in case of monetary disputes, the state costs for the administration of justice shall be borne by court fees paid by the participants in the proceeding can be deemed permissible under the Constitution; as well as for reasons of procedural efficiency in order to avoid unfounded, vexatious and other similar appeals. However, the possible objective of using court fees to earn extra income for the state and to finance from it other expenses of the state, if the fee is higher than is necessary for ensuring the bearing of the legal costs by the participants and procedural economy, cannot be considered legitimate.

The need to ensure the right to appeal outweighs procedural efficiency and the participation of the litigants in bearing the legal costs. The latter objective should be achieved in a way that a person lacking effective means can protect his or her fundamental rights in court.

Summary:

I. The applicant had requested a court order directing the defendant to pay the sum of 31,500,000 kroons (15,6 kroons = 1 euro) as a principal debt. The county court dismissed the action.

The applicant subsequently filed an appeal, for which he did not pay a state fee. The applicant requested to hear the appeal without payment of the fee, by arguing for procedural assistance under the existing regulatory framework for procedural assistance, but without application of the additional conditions pertaining to legal persons (which are entitled to very limited financial assistance under the law). The circuit court did not exempt the applicant from the obligation to pay the fee and did not grant him procedural assistance and required him to pay a state fee of 945,000 kroons for the appeal.

In the appeal against the court ruling filed with the Supreme Court, the applicant requested the annulment of the circuit court judgment and a new ruling accepting the appeal without requiring any further state fee or granting him procedural assistance to that extent.

Upon the filing of a statement of claim, a state fee, according to Article 56.1 and to Annex 1 to the State Fees Act, if the value of a civil matter exceeds 10,000,000 kroons, the full rate of the state fee is 3% of the value of the civil matter, but not more than 1,500,000 kroons. Based on the referred provisions, a state fee of 945,000 kroons had to be paid for the action in the county court. Pursuant to Article 56.19 of the State Fee Act, a state fee of 945,000 kroons has to be paid on the appeal as well.

The civil chamber of the Supreme Court referred the matter to be reviewed by the Supreme Court *en banc* to decide also the constitutionality of the provisions in question.

II. To assess the constitutionality of the regulatory framework for exemption from payment of a state fee on an appeal by means of procedural assistance, there is inevitably the question whether the state fee, payment of which the procedural assistance is sought, is constitutional. The obligation to pay a state fee on an appeal is in itself in conformity with right to appeal to a higher court (Article 24.5 of the Constitution).

The primary objective of a state fee is compensation in full or in part by a party of the act for expenses of a public-law act performed by the state.

The objective that in an action, at least in case of monetary disputes, the state costs on administration of justice shall be borne on the account of the fees paid by the participants in the proceeding (participation of the participants in bearing the legal costs principle) can be deemed permissible under the Constitution, i.e. other taxpayers need not finance that proceeding, at least in general. However, this principle cannot be extended in a way that the participants as a whole should similarly finance also the court proceedings where public interests are at stake, e.g. disputes regarding children and family, disputes with the state or, for example, criminal offence proceedings.

The legitimate objective of state fees is also procedural efficiency in order to avoid unfounded, vexatious and other similar appeals since it may result in the court system's inability to offer effective legal protection within a reasonable time.

The possible objective of court fees to earn extra income for the state, and to finance from it other expenses of the state if the fee is higher than is necessary for ensuring the bearing of the legal costs by the participants and procedural economy, cannot be considered legitimate. It would be contrary to the essence of the fee arising from Article 113 of the Constitution.

The obligation to pay in a civil matter with the value exceeding 10,000,000 kroons a state fee of 3% of the value of the matter on an appeal is not a moderate measure for complying with the participation of the participants in bearing the legal costs principle as well as for achieving procedural efficiency. The need to ensure the right to appeal outweighs procedural efficiency and the participation of the litigants in bearing the legal costs. The latter objective should be achieved in a way that a person lacking effective means can protect his or her fundamental rights in court.

Having recourse to the courts cannot be ensured only in matters with a prospect of definite success.

In a situation where the state has prescribed the obligation to pay in cases of a civil matter with the value exceeding 10,000,000 kroons a state fee of 3% of the value of the matter on an appeal, such an obligation may mean that a person lacks the actual possibility to protect his or her significant fundamental rights in court, i.e. the essence of the right to appeal has been damaged. The non-moderation of an infringement of the right to appeal is substantially increased by the fact that in order to file an appeal, the fee already paid upon filing of the action has to be paid again in the same amount, i.e. that for referring

the matter to the appeal court in case of dismissal of the action the plaintiff actually has to pay a state fee total of 6% of the value of the matter on the action.

III. There is one separate opinion from two judges.

Supplementary information:

The Supreme Court declared later many different amounts of state fees unconstitutional, too.

Cross-references:

Legal norms referred to:

- Article 24.5 of the Constitution.

Supreme Court:

- no. 3-4-1-10-00, 22.12.2000;
- no. 3-4-1-25-09, 15.12.2009.

European Court of Human Rights:

- *Paykar Yev Haghtanak Ltd v. Armenia*, no. 21638/03, 20.12.2007;
- *Kreuz v. Poland*, no. 28249/95, 19.06.2001, *Reports of Judgments and Decisions* 2001-VI;
- *Teltronic-CATV v. Poland*, no. 48140/99, 10.01.2006.

European Court of Justice:

- C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22.12.2010.

Languages:

Estonian, English (translation by the Court).



France

Constitutional Council

Important decisions

Identification: FRA-2016-1-001

a) France / **b)** Constitutional Council / **c)** / **d)** 15.01.2016 / **e)** 2015-516 QPC / **f)** Mr Robert M. and Others [incompatibility between taxi driving and operating as a VTC (*voiture de transport avec chauffeur*) (chauffeured vehicle) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 17.01.2016, text no. 21 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Vehicle, chauffeured / Taxi, driver versus VTC driver / Patients, transport / Parking, permit.

Headnotes:

The provision stating that taxi driving is incompatible with operating as a VTC driver amounts to a violation of freedom of enterprise.

Summary:

I. On 16 October 2015 a preliminary question was referred to the Constitutional Council by the *Conseil d'État* concerning the conformity with constitutionally guaranteed rights and freedoms of Article L. 3121-10 of the Transport Code.

According to the second sentence of this article, taxi driving is incompatible with operating as a driver of a chauffeured vehicle (hereinafter, "VTC").

The applicants contended that the provisions in question violate freedom of enterprise.

II. The Constitutional Council held that the provisions constitute a violation of freedom of enterprise.

It noted that in adopting the contested provisions, the legislature had sought to combat fraud in the taxi industry, notably in the patient transport sector, and to ensure that full use was made of parking permits issued to taxis.

On the one hand, the activity of taxi drivers and the activity of VTC drivers are carried on using vehicles which have distinctive markings. Furthermore, only light medical vehicles («véhicules sanitaires légers») can be approved by compulsory sickness insurance schemes to provide patient transport services.

On the other, the incompatibility enshrined in the contested provisions, and which applies only to taxi driving and VTC driving, does not preclude taxi drivers from also operating as drivers of motorised two- or three-wheel vehicles or as ambulance drivers. Nor does this incompatibility apply to holders of parking permits who do not themselves operate as taxi drivers.

The Constitutional Council held that in introducing the incompatibility referred to in the contested provisions, the legislature committed a violation of freedom of enterprise which can be justified neither by the objectives pursued nor by any other general-interest ground.

It therefore considered the second sentence of Article L. 3121-10 of the Transport Code to be unconstitutional.

Languages:

French.



Identification: FRA-2016-1-002

a) France / **b)** Constitutional Council / **c)** / **d)** 19.02.2016 / **e)** 2016-535 QPC / **f)** *Ligue des droits de l'homme* (policing of meetings and public places during a state of emergency) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 21.02.2016, text no. 26 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

5.5 Fundamental Rights – **Collective rights.**

Keywords of the alphabetical index:

Public order, safeguard / Administrative Court, supervision / State of emergency, extension / Provisional measures, renewal.

Headnotes:

The provisions of the Law on States of Emergency allowing administrative authorities, where a state of emergency has been declared, to order the temporary closure of concert halls/theatres, public houses and meeting places of any kind and to prohibit meetings likely to cause or maintain disorder operate together in a way that is not manifestly destabilising to the right to collective expression of ideas and opinions and the constitutional objective of safeguarding public order.

Summary:

I. On 18 January 2016 a preliminary question was referred to the Constitutional Council by the *Conseil d'État* on behalf of the *Ligue des droits de l'homme* concerning the conformity with constitutionally protected rights and freedoms of Article 11.I of Law no. 55-385 of 3 April 1955 on states of emergency.

Under these provisions, where a state of emergency has been declared, administrative authorities may order the provisional closure of concert halls/theatres, public houses and meeting places of any kind and prohibit meetings likely to cause or maintain disorder.

The submissions lodged with the Constitutional Council centred on the prejudice caused by these provisions to the right to collective expression of ideas and opinions.

II. The Constitutional Council began by noting that the contested provisions have neither the object nor the effect of governing the conditions under which demonstrations on the public highway are prohibited.

It then noted, in the first instance, that the temporary closure and prohibition of meetings provided for under the contested provisions may be ordered only if a state of emergency has been declared, i.e. where there is an imminent danger or public disaster, and only for locations situated in the area covered by this state of emergency or for meetings that are to be held there.

The Constitutional Council noted, in the second instance, that, on the one hand, both the temporary closure of concert halls/theatres, public houses and meeting places of all kinds and the duration of such orders must be justified by and proportionate to the necessity of preserving public order which gave rise to such closure. On the other hand, the prohibition of a meeting must be justified by the fact that such meeting is “of a nature to cause or maintain disorder” and proportionate to the grounds on which it is based. Any such measures which are individual in nature must be supported by reasons. Lastly, the administrative courts are charged with ensuring that each of these measures is suited to, necessary for and proportionate to the aim pursued by it.

Thirdly, the Constitutional Council noted that, pursuant to Article 14 of the Law of 3 April 1955, the temporary closure and the prohibition of meetings ordered in accordance with this Law will cease to have effect at the latest at the time when the state of emergency ends. A state of emergency, declared by decree adopted in the Council of Ministers, must, after a period of twelve days, be extended by a Law which sets its duration, and the duration must not be excessive having regard to the imminent danger or to the public disaster which led to the declaration of a state of emergency. Lastly, the Constitutional Council ruled that, if the legislature extends the state of emergency by a new Law, the temporary closure and prohibition of meetings ordered previously cannot be extended without being renewed.

Based on all of the foregoing, the Constitutional Council ruled that the contested provisions operate together in a way that is not manifestly destabilising to the right to collective expression of ideas and opinions and the constitutional objective of safeguarding public order.

The Constitutional Council found Article 8 of Law no. 55-385 of 3 April 1955 to be compatible with the Constitution.

Languages:

French.



Identification: FRA-2016-1-003

a) France / **b)** Constitutional Council / **c)** / **d)** 19.02.2016 / **e)** 2016-536 QPC / **f)** *Ligue des droits de l'homme* (Administrative searches and seizures during a state of emergency) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 21.02.2016, text no. 27 / **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.**

5.3.32 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:

State of emergency, search / State of emergency, computer data, copying / State of emergency, computer data, seizure / Administrative Court, responsibility, authorisation, necessity, seizure / Police, administrative police / State, liability, remedy.

Headnotes:

The provisions of the Law on States of Emergency introducing special rules on administrative searches during a state of emergency which constitute a regime of exceptional powers, the effects of which must be limited in time and space and which contribute to preventing the imminent danger or consequences of the public disaster to which the country is exposed, are compatible with the Constitution.

The provisions of this paragraph enabling the administrative authorities to copy computer data accessed in the course of these searches and which fail to provide legal guarantees capable of ensuring a reasonable balance between the constitutional objective of safeguarding public order and the right to respect for private life are not, however, compatible with the Constitution.

Summary:

I. On 18 January 2016 a preliminary question was referred to the Constitutional Council by the *Conseil d'État* on behalf of the *Ligue des droits de l'homme* concerning the conformity with constitutionally protected rights and freedoms of Article 11.1 of Law no. 55-385 of 3 April 1955 on states of emergency.

These provisions allow administrative authorities, in cases where a state of emergency has been declared, to order searches and to copy data stored in a computer system and accessed in the course of the search.

II. With regard to the provisions allowing searches, the Constitutional Council held firstly that such searches are a matter for the administrative police alone, that they do not affect individual freedom within the meaning of Article 66 of the Constitution and that accordingly these administrative searches need not be placed under the direction and control of the judicial authorities.

The Constitutional Council then gave its opinion on the contention that the contested provisions violate the right to respect for private life and the right to an effective judicial remedy.

It noted, in the first instance, that the measures provided for under the contested provisions may be ordered only where a state of emergency has been declared, i.e. where there is an imminent danger or public disaster, and only for locations situated in the area covered by this state of emergency.

The Constitutional Council took note secondly that the rules applicable to searches: the decision ordering the search must specify the location and time; the Public Prosecutor is informed of this decision without delay; the search is carried out in the presence of an officer from the investigating police and may only be carried out in the presence of the occupant or, in his or her absence, in the presence of his or her representative or of two witnesses; lastly, a record is made of the search, which must be communicated to the Public Prosecutor without delay.

Thirdly, the Constitutional Council ruled that the decision ordering a search on the basis of the contested provisions and the conditions governing its implementation must be justified by and proportionate to the reasons for the measure, in the specific circumstances that led to a state of emergency being declared. In particular, a search carried out during the night in a private residence must be justified on the grounds of urgency or that it is impossible to carry it out during the daytime. The administrative courts are responsible for ensuring that this measure, which must be supported by reasons, is suited to, necessary for and proportionate to the aim pursued by it.

Fourthly, while the forms of appeal provided for against a decision ordering a search on the basis of the contested provisions can only be activated after the measure has been implemented, they enable the

interested party to bring a liability claim against the state. Accordingly, the persons affected are not deprived of forms of appeal, which afford an opportunity for a review to ensure that the measure was implemented in an appropriate manner, having regard to the specific circumstances that led to the declaration of a state of emergency.

With regard to a measure constituting a regime of exceptional powers the effects of which must be limited in time and space and which contributes to preventing the imminent danger or consequences of the public disaster to which the country is exposed, the Constitutional Council accordingly found the contested provisions permitting administrative searches to be compatible with the Constitution.

With regard to the provisions enabling administrative authorities to copy any computer data which it may have been able to access in the course of the search, the Constitutional Council ruled that this measure is equivalent to a seizure. Neither this seizure nor the exploitation of the data thereby collected has been authorised by a court, even if the occupant of the location searched or the owner of the data objects and even though no offence has been established. In addition, data may be copied that has no link with the person whose conduct constitutes a threat to security and public order and who has frequented the location at which the search has been ordered.

The Constitutional Council ruled that in so doing, the legislature did not put in place legal guarantees capable of ensuring a reasonable balance between the constitutional objective of safeguarding public order and the right to respect for private life. It then declared the provisions of the second sentence of the third paragraph of Article 11.1 of the Law of 3 April 1955 unconstitutional.

The Constitutional Council therefore considered the provisions of this paragraph 1 introducing special rules on administrative searches during a state of emergency to be compatible with the Constitution, but declared unconstitutional the provisions of this paragraph which allowed the copying of computer data accessed in the course of the searches.

Languages:

French.



Georgia

Constitutional Court

Important decisions

Identification: GEO-2016-1-001

a) Georgia / **b)** Constitutional Court / **c)** Second Board / **d)** 04.02.2014 / **e)** 2/1/536 / **f)** Levan Asatiani, Irakli Vacharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze v. Ministry of Labour, Health and Social Affairs / **g)** www.constcourt.ge; *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.17 General Principles – **Weighing of interests**.
 3.21 General Principles – **Equality**.
 5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation**.
 5.3.43 Fundamental Rights – Civil and political rights – **Right to self fulfilment**.

Keywords of the alphabetical index:

Public health, protection / Blood, donation, prohibition, homosexuality, risk group / Unequal treatment, restriction, absolute.

Headnotes:

By prohibiting a given social group's possibility to donate blood and its components, the State does not allow the group the freedom of development through sexual behaviour and orientation, for which they are born and carry through their lives. This not only disproportionately limits the group's freedom of sexual life, but also prevents them from a healthy social development, creating a chasm between the group and society, and threatening society's health.

Summary:

I. The applicants disputed the norms of the Order of the Minister of Labour, Health and Social Affairs (Article 24 of the Order no. 241/N, Appendix 1 "On Determining Restrictions on Blood and its Component Donations", and the respective parts of Article 18.2 of the Appendix 1 of 27 November 2007 Order

no. 282/N "On Determining Mandatory Procedures for Blood Transfusion Establishments"). They alleged that the norms violated Article 14 of the Constitution (equality before the law) and Article 16 of the Constitution (right to development of the self). According to the disputed procedures, "homosexuality" was a risk group for HIV/AIDS. Attributing a group to the AIDS risk group was the ground for the absolute prohibition for blood donation; hence, homosexuals were prohibited from becoming blood donors.

II. To evaluate the disputed norms with regard to Articles 14 and 16 of the Constitution, the Court clarified the requirement to understand the meaning of the term "homosexuality". The Court indicated that it cannot be understood "as something solely of sexual behaviour variety, as it could also include within itself one's sexual orientation".

With regard to Article 14 of the Constitution, while evaluating norms, the Court determined that the persons meant under the umbrella term "homosexuality" were to be treated differently from those persons, for whom, despite their sexual behaviour and orientation, blood and blood component donation was not prohibited. While Article 14 of the Constitution does not list sexual orientation as one of the characteristics of discrimination, the common practice indicated that the list is not exhaustive and unequal treatment based on other signs will not remain outside of the scope of assessment.

The Court also determined that differential treatment established by the disputed norms "radically distanced equal persons from opportunities to participate in an equal manner in a specific social relationship" because homosexuals were prohibited indeterminately and without exception to donate blood. Therefore, the Court assessed differential treatment with strict scrutiny test. For the test, it elucidated whether the imposed restriction served a valid public aim and if so, whether the means employed to achieve this aim was necessary and the least restrictive.

According the arguments presented at the Court, sexual contact between men poses higher risk of transmitting infections. Therefore, the disputed norms serve a clear legitimate aim to protect the lives and the health of the recipients of blood and blood components by eliminating donors from the process of transfusion who pose a higher risk of acquiring infectious diseases. Furthermore, medical examination of blood cannot fully ensure that donor-to-recipient transmission of HIV virus does not take place due to the existence of the so called "window period". During this period when a virus incubates,

the analysis does not detect it in the blood. Risks existing within the “window period” make it necessary to carry out additional measures, in addition to blood analysis – collection of additional data, from a potential donor by a doctor via anamnesis.

Furthermore, the Court took into consideration that standard tests require several months, while emerging medical technologies effectively reduce “window period” down to several days. Nevertheless, in any scenario, when enough time has passed, fail-proof identification of the virus in the blood is possible. Therefore, instead of an absolute (unlimited in time) prohibition, it was possible to introduce a temporary restriction based on the “window period” for “Men who have Sex with Men” (hereinafter, “MSM”) sub-group of the general homosexual population.

Given the above-mentioned, the Court determined, that the disputed norms gave rise to unjustifiably strict unequal treatment and restricted the right beyond the actual needs. The reason is that, on one hand, it had introduced absolute restriction, even beyond the “window period” with regard to homosexual man who engages in risky behaviour. On the other hand, due to the term “homosexuality”, extremely broad nature, the prohibition touched those persons, who were not engaged in risky sexual behaviour. Therefore, disputed norms were declared unconstitutional with regard to Article 14 of the Constitution.

While deliberating Article 16 of the Constitution, the Court pointed out that the right to free development of personality includes the applicants’ right to become donors of blood and blood components, and act upon their inner values via this action, which is a component part of self-realisation and development process. At the same time, it was noted that the right to self-development is not an absolute right and limitations can be introduced to protect the health and lives of the recipients of blood and blood components.

However, limiting the disputed norm to a social group (“homosexuality”) introduced unnecessary restrictions on the rights of persons who belong to the group. The Court pointed out that a restriction must be directed not towards membership in a social/demographic group, but towards risky sexual behaviour, and at the same time, the restriction must be enacted for the period of time when the behaviour continues to remain risky from the point of view of blood donation.

The disputed norm eliminated those persons from the process of blood donation, who self-identified as homosexuals, but did not engage in risky sexual behaviour. Furthermore, homosexual men, who engaged in risky sexual behaviour, were devoid from blood donation opportunity for an indeterminate

amount of time, despite the fact the neutral risk of transmission of infections did not introduce the need to do so. Therefore, the disputed norm was also declared unconstitutional with regard to Article 16 of the Constitution due to unproportional restriction of the right to develop self.

Languages:

Georgian, English.



Identification: GEO-2016-1-002

a) Georgia / **b)** Constitutional Court / **c)** First Board / **d)** 11.04.2014 / **e)** 1/2/569 / **f)** Davit Kandelaki, Zurab Davitashvili, Emzar Gogvadze, Giorgi Meladze and Mamuka Pachuashvili v. Parliament / **g)** www.constcourt.ge; *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.18 General Principles – **General interest**.
 3.21 General Principles – **Equality**.
 5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work**.
 5.4.9 Fundamental Rights – Economic, social and cultural rights – **Right of access to the public service**.

Keywords of the alphabetical index:

Public broadcaster, board of trustees / Public broadcaster, pre-term, annulment, functions / Employment, public, independence.

Headnotes:

The element that defines the essence of certain state office is the degree of its independence from the executive or/and legislative branches. The interest of ensuring their independence may be restricted in special cases by the legitimate aim to improve the public office. Such special case would take place, when applicable norms are full of omissions so that the aim and purpose of a state position is contradictory and change is necessary.

Summary:

I. The applicants, member of the board of trustees of *Legislative Herald of Georgia* "Public Broadcaster", disputed the constitutionality of Article 2.3 of the "On amendments to the "Law on Broadcasting" (no. 833-RS). The norm allows the board of trustees, who were elected via the newly introduced norm, to start working from the moment of election of its seven members. This would discharge the existing board of trustees pre-term, violating Article 29.1 of the Constitution (right to hold any state position and public office).

II. The Constitutional Court interpreted Article 29 of the Constitution and noted that "state position", for the purposes of the article in question, is a term of autonomous meaning. It is not limited to state and political office holders and officials instituted by the law, but extends to a whole spectrum of labour relations, where the employer is the state, and financing for the employee is dispersed through state budgets and the person carries out public functions. The Court differentiated Article 29 of the Constitution from Article 30 of the Constitution, underscoring that the scope of Article 29 of the Constitution is limited to carrying out public functions while Article 30 of the Constitution concerns protecting standards of labour relations in the private sector.

The members of the Board of Trustees (trustees) carried out their lawful duties. They managed and governed the Public Broadcaster – an independent legal entity of public law, and were elected by the Parliament. This placed the board of trustees under the scope of Article 29 of the Constitution, not Article 30 of the Constitution. Therefore, the disputed interference (pre-term extinguishment of their duties) was evaluated with regard to Article 29 of the Constitution.

The Court noted that since the Board of Trustees is a guarantee editorial, managerial and financial independence of the Public Broadcaster, in order to fulfil these purposes, the independence of its members was of crucial value. The pre-term annulment of their functions must have been evaluated within the scope of constitutional guarantee of independence of a Trustee. This was based on Article 24 of the Constitution, which guarantees not only freedom of expression of media (in this case, the Public Broadcaster) but also the independence of its government body. Furthermore, the Court pointed out that the standards of Article 29 of Constitution were to be interpreted in connection with the constitutional principle of legal trust. The reason is that when a citizen is appointed to a position for a determinate amount of time, he or she has respectively legitimate expectations, which can only be restricted when important public interest is present.

Although the Court acknowledged that the implementation of a representative, effective and transparent model of Board of Trustees of the Public Broadcaster is an important public aim, it believed that the disputed norm was not the least restrictive mean to achieve this aim. The Parliament could reform the management system of the Public Broadcaster, without annulling the existing Board of Trustees before their term ended and with their participation as well.

Since the competencies of the Board of Trustees were not altered significantly, cohabitation of both the old and the news members could not be ruled out. The reason is that according to the new norm, it was no longer the President but various subjects (the Public Defender, the Parliamentary Majority, Members of Parliament outside of Parliamentary Majority, Supreme Council of Adjarian Autonomous Republic) presented the Board of Trustees candidates to the Parliament. The Court did not agree that opposing interests and views of both members elected via the old and the new norms were mutually exclusive. The reason is that the cooperation of persons from opposing perspective creates "foundations for pluralism and multipartite social inclusion".

The argument that the new rule of appointment was superior to the old norm was not sufficient to pre-term restriction of the function of the existing Board of Trustees, especially since the claimants' interests were related to the public interest of Public Broadcaster and the independence of its Board of Trustees. The Court pointed out that the essence of certain public offices lies in its independence from the political branches of the government while the terms of the office is one of the substantial components that guarantees that the person employed at the office has stable job and remains independent. Restricting the independence of respective public officials and the principle of non-interference in their functions can only be limited in indefeasible cases, when the goal of the interference is to improve the functioning of public office. Otherwise, pre-term annulment of office duties may become permanent, which renders the independence of respective body questionable.

In this scenario, the Court believed that the case for such exceptional interference was not demonstrated. The respondent could not explain what the indefeasible urgency was in pre-term annulment of the functions of existing Board of Trustees and why was this vital in order for the Public Broadcaster to go on carrying out its lawful functions. At the same time, the restriction jeopardised individual and institutional independence of the member of the Board of Trustees.

Considering the above, the Court determined that pre-term annulment of the office of the Board of Trustees of the Public Broadcaster was not absolutely required instrument to achieve aim, and the disputed norm was declared unconstitutional with regards to Article 29.1 of the Constitution.

Languages:

Georgian, English.



Identification: GEO-2016-1-003

a) Georgia / **b)** Constitutional Court / **c)** Plenary / **d)** 23.05.2014 / **e)** 3/2/574 / **f)** Giorgi Ugulava v. Parliament / **g)** www.constcourt.ge; *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.18 General Principles – **General interest**.
 4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities**.
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
 5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing**.

Keywords of the alphabetical index:

Official, directly elected, suspension, office, criminal proceedings.

Headnotes:

Suspension/termination of elected officials entails suspension/termination of the mandate of the people themselves, and is the strongest intervention into the autonomy of self-governance. For this reason, it should only be possible for clearly expressed, important, legitimate aims, namely a violation that infringes on voters' interests and in extreme circumstances, and is the only and necessary way. Furthermore, intervention should be conducted based on foreseeable, clear and strictly

regulated procedure, which would be based on fair balance of interests.

Summary:

I. The applicant (Mayor of Tbilisi) requested the Constitutional Court to review the constitutionality of Article 159 of the Criminal Procedure Code (hereinafter, "CPC"), which regulates the dismissal of an official elected by secret, universal, equal and direct suffrage. The norm is invoked if the official was charged with a criminal offence and a threat exists that his continued occupation of the office would obstruct investigation, compensation of costs incurred due to his crime, or he would continue the felonious activities (Article 159 of the CPC) with respect to Article 29.1 and 29.2 of the Constitution (the right to hold state position and public office). Additionally, the subject of the dispute was the fact that the Court, which decided on the suspension, was allowed to try a case without oral hearing (Article 160 of the CPC) with regard Article 42.1 of the Constitution (the right or oral hearing) and Article 42.3 of the Constitution (the right to defence).

II. The Constitutional Court ruled that Article 29 of the Constitution was violated, namely the limitation on the right of the "elected official to carry out duties, granted by Tbilisi voters for the duration of four years via secret, universal, equal and direct suffrage, without interruption. However, the constitutionally protected right is not only limited to the applicant's private interest, but it is also connected to such an important public interest, as is the realisation of the voters' will".

Addressing the proportionality of interference in Article 29 of the Constitution, the Court determined that the interference served a legitimate aim: to carry out investigation effectively. Achieving this legitimate aim is equally important to every defendant, including high-level, elected officials. Nevertheless, the duration of the official's suspension continued until the final decree; for some final decrees, the law has not introduced any deadlines. While it is true that the suspension is a temporary normative act, it may continue indefinitely. This is decisive with regard to elected officials, since their time to serve office is strictly determined and it will objectively be impossible to make-up for time lost and return to office. Occupation of the said office is solely permitted to persons elected by citizens in regular elections, which cannot be re-examined.

Therefore, the suspension of a high-level official for an indeterminate duration may effectively equal to a dismissal, limiting the official's right in a particularly grave, intense character. Furthermore, the law has not stipulated mechanisms to either substitute or

review this temporary measure until the final decree is made, even if there is no objective need and ground to continue imposing it. Despite the Court's belief that the measure is a lighter penalty than imprisonment, which would also achieve a legitimate aim, the measure was found to disproportionately restrict Article 29 of the Constitution because of its restrictive nature and non-existent mechanisms to re-examination.

Additionally, the Constitutional Court discussed how courts adopt decision to impose the disputed measure.

A trial without oral hearing does not violate the right to fair trial if the restriction serves legitimate aim, and if the specific case to be tried by a court does not necessitate this guarantee. For the right to fair trial, "components of the right shall be applied in case, and in quantity that is objectively required for specific protection/to avoid violation".

The Court determined that oral hearing is required when the person who participated in the process could affect the court decision. The probability grows even further when the courts evaluate factual circumstances, and when new evidences presented by the necessary parties could impact the court decision. Analysis of the disputed norm revealed that in the present case, the court inevitably stood before the need to examine factual evidences. It had to decide whether the presumption was backed up with evidence that the defendant would interfere with the investigation, compensation of costs incurred due to his crime, and would continue felonious activities. Additionally, not only was he deprived from participating in oral hearing, he was also not even able to present evidence in a written form before the decision-making court. Therefore, the Court determined that the disputed norm violated Article 42.1 of the Constitution.

The right to defence implies that the person is equipped with adequate, effective and sufficient legal tools to impact future decision. In the disputed case, the Court ruled that this could not be achieved without oral hearing. Therefore, the Court resolved, "hearing without oral arguments does not in itself and always equal to violating the rights of a person". However, when oral hearing is required for full enjoyment of entitlements, hearing without oral arguments violates not only Article 42.1 of the Constitution, but also the right to defence guaranteed under Article 42.3 of the Constitution.

Languages:

Georgian, English.



Identification: GEO-2016-1-004

a) Georgia / **b)** Constitutional Court / **c)** Second Board / **d)** 08.08.2014 / **e)** 2/4/532, 533 / **f)** Irakli Kemoklidze and Davit Kharadze v. Parliament / **g)** www.constcourt.ge; *LEPL Legislative Herald of Georgia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.1.1.4.2 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Incapacitated**.
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
 5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability**.
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity**.
 5.3.24 Fundamental Rights – Civil and political rights – **Right to information**.
 5.3.34 Fundamental Rights – Civil and political rights – **Right to marriage**.
 5.3.43 Fundamental Rights – Civil and political rights – **Right to self fulfilment**.
 5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

Keywords of the alphabetical index:

Physical disorder, mental / Capacity, legal proceedings / Consent, legal representative / Interference, rights / Personal development / Capacity, restoration.

Headnotes:

Restrictions on the rights of persons with mental retardations should conform to constitutional standards of human rights and fundamental freedoms, and should not rest upon the person's mental illness. Disability caused by psychological diseases does not always imply that a person is incapable of making conscious decisions in all areas of social life and carry out actions that may entail legal consequences, particularly small household transactions aimed at satisfying personal, reasonable needs that do not infringe on the legitimate rights and interest of other persons.

Summary:

I. The applicants (persons recognised as incapable) appealed a list of norms of the Civil Code, Civil Procedure Code and the “Law on Psychiatric Care”. They opined that these norms contradicted Articles 14, 16, 17, 18, 24, 36, 41 and 42 of the Constitution.

They disputed norms of the Civil Code:

- a. Restricted persons recognised as incapable due to their “imbecility” or mental illness, in their freedoms to willingly and actively acquire civil rights and responsibilities;
- b. Abolished acts of persons who were recognised as incapable;
- c. Banned persons who were recognised as incapable from the right to marry;
- d. Declared legal representatives as the persons’ lawful representatives empowered to represent the subject of their guardianship with third parties without specific appointment (e.g., courts) and were entitled to sign every necessary deal on behalf of persons recognised as incapable.

They also disputed norms of the Civil Procedure Code,

- a. That appointed guardians to legally represent the interests and defend persons recognised as incapable in the courts;
- b. When the person recognised as incapable had recovered from their disease, only the legal guardians, family members or psychiatric institutions had the right to apply to the courts to annul legal guardianship and to restore the persons in question to their capacities.

Additionally, they disputed norms of the “Law on Psychiatric Care” that:

- a. Foresaw, instead of a person recognised as incapable, the information about his or her disease and psychiatric care was to be given to his or her legal representative,
- b. Stripped off the person recognised as incapable from the right to participate in private legal matters;
- c. In order to administer treatment, it requested an informed consent of the legal representative of the person recognised as incapable, but sidestepped the will of the person him or herself.
- d. Allowed the legal representative of the person recognised as incapable to choose psychiatric care facility, and to stop medical examinations/treatment;

- e. Gave the right to doctors, for the purposes of security, to restrict enacted rights of the persons recognised as incapable;
- f. Declared treatment voluntary, if the legal representative, not the patient, had asked for it and had signed informed consent.

II. Substantiation of the Judgment:

With regards to Article 16 of the Constitution (the right to take necessary actions for the purposes of autonomy and for personal development), the Court first evaluated the group of norms of the Civil Code. They constituted a unified regime and restricted persons recognised as incapable, due to their “imbecility” or “mental disability”, from their liberties to willingly acquire and act upon rights and responsibilities, to represent selves with third parties, sign deals and turned them entirely dependent on their legal representatives, and for an indeterminate amount of time. Therefore, an entire class of persons, much like claimants in the present case, were declared as lacking civil free-will, regardless of the complexity of specific relations or risks. Considering this, taking away capacities in an absolute and blanket manner for an indeterminate amount of time amounted to losing autonomy in practically every aspect of life. This was seen as a highly intense interference in such right.

The legitimate aim of a restriction, according to the respondent, was to defend the rights and interests of persons with mental disabilities. The Court determined that Article 58, which annulled every single deal negotiated by a mentally disabled person (including deals that benefited these persons), vividly trespassed the aim to defend the persons with mental disorders, and were disproportionate restrictions. Therefore, this norm violated Article 16 of the Constitution.

Norms that enacted the status of being recognised as incapable and replaced the individual’s will with that of his or her legal representative were not justifiable means aimed at taking care of the person recognised as incapable. The existing normative approach to disorder was completely ignoring the reality that the limitation of mental disorders is characterised by the wide-ranging gradations and fragmentation of limiting the ability of persons with mental disorders to comprehend the results of their actions to a varying degree. The disputed norms, however, were applied to all persons recognised as mentally incapable, and took away from them the possibility to realise those capacities, which they did still have in their possession. The Court pointed out that an optimal mechanism to recognise a person as incapable should allow a court to consider the damage on the decision-making capacity of a person with mental disorders and must ensure as much as possible that

the rights and freedoms of this person are protected. Furthermore, the purpose of guardianship lies in supporting the person in the decision-making process and not in substituting their will in every field of life. Therefore, it was determined that the disputed norms disproportionately restricted the right to free development of personality of the persons recognised as incapable, and were declared unconstitutional with regards to Article 16 of the Constitution.

The Court also reviewed the norms of the “Georgian Law on Psychiatric Care” that restricted incapable persons’ freedom to choose the psychiatric care facility, a doctor and decide on commencing treatment. The Court pointed out that the right to self-development includes the right of an individual to submit him or herself to this or that kind of treatment, choose a doctor and a care facility. When a person is incapable to give informed and free consent to the treatment plan, interference in the right is permissible, if this will benefit the welfare of the person in question. However, when the person is capable of consenting independently and in an informed manner, any interference on his or her health shall require consent.

Since recognition of incapacity does not involve measurement of the level of mental disorder, a person recognised as incapable may possess this kind of capacity. He or she is unconditionally excluded from the process of medical decision-making that will impact his or her health, which results in ignoring his or her enacted rights. Therefore, these norms also disproportionately interfered in the right protected by Article 16 of the Constitution and thus, were declared unconstitutional.

The Court did not believe that the norms that took away the right from incapable persons to independently apply to a court when they recovered from their mental disorder, with the request for restoration of capacities, and to join the process launched at the initiative of other persons. Furthermore, the part of the norm that afforded a guardian, a doctor and a psychiatric care facility to go to the law and ask for restoration of the capacity of the person, was not determined to violate the right to self-development, since the aim of the norm was to restore a person in his or her rights.

The Court pointed out that these disputed norms instituted a restriction on the right enshrined in Article 42 of the Constitution (right to apply to a court). Therefore, the Court determined that a person recognised as incapable must not depend on the goodwill of his or her legal representatives, family members or psychiatric care facilities to be able to enjoy the right to appeal to a court, a right that will protect these persons from abuse of discretion.

Based on these reasons, the above-described norms were declared unconstitutional with regards to Article 42.1 of the Constitution.

Additionally, the Court evaluated these norms against Article 14 of the Constitution. The Court determined that the disputed norms established specific norms for the persons recognised as incapable, and capable persons were not given any preferential treatment with regards to the norm in question. There was no differential treatment between adult, regardless of their status of recognised capacities. Therefore, these norms were declared constitutional with regards to Article 14 of the Constitution.

The respective article of the Civil Code that prohibited marriage, if one of the future spouses was recognised as incapable, was evaluated with regards to Article 36 of the Constitution. The disputed norms took away the possibility for them to turn cohabitation with a partner into a legal recognition of their voluntary union into an act of creating a family. The legitimate aim of the disputed norms was to protect persons recognised as incapable from forced marriage and protect their right to property from interference.

The Court found that there was a least restrictive mechanism to achieve this legitimate aim – by allowing marriage through the consent of legal representative or respective body, which allowed for individual interference into the right to marriage. If a person has social skills to understand non-material results that accompany a marriage, which is not established at any moment when the recognition of incapacity takes place, then taking away the right to marry represents a disproportionate interference in the right. Therefore, without taking into the account the individual mental capacities, restricting the right of the persons recognised incapable was declared unconstitutional with regards to Article 36.1 of the Constitution.

The following norms (recognition of a person incapable, limitation of the right to marry and regulations related to psychiatric care) were assessed in relation to Article 14 of the Constitution because the applicants alleged that persons recognised as incapable were subjected to differential treatment when compared to persons with equal skills but not recognised as incapable. The Court found that the general characteristic of the social group in question is the recognition as incapable, which is based on their mental disorder. Membership of the group or transferring to other group is not dependent on the will of the persons recognised as incapable. The Court concluded that classical discrimination was taking place, regulated by Article 14 of the Constitution and hence, it applied “strict scrutiny” test to find out if it was justified.

Within the test, the Court determined that since it was possible to identify the individual capacities of the persons and tailor the status of incapable, the existing norms dictating the process of recognition, annulment of the acts of persons recognised as incapable, and complete substitution of their free-will with that of their legal representative, also the prohibition of the right to marry, were not interferences absolutely necessary and therefore, violated Article 14 of the Constitution.

Furthermore, the applicant disputed the norm of the “Law on Psychiatric Care” that disallowed a person recognised as incapable to receive information about their own disease and psychiatric care with regards to Article 16 of the Constitution (the right to free development of his or her personality), Article 24 of the Constitution (right to freedom of expression), and Article 41 of the Constitution (right to shall have the right to become acquainted, in accordance with a norm prescribed by law, with the information about him or her stored in state institutions as well as official documents existing there). The Court highlighted that the disputed norm regulated relations that arise in the process of psychiatric care, which is not part of the right to freedom of expression, which includes the right to disseminate information (with regards to Article 24 of the Constitution). At the same time, since psychiatric care facility, even it is a state institution, is not a body tasked with carrying out public functions, and for the purposes of Article 41, cannot be counted as “state institution”. Therefore, the disputed norm was declared constitutional with regards to both constitutional rights.

As for Article 16 of the Constitution, the Court indicated that it defends the right of a person to independently make decisions regarding their own health and treatment, and access to their own health records is crucial for making such decisions. Therefore, the disputed norm restricted the applicants’ right protected by Article 16 of the Constitution (access information about own health) and constituted interference in this right. The Court declared the norm as disproportional restriction. The Court found that it failed to recognise the varying degrees of individual mental capacities of persons recognised as incapable. With the blanket ban, the norm stripped them off of their rights to receive information about their own health conditions. Therefore, the norm was declared unconstitutional with regards to Article 16 of the Constitution.

Article 15.3 of the “Law on Psychiatric Care” allowed the doctors a right, in exceptional cases with the purpose of security, “to limit the rights of patients placed under stationary care, including the right to be protected from inhuman and undignified treatment”. The norm was challenged with regards to Article 17.1

of the Constitution, which stipulates that “honour and dignity of an individual is inviolable”. Article 17.2 of the Constitution prohibits various forms of inviolability in physical and mental integrity, among others, inhuman treatment and infringement upon honour and dignity. The Court pointed out that this is an absolute right and the state is mandated not only to restrain from such treatment but also to ensure that third parties do not interfere in this right. Word-by-word analysis of the norm illustrated that it allowed, in certain conditions, to treat patients placed under stationary care, in a manner that was inhumane and infringed upon honour and dignity. Therefore, the disputed norm was declared unconstitutional with regards to Article 17.1 and 17.2 of the Constitution.

Also disputed was the norm of the “Law on Psychiatric Care” that declared that with the consent of the patient’s legal representative, the placement of a patient in the stationary care facility was voluntary treatment. The norm was disputed with regards to Article 18.1 and 18.2 of the Constitution (inviolability of an individual’s liberty – right to movement and restriction of the right to free movement, including, for the purposes of forced treatment) and allows interference in the right only with a Court decision.

The Court determined that for the purposes of Article 18 of the Constitution, the placement of a person in psychiatric stationary facility, based only on the consent of his or her legal representative, cannot be interpreted as the will of the person, even if the patient is devoid of his or her ability to express his or her will that will meet the standard for such expression. Due to peculiar characteristics of mental disorder, placement in the stationary facility may last for long periods of time, for several months or even years (beyond the 48 hours) that the Constitution allows. Therefore, interference in Article 18 of the Constitution with such form, nature and intensity requires specific procedural safeguards, namely verification by the courts, if restriction of personal liberty takes place for more than 48 hours. Since the disputed norm allowed for extra-judicial interference in the individual’s right to liberty, it was declared unconstitutional with regards to Article 18.1 and 18.2 of the Constitution.

Languages:

Georgian, English.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2016-1-001

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 29-30.09.2015 / **e)** 2 BvR 2683/11, 2 BvR 1066/10; 2 BvR 1961/10 / **f)** / **g)** / **h)** *Deutsches Steuerrecht* 2015, 2757-2766 (referring to 2 BvR 2683/11); CODICES (German).

Keywords of the systematic thesaurus:

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

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

5.2 Fundamental Rights – **Equality**.

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

Keywords of the alphabetical index:

Expectations, legitimate / Pension, taxation / Effect, retroactive, genuine and false / Law, retroactive.

Headnotes:

Article 3.1 of the Basic Law, according to which all people are equal before the law, does not prohibit the legislator from treating different situations differently. However, differentiations always have to be justified by factual reasons that are appropriate with regard to the objective and the extent of the unequal treatment. Therefore, depending on the subject regulated and the criteria of differentiation, the general principle of equality sets different limits for the legislator in different cases (established case-law).

In tax law, the legislator has a broad leeway in choosing the taxable object and in determining the tax rate (cf. Federal Constitutional Court, 22 June 1995, 2 BvL 37/91, *Entscheidungen des Bundesverfassungsgerichts*, Official Digest – BVerfGE 93, 121 <136>; but also see BVerfGE, 6 March 2002, 2 BvL 17/99, BVerfGE 105, 73 <125>).

In particular, the legislator has a broad leeway to design when tasked with redesigning complex systems of regulation. However, in redesigning the

taxation of contributions to pension schemes and of the pension inflow, the legislator is not allowed to exceed the limits drawn by the prohibition of double taxation (cf. BVerfGE 105, 73 <134>).

The rule of law mandates that specific justifications be provided if the legislator retrospectively changes the legal consequences of a past situation by placing an additional burden onto the person liable to pay taxes (cf. BVerfGE, 10 March 1971, 2 BvL 3/68, BVerfGE 30, 272 <285>; cf. BVerfGE 105, 17 <37>, as well).

If such legal consequences only take effect after the promulgation of the relevant legal provision, but are triggered by a situation that, with regard to the constituent elements of that provision, already has been set into motion before (*“tatbestandliche Rückanknüpfung”*), this constitutes *de facto* retroactivity, which can be permissible under constitutional law (on that point cf. BVerfGE, 7 July 2010, 2 BvL 14/02, BVerfGE 127, 1 <17-18>).

Summary:

I. In its judgment of 6 March 2002 (BVerfGE 105, 73), the Second Panel of the Federal Constitutional Court held that the different taxation of pensions of civil servants and those of employees derived from the German statutory pension insurance scheme in 1996 was not compatible with Article 3.1 of the Basic Law. As a consequence, the legislator adopted a new law, the Retirement Income Act of 5 July 2004, by which the system of taxation was fundamentally changed. According to the new rules, taxation is deferred to the period of pension inflow. Consequently, in a first step, 50% of the pensions derived from the statutory pension insurance scheme or from comparable occupational pension schemes provided by self-regulatory professional organisations are to be taxed, and later this taxable share will gradually increase to 100% – to be reached by 2040.

The applicant of proceedings 2 BvR 2683/11 had been employed as an auditor for three years and had also worked as a self-employed auditor. He paid contributions to the German statutory pension insurance scheme; for 17 years, these contributions were higher than the maximum amount to be paid to the statutory pension insurance scheme by an employee. In his income tax declaration for the year 2005, he requested that only the revenue share of his pensions be taxed. The finance courts only granted this request with regard to the revenue share that was above the maximum contributions.

The applicant of proceedings 2 BvR 1066/10 was a civil servant, but had previously worked in a position in which he had been liable to pay contributions to the statutory pension insurance scheme and was therefore entitled to continue to pay contributions to that scheme on a voluntary basis, which he did. As a civil servant in retirement, he has been receiving pensions from that work since 2005 as well as a pension under the statutory pension insurance scheme. He requested that only the revenue share of his pension under the statutory pension insurance scheme was to be taxed. However, the tax authorities decided to tax 50% of the pension derived from the statutory pension insurance scheme. Neither his protest nor his action against this taxation was successful.

In proceedings 2 BvR 1961/10, a couple that had been taxed together in 2005 lodged a constitutional complaint. Due to a prior employment by which the husband, a civil servant, had been liable to pay contributions to the statutory pension insurance scheme, he had been entitled to continue to pay contributions to the statutory pension insurance scheme for medical professions on a voluntary basis, which he did. Until 2004, only the revenue share of 27% of his pensions under that scheme, which he received in addition to his civil service pension, was subject to taxation. In 2005, the taxable share of the pension under the statutory pension insurance scheme was raised to 50%. The applicants' protest and action against such taxation were unsuccessful.

The applicants asserted that Article 3.1 of the Basic Law had been violated.

II. The Federal Constitutional Court did not admit the constitutional complaints for decision.

That decision is based on the following considerations:

The provisions concerning the taxation of pensions on which the challenged decisions were based do not raise constitutional concerns. They are, in particular, compatible with the constitutional requirement of equal treatment. In realigning taxation by no longer taxing contributions to the statutory pension insurance scheme or related schemes, but by applying deferred taxation to the pension inflow according to the Retirement Income Act, the legislator has designed a system that is, in principle, compatible with the principle of equality. By taxing the pension inflow, the legislator also does not exceed the limits drawn by the prohibition of double taxation as long as and to the extent that the contributions to those schemes are exempt from tax.

To the extent that the provision of the third sentence of § 22.1.3.a.aa of the Income Tax Act, which regulates a transitional period, treats pensions of self-employed persons and those of employees equally, although the original situations of self-employed persons and employees differed with regard to the extent to which the individual contributions had been taxed in the past, this is to be tolerated during the transition period. A similar reasoning applies with regard to civil servants and those covered by the statutory pension insurance scheme accordingly. In his regulation of the transition period (taxing 50% of each pension in 2005 and gradually increasing the taxable share up to 100 % by 2040 regardless of the extent to which the pension scheme contributions had been taxed in each individual case in the past), the legislator stayed within his leeway to design. To determine how the contributions of each person liable to pay taxes had been taxed in the past would not have been compatible with the requirement to create solutions that are easy to handle and to manage due to the enormous amount of proceedings in taxing pensions.

In addition, the provisions of the Retirement Income Act do not result in an impermissible double taxation for the applicants. It does not raise any constitutional concerns to apply the nominal value principle when comparing the contributions to the pension schemes with the pension inflow that is not subject to taxation (cf. already Federal Constitutional Court, 19 December 1978, 1 BvR 335/76, BVerfGE 50, 57 <77 et seq.>).

The provisions of the Retirement Income Act do not violate the principle of legitimate expectations, either. They create "unreal" retroactivity (*de facto* retro-activity), which, however, does not raise any constitutional concerns. This is the case because the *de facto* retroactive effect is suitable and necessary to achieve the aim of the Act; it is appropriate as well.

Supplementary information:

Legal norms referred to:

- Article 3.1 of the Basic Law; first, second and third sentence of § 22.1.3.a.aa of the Income Tax Act; Retirement Income Act.

Cross-references:

Federal Constitutional Court:

- 2 BvL 3/68, 10.03.1971, BVerfGE 30, 272 <285>;

- 1 BvR 335/76, 19.12.1978, *BVerfGE* 50, 57 <77 et seq.>;
- 2 BvL 37/91, 22.06.1995, *BVerfGE* 93, 121 <136>, *Bulletin* 1995/2 [GER-1995-2-022];
- 2 BvR 305/93, 2 BvR 348/93, 05.02.2002, *BVerfGE* 105, 17 <37>;
- 2 BvL 17/99, 06.03.2002, *BVerfGE* 105, 73 <125>;
- 1 BvR 2192/05, 17.11.2009, *BVerfGE* 125, 1;
- 2 BvL 14/02, 2 BvL 2/04, 2 BvL 13/05, 07.07.2010, *BVerfGE* 127, 1.

Languages:

German.



Identification: GER-2016-1-002

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 15.12.2015 / **e)** 2 BvL 1/12 / **f)** Treaty Override / **g)** to be published in the Federal Constitutional Court's Official Digest (*Entscheidungen des Bundesverfassungsgerichts*) / **h)** *Deutsches Steuerrecht* 2016, 359-376; *Internationales Steuerrecht* 2016, 191-208; *Wertpapier Mitteilungen* 2016, 568-574; *Finanz-Rundschau* 2016, 326-340; *Höchststrichterliche Finanzrechtsprechung* 2016, 405-415; *Deutsches Verwaltungsblatt* 2016, 503-509; *Neue Juristische Wochenschrift* 2016, 1295-1307; CODICES (German).

Keywords of the systematic thesaurus:

- 1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**
- 2.2.1.2 Sources – Hierarchy – Hierarchy as between national and non-national Sources – **Treaties and legislative acts.**
- 2.3.8 Sources – Techniques of review – **Systematic interpretation.**
- 3.3 General Principles – **Democracy.**
- 3.9 General Principles – **Rule of law.**
- 4.5.2.1 Institutions – Legislative bodies – Powers – **Competences with respect to international agreements.**

Keywords of the alphabetical index:

Interpretation, limit / Interpretation, principles / *Lex posterior*, principle / *Pacta sunt servanda*, principle / Tax, double taxation, treaty / Taxation, double, avoidance, international treaty / Treaty, domestic law, effect / Treaty, double taxation, relation to national law.

Headnotes:

Sentence 1 of § 80.2 of the Federal Constitutional Court Act does not require the referring court to mention, and elaborate on, every conceivable legal view. In principle, the issue of whether the validity of the legal provision in question is essential to the referring court's decision is determined by that court's legal view – unless that view is obviously absolutely untenable.

It follows from sentence 1 of Article 59.2 of the Basic Law that, within the national legal order, international treaties have the same rank as statutory federal law if they do not fall within the scope of another more specific “opening clause” – particularly Articles 23-25 of the Basic Law.

Sentence 1 of Article 59.2 of the Basic Law does not limit the applicability of the *lex posterior*-principle with regard to international treaties. Within the boundaries of the Constitution and according to the will of the people as manifested in elections, later legislators must be able to revoke legal acts of previous legislators.

Unconstitutionality of statutory law that violates international law cannot be based on the unwritten constitutional principle of openness to international law. While the principle of openness to international law has constitutional rank, it does not entail an absolute constitutional duty to obey all rules of international law.

(Limited) precedence of international treaty law over statutory law, or limitations on the “*lex posterior* principle” cannot be derived from the rule of law principle.

Summary:

I. In a now defunct 1985 treaty aimed at avoiding double taxation (DTT Turkey 1985), Germany and Turkey *inter alia* agreed that income from employment earned in Turkey by persons fully liable for German taxes does not count into the basis of assessment for German taxes and may only be used to set the tax rate for other sources of income.

According to sentence 1 of § 50d.8 of the Income Tax Act (hereinafter, the “Act”) as amended by the 2003 Tax Amendment Act and in force today, the exemption “will only be granted, irrespective of the applicable [double taxation] treaty, if the citizen liable for taxation shows that the state entitled under the treaty to exercise the right of taxation has waived this right or that the taxes assessed by this state on the basis of the income in question have been paid”. In the initial proceedings, the plaintiffs – a married couple whose taxes are jointly assessed – challenged their income tax bill for the year 2004. The husband had earned income from employment in Germany and in Turkey. Since the couple had not shown that the income earned in Turkey had been taxed there or that Turkey had waived its right of taxation, the tax office had treated the entire gross income from employment as taxable. Legal recourse before the finance court remained without success. By order of 10 January 2012, the Federal Court of Finance suspended the appeal proceedings in order to obtain a decision by the Federal Constitutional Court on whether the first sentence of § 50d.8 of the Act is constitutional.

II. The Federal Constitutional Court held that the first sentence of § 50d.8 of the Act is compatible with the Constitution.

The decision is based on the following considerations:

Under the system of the Basic Law, international treaties generally have the same rank as statutory federal law (first sentence of Article 59.2 of the Basic Law). Due to their rank, such international treaties can be superseded by later federal statutes that contradict them according to “*lex posterior derogate legi priori*” principle. This follows from the principles of democracy and of parliamentary discontinuity, and from the fact that Parliament is not competent to denounce international treaties and therefore must be able to act at least within its field of competence to change the situation.

Nothing else follows from the principle that agreements must be kept (“*pacta sunt servanda*”), which is recognised as a general rule of public international law, and therefore has a rank above statutory law, but below constitutional law in Germany (cf. second sentence of Article 25 of the Basic Law) because it does not make all provisions of international treaties general rules of public international law within the meaning of Article 25 of the Basic Law, bestowing precedence over statutory law. Nor does the case-law of the Federal Constitutional Court preclude newer federal statutes from superseding provisions of public international law that conflict with them: The Federal Constitutional

Court’s *Görgülü* order (Decision 2 BvR 1481/04 of 14 October 2004) only addressed the legal consequences of regular courts insufficiently taking into account public international law; more precisely, it concerned the importance of the European Convention on Human Rights – a treaty concerning the protection of human rights, a matter that is specifically enshrined in Article 1.2 of the Basic Law. In addition, public international law, in particular the concept of good faith (cf. Article 26 and the first sentence of Article 27 of the Vienna Convention on the Law of Treaties – hereinafter, “VCLT”), does not preclude the effectiveness on the national level of legal acts that violate public international law. Nor does it follow from the unwritten principle of openness to international law that national statutes contravening international treaties are unconstitutional. According to the case-law of the Federal Constitutional Court, that principle in particular serves as a guideline for the interpretation of fundamental rights, the constitutional principles derived from the rule of law, as well as statutory law, but it does not apply in a way that is absolute and independent of the methodical limits of statutory interpretation. Therefore, the first sentence of Article 59.2 of the Basic Law cannot be interpreted – in a way that is favourable to international law – to mean that the legislator may only in exceptional cases, i.e. only to prevent a violation of fundamental constitutional principles, override obligations under international law. Such an interpretation would be untenable under methodical aspects. This becomes particularly clear when looking at double taxation treaties: Since double taxation treaties do not usually violate fundamental constitutional principles, *de facto*, they would – like the general rules of international law – generally rank above statutory law. However, such an equalisation would contravene the differentiation the constitutional legislator made in the different constitutional provisions. Interpretation of Article 59.2 of the Basic Law cannot ignore this fact. Furthermore, treaty overrides are not unconstitutional for violating the rule of law. Interpretations of the Basic Law’s rule of law principle must satisfy the requirements of systematic constitutional interpretation. Thus they are limited at least by the Basic Law’s express provisions and by the principle of democracy. Measured by these standards, the first sentence of § 50d.8 of the Act does not violate the Basic Law – irrespective of whether it truly constitutes a treaty override.

The provision is also compatible with Article 3.1 of the Basic Law.

III. Separate Opinion of Justice König

Neither the outcome of the decision by the Senate’s majority nor its reasoning convinced Justice König.

According to her, the decision essentially upholds a legal view presented by the Second Panel in its 1957 Judgment on the *Reichskonkordat* (Decision 2 BvG 1/55, 26 March 1957), which she considers to be outdated in today's globalised world and its multitude of international treaties. Rather, according to her, it is necessary to strike an appropriate balance between the principle of democracy on the one hand and the rule of law principle in conjunction with the principle of openness to international law on the other hand. In her view, in striking this balance, one should particularly look at the following criteria: the aim pursued by the later statute as well as its relevance to the common good; the effects on the legal situation of the individuals who benefit from the international provision; the urgency of the deviating provision; the possibility of using reasonable means of ending the international obligation in accordance with public international law, e.g. issuing an interpretative statement, denouncing or modifying the treaty; as well as the legal consequences of a breach of public international law. According to these standards, in her view, the first sentence of § 50d.8 of the Act as amended by the 2003 Tax Amendment Act was not compatible with the Basic Law. It constituted a treaty override in violation of international law. In weighing the abovementioned criteria, the aspects arguing for the unconstitutionality of the treaty override held more weight.

Cross-references:

Federal Constitutional Court (selection):

- 2 BvG 1/55, *BVerfGE* 6, 309 <363>, 26.03.1957;
- 2 BvR 1481/04, *BVerfGE* 111, 307, 14.10.2004, *Bulletin* 2004/3 [GER-2004-3-009];
- 2 BvR 955/00, 1038/01, *BVerfGE* 112, 1, 26.10.2004, *Bulletin* 2004/3 [GER-2004-3-010];
- 2 BvR 2365/09, 740/10, 2333/08, 1152/10, 571/10, *BVerfGE* 128, 326, 04.05.2011, *Bulletin* 2011/2 [GER-2011-2-013].

Languages:

German, English (translation by the Court is being prepared for the Court's website); English press release available on the Federal Constitutional Court's website.



Identification: GER-2016-1-003

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 15.12.2015 / **e)** 2 BvR 2735/14 / **f)** / **g)** to be published in the Federal Constitutional Court's Official Digest (*Entscheidungen des Bundesverfassungsgerichts*) / **h)** *Europäische Grundrechte-Zeitschrift* 2016, 33-50; *Neue Juristische Wochenschrift* 2016, 1149-1162; *Juristenzeitung* 2016, 410-422; CODICES (German).

Keywords of the systematic thesaurus:

1.3.5.2.2 Constitutional Justice – Jurisdiction – The subject of review – Law of the European Union/EU Law – **Secondary legislation.**

2.2.1.6.3 Sources – Hierarchy – Hierarchy as between national and non-national Sources – Law of the European Union/EU Law and domestic law – **EU secondary law and constitutions.**

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.**

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

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

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

Keywords of the alphabetical index:

Community law, national law, interpretation favourable to Community law, limits / Constitution, clause, immutable / Constitution, identity / Constitution, immutability, principle / Constitutional identity / European Arrest Warrant, surrender procedures between Member States / European Arrest Warrant, non-execution, limitation / European Union, law, effectiveness / European Union, member states, mutual trust / Identity, constitutional, review / Guilt, individual, principle / Mutual legal assistance in criminal matters / Review, standard / Trial *in absentia*, condemnation / Trial *in absentia*, right to new trial.

Headnotes:

By means of the identity review, the Federal Constitutional Court guarantees, without reservations and in every individual case, the protection of fundamental rights which is indispensable according to the third sentence of Article 23.1 in conjunction with Article 79.3 and Article 1.1 of the Basic Law.

The strict requirements for activating the identity review are paralleled by stricter admissibility requirements for constitutional complaints that raise such an issue.

The principle of individual guilt forms part of the constitutional identity. Therefore, one must also ensure that it is complied with in extraditions for the purpose of executing sentences that were rendered in the absence of the requested person during the trial.

German public authority must not assist other states in violating human dignity. The extent and the scope of the investigations, which the courts are under an obligation to conduct in order to ensure the respect of the principle of individual guilt, depend on the nature and the significance of the points submitted by the requested person that indicate that the proceedings in the requesting state fall below the minimum standards mandated by Article 1.1 of the Basic Law.

Summary:

I. The applicant is a citizen of the United States of America. In 1992, by final judgment of the Florence *Corte di Appello*, he was sentenced in absence to a custodial sentence of thirty years. In 2014, he was arrested in Germany on the basis of a European Arrest Warrant. In the context of the extradition procedure, he mainly submitted that he did not have any knowledge of his conviction and that, under Italian law, he would not be able to have a new evidentiary hearing in the appeals proceedings. Nevertheless, by the challenged order of 7 November 2014, the Higher Regional Court declared the extradition of the applicant to be permissible. In his constitutional complaint, the applicant mainly asserted that his fundamental rights under Article 1 of the Basic Law (human dignity), Article 2.1 of the Basic Law (right to personal self-determination), the second sentence of Article 2.2 of the Basic Law (personal liberty), Article 3 of the Basic Law (equality) and Article 103.1 of the Basic Law (right to be heard by the court dealing with the case) were violated. In addition, he asserted a violation of his fundamental right to a fair trial (Article 2.1 in conjunction with Article 20.3 of the Basic Law, Article 6.3 ECHR), a violation of the binding minimum requirements under public international law enshrined in the Constitution, and of Article 6.3 ECHR.

II. The Federal Constitutional Court held that the Higher Regional Court, in granting the extradition, had violated the applicant's human dignity (Article 1.1 in conjunction with the third sentence of Article 23.1 and Article 79.3 of the Basic Law). The applicant had asserted in a substantiated manner that Italian procedural law did not provide him with the opportunity to have a new

evidentiary hearing at the appeals stage. However, the Higher Regional Court had not followed up on these objections by way of investigations, despite its obligation to do so. The Federal Constitutional Court therefore reversed the challenged decision and remanded it to the Higher Regional Court. It also held that in this regard both the Framework Decision on the European Arrest Warrant (hereinafter, the "Framework Decision") and the German law transposing it were compatible with human dignity.

The Federal Constitutional Court's decision is based on the following considerations:

In general, sovereign acts of the EU and acts of German public authority – to the extent that they are determined by Union law – are accorded precedence over German law. However, if the German constitutional identity, as protected under the third sentence of Article 23.1 in conjunction with Article 79.3 of the Basic Law, is at stake, the Federal Constitutional Court has the exclusive power, upon application, to conduct an identity review, ultimately declaring such an act to be inapplicable. Such a review is compatible with EU law, as it is a concept inherent in the first sentence of Article 4.2 of the Treaty on European Union (TEU) and does not entail a substantial risk for the uniform application of Union law due to the restraint with which it is exercised and due to the German Constitution's openness to European integration which is taken into account.

In the present case, the Higher Regional Court's extradition decision was determined by Union law – the Framework Decision on the European Arrest Warrant. The Federal Constitutional Court reviewed the case according to standards under German constitutional law because the strict procedural requirements for an identity review were met, and the German constitutional identity was possibly at stake, as the applicant asserted a violation of the right of an effective defence in criminal cases. This right is contained within the scope of the principle of individual guilt, the latter being enshrined in human dignity, which forms part of the constitutional identity. It is also a constitutive element of the rule of law.

There was no need to limit the precedence of the Framework Decision via Article 23.1 in conjunction with Article 79.3 of the Basic Law: Both the German Constitution and the Framework Decision allow and require a national authority that decides on an extradition to review whether the requirements under the rule of law have been complied with, even if the European Arrest Warrant formally meets the requirements of the Framework Decision. Minimum guarantees of the right of defence necessary according to the principle of individual guilt have to be

taken into account in extradition decisions and might require further investigations by the relevant court. The right mandates that a requested person who has been sentenced in his or her absence and who has not been informed about the trial and its conclusion be at least provided with the real opportunity to defend him or herself effectively after having learned of the trial, in particular by presenting circumstances to the court that may exonerate him or her and by having them reviewed. Despite relevant indications warranting further investigations, the Higher Regional Court had not duly investigated whether the applicant would be accorded the right to a full retrial of the case, with regard to both the facts and the merits, if he were extradited. Thereby it had failed to meet its obligation corresponding to the applicant's right.

In general, to the extent required, the Federal Constitutional Court will base its review of the European act in question on the interpretation provided by the European Court of Justice in a preliminary ruling under Article 267.3 of the Treaty on the Functioning of the European Union (TFEU). In this case, according to the Court, there was no need for a preliminary ruling under Article 267 TFEU, because the *acte clair* doctrine applied. There was no conflict between Union law and the protection of human dignity under the Basic Law.

Cross-references:

The Federal Constitutional Court referred extensively to its previous case-law.

European Court of Human Rights (selection):

- *Colozza v. Italy*, no. 9024/80, 12.02.1985, §§ 27-31, *Special Bulletin Leading Cases – ECHR* [ECH-1985-S-001];
- *Soering v. United Kingdom*, no. 14038/88, 07.07.1989, § 91, *Special Bulletin Leading Cases – ECHR* [ECH-1989-S-003];
- *Poitrimol v. France*, no. 14032/88, 23.11.1993, § 35;
- *Van de Hurk v. the Netherlands*, no. 16034/90, 19.04.1994, § 59;
- *Mantovanelli v. France*, no. 21497/93, 18.03.1997, § 33;
- *Lietzow v. Germany*, no. 24479/94, 13.02.2001, § 44;
- *Medenica v. Switzerland*, no. 20491/92, 14.06.2001, §§ 55, 57;
- *Jones v. United Kingdom*, no. 30900/02, 09.09.2003;
- *Somogyi v. Italy*, no. 67972/01, 18.05.2004, § 72;
- *Sejdovic v. Italy*, no. 56581/00, 10.11.2004, § 40;

- *Stoichkov v. Bulgaria*, no. 9808/02, 24.03.2005, § 56;
- *Sejdovic v. Italy*, no. 56581/00, 01.03.2006, §§ 85-88, 103 *et seqq.*

Court of Justice of the European Union (selection):

- C-6/64, *Costa v. ENEL*, 15.07.1964, [1964] *European Court Reports* 1251 <1269-1270>, *Special Bulletin Leading Cases – ECJ* [ECJ-1964-S-001];
- C-29/69, *Stauder*, 12.11.1969, [1969] *European Court Reports* 419, paragraph 7, *Special Bulletin Leading Cases – ECJ* [ECJ-1969-S-001];
- C-283/81, *C.I.L.F.I.T.*, 06.10.1982, [1982] *European Court Reports* 3415, paragraphs 16 *et seqq.*;
- C-218/82, *Commission v. Council*, 13.12.1983, [1983] *European Court Reports* 4063, paragraph 15;
- C-222/84, *Johnston*, 15.05.1986, [1986] *European Court Reports* 1651, paragraph 19, *Special Bulletin Leading Cases – ECJ* [ECJ-1986-S-002];
- C-5/88, *Wachauf*, 13.07.1989, [1989] *European Court Reports* 2609, paragraph 19;
- C-473/93, *Commission v. Luxemburg*, 02.07.1996, [1996] *European Court Reports* I-3207, paragraph 35;
- C-221/97 P, *Schröder and Thamann v. Commission*, 10.12.1998, [1998] *European Court Reports* I-8255, paragraph 24;
- C-397/01 to C-403/01, *Pfeiffer*, [2004] 05.10.2004, *European Court Reports* I-8835, paragraphs 115 and 116;
- C-36/02, *Omega*, 14.10.2004, [2004] *European Court Reports* I-9609, paragraphs 31 *et seqq.*;
- C-105/03, *Pupino*, 16.06.2005, [2005] *European Court Reports* I-5285, paragraphs 58 *et seqq.*, *Bulletin* 2008/2 [ECJ-2008-2-016];
- C-303/05, *Advocaten voor de Wereld*, 03.05.2007, [2007] *European Court Reports* I-3633, paragraph 45, *Bulletin* 2009/2 [ECJ-2009-2-007];
- C-388/08 PPU, *Leymann and Pustovarov*, 01.12.2008, [2008] *European Court Reports* I-8993, paragraph 51;
- C-491/10 PPU, *Aguirre Zarraga*, 22.12.2010, [2010] *European Court Reports* I-14247, paragraphs 70-71;
- C-42/11, *Lopes Da Silva Jorge*, 05.09.2012, EU:C:2012:517, paragraph 56, [ECJ-2012-E-009];
- C-399/11, *Melloni*, 26.02.2013, EU:C:2013:107, paragraphs 46, 48 *et seqq.*, 59, [ECJ-2013-E-003];
- C-168/13 PPU, *Jeremy F.*, 30.05.2013, EU:C:2013:358, paragraphs 36, with further references, and 49, [ECJ-2013-E-009];

- C-156/13, *Digibet and Albers*, 12.06.2014, EU:C:2014:1756, paragraph 34;
- C-362/14, *Schrems*, 06.10.2015, EU:C:2015:650, paragraphs 91 *et seqq.*

The Court also referred to several opinions rendered by different Advocates General.

Languages:

German, English (translation by the Court is being prepared for the Court's website); English press release available on the Federal Constitutional Court's website.



Identification: GER-2016-1-004

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 12.01.2016 / **e)** 1 BvL 6/13 / **f)** Professional Partnership of Lawyers with Physicians and Pharmacists / **g)** to be published in the Federal Constitutional Court's Official Digest (*Entscheidungen des Bundesverfassungsgerichts*) / **h)** *Zeitschrift für Wirtschafts- und Insolvenzrecht* 2016, 258-266; *Wertpapier-Mitteilungen* 2016, 379-384; *Monatsschrift für Deutsches Recht* 2016, 242-244; *Anwaltsblatt Sonderheft* 2016, 261-263; *Neue Juristische Wochenschrift* 2016, 700-708; *Europäische Grundrechte-Zeitschrift* 2016, 61-72; *BRAK-Mitteilungen* 2016, 78-87; *Deutsches Steuerrecht* 2016, 990-991; CODICES (German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Conflict of interest / Lawyer, professional privilege / Lawyer, client, confidentiality / Lawyer, pharmacist, professional conduct, right to practice / Pharmacist, profession / Medical practitioner / Professional conduct, right to practice.

Headnotes:

The prohibition on establishing a partnership as enshrined in the first sentence of § 59a.1 of the Federal Lawyers' Act violates the freedom to practise an occupation, insofar as it prohibits lawyers to establish a professional partnership with physicians and pharmacists for the joint practising of their professions.

Summary:

I. The two petitioners in the initial proceedings are a lawyer and a physician and pharmacist. They established a professional partnership and applied for its entry into the partnership register. A Local Court and a Higher Regional Court denied the registration arguing that such a partnership conflicts with the exhaustive regulation of the first sentence of § 59a.1 of the German Federal Lawyers' Act (hereinafter, the "Act"), which does not list the professions of physician and pharmacist. The Federal Court of Justice suspended the proceedings and referred it to the Federal Constitutional Court for review.

II. Upon the referral, the Federal Constitutional Court decided that the first sentence of § 59a.1 of the Act is unconstitutional and void to the extent that it prohibits lawyers to establish an inter-professional partnership with physicians and pharmacists. The prohibition disproportionately interferes with the freedom to practise an occupation (Article 12.1 of the Basic Law).

The decision is based on the following considerations:

The purpose of the first sentence of § 59a.1 of the Act is to ensure that the essential basic obligations of a lawyer are complied with. These include professional confidentiality, the prohibition against representing conflicting interests and the duty to refrain from entering into professional relationships that compromise a lawyer's professional independence.

Under the principle of proportionality, the prohibition of a partnership with physicians and pharmacists is, however, not necessary to ensure lawyers' professional confidentiality; apart from that, it is not appropriate to achieve the purpose pursued by the legislator.

Lawyers must maintain confidentiality under § 43a.2 of the Act and § 203.1, no. 3 of the Criminal Code. The legislator may bar those professions from joining a professional partnership for which a sufficient degree of confidentiality does not appear to be guaranteed. The legislator ruled out such

deficits only for those professions explicitly mentioned in § 59a.1 of the Act, but excluded physicians and pharmacists from this group. This is generally not necessary in order to safeguard the clients' interest in confidentiality. When hiring an inter-professional partnership, it is generally expected that client-related information is shared with the non-legal partners; this does not constitute a breach of confidentiality.

The requirement of proportionality *stricto sensu* is not met if the prohibition against establishing a partnership is based solely on the fact that, insofar as facts have not been confided or made known to physicians or pharmacists in their professional capacity, they are not as such obliged to maintain confidentiality. In order to provide competent legal advice and be economically successful it may be essential for law firms to offer legal assistance in specialised fields and establish to that end suitable inter-professional partnerships. Any resulting increased endangerment of confidentiality is small and does not justify the substantial interference with the freedom to practice an occupation. Notably, the legislator did not assume such risks in the case of those professions mentioned in § 59a.1 of the Act.

Prohibiting professional partnerships of lawyers with physicians and pharmacists is, to a large extent, not necessary or at least not appropriate for safeguarding the lawyer's rights to refuse to testify. According to the relevant rules of procedure, physicians and pharmacists can also refuse to testify. The potential risk that their right to refuse to testify falls behind that of the lawyer is low and does not differ from the risk the legislator accepts regarding those professions that are permitted to establish professional partnerships with lawyers.

Nor does safeguarding the rights to protection against seizure under criminal procedural law make it necessary to prohibit such inter-professional partnerships. The protection of physicians and pharmacists against seizure under § 97 of the Code of Criminal Procedure (hereinafter, the "Code") does not fall behind the protection lawyers can claim.

Nor does the prohibition against taking or using evidence make it necessary to prohibit such inter-professional partnerships. Indeed, under § 160a.1 of the Code, the prohibition against taking or using evidence that applies in favour of lawyers is absolute while the prohibition that applies in favour of physicians and pharmacists is relative (cf. § 160a.2 in conjunction with § 53.1, no. 3 of the Code). However, also the professions mentioned in § 59a.1 of the Act are only subject to such relative protection; thus, the legislator accepts a limited weakening of the clients'

interest in confidentiality in favour of the freedom to practice an occupation.

While a prohibition of inter-professional partnerships might still be necessary to protect a lawyer's independence it is, however, not appropriate. The legislator's assumption that such a prohibition is necessary to protect professional independence is generally plausible and not objectionable. Compared to the permissible combinations of professions under § 59a of the Act, however, the inter-professional cooperation of lawyers with physicians and pharmacists does not entail an increased potential endangerment of the lawyers' independence.

The objective to avoid conflicts of interests does not justify a prohibition of inter-professional partnerships either. Under the Federal Lawyers' Rules of Professional Practice, lawyers may not represent conflicting interests, and under § 356 of the Criminal Code a violation of the lawyer-client relationship is punishable. Physicians and pharmacists cannot be offenders under § 356 of the Criminal Code, and their professional codes of conduct do not have corresponding provisions. However, not all professions listed in § 59a of the Act are required to represent the interests of one party only either. Generally, under the Federal Lawyers' Rules of Professional Practice, lawyers must therefore be compelled to contractually commit non-legal partners to comply with these rules of professional practice and furthermore ensure that the prohibition against representing conflicting interests is not disregarded.

Overall, when permitting inter-professional partnerships, the legislator accepted that risks to the lawyer's integrity cannot be ruled out completely. Thus, also against that background, this specific prohibition against establishing a partnership constitutes an inappropriate interference with the freedom to practice an occupation.

Languages:

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



Identification: GER-2016-1-005

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 17.02.2016 / **e)** 1 BvL 8/10 / **f)** / **g)** to be published in the Federal Constitutional Court's Official Digest (*Entscheidungen des Bundesverfassungsgerichts*) / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy**.

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

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

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

Keywords of the alphabetical index:

Law, reserved matter, delegation, limit / Legislative delegation, precision / Legislative power, non-delegation / Research, academic / Statute, necessary elements / Statutory authorisation / Statutory reservation, principle / University, organisation / University, autonomy / University, founding or recognition / University, study.

Headnotes:

The fundamental right of freedom of research and teaching guaranteed by the first sentence of Article 5.3 of the Basic Law does not conflict with requirements set down to assure the quality of academic studies offered by universities. However, the legislator may not leave essential decisions on the accreditation of study programmes to other actors: the legislator must take them itself, while taking into account the inner rationality of research and teaching.

Summary:

I. In specific judicial review proceedings requested by the Arnsberg Administrative Court, the First Panel of the Federal Constitutional Court decided that the provisions stipulated in the sixth sentence of § 72.2 in conjunction with § 72.1, no. 3 of the former version (hereinafter, "(f.v.)") of the Act on the Higher Education Institutions of the Land of North Rhine-Westphalia (hereinafter, the "Act") concerning the accreditation of study programmes in the Land North Rhine-Westphalia requiring that study programmes be accredited by agencies "in accordance with applicable regulations" are incompatible with the Basic Law (first sentence of Article 5.3 in conjunction with Article 20.3 of the Basic Law).

Under the Act (f.v.) higher education institutions that were not under the responsibility of the Land required state recognition in order to be put on an equal footing with state higher education institutions in terms of graduation, the right to hold examinations, and the right to award an academic degree. Without state recognition, these institutions were not allowed to operate under the designation "higher education institution". Pursuant to § 72.1, no. 3 of the Act (f.v.), a prerequisite for state recognition was "a majority of ... successfully accredited study programmes". According to the sixth sentence of § 72.2 of the Act (f.v.), accreditations were carried out "in accordance with applicable regulations".

II. Against that background, the Federal Constitutional Court held that the accreditation requirement involves a significant interference with the freedom of research and teaching, which the legislator may not leave to other actors. In order to meet the requirement of a statutory provision, the legislator must determine the necessary requirements itself.

The Federal Constitutional Court also noted that the fundamental right of freedom of research and teaching includes academics' independence to determine the content, organisation and methodical approach of study courses as well as the right to express academic doctrines. This independence is, however, limited in the case at issue because the statutory requirement to obtain state recognition forces private higher education institutions to accredit study programmes if they want to be recognised by the state. Such recognition is indispensable if the institution wants to operate as a higher education institution. As such, the required accreditation directly affects the structure and content of academic teaching. This interference with the freedom of research and teaching cannot be justified under constitutional law. It is not justified by the Europeanisation of the higher education area initiated by the "Bologna Process" either.

The fundamental right of freedom of research and teaching does not conflict with requirements ensuring proper teaching and a transparent examination system. However, quality assurance measures that interfere with the freedom of research and teaching, enshrined in the first sentence of Article 5.3 of the Basic Law, require, in conjunction with Article 20.3 of the Basic Law, an adequate legal basis. The rule of law and the principle of democracy oblige the legislator to enact provisions that are essential for the realisation of fundamental rights itself. As far as evaluative decisions relevant to fundamental rights are concerned, the legislator must determine by whom these decisions are to be adopted and what the relevant procedure will be. However, the sixth

sentence of § 72.2 of the Act (f.v.) does not provide for adequate legislative decisions concerning the evaluation criteria, the procedure and the organisation of the accreditation. This lack is not compensated by adequate legal provisions stipulated elsewhere either. In particular, there are no requirements for adequate participation of the research and teaching staff as such.

By passing the provision in question, the legislator factually gave up control over the statutory regulation of requirements for the accreditation regarding contents, procedure, and organisation and has not taken the decisions that govern the grave interference with the first sentence of Article 5.3 of the Basic Law itself. Rather, many essential decisions are left to the accreditation council; and this gives very extensive leeway to the accreditation agencies. Due to the requirement to respect freedom of research and teaching, the legislator precluded from regulating the specifics of teaching programmes.

Reviewed provisions that prove to be incompatible with the Basic Law must principally be declared void. However, the Court may also limit its decision to declaring an unconstitutional provision incompatible with the Constitution. The sixth sentence of § 72.2 and the first sentence of § 7.1 of the Act (f.v.) prove to be incompatible with the first sentence of Article 5.3 of the Basic Law in conjunction with the principle of democracy and the rule of law. Incompatibility also extends to the second sentence of § 7.1 of the Act (f.v.) and, in the interest of legal clarity, also to the first and second sentence of § 7.1 of the Act of the current version that entered into force in 2014, which correspond to the sixth sentence of § 72.2 HG NRW (f.v.). The Land legislator must set down regulations in conformity with the Constitution which take effect on 1 January 2018 at the latest.

Languages:

German, English (translation by the Court is being prepared for the Court's website); English press release available on the Court's website.



Identification: GER-2016-1-006

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 19.04.2016 / **e)** 1 BvR 3309/13 / **f)** / **g)** to be published in the Federal Constitutional Court's Official Digest (*Entscheidungen des Bundesverfassungsgerichts*) / **h)** *Neue Zeitschrift für Familienrecht* 2016, 400-408; CODICES (German).

Keywords of the systematic thesaurus:

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

Descent, child, interest / Descent, right to know / Identity, personal, right / Paternity, biological father / Parentage, identity, personal, right to know / Parentage, right to know / Paternity, action to establish / Paternity, investigation / Paternity, right to establish, child / Paternity, right to know / Paternity, search / Personality, general right.

Headnotes:

The general right of personality (Article 2.1 in conjunction with Article 1.1 of the Basic Law) does not require the legislator to provide an isolated procedure to determine parentage vis-à-vis the putative biological, but not legal father (referred to as procedure aimed at determining parentage without legal consequences) in addition to the already existing procedure of establishing paternity pursuant to § 1600d of the Civil Code.

Summary:

I. The applicant, who was born out of wedlock in 1950, assumes that the respondent in the initial proceedings (hereinafter, the “respondent”) is her biological father. In 1954, the applicant took legal action against the respondent, seeking “establishment of parentage by blood type” according to the law applicable at that time. The Regional Court's decision dismissing that action in 1955 became final. In 2009, the complainant requested the respondent to consent to a DNA test “to conclusively determine” his biological paternity, which the respondent refused. Subsequently, the complainant – relying on § 1598a of the Civil Code (hereinafter, the “Code”) –

requested the respondent to consent to a genetic parentage test and to submit to the taking of a genetic sample suitable for that test. § 1598a of the Code provides such a right for the father, the mother, and the child within a legal family vis-à-vis the other two members of that family. According to the complainant, § 1598a of the Code should be interpreted in conformity with the Basic Law and human rights so that also the respondent, as the putative biological, but not legal father, could be requested to participate in proceedings aimed at determining parentage without legal consequences. The Local Court held that provision to be inapplicable and rejected the applicant's action. The complaint lodged against that decision before the Higher Regional Court was unsuccessful. The applicant lodged a constitutional complaint, asserting, in particular, that her general right of personality under the Basic Law and Article 8 ECHR had been violated by those judicial decisions.

II. The Federal Constitutional Court decided that the constitutional complaint was unfounded.

The decision is based on the following considerations:

The protection of the knowledge of one's origins – a protection derived from the general right of personality – is not an absolute one, but has to be reconciled with conflicting fundamental rights. In this regard, the legislator possesses a leeway to design. It remains within the legislator's leeway to design to only provide means for determining parentage without legal consequences within the legal family, but not vis-à-vis the putative biological father who is not the legal father. The same assessment applies if seen in light of the European Convention on Human Rights – and irrespective of the fact that German constitutional law would permit a different legal solution.

Cross-references:

European Court of Human Rights:

- *Ahrens v. Germany*, no. 45071/09, 22.03.2012;
- *Anayo v. Germany*, no. 20578/07, 21.12.2010;
- *Godelli v. Italy*, no. 33783/09, 25.09.2012;
- *Jäggi v. Switzerland*, no. 58757/00, 13.07.2006, *Reports of Judgments and Decisions* 2006-X;
- *Kautzor v. Germany*, no. 23338/09, 22.03.2012;
- *Mikulić v. Croatia*, no. 53176/99, 07.02.2002, *Reports of Judgments and Decisions* 2002-I;
- *Odièvre v. France*, no. 42326/98, 13.02.2003, *Reports of Judgments and Decisions* 2003-III;
- *Pascaud v. France*, no. 19535/08, 16.06.2011;
- *Schneider v. Germany*, no. 17080/07, 15.09.2011.

Languages:

German, English (translation by the Court is being prepared for the Court's website); English press release available on the Court's website.



Identification: GER-2016-1-007

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 20.04.2016 / **e)** 1 BvR 966/09, 1 BvR 1140/09 / **f)** / **g)** to be published in the Federal Constitutional Court's Official Digest (*Entscheidungen des Bundesverfassungsgerichts*) / **h)** *Neue Juristische Wochenschrift Spezial* 2016, 313; CODICES (German).

Keywords of the systematic thesaurus:

- 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**
- 5.1.4.3 Fundamental Rights – General questions – Limits and restrictions – **Subsequent review of limitation.**
- 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.**
- 5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home.**
- 5.3.36 Fundamental Rights – Civil and political rights – **Inviolability of communications.**

Keywords of the alphabetical index:

Surveillance, secret, measure / Data collection, secret / Data, personal, treatment / Personal data, collection / Personal data, protection / Police, criminal authority, judicial supervision / Police, legislation / Police, measure / Police, surveillance, limits / Privacy, invasion, proportionality / Security, public, danger / Terrorism, fight, fundamental rights, protection, weighing / Internet, online search / Remote search, information technology systems, right / Data, use, purpose limitation, principle / Data, use, principle of change in purpose / Data transfer, third country.

Headnotes:

1.a. The authorisation of the Federal Criminal Police Office to carry out covert surveillance measures (surveillance of private homes, remote searches of information technology systems, telecommunications surveillance, collection of telecommunications traffic data and surveillance outside of private homes using special means of data collection) is, for the purpose of protecting against threats from international terrorism, in principle compatible with the fundamental rights enshrined in the Basic Law.

b. The design of these powers must satisfy the principle of proportionality. Powers that constitute a serious interference with privacy must be limited to the protection or legal reinforcement of sufficiently weighty legally protected interests; require that a threat to these interests is sufficiently specifically foreseeable; may, only under limited conditions, also extend to third parties from whom the threat does not emanate and who belong to the target person's sphere; require, for the most part, particular rules for the protection of the core area of private life as well as the protection of persons subject to professional confidentiality; are subject to requirements of transparency, individual legal protection, and supervisory control; and must be supplemented by deletion requirements with regard to the recorded data.

2. The requirements for the use and transfer of data collected by the state follow the principles of purpose limitation and change in purpose.

a. The scope of a purpose limitation depends on the specific legal basis for the data collection: the data collection initially takes its purpose from the respective investigation procedure.

b. The legislator may allow a use of the data beyond the specific procedure of the data collection in the context of the original purposes of the data (further use). This implies that the use of collected data is limited to the same authority, acting in the same function, and for the protection of the same legal interests. For data from the surveillance of private homes or from access to information technology systems, each further use must additionally also fulfil the relevant risk situation requirements applicable to the data collection.

c. Moreover, the legislator may also allow for a further use of the data collected by the state for other purposes than those determining the original data collection (change in purpose).

The proportionality requirements for such a change must conform to the principle of a hypothetical re-collection of data. According to this, the new use of

the data must serve the protection of legal interests or aim to investigate criminal offences of such weight that would, by constitutional standards, justify collecting them again with comparably weighty means. A specific risk situation, as required for the initial data collection, is generally not required a second time; it is necessary but generally also sufficient that there be a specific evidentiary basis for further investigations.

With regard to data from the surveillance of private homes and from remote searches of information technology systems, a change in purpose is only permitted if the relevant risk situation requirements applicable to the collection of the data are again fulfilled.

3. The transfer of data to state authorities in third countries is subject to the general constitutional principles of purpose limitation and change in purpose. In assessing a new use, the autonomy of the other legal order must be respected. A transfer of data to third countries requires the ascertainment that, in the third country, the data will be handled in sufficient conformity with rule-of-law standards.

Summary:

I. The complainants, in a constitutional complaint, challenged certain powers, which were introduced into the Federal Criminal Police Office Act (hereinafter, the "Act"); extending its tasks from its previous law enforcement duties to also include the protection against threats from international terrorism. The thus expanded scope of previously existing rules on the transfer of data from German state authorities to third countries was also challenged.

II. The Federal Constitutional Court, consolidating a line of established case-law, decided that the provisions on covert surveillance measures were, in principle, compatible with fundamental rights under the Basic Law. However, in some respects the current design of the investigative powers granted was found to not satisfy the principle of proportionality. Certain provisions were also found to be too unspecific and too broad. Parts of the provisions concerning the transfer of data were found to be lacking sufficient legal restrictions.

III. Separate opinion of Justice Eichberger:

The prerogative of appraisal with regard both to the actual assessment of the risk situation and the prognosis of its development belongs to the legislator. In light of this, the Panel should not have set down such detailed requirements; they lead to a problematic entrenchment of excessive constitutional requirements in this field.

With regard to provisions on measures which the Panel deems too unspecific and disproportionate, it would have been possible to interpret these in conformity with the Basic Law.

The exception applying to a change in purpose with regard to data from the surveillance of private homes or remote searches is not necessary. A further use – even with a different purpose – of this data resulting from an initial massive interference with privacy, does indeed perpetuate this interference, but it does not again reach the level of severity of the initial interference. In this regard, the general rules should apply.

Separate opinion of Justice Schluckebier:

By stipulating numerous detailed requirements of a technical nature, the Panel unduly places its own notion of regulatory framework before that of the democratically legitimised legislature. The solution proposed by the Panel with regard to an independent body for screening data does not sufficiently satisfy the requirements of appropriateness with regard to the effective prevention of terrorist crimes. Also, some of the challenged provisions could have been interpreted in conformity with the Basic Law.

Supplementary information:

It was the first time the Constitutional Court had been called upon to decide on transfers of data to third countries. The decision, however, does not pertain to transfers to Member States of the European Union (§ 14a of the Act).

Legal norms referred to:

- § 14, § 20c.3, § 20g, § 20h, § 20j.1, § 20k, § 20l, § 20m.1, § 20u.1 and 20u.2 in conjunction with sentence 1 of § 53.1, nos. 2 & 3 of the Code of Criminal Procedure, § 20v and § 20w of the Act, in the version of 31 December 2008 (Federal Law Gazette 2008, p. 3083 *et seq.*);
- Articles 1.1, 2.1, 10.1, 13.1, 13.3, 19.4, 20.3 and 73.1, no. 9a of the Basic Law.

Cross-references:

Constitutional Court:

- 1 BvR 2378/98, 1 BvR 1084/99, *BVerfGE* 109, 279, 03.03.2004, *Bulletin* 2004/1 [GER-2004-1-002] and [GER-2004-H-001];
- 1 BvR 370/07, 1 BvR 595/07, *BVerfGE* 120, 274, 27.02.2008, *Bulletin* 2008/1 [GER-2008-1-006];

- 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, *BVerfGE* 125, 260, 02.03.2010, *Bulletin* 2010/1 [GER-2010-1-005];
- 2 BvR 236/08, 2 BvR 237/08, 2 BvR 422/08, *BVerfGE* 129, 208, 12.10.2011;
- 1 BvR 1215/07, *BVerfGE* 133, 277, 24.04.2013, *Bulletin* 2013/1 [GER-2013-1-010];
- 1 BvR 668/04, *BVerfGE* 113, 348, 27.07.2005;
- 1 BvR 2226/94, 1 BvR 2420/95, 1 BvR 2437/95, *BVerfGE* 100, 313, 14.07.1999, available in English on the Court's website;
- 1 BvF 3/92, *BVerfGE* 110, 33, 03.03.2004;
- 1 BvR 518/02, *BVerfGE* 115, 320, 04.04.2006, *Bulletin* 2006/2 [GER-2006-2-008];
- 2 BvR 2500/09, 2 BvR 1857/10, *BVerfGE* 130, 1, 07.12.2011, *Bulletin* 2011/3 [GER-2011-3-020].

European Court of Human Rights:

- *Uzun v. Germany*, no. 35623/05, 02.09.2010, *Reports of Judgments and Decisions* 2010 (extracts);
- *Klass and others v. Germany*, no. 5029/71, 06.09.1978, *Special Bulletin Leading Cases – CEDH* [ECH-1978-S-004], Series A, no. 28;
- *Zakharov v. Russia*, no. 47143/06, 04.12.2015, *Reports of Judgments and Decisions* 2015;
- *Szabó and Vissy v. Hungary*, no. 37138/14, 12.01.2016.

Court of Justice of the European Union:

- C-362/14, *Schrems/Digital Rights Ireland*, 06.10.2015, [not yet published];
- C-293/12, C-594/12, *Digital Rights Ireland Ltd/Minister for Communications, Marine and Natural Resources*, 08.04.2014, [not yet published].

Languages:

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



Hungary

Constitutional Court

Important decisions

Identification: HUN-2016-1-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 06.04.2016 / **e)** 7/2016 / **f)** On the amendment to the Act on postal services / **g)** *Magyar Közlöny* (Official Gazette), 2016/47 / **h)**.

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
5.3.24 Fundamental Rights – Civil and political rights – **Right to information.**

Keywords of the alphabetical index:

Postal service, national, operation / Public disclosure, scope.

Headnotes:

Changes made to legislation on postal services affecting the scope of public disclosure at the state-owned Hungarian Post are compliant with the Constitution.

Summary:

1. On 9 March, the President declined to sign the act adopted by Parliament on restricting public access to information concerning the national postal service, simply citing the retroactive effect of the amendments to the act on postal services as justification for sending that legislation to the Constitutional Court.

The main thrust of the provisions on Post Office spending is publicity, although *Magyar Posta* (the state-owned Hungarian Post) has the competence to make business secrets confidential if their disclosure would cause disproportionate harm to business activity. This could particularly be the case where disclosing the data would create an undue advantage for competitors.

II. The Constitutional Court acknowledged that the new legal rule had retrospective effect, but not with a view to disadvantage, which meant it was

not unconstitutional. Moreover, it is within the competence of the ordinary courts to decide whether disclosing certain data would cause disproportionate harm or result in undue advantage.

Languages:

Hungarian.



Identification: HUN-2016-1-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 06.04.2016 / **e)** 8/2016 / **f)** On the amendment to the Act on the Hungarian National Bank / **g)** *Magyar Közlöny* (Official Gazette), 2016/47 / **h)**.

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
4.10.5 Institutions – Public finances – **Central bank.**
5.3.24 Fundamental Rights – Civil and political rights – **Right to information.**

Keywords of the alphabetical index:

Central bank, public funds / Data, access, public interest.

Headnotes:

The Hungarian National Bank exercises public functions and exclusively manages public funds. Therefore, it is accountable to the public in the spirit of transparency and the virtue of public life. The Hungarian National Bank may set up companies or foundations only in harmony with its tasks and primary objectives.

Summary:

I. On 1 March 2016, Parliament adopted an amendment to the Act on the Hungarian National Bank (hereinafter, “MNB”) which allowed for the data of the MNB’s business units to be classified for up to ten years if releasing it could jeopardise the MNB’s monetary or foreign exchange policy interests.

Once Parliament passed the amendment, data managed by companies partially or wholly owned by the MNB were no longer accessible to the public. The amendment was passed by Parliament after a journalist sued to gain access to details of the spending by the MNB's Pallas Athene Domus Animae Foundation and after the Budapest City Court ordered the Pallas Athéné Domus Animae Foundation to publish information on the flow of public money.

On 9 March 2016, the President declined to sign the amendment allowing the MNB to classify data on how it spends public money for its foundations, arguing that this amendment ran counter to the Constitution and national legislation regulating the handling of public money and provision of public information. According to the President, the modification to the MNB Act was incompatible with the constitutional provisions concerning the administration of public finances and information of public interest. The President noted that the Constitution "places special importance on constitutional requirements affecting public funding and public information compared to the previous Constitution". He also suggested that the retroactive effect of the change did not comply with the constitutional principle of legal certainty.

II. The Constitutional Court annulled the modification to the MNB Act which would have allowed the MNB to spend public money without disclosing how that money is spent. Allowing the MNB to classify the way its foundations spend public money was against Articles VI.2 and 39.2 of the Fundamental Law; public spending must be transparent.

The Constitutional Court underlined that the MNB exercises public functions and exclusively manages public funds. It is accordingly accountable to the public in the spirit of transparency and the virtue of public life. The MNB may set up companies or foundations only in harmony with its tasks and primary objectives, so the considerations it grants to these entities do not lose their characteristic of public funds.

Consequently, these organisations are obliged to ensure the publicity of their data and, in the Constitutional Court's opinion, there was no constitutional reason why the law should restrict freedom to information. The amendment was unconstitutional.

The Court further ruled that the amendment was against the Constitution, because it would have made the finances of the foundations secret with retroactive effect.

III. Justice Béla Pokol and András Zs Varga attached separate opinions to the majority decision.

Languages:

Hungarian.



Ireland

Supreme Court

Important decisions

Identification: IRL-2016-1-001

a) Ireland / **b)** Supreme Court / **c)** / **d)** 11.02.2016 / **e)** 2010/1065JR / **f)** Jason O'Brien v. District Judge John Coughlan and the Director of Public Prosecutions / **g)** [2016] IESC 4 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.4 Constitutional Justice – **Procedure**.
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
 5.3.13.7 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to participate in the administration of justice**.

Keywords of the alphabetical index:

Constitution, due process, trial in due course of law / Constitutional justice, natural justice, sentencing, presence in court / Custodial arrest warrant, judicial review.

Headnotes:

Although a trial judge has discretion to proceed to conviction in a case in the absence of an accused, once the judge has in mind to impose a prison sentence, particularly one of length, and where the offence in question would not invariably attract a prison sentence, it would be contrary to the right to a trial in due course of law to impose a sentence of imprisonment in the accused's absence.

Summary:

The Supreme Court is the final court of appeal under the Constitution of Ireland. It hears appeals from the Court of Appeal (which was established on 28 October 2014 in accordance with the Constitution of Ireland) and in certain instances direct from the High Court. The decision of the Supreme Court summarised here is an appeal brought by the Director of Public Prosecutions against a decision of the High

Court granting the relief sought in an application for judicial review. The issue in the appeal was whether a judge of the District Court was entitled to proceed with a criminal trial in the absence of a defendant and, upon conviction, sentence the defendant to a period of imprisonment. The High Court held that such a trial could proceed on proof of due notice to the person accused of the offence. However, if a judge was considering a substantial term of imprisonment, a bench warrant should be issued compelling to defendant to attend court for a sentence to be imposed. The Director of Public Prosecutions appealed the order and judgment of the High Court.

Mr O'Brien was charged with various offences under the Road Traffic Acts. He had previous convictions, including a number for road traffic offences. He failed to attend the District Court in answer to a summons on 30 April 2010, but subsequently appeared in court in relation to the case on 4 June 2010 and 2 July 2010. He was represented by a solicitor, and the judge fixed a date for trial. The defendant did not attend court on the date of the trial, and put forward the excuse that he was mistaken as to the date. On the date of the trial, the judge of the District Court refused an application by the defendant's solicitor for an adjournment, heard the prosecution evidence in the case, and proceeded to convict the applicant. The applicant's solicitor suggested that a bench warrant ought to be issued securing the attendance of the applicant in court before a sentence was imposed. The judge did not agree, and sentenced the applicant to a term of 5 months imprisonment and disqualified him from driving for 40 years. The High Court held that a bench warrant should have been issued before a serious sentence was imposed, but there was no requirement for a trial to be adjourned when there was reliable evidence that the defendant was aware of the trial date. The Court relied on the decision of the Supreme Court in *Brennan v. Windle* [2003] 3 IR 494, that where a sentencing judge is considering imposing a sentence of some length where the offence in question would not invariably result in a sentence of imprisonment, the failure to at least ascertain whether there was a bona fide reason for the failure of the defendant to appear in court would constitute a breach of fair procedures and a breach of the requirements of constitutional justice.

The Supreme Court observed that "[n]othing could be clearer than the principle that in order to exercise any of the rights guaranteed by Article 38.1 of the Constitution, which prohibits any criminal trial taking place "save in due course of law", a person accused of a crime must know when and where they are to be tried". However, having regard to the need for balance, the Court was of the view that, while the

accused has a right to attend at his or her own criminal trial to participate, this can be lost through persistent misconduct and can be waived by a decision not to attend court. Whether a constitutional right has been waived depends on a factual analysis of the circumstances. The Supreme Court held that in the present case, there was nothing to suggest that the judge of the District Court exercised his discretion incorrectly in proceeding with the case in the absence of the accused particularly as the accused knew of the date, had been in court when it was fixed and was legally represented. However, the Court noted that sentencing is regarded as a separate hearing from a trial which has led to conviction, where separate evidence may be led by the prosecution, previous convictions of an accused may be provided, and an accused may gather material and offer mitigation. Despite arguments advanced in an attempt to distinguish the facts of the present case from those in *Brennan v. Windle* [2003] 3 IR 494, the Supreme Court found that the requirements of natural justice as outlined in that case were equally applicable to the present case. The Court concluded that, as the District Court judge had in mind to impose a prison sentence, and particularly one of the lengths involved, and particularly as the offence in sentence would not invariably attract a prison sentence, the District Court judge failed to afford the applicant a trial in due course of law. The appeal was dismissed.

Cross-references:

Supreme Court:

- *Brennan v. Windle* [2003] 3 IR 494, 31.07.2003.

Languages:

English.



Identification: IRL-2016-1-002

a) Ireland / **b)** Supreme Court / **c)** / **d)** 28.04.2016 / **e)** SC 294/14 / **f)** Minister for Justice and Equality v. J.A.T. no. 2 / **g)** [2016] IESC 17 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

3.16 General Principles – **Proportionality.**

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

5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time.**

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

Keywords of the alphabetical index:

European Arrest Warrant / Abuse of process / Admonishment / Surrender / Family life, extradition, interference.

Headnotes:

Where an abuse of process has been found to have occurred in respect of European Arrest Warrant proceedings, it is not appropriate for a Court to admonish the parties responsible while also surrendering the appellant.

Summary:

The Supreme Court is the final court of appeal under the Constitution of Ireland. It hears appeals from the Court of Appeal (which was established on 28 October 2014 in accordance with the Constitution of Ireland) and in certain instances directly from the High Court. The decision of the Supreme Court summarised here arose following a certification of the following question by the High Court for an appeal to the Supreme Court, having found that in the particular circumstances of the case, the issue of a European Arrest Warrant amounted to an abuse of process on the part of the prosecuting authority of the issuing State and/or the respondent:

“Where such an abuse of process has been found to have occurred is it sufficient or appropriate for the Court to admonish the parties responsible whilst also surrendering the applicant?”. The applicant appealed to the Supreme Court from that order.

The Minister for Justice and Equality cross-appealed, and submitted that the High Court erred in law and in fact in finding that:

1. the applicant had suffered unjust harassment in the manner in which his rendition had been pursued;
2. cumulatively, the proceedings were oppressive to the appellant and/or to his family; and
3. the proceedings constituted an abuse of the Court's process.

The appellant was sought by the United Kingdom on foot of a European Arrest Warrant (hereinafter, "EAW") in relation to offences of conspiracy to cheat the public revenue and conspiracy to commit money laundering. The applicant did not consent to being surrendered on the EAW, and opposed it on the grounds that the appellant had suffered an abuse of process in light of all the circumstances of the case.

A warrant had been issued by the Magistrates' Court in London on 7 March 2008, and the appellant was arrested in Ireland. On 21 December 2010, the Irish Supreme Court discharged the applicant from the warrant. The authorities in the United Kingdom issued a second European Arrest Warrant, contending that this warrant took into account the judgment of the Supreme Court in *Minister for Justice v. T* [2010] IESC 61. The High Court found that there had been an abuse of process, but that this abuse of process could be appropriately addressed by the admonishment of the parties responsible for it.

Regarding the cross-appeal by the Minister contending that the High Court erred in finding that the appellant suffered unjust harassment, oppression and an abuse of process, the Supreme Court was satisfied that there was an evidential basis upon which the trial judge could find that there was an abuse of process, and dismissed the cross-appeal of the Minister. The Court considered the question certified, which concerned whether it is sufficient or appropriate for the Court, where the trial judge has found an abuse of process, to admonish the parties, while surrendering the appellant. In relation to the issuing of the second warrant, the Supreme Court noted that it has long been settled jurisprudence in relation to applications for extradition or surrender that the fact that there was an earlier warrant is not a basis of itself upon which to surrender. The issuing of a second EAW for the same offences does not of itself constitute an abuse of process, or reason to refuse surrender. However, the Court was of the view that this was a factor to be considered in light of all the circumstances of the case. Similarly, the time which had passed since the alleged offences, the arrest on foot of the first EAW and the hearing of the

appeal, was not of itself a factor upon which a request for surrender would be refused. However, the Court held that this time period had to be considered having regard to all the circumstances of the case. The Court also had regard to factors relating to the health of the appellant and that of his son.

The Supreme Court stated that it was clear that no deliberate actions were taken to intentionally create the abuse of process. It noted that the admonishment of the parties, which would include the Minister, Central Authority and the prosecuting authorities in the United Kingdom, would have no effect on the applicant, and would in fact mean that the responsible parties would benefit, while the appellant would be surrendered. The Supreme Court stated that in general, "if there is an abuse of process by authorities they should not benefit" and that the "rule of law, and the right to fair procedures, requires that such a general principle be applied". The Court noted that there may be circumstances where it considers that there was an abuse of process, but to a limited degree, but surrender could take place, having regard to the principle of proportionality. However, the Court was of the view that "such a finding would arise only in a situation where a process was found to be an abuse, but in a limited manner, and with limited effect". The Court considered that in this case there was an accumulation of factors:

- a. this was the second EAW warrant issued in relation to the alleged offences;
- b. failings in the first EAW could have been addressed in the first application;
- c. considerable time had passed since the alleged offences and considerable time had passed since the arrest of the applicant in the first EAW;
- d. the medical condition of the appellant who was a vulnerable person;
- e. the medical condition of the appellant's son, for whom the appellant was a significant carer;
- f. the family circumstances;
- g. the oppressive effect which two sets of EAWs had on the appellant, his son and his family;
- h. no explanation had been given for the delays;
- i. there had been no engagement by the authorities with the issues as to the first EAW or the delays;
- j. the Central Authority had a duty to bring to the attention of the issuing State authorities defects of internal contradictions in a warrant, and to consider whether all the documentation was complete and clear, before being relied upon to seek the endorsement of a EAW;
- k. the duty of the Court to protect fair procedures; and

- I. the principle that a party in litigation should not benefit from proceedings which were *de facto* abusive of the Court's process.

Having regard to Section 37 of the European Arrest Warrant Act, which provides that a person shall not be surrendered if his or her surrender would be incompatible with the State's obligations under the European Convention on Human Rights, the Protocols thereto, or would be in contravention of the Constitution, and Article 8 ECHR, the Court held that the family factors were relevant in this case. The appellant had health issues, his son suffered from schizophrenia; the appellant was his son's primary carer, the wife of the appellant was unable to be the primary carer, and the appellant played a primary role in the family, by driving the son to medical appointments, etc. in circumstances where they resided in the country.

The Supreme Court (Denham CJ) concluded:

"While no single factor, as set out above, governs this appeal, in circumstances where the High Court has found, correctly in my view. That there has been an abuse of process, I am satisfied that the factors, referred to in these judgments, taken cumulatively, are such that there should not be an order for the surrender of the appellant."

In answer to the question certified, the Court held that where such an abuse of process has been found to have occurred, it is not appropriate for the Court to admonish the parties responsible while also surrendering the appellant. The appeal was allowed, and the Court refused to make an order for the surrender of the appellant.

O'Donnell J, in his judgment, emphasised that this was a rare and exceptional case.

Cross-references:

Supreme Court:

- *Minister for Justice v. T* [2010] IESC 61, 21.12.2010.

Languages:

English.



Italy Constitutional Court

Important decisions

Identification: ITA-2016-1-001

a) Italy / **b)** Constitutional Court / **c)** / **d)** 12.01.2016 / **e)** 20/2016 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 7, 17.01.2016 / **h)**.

Keywords of the systematic thesaurus:

- 3.10 General Principles – **Certainty of the law.**
- 3.22 General Principles – **Prohibition of arbitrariness.**
- 4.6.4.3 Institutions – Executive bodies – Composition – **End of office of members.**
- 4.8.2 Institutions – Federalism, regionalism and local self-government – **Regions and provinces.**

Keywords of the alphabetical index:

Civil servant, discharge from post / Political decision, implementation.

Headnotes:

Automatic, or in any case discretionary, discharge from a managerial post, instigated for reasons which are not connected with the contract of employment and which do not relate to the results achieved in performing the relevant duties, is incompatible with the Constitution, which provides that public services must be organised in such a way that they guarantee the smooth functioning and impartiality of the administration, insofar as it applies to holders of managerial posts, albeit not governed by the administration's rules, whose remit is limited to implementing decisions taken at a political level.

Summary:

The Court of Cassation called into question the legitimacy of two legal provisions of the Abruzzo region:

- Article 1.2 of the Law of 12 August 2005, no. 27, providing that appointments to the most senior bodies of public organisations in the Abruzzo Region, which are made by persons who have

regional political authority, shall be for the same duration as appointments to the regional council, a provision which had been applied to the manager of “*Abruzzo-lavoro*”, a public organisation of the Abruzzo Region, which was subsequently abolished;

- Article 2.1 of the same law, which made provision, as soon as it entered into force, for the revocation of the managers of the region's public organisations, as designated in Article 1.2, who had been appointed by political executive bodies under the previous regional council.

The manager of “*Abruzzo-lavoro*” was vested with representation powers and exercised organisational and managerial authority. He had been appointed following a public process, after the examination of candidates’ CVs. The candidates had to satisfy the criteria for managerial posts within the regional authority, be under 65 years of age, have an in-depth knowledge of the fields in which “*Abruzzo-lavoro*” worked and have lengthy experience of managing complex organisations. The aim of “*Abruzzo-lavoro*” was to provide technical assistance to the region and the provinces and to monitor the labour market. Its manager, who performed administrative and technical duties, was responsible for its performance in his capacity as manager and could be revoked only in the circumstances referred to in Article 21 of Law no. 29 of 1993, as amended by Article 14 of Legislative Decree no. 80 of 1998, including failure to fulfil the balanced budget obligation; failure to abide by the time-limit set for the completion of staff recruitment procedures; and conviction of offences committed in the course of his managerial duties. The manager was responsible for pursuing the objectives laid down by the region's (political) executive bodies without being in a relationship of trust with the latter.

II. Above all, the Constitutional Court declared inadmissible the question raised with regard to Article 1.2 of the Abruzzo Law: the manager of “*Abruzzo-lavoro*” had been discharged from his post pursuant to Article 2.1 of the Law and, consequently, it was this provision alone that the Court must examine.

In line with its previous case-law (see *Supplementary information*), the Constitutional Court declared unconstitutional the part of the impugned provision applicable to the manager of “*Abruzzo-lavoro*”. The Court held that automatic discharge, irrespective of any fault, if enforced against managers who do not work directly together with holders of political office and whose duties are limited to implementing their decisions, as in the case of the manager of “*Abruzzo-lavoro*”, was contrary to Article 97.2 of the Constitution.

Supplementary information:

The regional provision to which this judgment relates had given rise to a “primary” appeal, submitted to the Constitutional Court by the State as soon as it had been approved. On that occasion, the Court had only been able to examine the matter from an “abstract” point of view, because the provision had not yet been enforced, and, in its Judgment no. 233 of 2006, it declared the question to be unfounded on the basis of the general provisions contained in the law. Subsequently, the Court recognised the non-conformity with the Constitution of provisions of regional laws implementing the “automatic discharge” rule for managers who did not contribute to the process of shaping a region's political objectives but confined themselves to achieving, from a technical viewpoint, the targets that had been set for them (Judgments no. 27 of 2014, no. 152 of 2013, no. 228 of 2011, no. 104 of 2007).

Languages:

Italian.



Kazakhstan

Constitutional Council

Important decisions

Identification: KAZ-2016-1-001

a) Kazakhstan / **b)** Constitutional Council / **c)** / **d)** 24.02.2015 / **e)** 2 / **f)** / **g)** *Kazakhstanskaya pravda* (Official Gazette), 05.03.2015 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.4.3 Institutions – Head of State – **Powers.**

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

4.4.4.3 Institutions – Head of State – Appointment – **Direct/indirect election.**

5.3.41.6 Fundamental Rights – Civil and political rights – Electoral rights – **Frequency and regularity of elections.**

Keywords of the alphabetical index:

Election, law, system, voting, secrecy / President, competence.

Headnotes:

The President exclusively has the competence to assign pre-term presidential elections according to Article 41.3-1 of the Basic Law without any conditions and restrictions. This applies to when the election of the President coincides with the election of a new Parliament, as confirmed in Article 41.3 of the Constitution.

Summary:

I. On 19 February 2015, the Chairman of the Senate of the Parliament requested the Constitutional Council to provide an official interpretation of Article 41.3-1 of the Constitution, which stipulates that pre-term presidential elections are assigned by Presidential Decree and held in order and terms established by constitutional law.

II. In its decision, the Constitutional Council emphasised that the people shall be the only source of state power. They shall exercise power directly

through a national referendum and free elections. They shall delegate the execution of their power to state institutions. The right to act on behalf of the people and the state shall belong to the President and Parliament within the limits of the Constitution (Article 3.1-3 of the Constitution).

These constitutional provisions set the political and legal principles of democracy, clarify the relations of direct and representative forms of democracy and confirm the status of the citizen, including the right to participate in state affairs directly and through their representatives. The provisions also confirm the mission, order of formation, functions, competence and responsibility of the highest state bodies and their relationship in the mechanism of checks and balances.

The President acts as the highest representative of the people, elected by citizens of voting age based on universal, equal and direct suffrage under a secret ballot.

Thereby a presidential election is a form of investment in his or her supreme power in the state. Upon the results, the Head of State receives the mandate on the management of Kazakhstan, representation of the people, and domestic and international relations.

Being the Head of State, its highest official, the President defines the main directions of domestic and foreign policy. The Constitution determines the status of the publicly elected President as a symbol and guarantor of the unity of the people and state power, inviolability of the Constitution, and the rights and freedoms of an individual and citizen. The Constitution assigns to the President the duty to arbitrate concerted functioning of all branches of state power and responsibility of the institutions of power before the people (Article 40).

The norms of Article 41 of the Basic Law have systemically regulated the legal principles of the organisation and holding presidential elections. Together with other constitutional norms, they define the principles of the Head of State election, regulate activity of subjects of electoral process, and provide general functioning of the democratic system during a presidential election.

According to the Article 41.3-1 of the Constitution, preterm presidential elections are assigned by Decree of the President and are held in order and terms established by constitutional law.

Preterm elections of the Head of State are held out of term, as established by Article 41.3 of the Basic Law.

The elections are directly connected with the decision of the President. Their appointment has no legal restrictions per the Constitution.

Languages:

Kazakh, Russian.



Korea Constitutional Court

Important decisions

Identification: KOR-2016-1-001

a) Korea / **b)** Constitutional Court / **c)** / **d)** 24.04.2014 / **e)** 2011Hun-Ma659-683 / **f)** Prohibition of Adolescents' Nighttime Access to Online Games Case / **g)** 26-1(2), *Korean Constitutional Court Report* (Official Digest), 176 / **h)**.

Keywords of the systematic thesaurus:

3.14 General Principles – **Nullum crimen, nulla poena sine lege.**

3.16 General Principles – **Proportionality.**

3.17 General Principles – **Weighing of interests.**

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

5.2 Fundamental Rights – **Equality.**

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

Keywords of the alphabetical index:

Compulsory shutdown system / Internet, online game service / Freedom of action, general / Restriction, excessive, rule against.

Headnotes:

Provisions of the Juvenile Protection Act that restrict online game providers from giving access to adolescents at night and impose criminal punishment for violation thereof are constitutional.

Summary:

I. The applicants in this case are children under the age of 16, parents of children under 16, and online game providers. They challenged provisions of the Juvenile Protection Act (hereinafter, the "Act") prohibiting adolescents to access online games between midnight and 6 a.m. as well as imposing criminal punishment for violation thereof. They argued that these provisions infringe on their rights, including

the online game providers' occupational freedom, the adolescents' general freedom of action, and the parents' right to educate their children.

II. The Constitutional Court held that the disputed provisions are constitutional, stating that they neither violate *nulla poena sine lege* nor infringe on the online game providers' occupational freedom, the adolescents' general freedom of action, and the parents' right to education of their children.

1. Conformity with the Rule of Clarity under the Principle of *Nulla poena sine lege*

Under the Act, "Internet game" is defined as game products provided in real time via an information and communications network among those defined in the Game Industry Promotion Act. Therefore, anyone can easily comprehend that all game products, requiring access to information and communications networks including the Internet, are classified as Internet games regardless of the devices used or game types. If the game products are not defined as games under the Game Industry Promotion Act or do not require access to information and communications networks, they are not deemed as Internet games. As the meaning of "Internet game" is clear, the provisions at issue do not breach the rule of clarity under the principle of *nulla poena sine lege*.

2. Conformity with the Rule against Excessive Restriction

The provisions at issue are designed to promote adolescents' sound growth and development, and prevent their addiction to Internet games. Internet games in general are not considered to be a negative form of entertainment or pastime. Banning adolescents' access to Internet games only from midnight to 6 a.m. is hardly an excessive regulation given the high rate of Internet game access by adolescents, the negative impact of excessive indulgence or addiction to Internet games, the nature of Internet games not allowing easy, voluntary cessation, etc.

The "optional shutdown system" under the Game Industry Promotion Act that require juveniles or their legal representatives to voluntarily request for the shutdown is scarcely used in practice and is therefore not sufficient to serve as an alternative means. For the said reasons, the provisions at issue satisfy the least restrictive means test. The balance of interests is also achieved, taking into account the importance of public interest served by protecting the health of juveniles and preventing their addiction to Internet games. Therefore, the provisions at issue do not infringe on the online game providers' occupational

freedom, the adolescents' general freedom of action in terms of their pastime and entertainment activities, and the parents' right to education of their children.

3. Protection of the Right to Equality

Internet games are highly addictive. They allow real-time interaction between users and are likely to be easily accessible at any time where information and communication networks are available, potentially resulting in gaming long-hour. Therefore, reasonable grounds exist for applying the shutdown system only to Internet games. Additionally, Internet game products provided by those who have reported themselves as value-added telecommunications business operators (defined by the Telecommunications Business Act through regular routes following the rating process under the Game Industry Promotion Act) are subject to the shutdown. The restriction applies to domestic and foreign providers. The fact that some game products illegally distributed through foreign servers are exempted from the shutdown does not necessarily mean that the domestic providers' right to equality and non-discrimination has been violated.

III. Two justices filed dissenting opinions.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2016-1-002

a) Korea / b) Constitutional Court / c) / d) 26.06.2014 / e) 2012Hun-Ma782 / f) Case on the Restriction on Religious Assemblies of Pre-trial Detainees and Unassigned Inmates / g) 26-1(2), *Korean Constitutional Court Report* (Official Digest), 670 / h).

Keywords of the systematic thesaurus:

- 3.16 General Principles – **Proportionality**.
- 3.17 General Principles – **Weighing of interests**.
- 3.18 General Principles – **General interest**.
- 3.20 General Principles – **Reasonableness**.
- 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.
- 5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship**.

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

Keywords of the alphabetical index:

Detainee, pre-trial / Inmate, unassigned / Detention centre / Religious assembly / Activity, religious, attendance, restriction.

Headnotes:

Freedom of religion applies to everyone, including inmates and detainees. Limiting an individual's participation in weekly religious activities at a detention centre during pre-trial or during detention as an unassigned inmate (inmates whose additional trial is pending, whose remaining detention period is less than three months or who is subject to transfer) excessively restricted the freedom of religion, because pre-trial detainees as well as sentenced inmates deserve the opportunity to attend religious activities. The opportunities to attend religious activities are *de facto* not provided for them considering that the detention period of pre-trial detainees and unassigned inmates is short.

Summary:

I. The applicant was being detained on a charge of violating the Punishment of Violence, etc. Act at the Busan Detention Centre from 16 April 2012 to after 26 July 2012, when his conviction was confirmed, because another trial was pending. The applicant filed this constitutional complaint on 19 September 2012, alleging the detention centre's restriction on the applicant's basic rights to participate in religious assemblies held at the facility every Tuesday from 16 April 2012 to 26 July 2012 infringed on his freedom of religion (except from 27 July to 19 September 2012 when the applicant was held as an unassigned inmate). During the time, he was held as a pre-trial detainee, was under investigation and punishment, and then as an unassigned inmate.

II. The Constitutional Court ruled that it was unconstitutional for the warden of the Busan Detention Centre to limit the applicant's participation in religious activities at the detention centre when he was detained from 16 April to 19 September 2012. The restriction infringed on his freedom of religion.

The correctional facility, including a detention centre and prison, requires strict discipline and regulation to maintain the security of the facility, staff, and detainees. Nonetheless, sentenced inmates as well as pre-trial detainees deserve the opportunity to attend religious activities, because religious activities

contribute to the education and reformation of inmates, and the mental security of detainees. Moreover, the law provides that detainees can attend religious activities.

The original purpose of religious activities at the detention centre is education and reformation, suggesting that it is reasonable for the detention centre to provide religious activities in principle. Nevertheless, the detention centre provides three or four opportunities to attend religious activities per month for working inmates, which amounts to 1/8 of pre-trial detainees and unassigned inmates. In contrast, pre-trial detainees and unassigned inmates are provided one opportunity to attend religious activities per month in principle. In practice, pre-trial detainees and unassigned inmates are provided one opportunity to attend per year, because the religious assemblies are held at each building in turn, due to the lack of seating capacity and staff.

Considering that the detention period of pre-trial detainees and unassigned inmates is short, the opportunities to attend religious activities are *de facto* not provided for them. Therefore, the detention centre's action excessively restricted the freedom of religion of the applicant even under the consideration of inferior facilities of the Busan Detention Centre.

In addition, the detention centre did not consider the less restrictive means, which could be a way to distribute appropriate opportunities to attend religious activities for the freedom of religion to working inmates and other inmates under the given circumstances, a way to allow the attendance at religious activities by separating accessories or related persons, if any, or a way to allow the attendance of unassigned inmates at the religious activities for working inmates if there are no accessories or related persons. Therefore, the restriction on the attendance at religious activities did not satisfy the least restrictive principle.

The restriction on the attendance at religious activities may contribute to the security and order of the detention centre and the smooth running of religious activities. Nevertheless, such public interests did not exceed the significance of the infringement of freedom of religion, suggesting the principle of balance of interest was violated.

Therefore, the restriction on the attendance at religious activities infringed the freedom of religion of the applicant under the principle against excessive restriction.

Languages:

Korean, English (translation by the Court).

*Identification:* KOR-2016-1-003

a) Korea / **b)** Constitutional Court / **c)** / **d)** 24.07.2014 / **e)** 2009Hun-Ma256, 2010Hun-Ma394(Consolidated) / **f)** Case on restricting voting right of overseas electors / **g)** 26-2(1), *Korean Constitutional Court Report* (Official Digest), 173 / **h)**.

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 3.20 General Principles – **Reasonableness.**
 4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy.**
 4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system.**
 4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility.**
 4.9.9.1 Institutions – Elections and instruments of direct democracy – Voting procedures – **Polling stations.**
 4.9.9.6 Institutions – Elections and instruments of direct democracy – Voting procedures – **Casting of votes.**
 5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote.**

Keywords of the alphabetical index:

Election, by-election / Election, overseas elector, registration / Election, principle of universal suffrage / Domestic residence, report / Parliament, member, local constituency / Referendum, right to participate / Resident, registration.

Headnotes:

The provision of the National Referendum Act that grants voting rights just to registered residents in a given jurisdictional area and overseas Koreans who have reported their domestic residence to the authorities restricts the suffrage of overseas Koreans.

Summary:

I. The applicants are Korean nationals over nineteen-years-old living in Japan and the U.S.A., who neither report their domestic residence nor register as residents (hereinafter, “overseas electors”). They filed this constitutional complaint on 12 May 2009, arguing that Article 218-4.1 of the Public Official Election Act and Article 14.1 of the National Referendum Act infringe on their fundamental right to vote by depriving them of the right to cast votes for National Assembly elections and participate in national referendums.

II. Whereas the Constitutional Court held that the challenged provisions of the Public Official Election Act constitutional, it found unconstitutional Article 14.1 of the National Referendum Act. The Court provided the following analysis.

1. Whether the overseas electors’ right to vote or the principle of universal suffrage is violated by the proviso of Article 15.1 of the Public Official Election Act that does not recognise overseas electors’ right to vote in an election of the National Assembly members of local constituencies due to the termination of the term of membership (hereinafter, the “Right to Vote Provision”) and by the part of “whenever an election of members of proportional representation for the National Assembly due to the termination of the term of membership are held, any elector who intends to vote overseas shall file an application for registration of an overseas elector” in Article 218-5.1 of the Public Official Election Act (hereinafter, the “Overseas Elector Registration Provision”).

A local constituency National Assembly member speaks for the interests of his or her constituency, and works as a representative of the people. Compared to the Presidential Election or election of proportional representation members for the National Assembly conducted nationwide for which Korean nationals are eligible to vote, local elections require prospective voters to have a “connection with the specific locations” where such elections are held. Requiring the registration as residents and the report of domestic residence to participate in local constituency National Assembly member elections is a reasonable means to certify the relevant people’s local connection. Therefore, the Right to Vote Provision and the Overseas Elector Registration Provision that do not acknowledge overseas elector’s right to vote for an election of members of proportional representation for the National Assembly due to the termination of the term of membership cannot be regarded as infringing on the overseas elector’s right to vote or violating the principle of universal suffrage.

2. Whether the Overseas Elector Registration Provision that does not recognise the right to vote in the by-election of the National Assembly members violates the overseas elector's right to vote or the principle of universal suffrage

The legislator, while establishing the overseas election system, decided not to allow overseas electors to vote for the by-election of the National Assembly members, because the voting rate of by-elections held in foreign countries would be low. Moreover, it would require tremendous time and expense to conduct overseas by-elections, because whenever the grounds for by-elections are confirmed, diplomatic missions in foreign countries should prepare for such elections. Also, the election system established by the legislator cannot be considered distinctively unreasonable or unfair. Therefore, the Overseas Elector Registration Provision does not violate overseas electors' right to vote or the principle of universal suffrage.

3. Whether the Overseas Elector Registration Provision that requires overseas electors to file an application for registration whenever elections are held violates overseas elector's right to vote

The method to make the electoral roll of overseas electors based on their application for registration is a reasonable way to prevent disorder in voting as it confirms overseas electors' right to vote in a relevant election and to register overseas electors who have the right to vote in the electoral roll. Therefore, the Overseas Elector Registration Provision does not violate overseas elector's right to vote.

4. Whether the part of Article 218-19.1 and 218-19.2 of the Public Official Election Act that requires overseas electors to visit in person – not by mail or Internet – overseas polling places to cast votes (hereinafter, the "Overseas Voting Procedure Provision") violates overseas electors' right to vote

Ensuring fairness in election, the legislator considered the technical problems in election such as delivery of voting paper, effectiveness, etc. Requiring overseas electors to physically go to an overseas polling station in order to cast a vote, rather than by mail or internet, does not seem unacceptably unfair or unreasonable. Therefore, the Overseas Voting Procedure Provision does not violate overseas electors' right to vote.

5. Whether the part of "eligible voters registered as residents in their jurisdictional area and those, as Korean nationals residing abroad under Article 2 of the Act on the Immigration and Legal Status of Overseas Koreans, whose domestic residence

reports have been made under Article 6 of the same Act" in Article 14.1 of the National Referendum Act (hereinafter, the "National Referendum Provision") violates overseas elector's right to vote

A referendum on important national policy stipulated in Article 72 of the Constitution and a referendum on the amendment to the Constitution stipulated in Article 130 of the Constitution are the process in which citizens approve the decision of the National Assembly and the President. It is a logical conclusion that the subject of the right to elect representative organs also becomes the subject of the right to approve the decision of such representative organs. Since overseas electors, as people with the right to elect representative organs, also have the right to approve the decisions made by the representative organs, overseas electors should be considered as people with the right to participate in a national referendum. Also, because a national referendum is a process where the people directly participate in national politics, those who are considered Korean nationals should be eligible to participate in a referendum. As such, the exclusion of the right to participate in a referendum, fundamentally derived from the status as Korean nationals, due to the abstract danger of or difficulties with election technicalities, amounts to a practical deprivation of the rights endowed by the Constitution. Therefore, the National Referendum Provision infringes on overseas electors' right to participate in a referendum.

6. Decision of nonconformity to the Constitution regarding the National Referendum Provision

The instant nullification of the National Referendum Provision on the ground of the Court's declaration of unconstitutionality will render impossible the preparation of the voter's list even when a referendum is scheduled to be held. Therefore, a transitional application of the National Referendum Provision is necessary until the legislator amends the provision. Also, there are many technical difficulties that must be resolved in the referendum process and fairness of the referendum. Therefore, the Court declares that the National Referendum Provision does not conform to the Constitution, but orders the transitional application of the provision until the legislator cures the defects.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2016-1-004

a) Korea / **b)** Constitutional Court / **c)** / **d)** 30.10.2014 / **e)** 2012Hun-Ma190.192.211.262.325, 2013Hun-Ma781, 2014Hun-Ma53(Consolidated) / **f)** Case on Standard for Population Disparity allowed in Division of Electoral District / **g)** 26-2(1), *Korean Constitutional Court Report* (Official Digest), 668 / **h)**.

Keywords of the systematic thesaurus:

3.21 General Principles – **Equality**.

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

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

Keywords of the alphabetical index:

Population disparity / Election, electoral district, arbitrary designation / Local representativeness.

Headnotes:

Table 1 of Article 25.2 of the Political Official Election Act, which designates electoral districts for the National Assembly elections based on the 50% population disparity between the most and the least populous districts, infringes on the right to vote and on equal voting rights (one person, one vote).

Summary:

I. The applicants (electors who registered as residents in the relevant districts) requested the Constitutional Court to review Table 1 of Article 25.2 of the Political Official Election Act (hereinafter, “Table”). They argue that the principle of equality in the election process and their right to vote are infringed upon by the redistricting system captured in the Table, which is based on the 50% population disparity between the most and the least populous districts. Additionally, they challenged that the redistricting system not only arbitrarily divides some administrative districts, but also combines them with other districts.

II. The Constitutional Court examined the disputed Table, which designates electoral districts for the National Assembly elections based on 50% population disparity between the most and the least

populous districts. Although the designation of electoral districts is not regarded as arbitrary *per se*, the Court found that it violates the applicants’ right to vote and principle of equality in the election process (namely, one person, one vote).

1. Whether the Relevant Parts of the Electoral District Table violate the equality in the worth of votes

The Constitutional Court had considered the standard of 50% population disparity between the most and the least populous districts regarding the local representativeness of the National Assembly members, population disparity between city and rural areas, developmental imbalance, etc. (2000Hun-Ma92, 25 October 2001). Given the following facts, the Court held that it is time to change the standard of population disparity allowed under the Constitution to the limit of 33⅓% deviation in population and the maximum permissible population ratio between the most populous and least districts should be 2:1.

1. If the standard of 50% disparity in population is applied, the value of one person’s vote, for example, could be three times more than that of another person’s vote, which is an excessive inequality in the value of votes. Moreover, under the unicameral system, it can possibly be expected that, with the 50% disparity standard, the number of votes acquired by an assembly member elected in a less populous area are less than those acquired by an assembly member defeated in a more populous area. The result is never desirable from the perspective of representative democracy.
2. Even though the local representativeness of the National Assembly members is an important factor to be considered in the formation of the National Assembly, this cannot take priority over the equality in the weight of votes from which the principle of sovereignty originates. The current situation entrenches the need for the local autonomy system to sacrifice the constitutional principle of the equality in the weight of votes.
3. As the permissible limit of population disparity is relaxed, the area of imbalance in representativeness increases, which could reinforce the local political party system. In particular, such an imbalance can be seen even within rural areas in similar conditions, which could potentially hamper development in those areas and disturb the balance in the development of national land.
4. Considering that the next election will be held after one and a half years and the National Assembly, in delineating the constituencies for

the National Assembly elections, can receive support from the Constituency Demarcation Committee for the National Assembly Elections composed of professionals [although not a standing committee (Article 24 of the Public Official Election Act)], practical difficulties in the adjustment of electoral districts cannot be used as the reason for relaxing the limit of population disparity.

5. Finally, since the research on foreign legislation and case-law shows that the permitted standard of population disparity has been stricter in many countries, we can no longer delay adopting a stricter standard for population disparity.
6. Therefore, the parts of “Gyeonggi Province, Yongin City, Electoral District A”, “Gyeonggi Province, Yongin City Electoral District B”, “South Chungcheong Province, Cheonan City, Electoral District A” and “Incheon Metropolitan City, Namdong-Gu, Electoral District A” in the Entire Electoral District Table at Issue, where the population disparity between the most and least populous districts is more than 33½%, violate the right to vote and the equality right of the applicants, who are living in the aforementioned election districts.

2. Whether the four electoral districts at issue amount to arbitrary division of electoral districts

The main reason the National Assembly, in delineating the boundaries of the four electoral districts at issue, divided some parts of administrative districts and combined them with other districts, is that it is hard to find any other alternatives to narrow the population disparity between the districts. Also, since the administrative district map shows that the divided districts are located geographically near the combined districts, there seems to be no big difference in living conditions, transportation or educational environment among the districts. We also cannot identify with any clear evidence that the new demarcation of electoral districts by the National Assembly shows its clear intention to discriminate electors who reside in specific areas, against other electors or such a demarcation evidently results in *de facto* discrimination against those electors.

Moreover, the Court considered the difference between the National Assembly’s constituency demarcation and the proposal suggested by the Constituency Demarcation Committee for the National Assembly Elections. The Court also considered the consequential discordance between the Electoral District Table for the elections of the local constituency members of the National Assembly

elections and that for the elections of the members of local government councils. However, the Court held that there are no reasons to conclude that the four electoral districts at issue deviate from the acceptable boundary of legislative discretion. Therefore, the Four Electoral Districts at Issue are not arbitrary demarcations of electoral districts, departing from the boundary of legislative discretion.

3. Inseparability of the Electoral District Table and the need to render a decision of nonconformity to the Constitution

Within the Electoral District Table, all districts are interconnected, such that a single change in one district may cause sequential changes in other districts. In this regard, electoral districts in the Electoral District Table as a whole are inseparable and should be considered as a single entity. Therefore, if one part of the Electoral District Table is considered unconstitutional, the Entire Electoral District Table at Issue should also be considered unconstitutional.

However, a decision of simple unconstitutionality of the entire electoral district Table at issue – if rendered in this situation where the National Assembly election has already been held based on the Table at issue – may bring about a legal vacuum where no electoral district Table for the elections of the local constituency members of the National Assembly exists on which the next re-election or vacancy election, if any, should be based on. Therefore, we render a decision of nonconformity to the Constitution, ordering temporary application of the Table at issue until the legislator revises it, by 31 December 2015.

Languages:

Korean, English (translation by the Court).



Kosovo

Constitutional Court

Important decisions

Identification: KOS-2016-1-001

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 04.04.2016 / **e)** KO 47/16 / **f)** Aida Dërguti, Bali Muharremaj, Enver Hoti and 25 other Deputies of the Assembly of the Republic of Kosovo – Constitutional review of the Decision of the Assembly of the Republic of Kosovo, no. 05-V-233, concerning the election of the President of the Republic of Kosovo / **g)** *Gazeta Zyrtare* (Official Gazette), 05.04.2016 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

4.4.4.3 Institutions – Head of State – Appointment – **Direct/indirect election.**

4.5.6.2 Institutions – Legislative bodies – Law-making procedure – **Quorum.**

4.6.4.2 Institutions – Executive bodies – Composition – **Election of members.**

Keywords of the alphabetical index:

Election, parliament, member, vote / Election, President / Election, validation, quorum, majority / Election, Constitutional Court, competence.

Headnotes:

When the requirement for the Assembly to make a decision is a majority greater than the regular quorum, then that majority determines the quorum. That is, if a procedure requires a two-thirds majority for a decision to be valid, then the quorum is two-thirds as well. The failure of deputies to fulfil obligations set forth by the laws governing their work does not invalidate the Assembly's decision, provided the majority requirement was met. It is neither a constitutional prerequisite nor a requirement that all 120 deputies are present and vote to validate a presidential election decision.

The Constitutional Court has no jurisdiction to serve as an intermediary to address applicants' questions to the Assembly or other public institutions. The interpretation of the case-law of the Constitutional

Court should be done within the context of the overall scope of the former judgment. That is, specific paragraphs cannot be taken out of context in order to determine future interpretations of the Constitution.

Summary:

I. The applicants (group of 28 Assembly deputies) filed a referral pursuant to Article 113.5 of the Constitution, contesting the Assembly's decision to elect Hashim Thaçi as President of Kosovo on its third ballot. They alleged that the election procedure was accompanied by substantial and procedural violations of Article 86.4 and 86.5 of the Constitution. The applicants claimed that the required quorum provided by Article 86 of the Constitution was not reached. They based this argument on a specific paragraph of a former judgment of the Court (*Bulletin* 2014/2 [KOS-2014-2-004]), relating to the election procedure of a previous President of the Republic, where, *inter-alia*, it was stated that all deputies should vote, minus those properly excused by the President of the Assembly.

The Court invited all interested parties to comment on the Referral. Only the President of the Assembly submitted his comments. He stated that the procedure for the election of the President of the Republic was done in accordance with Article 86 of the Constitution. He further explained that at least two candidates were nominated; the nominations were verified as requested; the three rounds of voting were held and in all of them, two-thirds of all deputies of the Assembly participated in voting; the whole procedure was conducted as a single procedure and no breaks took place.

II. The Court, by majority, held that the referral is inadmissible, as it was bereft of constitutional basis. The applicants did not sufficiently substantiate that the Assembly's decision on the election of the President violated Article 86.4 and 86.5 of the Constitution.

It is worth noting that the Court for the first time decided to declare inadmissible as manifestly ill-founded a request filed by the deputies under Article 113.5 of the Constitution. The applicants did not present any arguments in relation to the substance of the challenged decision. They merely asked the Court to submit specific questions to the Assembly following whose answers the Court was to make a decision. In addition, the applicants constructed their arguments around a specific paragraph of a former judgment of the Court, quoted above, and used it to argue that there was no quorum when the President of the Republic was elected.

In respect of the applicants' request that the Court submit a list of questions that the applicants had prepared to the Assembly, the Court concluded that it has no jurisdiction to serve as an intermediary to address the applicants' questions to the Assembly. In this regard, it concluded that such a request does not come within the scope of referrals that the applicants may submit under Article 113.5 of the Constitution. Through this constitutional provision, the applicants can only contest the constitutionality of a law or decision adopted by the Assembly as regards to its substance and the procedure followed.

Regarding the applicants' allegations on the Assembly's voting procedure for the presidential election, the Court defined a quorum as the minimum number of deputies who must be present for a valid decision to be made. It further explained that, according to the Constitution, the Assembly of Kosovo has a quorum when more than half of all Assembly deputies are present. However, the Court stated that such provision applies only if the Constitution does not specifically require a greater majority for a decision to be taken. Where the Constitution specifically prescribes that a greater number of deputies are required for a valid decision, then the required majority determines the necessary quorum.

In the present case, the necessary quorum for the first and second round of voting was two-thirds of all deputies of the Assembly. For the third round, a simple majority of all deputies present and voting would be sufficient. In all three rounds of voting, there was a quorum of two-thirds of all deputies who were present and voted.

The Constitutional Court also decided on the applicants' interpretation of a specific paragraph of a previous judgment of the Court. The Court stated that the applicants' interpretation does not correspond with the Court's assessment made in that judgment. It further explained that such a paragraph, namely paragraph 85, must be understood within the context of the overall scope of that judgment and in particular, section "Vote by the Assembly", specifically paragraphs 80 to 84 of the same judgment. In relation to this, the Court explained that indeed it maintains that all 120 deputies should feel obliged to be present and vote. However, that is their obligation according to the Law on Deputies. Their failure to fulfil obligations set forth by the laws governing their work does not invalidate a decision of the Assembly as long as the necessary majority specified in the Constitution is maintained in the Assembly.

For the reasons stated, the Court declared that the referral was inadmissible as manifestly ill-founded on constitutional basis.

Languages:

Albanian, Serbian, English (translation by the Court).



Kyrgyz Republic

Constitutional Chamber

Important decisions

Identification: KGZ-2016-1-001

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 11.03.2015 / **e)** 4-p / **f)** / **g)** Official website and *Bulletin of Constitutional Chamber 2015* / **h)** CODICES (Kyrgyz, Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

The Bar, organisation.

Headnotes:

The Constitution guarantees freedom of association for all. It also provides for safeguards for a fair and independent system of justice as well as access to qualified legal assistance, in some cases at the expense of the state. In this regard, the Bar enjoys an exceptional public status under the Constitution, which in turn places a direct obligation on the state to regulate the law on the organisation of the activities of the Bar, along with the rights, obligations and responsibilities of lawyers. Such an activity does not, therefore, contravene the Constitution.

Summary:

I. The Constitutional Chamber was asked to examine various provisions of the Law on the Bar and Advocacy, which effectively force lawyers to engage in advocacy. The suggestion was made that these provisions violated the right of lawyers to form public associations or to join them on a voluntary basis and the right free expression enshrined in the Constitution. It was also contended that these provisions limited the right to join political parties, trade unions and other public associations on a voluntary basis.

A particular feature of the right to association is that it does not only embrace the freedom of expression

between citizens and associations; it also covers autonomy in determining goals and objectives and the development of solutions. The goals and objectives of advocacy arise from constitutionally significant public legal relations.

The specific requirements for admission to the profession, such as compulsory membership of a professional self-governing community, payment of membership fees, continuing education, compliance with the Code of Professional Ethics, responsibility for improper conduct or performance of duties should be considered to be socially justified and essential in order to protect the vital public interest in the administration of justice.

The Constitution establishes guarantees for an independent and fair system of justice, as well as access to qualified legal assistance, in certain cases at the expense of the state. In this regard, the Bar is granted with an exceptional public status by the Constitution, which places a direct obligation on the state to regulate the law on the organisation of the activities of the Bar, along with the rights, obligations and responsibilities of lawyers.

However, the provisions of the Law on the Bar and Advocacy are not regulated to an appropriate degree; legal *lacunae* exist in many issues directly related to the implementation of advocacy.

Uncertainty in the legal regulation of disciplinary proceedings and the revocation of licenses of lawyers in the absence of a formal organisational structure to regulate lawyers' activities and of mechanisms to ensure the independence and autonomy of each lawyer pose a threat to the proper functioning of the legal profession.

When amending the Law on the Bar and Advocacy, the legislator must observe the principle of proportionality of state intervention whilst at the same time assessing the actual abilities of the organisation and its institutional capacity. It must also prevent the violation of the principle of independence and independence of each lawyer.

Once the appropriate changes and additions have been made, Article 32.6 of the above Law must be implemented.

Languages:

Kyrgyz, Russian (non-official translation by the Chamber).



Identification: KGZ-2016-1-002

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 10.06.2015 / **e)** 8-p / **f)** Review of the constitutionality of the first sentence in Article 3.3 of the Law on Status of Deputies of Local Government / **g)** Official website and *Bulletin of Constitutional Chamber 2015* / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

1.3.4.4 Constitutional Justice – Jurisdiction – Types of litigation – **Powers of local authorities.**

4.9 Institutions – **Elections and instruments of direct democracy.**

Keywords of the alphabetical index:

Local autonomy, right.

Headnotes:

The process of recalling a local government deputy falls solely within the remit of the electorate. It is closely linked with the expression of voters' will and is considered as a form of direct democracy. A legal provision allowing local government to launch this process itself is at variance with the fundamental principles of a constitutional democracy.

Summary:

I. On 10 June 2015, the Constitutional Chamber considered a case about the constitutionality of the first sentence of Article 3.3 of the Law on the Status of Deputies of Local Governments (hereinafter, the "Law"). This provision allows for a recall by local government of a local government deputy who has been absent without valid reason on more than four consecutive occasions and for non-execution of resolutions and orders of the local government.

Citizens Osmonbaev B.K., Osmonalieva A.M. and Sutalinov G.A. lodged an appeal with the Constitutional Chamber, seeking recognition that this norm was in breach of the Constitution, on the basis that it violated the fundamental constitutional principles of democracy. The applicants contended that the right to withdraw belonged within the exclusive remit of voters residing in the relevant administrative-territorial units.

In support of their arguments, the applicants referred to the actual circumstances that establish the early termination of full powers of local government deputy Dzhusubaliev A.K. by the Resolution of the local government. The formal reason for this was the non-execution by Dzhusubaliev A.K. of resolutions of the government of town Orok. The legal basis for it was Article 3.3 of the Law.

II. The Constitutional Chamber began by noting that local government is at the heart of the constitutional system. For that reason, the Constitution allows local communities the right and the real opportunity to resolve issues of local importance. Local self-government is implemented directly by local communities of citizens, or through the system of local government (Articles 110.1, 110.3 and 111).

By means of elections, representative bodies of local self-government are formed and, through their activities, representative participation is provided for the local community in the implementation of local self-government (Article 7 of the Law on Local Self-Government).

The representative nature of the constitutional and legal status of a local government deputy implies responsibility for the effective implementation of the interests of the local community and the proper execution of deputy powers.

The norms under dispute allow local government, by a majority of the total number of deputies, to initiate the procedure of recalling a local government deputy who has been absent without valid reason from sessions of local government on more than four consecutive occasions, and for non-execution of resolutions and orders of the local government.

The institution of recall allows for the early termination of the powers of elected officials at the behest of voters. It is closely linked with the expression of voters' will and is considered a form of direct democracy. Deputies are usually recalled due to loss of confidence by voters because of non-execution of the powers with which they have been vested. This is why it is the voters alone who can invoke and initiate a recall; a deputy's recall should be carried out by a process which closely resembles elections, so as to ensure the realisation of the constitutional principle of popular sovereignty and the right of citizens to implement local self-government.

A legal provision, which allows local government to launch the process of recalling a deputy, runs counter to the fundamental principles of a constitutional democracy.

Parliament must now enact the appropriate changes and amendments resulting from the requirements of the Constitution and the accepted decision.

Languages:

Russian.



Identification: KGZ-2016-1-003

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 24.06.2015 / **e)** 9-p / **f)** / **g)** Official website and *Bulletin of Constitutional Chamber 2015* / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

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:

Media, foreign, elections.

Headnotes:

The rule prohibiting the retransmission of foreign television and radio programmes which disseminate information discrediting the honour, dignity and business reputation of candidates cannot be considered a violation of the right to freedom of expression and freedom of information.

Summary:

I. Citizens Osmonbaev B.K. Osmonaliev A.M. and Sutalinov G.A. filed a petition with the Constitutional Chamber seeking recognition of the regulations of Article 22.16 of the Constitutional Law on Elections of the President and Deputies of the *Zhogorku Kenesh*

(Parliament) of the Kyrgyz Republic as being in breach of the Constitution. They claimed that the regulation restricted citizens' right to freedom of expression and information and that local media was unfairly bearing the responsibility for disseminating material which discredited the honour, dignity and business reputation of candidates.

II. The Constitutional Chamber observed that the right to campaign belongs to the citizens of the Kyrgyz Republic, candidates and political parties. The media is simply a conduit for information services, a tool in election campaigning.

The right to pre-election campaign is not comparable to the right to freedom of expression, freedom of speech and information. It is implemented in a strict manner, only during the election campaign and exclusively within the framework of the electoral legal relations.

The right of a State to regulate the electoral process does not require conformity with other international bodies. The existence of such legal statutes cannot be considered as a violation of the constitutional right of everyone, including foreign media, to freedom of expression and freedom of information. By retransmitting foreign television and radio programmes, they are not deprived of the right of access to full information on elections and the electoral process.

The Constitution puts individuals and their rights first in all spheres of public life, thus guaranteeing to all the right of protection of honour and dignity (Article 29.1 of the Constitution). No one should be restricted in their right to defend honour and dignity and related rights and freedoms before the court. There must be real protection of the rights and legitimate interests of persons whose honour and dignity has suffered damage due to the spread of negative information. At the same time, it is not possible to resolve issues of rebuttal in defence of honour, dignity and business reputation of the candidate in the foreign media, when such a possibility should be provided on a mandatory basis according to the law.

Languages:

Russian.



Identification: KGZ-2016-1-004

a) Kyrgyz Republic / b) Constitutional Chamber / c) Plenary / d) 02.09.2015 / e) 10-p / f) Mr Isaev A.M. / g) Official website and *Bulletin of Constitutional Chamber* 2015 / h) CODICES (Russian).

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.**

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:

Access to courts, limitations.

Headnotes:

A deadline of three months for lodging a complaint against normative legal acts for state authorities, local government organisations and their officials which have restricted the rights of individuals and citizens, does not interfere with the universal right to judicial protection of rights and freedoms. The legislator is entitled, in order to ensure legal stability in civil matters, to set out specific rules for making the challenges outlined above and this should not be perceived as a violation of the rights guaranteed by the Constitution.

Summary:

I. Citizen Isaev A.M. filed a petition with the Constitutional Chamber, seeking the recognition of Article 263.3 of the Civil Procedure Code (hereinafter, “the Norm”) as unconstitutional. The applicant argued that the three-month period established in the Norm for challenging the normative legal acts of state authorities, local self-government bodies and their officials which have restricted or violated the rights and freedoms of citizens and legal persons contradicts the Constitution and the International Covenant on Civil and Political Rights. The applicant also claimed that the establishment in the Norm of a deadline for applying to the Court to invalidate the normative legal act of a public authority is unnecessary and creates barriers that limit access to justice.

II. The Constitutional Chamber referred to the judicial protection enshrined within the Constitution of the rights and freedoms provided by the Constitution, laws and international treaties, to which the Kyrgyz Republic is a party and universally recognised principles and norms of international law (Articles 1.1, 16.1 and 40.1 of the Constitution). These constitutional provisions are consistent with the provisions of Article 14.1 of the International Covenant on Civil and Political Rights, which guarantee the universal right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in cases of dispute over rights and obligations.

The Civil Procedure Code of the Kyrgyz Republic specifies the constitutional provisions on guarantees of judicial protection of rights and freedoms which define the tasks of civil proceedings as the protection of violated or disputed rights, freedoms and lawful interests of citizens and legal entities, government bodies and local self-government and other entities of civil, labour, administrative, or other legal rights and interests of the Kyrgyz Republic, as well as the protection of the public interest. Regulations governing civil procedure must provide for correct and timely consideration and resolution of civil cases and the imposition of lawful judicial acts and their actual implementation. They must also help strengthen rule of law, public order and prevent offences (Article 3 of the Civil Procedure Code).

The three-month period is an element of legal stability. It does not just protect the interests of the law-making body; it also safeguards the principle of legal certainty, which is a value in its own right. The Constitution does not prevent the legislator from setting deadlines for lodging complaints regarding the regulatory legal acts of a public authority. The legislator has the right, on the basis of an objective need to ensure legal stability in civil matters, to provide special rules for contesting normative legal acts on the part of the state authority, local government and their officials. This cannot be perceived as a breach of the rights and freedoms guaranteed by Article 16 of the Constitution.

The realisation of the right to state compensation for damages caused by normative legal acts by public authorities, local governments and their officials cannot be violated, provided these rights are exercised responsibly and do not violate the rights and freedoms of other persons, established by the Constitution (Articles 16.1, 20.1, 20.2, 20.3, 20.5, 20.7, 40 and 41 of the Constitution) and the laws of the Kyrgyz Republic.

III. Judges Aidarbekova Ch.A., Bobukeeva M.R., Mamyrov E.T. and Oskonbaev E.Zh. have given individual opinions in this case.

Languages:

Russian.



Identification: KGZ-2016-1-005

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 14.09.2015 / **e)** 11-p / **f)** Toktakunov N. (Biometrical registration of citizens) / **g)** Official website and *Bulletin of Constitutional Chamber 2015* / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Biometric data, storage / Biometric data, use.

Headnotes:

The biometric registration of citizens is carried out for the purposes of protection of national security; it does not contradict the Constitution.

Summary:

I. Toktakunov N. and Umetalieva T., Chairman of the Association of Legal Entities “Association of non-governmental and non-profit organisations” asked the Constitutional Chamber to recognise the provisions of the Law on the Biometric Registration of Citizens of the Kyrgyz Republic as being in breach of Articles 5.3, 6, 16.1, 16.2, 20.1, 20.3, 24.1, 29.1, 29.3, 29.4 and 52.1.1 of the Constitution.

According to Toktakunov N., the principle of mandatory biometric registration involves coercion, bringing with it the potential for physical violence, as biometric data cannot be collected without the participation of the person concerned. It also conflicts

with the constitutional bar on the collection, storage, use and dissemination of confidential information about the private life of a person without their consent. Legal provisions to the effect that the database of biometric data is the property of the Kyrgyz Republic allow government representatives to use and distribute biometric data without the consent of the bearer.

According to T. Umetalieva, the provisions allow the unauthorised collection of confidential information about a person without his or her consent and without a court decision. Under the Law on Information of a Personal Nature, citizens’ biometric data is personal data and subject to the safeguards and principles of privacy stipulated in Constitution. The applicant considers that no law can oblige and no public authority may require citizens to provide their personal data compulsorily, since Article 20.3 of the Constitution does not permit restrictions on the rights and freedoms for other purposes and to a greater extent than is provided for by the Constitution.

II. The Constitutional Chamber noted that, in the framework of the Commonwealth of Independent States (hereinafter, “CIS”), an agreement was signed (Chisinau, 14 November 2008) which stipulated the establishment of public informational systems of new generation passport and visa documents with the use of biometric data, in order to improve the national security of the states who were parties to the Agreement. The introduction of new technologies with the use of biometrics is an important means of ensuring national security. Consequently, the principle of mandatory biometric registration, which means the obligatory passing of biometric data (Article 5.1 and 5.4.1 of the Law) cannot be regarded as a violation of Articles 5.1, 6, 24.1 and 29 of the Constitution, provided that Article 20.2 of the Constitution is respected.

Biometric registration of citizens for the purpose of timely registration of citizens and issuance of identification documents, as well as the preparation of an updated voters’ list as an integral part of the electoral process with a view to ensuring fair, free and transparent elections, is proportionate to the restriction of the right to privacy, in the framework of protection of national security.

Securing the right of the Kyrgyz Republic to the database is simply aimed at eliminating uncertainty in data management; it cannot serve as a basis for the violation of anyone’s constitutional rights.

Languages:

Russian.



Identification: KGZ-2016-1-006

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 23.09.2015 / **e)** 12-p / **f)** / **g)** Official website and *Bulletin of Constitutional Chamber* 2015 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.9.7.1 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Electoral rolls.**

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

Keywords of the alphabetical index:

Election, universal suffrage / Data, biometrical.

Headnotes:

Norms which only allow citizens to be included in the list of voters and to exercise their right to vote if they have undergone biometric registration should not be perceived as being in breach of the principle of universal and equal suffrage and the right of citizens to elect and be elected to bodies of state power and local self-government.

Summary:

I. Citizens Osmonalieva A.M., Osmonbaev B.K., Sutalinov G.A., filed a petition with the Constitutional Chamber asking it to recognise the regulatory provision of Article 14.2 of the Constitutional Law on Elections of the President of the Kyrgyz Republic and deputies of the *Zhogorku Kenesh* (Parliament), expressed by the words “and those who passed a biometric registration in the manner established by legislation” unconstitutional. In their view, the inclusion in the voters’ list of only those citizens who have submitted biometric data is an unreasonable restriction on citizens’ voting rights.

II. The Constitutional Chamber observed that on 15 October 2013, in a review of the electoral legislation and practices of the States parties to the Organisation for Security and Cooperation in Europe (OSCE), prepared by the Office for Democratic Institutions and Human Rights with respect to Kyrgyzstan, the absence was noted “of clear and

formal rules for the system of voter registration management in Kyrgyzstan, which creates the potential risks of manipulation of voter lists”.

In this context, the legislator introduced a new procedure for drawing up electoral lists in the Constitutional Law on Elections of the President of the Kyrgyz Republic and deputies of the *Zhogorku Kenesh* (Parliament), combining both declarative and imperative approaches, aimed at removing the possibility of double or multiple entries in the voters’ lists of the same people. The legislator also provided a mechanism for tracking the voters due to changes in their place of residence on the basis of the Unified State Register of population.

The Constitutional Chamber in its decision dated 14 September 2015 did not find separate provisions of the Law on the Biometric Registration of Citizens of the Kyrgyz Republic and the requirement of mandatory biometric registration of citizens of the Kyrgyz Republic with a view to the preparation of an updated voters’ list to be in contravention of the Constitution.

The state is entitled to develop and use a variety of tools to ensure transparency, integrity and fairness of elections. One such tool is the use of new technologies in the preparation of an updated voters’ list.

III. Judge Osmonbaev E. filed a dissenting opinion in this matter.

Languages:

Russian.



Identification: KGZ-2016-1-007

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 05.10.2015 / **e)** 13-p / **f)** LLC “Palladeks KR” / **g)** Official website and *Bulletin of Constitutional Chamber* 2015 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Tax law, amendments / Environment, protection.

Headnotes:

The licensing system for the right to use subsoil is a means by which the state carries out the regulation and control of natural resources and environmental protection. The purpose of subsoil use licensing is to ensure the rational and integrated use and protection of subsoil.

Summary:

I. The Limited Liability Company “Palladeks KR” and the non-public joint-stock company “Tekstonik” filed a petition with the Constitutional Chamber (hereinafter, the “Chamber”) to recognise Article 53.2 of the Law on Subsoil” (hereinafter, the “Law”) and paragraph 12 of the Regulation on the procedure for the payment and calculation of payment for the retention of licenses for subsoil use approved by the Decree of the Government dated 14 December 2012 no. 834 (hereinafter, the “Regulation”) as breaching Articles 6.5, 20.1 and 20.3 of the Constitution.

The applicants took issue with the Law enacted on 9 August 2012, which introduced a new non-tax payment for holding a license for subsoil use. For the implementation of this Law, a Regulation was approved on 14 December 2012, establishing the procedure for payment and the calculation of payment for the retention of licenses. Under these provisions, the calculation of time limits for determining the amount of license fees for licenses issued before the entry into force of the Law is carried out from the initial date of licensing, which aggravated the responsibility of subsoil users, thus violating their rights and legitimate interests.

II. The Constitutional Chamber noted that the licensing system for the right to use subsoil is a means by which the state carries out the regulation and control of natural resources and environmental protection. The purpose of subsoil use licensing is to ensure the rational and integrated use and protection of subsoil.

The Law on Non-Tax Payments provided for a deduction, a type of payment made by the subsoil

user to the local budget for the development and maintenance of local infrastructure. Article 19.2 of the Law on Non-Tax Payments establishes the order and terms of payment for holding a license for subsoil use established by the Government, and the payment for the retention of the license for subsoil use for subsoil users who have received the right to seek and/or explore and/or develop mineral resources in the Kyrgyz Republic.

The license payment mentioned above is a specific type of public law payment, the collection of which is not only aimed at satisfying the fiscal interests of the state, but also allows for a solution to the problem of the efficient management and protection of mineral resources.

Article 13 of the Constitution, in conjunction with Article 55 of the Constitution, allow for the collection of public payments in the form of taxes and fees established by law.

The question of the legal nature of mandatory payments as a tax or non-tax has a constitutional dimension, as it is connected with the concept of legally established taxes and fees.

Non-tax payments, like taxes, are constitutionally valid payments of a public nature established by law and paid without fail. In this context, the legislator, on the basis of the discretion granted by the Constitution, has established a fee for holding a license on subsoil use as an economic mechanism to stimulate subsoil users to the efficient and rapid development of mineral resources and as a support to the local budget in order to resolve the socio-economic problems of the local population and region.

The applicant took issue with the procedure for determining the size of the payment of license fees, pointing out that Parliament and the Government introduced the calculation of payments for licences for subsoil use on the basis of a retroactive period of the possession of license.

The Chamber noted that the proportionality of the provision needed to be assessed primarily in conjunction with the principles of justice and the mobility of tax and other obligatory tax payments. Fair taxation should be based on the harmonious combination of the financial interests of the State, society and taxpayers.

These principles establish the impossibility of giving retroactive effect to new taxes and non-tax payments, and their incorporation is caused by the socio-economic situation of the country, taking into account the interests of society, the State and taxpayers.

The legislator, in exercising the legal regulation of the order of payment and calculation of payment for the retention of licenses for subsoil use, has not moved beyond the principles mentioned above and has fully implemented the observance of the constitutional establishment under Article 6.5 of the Constitution. Paying for holding a license, in accordance with Article 53.3 of the Law, is charged from the date of its entry into force in a manner approved by the Government. The Act came into force one month after its official publication. A method of calculating the license fee, approved by the Government, determined in accordance with the requirements of Article 53 of the Law, includes the integration period of the actual possession of the license for subsoil use. This approach of the legislator to determining the size of payment is fair and excludes certain advantages over other subsoil users and the infringement of the rights of subsoil users only granted the right to use subsurface resources by contrast with those who won the right before. The approach applied by the legislator in determining the value of the license fee is related only to the method of calculating the payment; it is not possible to give retroactive payment for the retention of the license.

The Chamber also found the applicants' claim for recognition of the contested provisions to be contrary to Article 20.1 and 20.3 of the Constitution to be unfounded, as it has no direct constitutional semantic connection. The contested provisions establish new responsibilities and cannot be regarded as the norm, diminishing or limiting the rights of the applicants.

III. Two judges have given individual opinions in this case.

Languages:

Russian.



Identification: KGZ-2016-1-008

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 09.12.2015 / **e)** 16-p / **f)** Imomnazarova / **g)** Official website and *Bulletin of Constitutional Chamber* 2015 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.7.14 Institutions – Judicial bodies – **Arbitration.**

Keywords of the alphabetical index:

Arbitration Court, nature.

Headnotes:

The legal nature of arbitral courts is based on the principles of autonomy of the will and freedom of contract. Parties which agree to apply for a dispute to be resolved by an arbitration court also agree to perform all duties that may arise from it and to put the court's decision into effect.

Summary:

I. Citizens B. Imomnazarova, G. Myrzakulova and V. Myachin asked the Constitutional Chamber to recognise Article 28 of the Law on the arbitration courts as unconstitutional, on the basis that arbitration court decisions pose a restriction on the right of citizens to judicial protection of the rights and freedoms guaranteed by the Constitution, because they are final and not subject to appeal.

II. The Constitutional Chamber held that the judicial protection of human rights and freedoms is exercised by the courts within the national judicial system, which has been established by the Constitution and laws. The judicial system is composed of the Supreme Court and local courts, therefore other courts or entities engaged in the resolution of disputes or other conflicts outside the judicial system cannot administer justice in the Kyrgyz Republic.

However, under the Constitution, through the guarantee of the right to judicial protection, everyone is entitled to protect their rights by all means not prohibited by law and the development of extra-judicial and pre-trial methods is assured.

One legal method of resolving civil disputes, which is generally accepted in modern society, is an application to the arbitration court. The Constitution allows civil disputes between individuals to be resolved through the procedure of arbitration hearings, and the arbitration court acts as an institute of civic society.

Allowing interested parties the discretion to apply to the court of general jurisdiction for the resolution of their disputes or to choose an alternative way of protecting their rights and to apply to the arbitration court in accordance with the guarantees secured in

Articles 40, 42 and 58 of the Constitution cannot be regarded as a violation. Rather, it expands opportunities for the resolution of disputes in the civil forum.

Under the Law on Arbitration Courts, parties in civil law matters can, without the case being considered by a court of general jurisdiction, conclude an agreement, (this can also take the form of an arbitration clause in a contract), and resolve the dispute through arbitration. Such a waiver of the right to have one's dispute heard by a court of a general jurisdiction is not a violation of the right to judicial protection, provided it is made without coercion.

Thus, the establishment of arbitration courts to resolve disputes between individuals and legal entities is not excluded. In this context, the word "court" should not necessarily be understood as a classic type of court, but rather as a body established to address a limited number of disputes.

The provisions under dispute, which provide that an arbitral award is final and not subject to appeal, arise from the legal nature of the institution of arbitration courts, which are based on the principle of autonomy of the will and freedom of contract. When parties agree to their dispute being resolved by the arbitration court, they agree to perform all the duties that may arise from this and, in particular, to carry out the court's decision.

III. Judge Ch. Osmonova submitted a dissenting opinion in this case.

Languages:

Russian.



Identification: KGZ-2016-1-009

a) Kyrgyz Republic / **b)** Constitutional Chamber / **c)** Plenary / **d)** 16.12.2015 / **e)** 17-p / **f)** Review of the constitutionality of Article 378.4 of the Labour Code / **g)** Official website and *Bulletin of Constitutional Chamber 2015* / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age.**

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

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

Keywords of the alphabetical index:

Employment, labour law.

Headnotes:

The mere fact of having reached an age limit is not a reasonable basis to dismiss a dean or to stop him or her taking part in elections for this post. Provisions seeking to impose an upper age limit are in contravention of the principle of equality, given that the post of dean of faculty is not an administrative function, but instead aligned with educational and scientific research.

Summary:

I. On 16 December 2015, the Constitutional Chamber considered a case on the constitutionality of Article 378.4 of the Labour Code. Under this provision, the posts within public and municipal higher education institutions of rectors, vice-rectors, deans and heads of institutions may be held by persons who are under sixty-five years of age, regardless of the duration of their contracts of employment.

II. The Constitutional Chamber found that the provision did not contradict the Constitution provided it did not apply to the positions of deans of faculties in state and municipal institutions of higher education. It drew a distinction in its decision between the post of dean and that of rector, vice-rector and head of institution; the latter are primarily concerned with the implementation of managerial and administrative functions. The legislator, in order to ensure the interests of the state and municipalities, is entitled to set high requirements for heads of state and municipal universities. This in itself is not contrary to the Constitution.

The position of dean of the faculty is scientific/educational in nature rather than administrative. A dean performs work which differs significantly from that of an administrative employee. The provision under dispute imposed age limits on the post of dean of faculty. No such restrictions were placed on other

scientific – teaching posts. Being over sixty-five years of age does not interfere with the successful implementation of scientific and pedagogical activity. To the extent, therefore, that the disputed norm envisages an age limit for those holding the posts of faculty dean in state and municipal universities, it violates the constitutional principle of equality of rights, leading to discrimination in the implementation of the right, set out in Article 16.2.2 of the Constitution.

Cross-references:

Constitutional Chamber:

- no. 27, 30.04.2014;
- no. 31, 14.05.2014.

Languages:

Russian.



Identification: KGZ-2016-1-010

a) Kyrgyz Republic / b) Constitutional Chamber / c) Plenary / d) 17.02.2016 / e) 2-p / f) / g) Official website and *Bulletin of Constitutional Chamber 2015* / h) CODICES (Russian).

Keywords of the systematic thesaurus:

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:

Legal entity / Statute of limitation.

Headnotes:

Legal entities and individuals engaged in entrepreneurial activities may restore a missed limitation period for valid reasons. Provisions preventing them from doing so run counter to the principle of equality before the law and judicial protection.

Summary:

I. A representative of the “Farmaciya Jsc.”, Mrs Kochkorbaeva N.B., filed a petition with the Constitutional Chamber, asking it to declare Article 215.2 of the Civil Code unconstitutional. This norm prevents legal entities and citizens engaged in entrepreneurial activities from restoring the limitation period under any circumstances. Once this period has expired (three years in total), the court has to refuse to accept any case seeking redress for violated rights; there is no possibility of verifying the validity of the reasons for having missed the deadline. The applicant contended that this norm deprived these subjects of the possibility of judicial protection, which is guaranteed by the Constitution and not open to restriction by the legislator.

II. The Constitutional Chamber noted that there are situations in legal practice where a party cannot embark on the judicial protection of his or her rights because the limitation period has expired, although he or she might not realise (or have a proper opportunity to realise) that his or her rights have been breached. This is because, under the Civil Law, a certain category of persons (in particular legal entities and those engaged in entrepreneurial activities), have no opportunity to restore the limitation period. This is a legal restriction, preventing the realisation of the right to judicial protection.

The Chamber also noted that the different approach of the legislator to different groups of subjects of civil relations as provided in the Article 215.2 of the Civil Code, some of whom do not have the right to restore a limitation period, runs counter to the constitutional principle of equality of all before the law and the court, and cannot offer all citizens equal protection.

Languages:

Russian.



Latvia

Constitutional Court

Statistical data

1 January 2016 – 30 April 2016

Decisions of the Panels: 58

Decisions of the Plenary Court: 3

Judgments: 3

Important decisions

Identification: LAT-2016-1-001

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 02.07.2015 / **e)** 2015-01-01 / **f)** On the compliance of the First and the Second Part of Section 7 of the Law on the National Flag of Latvia and Section 20143 of the Administrative Violations Code with Article 100 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 06.07.2015, 129 (5447) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

4.2.1 Institutions – State Symbols – **Flag**.

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

Keywords of the alphabetical index:

Flag, display, regulation / Penalty, proportionality.

Headnotes:

The obligation to place the national flag on residential buildings strengthens the awareness of statehood. Establishing a sanction to ensure that obligations of civic nature are met should only be recognised as proportionate in exceptional cases.

Summary:

I. Certain norms of the Law on the National Flag require the Latvian national flag to be displayed on residential buildings on ten days of the year, and on five out of these in “mourning presentation”. The Administrative Violations Code envisages an

administrative sanction for failure to perform this obligation.

The applicant received an administrative sanction for having failed to display the national flag in “mourning presentation” on her house on 14 June. She explained that this was because she had organised a family celebration that day and had not wanted to express mourning. She made reference to the freedom of speech in its negative aspect, i.e., the freedom not to express one’s opinion.

II. The Constitutional Court held that the freedom of speech also comprises the use of symbols – including the use of a flag. By imposing an obligation to fly the flag, the contested norms had restricted the applicant’s freedom of speech.

The Constitutional Court acknowledged that placement of the flag on residential buildings does not only serve to ensure that those living in the building participate in the commemoration of historic events. It also serves to ensure that a large part of society is kept informed and reminded of historic events of national significance. It accordingly found that the obligation to place the national flag on residential buildings was proportional.

However, the Constitutional Court also pointed out that imposing an administrative sanction for not placing the flag on residential buildings changes the legal nature of the restriction so that potentially the flag is only flown because of the sanction, not in remembrance of historical events of national significance. The Court agreed that when the democratic structure of the state was being created and consolidated, a pronouncedly imperative approach to defining civic obligations in connection with the development of the awareness of statehood could have been necessary and commensurate. However, there are no grounds for maintaining this state of affairs over a longer period, especially if the negative aspect in a person’s freedom of speech is impinged upon. The introduction even of minor penalties in the field of freedom of speech has a negative impact (chilling effect) on society in general; it is thus only admissible only in exceptional cases. The Court was not convinced from the evidence before it that the legislator had provided sufficient substantiation as to the existence of an exceptional case. It therefore held that the sanction for not placing the national flag on residential buildings was not proportional and was unconstitutional.

III. Two Justices of the Constitutional Court expressed a dissenting opinion, arguing that the legislator had a broad discretion in regulating the use of state symbols and establishing administrative

sanctions. The Constitutional Court could only intervene if the boundaries of discretion were clearly exceeded. In this case, the administrative sanction was not severe and therefore proportional.

Cross-references:

Previous decisions of the Constitutional Court:

- no. 2003-05-01, 29.10.2003, *Bulletin* 2003/3 [LAT-2003-3-011];
- no. 2003-02-0106, 05.06.2003, *Bulletin* 2003/2 [LAT-2003-2-007];
- no. 2004-18-0106, 13.05.2005, *Bulletin* 2005/2 [LAT-2005-2-005];
- no. 2005-19-01, 22.12.2005;
- no. 2008-09-0106, 16.12.2008;
- no. 2008-11-01, 22.12.2008;
- no. 2008-12-01, 04.02.2009;
- no. 2010-01-01, 07.10.2010;
- no. 2011-01-01, 25.10.2011, *Bulletin* 2012/1 [LAT-2012-1-001];
- no. 2014-34-01, 08.04.2015.

European Court of Human Rights:

- *Vogt v. Germany*, no. 17851/91, 26.09.1995, paragraphs 52.ii, 52.iii, 53, Series A, no. 323;
- *Zana v. Turkey*, no. 18954/91, 25.11.1997, paragraph 51, *Reports* 1997-VII;
- *Steel and Others v. the United Kingdom*, no. 24838/94, 23.09.1998, paragraphs 51, 92, *Reports* 1998-VII;
- *Nikula v. Finland*, no. 31611/96, 21.03.2002, paragraphs 46, 54, 55, *Reports of Judgments and Decisions* 2002-II;
- *Skalka v. Poland*, no. 43425/98, 27.05.2003, paragraphs 35, 38;
- *Perna v. Italy*, no. 48898/99, 06.05.2003, paragraph 39.b, *Reports of Judgments and Decisions* 2003-V;
- *Ždanoka v. Latvia*, no. 58278/00, 16.03.2006, paragraphs 95, 121, *Reports of Judgments and Decisions* 2006-IV;
- *Stoll v. Switzerland*, no. 69698/01, 10.12.2007, paragraphs 153, 154, *Reports of Judgments and Decisions* 2007-V;
- *Vajnai v. Hungary*, no. 33629/06, 08.07.2008, paragraphs 43, 45, 46, 55, *Reports of Judgments and Decisions* 2008;
- *Tănase v. Moldova*, no. 7/08, 27.04.2010, paragraphs 166, 167, *Reports of Judgments and Decisions* 2010;
- *Gillberg v. Sweden*, no. 41723/06, 03.04.2012, paragraph 84;
- *Fáber v. Hungary*, no. 40721/08, 24.07.2012, paragraph 52;

- *Eon v. France*, no. 26118/10, 14.03.2013, paragraphs 52, 61;
- *Murat Vural v. Turkey*, no. 9540/07 21.10.2014, paragraphs 44, 46, 62, 63;
- *Petropavlovskis v. Latvia*, no. 44230/06, 13.01.2015, paragraphs 70, 71, *Reports of Judgments and Decisions* 2015.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2016-1-002

a) Latvia / b) Constitutional Court / c) / d) 12.11.2015 / e) 2015-06-01 / f) On the compliance of Section 116.1 of the Judicial Disciplinary Liability Law with Article 100 of the Constitution / g) *Latvijas Vestnesis* (Official Gazette), 12.11.2015, 223 (5541) / h) CODICES (Latvian, English).

Keywords of the systematic thesaurus:

5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence**.
 5.3.24 Fundamental Rights – Civil and political rights – **Right to information**.
 5.3.25 Fundamental Rights – Civil and political rights – **Right to administrative transparency**.

Keywords of the alphabetical index:

Judge, disciplinary proceedings, confidentiality / Judge, independence.

Headnotes:

Restricted access to information about probable disciplinary violations committed by judges carries more weight than disclosure of such information.

Summary:

I. The Supreme Court submitted an application to the Constitutional Court regarding a norm which prohibited access to decisions to launch disciplinary proceedings against a judge and the materials of the

disciplinary case until the entry into force of the decision in the disciplinary case. The norm prohibited, for example, disclosure of the name of the judge against which proceedings had been launched.

The applicant acknowledged that the norm protected a judge and the judiciary against unfounded injury to reputation, thus safeguarding the authority of the judiciary, but contended that it represented a disproportionate restriction of public control over the activities of the judiciary.

II. The Constitutional Court recognised that the contested norm protected judges from unfounded accusations during the period when disciplinary cases had been initiated, but had yet to be reviewed. Fully unverified information about a probable violation committed by a judge might cast doubt over their objectivity or competence to adjudicate cases. It could also undermine the authority of the judiciary as a whole. The Court stressed the importance of protecting the authority of the judiciary in a democratic and law-governed state. The judiciary must enjoy public trust in order to perform its duties successfully. Therefore the benefit that society gains from maintaining the authority of the judiciary exceeds the harm caused to an individual by restricting his rights to receive information about a probable disciplinary violation that has not been fully verified. The contested norm is constitutionally compliant.

III. Two Justices of the Constitutional Court expressed a dissenting opinion, emphasising the importance of promoting public trust in the courts. Courts cannot function properly without trust. In order to promote trust, the work of courts must be transparent. Any restriction of access to information about probable disciplinary violations committed by judges must be as narrow as possible. There are cases where the information about disciplinary proceedings should be disclosed.

Cross-references:

Previous decisions of the Constitutional Court:

- no. 04-02(99), 06.07.1999, *Bulletin* 1997/2 [LAT-1997-2-002];
- no. 2001-12-01, 19.03.2002, *Bulletin* 2002/1 [LAT-2002-1-004];
- no. 2003-05-01, 29.10.2003, *Bulletin* 2003/3 [LAT-2003-3-011];
- no. 2003-02-0106, 05.06.2003, *Bulletin* 2003/2 [LAT-2003-2-007];
- no. 2004-18-0106, 13.05.2005, *Bulletin* 2005/2 [LAT-2005-2-005];

- no. 2005-19-01, 22.12.2005;
- no. 2007-03-01, 18.10.2007, *Bulletin* 2007/3 [LAT-2007-3-005];
- no. 2009-11-01, 18.01.2010, *Bulletin* 2010/2 [LAT-2010-2-001];
- no. 2009-45-01, 22.02.2010;
- no. 2010-01-01, 07.10.2010;
- no. 2014-34-01, 08.04.2015;
- no. 2015-01-01, 02.07.2015.

European Court of Human Rights:

- *Prager and Oberschlick v. Austria*, no. 15974/90, 26.04.1995, paragraph 34, Series A, no. 313;
- *De Haes and Gijssels v. Belgium*, no. 19983/92, 24.02.1997, paragraph 37, *Reports* 1997-I;
- *Morice v. France*, no. 29369/10, 23.04.2015, paragraphs 128, 170, *Reports of Judgments and Decisions* 2015.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2016-1-003

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 23.11.2015 / **e)** 2015-10-01 / **f)** On the compliance of Section 7.3 of the Law on Prevention of Conflict of Interest in Activities of Public Officials with the first sentence of Article 91 and Article 110 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 25.11.2015, 231 (5549) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.
5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

Keywords of the alphabetical index:

Judge, profession, combination / Child, disabled, care.

Headnotes:

There is no reason why providing an assistant's services to his or her own child would place a judge in a conflict of interest situation.

Summary:

I. The norm under dispute defined the positions and types of activity with which the office of a public official (including that of a judge) may be combined. An official could, for example, perform the work of a teacher or engage in scientific or creative work.

A judge who was bringing up a disabled child had submitted a constitutional complaint. Children in such cases are entitled to an assistant's services, which are paid for. These services may also be provided by one of the child's parents. The contested norm prohibited the applicant from becoming an assistant to her disabled child, as the combination of the office of judge and the provision of such a service was prohibited. This, in the applicant's opinion, resulted in a breach of the rights of a family and the rights of a disabled child to special protection. The applicant also argued that the contested norm was incompatible with the principle of equality.

II. The Constitutional Court recognised that the contested norm had a legitimate aim; by restricting the areas of a judge's occupations, it ensured transparency and responsibility of a judge's activities as a public official, as well as independence of the judiciary. However, if it meant that a judge was prohibited from providing assistant's services to his or her own child, the contested norm was not appropriate for reaching the legitimate aim.

The Constitutional Court found that Parliament had not provided arguments as to why providing an assistant's services to his or her own child would place a judge in a conflict of interest situation or subject his or her independence to a greater risk than the combining of a judge's office with other types of activities permitted by the contested norm. The norm was found to be incompatible with the principle of equality.

Cross-references:

Previous decisions of the Constitutional Court:

- no. 2000-07-0409, 03.04.2001, *Bulletin* 2001/1 [LAT-2001-1-002];
- no. 2001-12-01, 19.03.2002, *Bulletin* 2002/1 [LAT-2002-1-004];

- no. 2003-02-0106, 05.06.2003, *Bulletin* 2003/2 [LAT-2003-2-007];
- no. 2004-18-0106, 13.05.2005, *Bulletin* 2005/2 [LAT-2005-2-005];
- no. 2005-02-0106, 14.09.2005;
- no. 2005-09-01, 04.11.2005, *Bulletin* 2005/3 [LAT-2005-3-006];
- no. 2006-07-01, 02.11.2006;
- no. 2006-08-01, 21.02.2007, *Bulletin* 2007/3 [LAT-2007-3-001];
- no. 2006-10-03, 11.12.2006;
- no. 2006-13-0103, 04.01.2007;
- no. 2007-01-01, 08.06.2007, *Bulletin* 2007/3 [LAT-2007-3-004];
- no. 2007-13-03, 19.12.2007;
- no. 2007-15-01, 12.02.2008;
- no. 2007-22-01, 02.06.2008;
- no. 2008-11-01, 22.12.2008;
- no. 2008-37-03, 29.12.2008;
- no. 2008-43-0106, 03.06.2009;
- no. 2008-47-01, 28.05.2009, *Bulletin* 2009/2 [LAT-2009-2-003];
- no. 2009-11-01, 18.01.2010, *Bulletin* 2010/2 [LAT-2010-2-001];
- no. 2009-46-01, 02.02.2010;
- no. 2010-02-01, 19.06.2010;
- no. 2011-01-01, 25.10.2011, *Bulletin* 2012/1 [LAT-2012-1-001];
- no. 2012-06-01, 01.11.2012.

European Court of Human Rights:

- *Stec and Others v. the United Kingdom*, no. 65731/01, 65900/01, 12.04.2006, paragraph 51, *Reports of Judgments and Decisions* 2006-VI;
- *Thlimmenos v. Greece*, no. 34369/97, 06.04.2000, paragraph 48, *Reports of Judgments and Decisions* 2000-IV;
- *Carson and Others v. the United Kingdom*, 16.03.2010, paragraphs 61, 62, *Reports of Judgments and Decisions* 2010;
- *Spūlis and Vaškevičs v. Latvia*, no. 2631/10 and 1253/10, 18.11.2014, paragraph 41.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2016-1-004

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 21.12.2015 / **e)** 2015-03-01 / **f)** On the compliance of Section 2 of the law “Amendments to the Insolvency Law” of 25 September 2014 and the law “Amendments to the Law On Prevention of Conflict of Interest in the Activities of Public Officials” of 30 October 2014 with Article 1 and the first sentence of Article 106 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 23.12.2015, 251 (5569) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Insolvency, administrator, status / Bar, independence, confidentiality.

Headnotes:

The obligation incumbent on public officials to indicate parties to their transactions contradicts the duty of advocates to observe the principle of confidentiality.

Summary:

I. Under the contested norms, administrators of insolvency proceedings are on an equal footing with public officials; the restrictions, prohibitions and obligations defined for public officials apply to administrators as well. One of the duties of a public official is to submit a declaration which must include information on all kinds of income and transactions conducted, indicating the amount of and parties to these transactions.

A number of persons who combined their activities as advocates with performing the duties of an administrator of insolvency proceedings made an application to the Constitutional Court arguing that the status of a public official prohibited them from being advocates at the same time, thus restricting their right to freely choose employment.

II. The Constitutional Court noted that the legislator may define the persons who should be recognised as being public officials. However, the legislator must

also make sure that individual fundamental rights are not disproportionately restricted.

The Constitutional Court recognised that the legislator put administrators on the same footing in their official activities in order to ensure transparency of administrators' activities and to decrease the risk of conflict of interest and corruption. Effective and transparent insolvency proceedings are one of the factors that ensure economic growth and stability. Thus, the contested norms protected the rights and public welfare of others.

However, the legislator did not identify the risks to which the contested norms subjected the applicants' fundamental rights. The mutual exchange of information between an advocate and his or her client deserves special protection. An advocate cannot perform his or her duties of office unless he or she can ensure confidentiality in his or her clients' affairs. In some situations, the principle of confidentiality prohibits requesting information not only about the content of legal assistance provided by an advocate, but also about the person to whom it has been provided. The contested norms may therefore sometimes clash with the principle of confidentiality and they preclude the applicants from combining the administrator's office with that of advocate. Such restriction is disproportionate. The Constitutional Court found the norms to be incompatible with the first sentence of Article 106 of the Constitution.

III. One Justice of the Constitutional Court expressed a dissenting opinion. He focused on the Constitutional Court's conclusion that the legitimate aim could be reached with less restrictive measures and argued that the Court should have considered whether it would be possible with such measures to reach the legitimate aim of equal quality.

Cross-references:

Previous decisions of the Constitutional Court:

- no. 2001-16-01, 04.06.2002, *Bulletin* 2002/2 [LAT-2002-2-005];
- no. 2003-12-01, 18.12.2003;
- no. 2002-21-01, 20.05.2003, *Bulletin* 2003/2 [LAT-2003-2-006];
- no. 2002-20-0103, 23.04.2003, *Bulletin* 2003/1 [LAT-2003-1-005];
- no. 2003-05-01, 29.10.2003, *Bulletin* 2003/3 [LAT-2003-3-011];
- no. 2003-08-01, 06.10.2003, *Bulletin* 2003/3 [LAT-2003-3-010];
- no. 2005-12-0103, 16.12.2005;
- no. 2005-03-0306, 21.11.2005, *Bulletin* 2005/3 [LAT-2005-3-007];

- no. 2005-09-01, 04.11.2005, *Bulletin* 2005/3 [LAT-2005-3-006];
- no. 2005-13-0106, 15.06.2006, *Bulletin* 2006/2 [LAT-2006-2-003];
- no. 2005-22-01, 23.02.2006;
- no. 2006-42-01, 16.05.2007;
- no. 2008-01-03, 23.09.2008;
- no. 2008-42-01, 23.04.2009;
- no. 2009-100-03, 20.04.2010;
- no. 2009-113-0106, 06.10.2010;
- no. 2010-01-01, 07.10.2010;
- no. 2010-55-0106, 11.05.2011;
- no. 2011-04-01, 22.11.2011;
- no. 2010-60-01, 30.03.2011;
- no. 2011-09-01, 30.01.2012;
- no. 2013-04-01, 07.02.2014;
- no. 2015-10-01, 23.11.2015;
- no. 2014-11-0103, 25.03.2015;
- no. 2014-34-01, 08.04.2015.

European Court of Human Rights:

- *Michaud v. France*, no. 12323/11, 06.12.2012, paragraphs 117, 118, 123-131, *Reports of Judgments and Decisions* 2012;
- *André and Another v. France*, no. 18603/03, 24.07.2008, paragraph 41;
- *Brito Ferrinho Bexiga Villa-Nova v. Portugal*, no. 69436/10, 01.12.2015, paragraph 57.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2016-1-005

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 12.02.2016 / **e)** 2015-13-03 / **f)** On Compliance of the First Sentence in Paragraph 24 of the Riga City Council Binding Regulation of 19 February 2013 no. 211 “On the Municipal Fee for the Maintenance and Development of the Municipality Infrastructure in Riga” with Article 105 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 15.02.2016, 31 (5603) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers**.
 4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities**.
 4.10.7 Institutions – Public finances – **Taxation**.
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Taxation, power / Decentralisation / *Ultra vires*.

Headnotes:

Applying a restriction upon fundamental rights by analogy is inadmissible.

Summary:

I. Riga City Council enacted a norm to the effect that if a building permit was revoked or annulled, any fees paid for the maintenance and development of the municipal infrastructure within the administrative territory of Riga would not be reimbursed, but would be counted as part of the fee when another building permit was received for a new construction project in the same place.

An entrepreneur had received a building permit and paid the infrastructure fee. He did not commence construction and requested the Riga City Council to revoke the building permit which was issued to him. In accordance with the norm under dispute, the infrastructure fee was not repaid. He sought a ruling from the Administrative Court.

The Administrative Court recognised that the norm restricted the property rights of persons who had paid the infrastructure fee and had not commenced construction.

II. The Constitutional Court noted that a local government has the right to issue binding regulations only in cases prescribed by law and within the scope of its authorisation. Binding regulations issued by local governments should not be incompatible with the norms of the Constitution and other legal norms with higher legal force.

Under the disputed Cabinet of Ministers Regulation, fees for receiving a building permit will not be reimbursed in cases where the building permit is not realised. However, the regulation does not provide that if the construction concepts are not realised, the infrastructure fee should not be repaid.

The suggestion was made during the proceedings that by analogy with the fee for receiving a building permit, infrastructure fees that had been paid should not be repaid. However, the Constitutional Court noted that applying a restriction upon fundamental rights by analogy was inadmissible. Moreover, the duty to pay any fee should be viewed as a restriction upon the right to property. The regulation does not grant a local government authority the right not to repay infrastructure fees if the construction concept is not realised. Such a restriction upon fundamental rights is inadmissible.

The Riga City Council had not abided by the scope of its authorisation, when it issued the contested norm. The Constitutional Court therefore found it unconstitutional.

Cross-references:

Previous decisions of the Constitutional Court:

- no. 04-03(98), 10.06.1998, *Bulletin* 1998/2 [LAT-1998-2-004];
- no. 2001-09-01, 21.01.2002;
- no. 2002-01-03, 20.05.2002;
- no. 2005-03-0306, 21.11.2005, *Bulletin* 2005/3 [LAT-2005-3-007];
- no. 2005-12-0103, 16.12.2005;
- no. 2005-16-01, 08.03.2006, *Bulletin* 2006/1 [LAT-2006-1-002];
- no. 2006-28-01, 11.04.2007, *Bulletin* 2007/3 [LAT-2007-3-002];
- no. 2007-01-01, 08.06.2007, *Bulletin* 2007/3 [LAT-2007-3-004];
- no. 2007-04-03, 09.10.2007;
- no. 2009-09-03, 19.11.2009;
- no. 2008-12-01, 04.02.2009;
- no. 2010-09-01, 13.10.2010;
- no. 2010-02-01, 19.06.2010;
- no. 2010-12-03, 27.10.2010;
- no. 2010-40-03, 11.01.2011, *Bulletin* 2011/2 [LAT-2011-2-003];
- no. 2011-05-01, 03.11.2011;
- no. 2012-16-01, 10.05.2013, *Bulletin* 2013/2 [LAT-2013-2-002];
- no. 2013-06-01, 18.12.2013, *Bulletin* 2013/3 [LAT-2013-3-005];
- no. 2014-06-03, 29.12.2014;
- no. 2013-21-03, 12.12.2014;
- no. 2014-36-01, 13.10.2015.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2016-1-006

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 02.03.2016 / **e)** 2015-11-03 / **f)** On Compliance of Paragraphs 19 and 20 of the Bank of Latvia Regulation no. 141 of 15 September 2014 “Requirements Regarding Prevention of Money Laundering and Financing of Terrorism in Buying and Selling Foreign Currency Cash” with Articles 1 and 64, and the First Sentence in Article 91 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 04.03.2016, 45 (5617) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers**.
 4.6.7 Institutions – Executive bodies – **Administrative decentralisation**.
 4.10.5 Institutions – Public finances – **Central bank**.
 5.2 Fundamental Rights – **Equality**.

Keywords of the alphabetical index:

Money laundering, reporting, obligation / *Ultra vires*.

Headnotes:

The law provides exhaustive regulation on cases where credit institutions and capital companies engaged in buying and selling foreign currency cash must identify their clients. The Bank of Latvia exceeded the authorisation granted by the legislator in enacting the disputed norms.

Summary:

I. The applicant in this matter was a capital company, which, as part of its commercial activities, was also engaged in the buying and selling of foreign currency cash. This service is provided only by capital companies which have received licences from the Bank of Latvia, as well as credit institutions. The requirements defined in law apply to both these groups.

The applicant noted that before the contested norms were adopted, regulatory enactments provided that capital companies which were engaged in trading cash and credit institutions had to identify the client in every transaction which was equivalent to

8,000 euros or over. The contested norms, however, only applied to capital companies which were engaged in trading cash. They did not apply to credit institutions providing an identical service. The applicant alleged that this situation was incompatible with the principle of equality and that in adopting the contested norms the authorisation granted by the legislator was breached.

II. The Constitutional Court noted that adoption of laws fell within the competence of the legislator. However, to make the legislative process more effective, institutions of public administration may in certain cases adopt external regulatory enactments. The Bank of Latvia may only issue external regulatory enactments in accordance with the authorisation granted by Parliament in the field of competence granted to it by law.

The Constitutional Court recognised that the Bank of Latvia was not allowed to issue regulation on issues that had been resolved by the legislator itself. The law provides exhaustive regulation on cases where credit institutions and capital companies which are engaged in trading cash must identify their clients. However, the Bank of Latvia adopted norms which defined new cases where clients must be identified. In so doing, it exceeded the authorisation granted to it by the legislator.

The Constitutional Court held that the differential treatment established by the contested norms was not established by law. The Bank had acted contrary to the principle of separation of powers and had exceeded the authorisation granted by the legislator. The contested norms were incompatible with the Constitution; the Court recognised them as being invalid as of the point at which they were adopted.

III. One Justice of the Constitutional Court expressed a dissenting opinion, contending that the contested norms should be declared invalid at some point in the future.

Cross-references:

Previous decisions of the Constitutional Court:

- no. 04-03(98), 10.06.1998, *Bulletin* 1998/2 [LAT-1998-2-004];
- no. 03-05(99), 01.10.1999, *Bulletin* 1999/3 [LAT-1999-3-004];
- no. 04-03(99), 09.07.1999, *Bulletin* 1999/2 [LAT-1999-2-003];
- no. 2001-02-0106, 26.06.2001, *Bulletin* 2001/2 [LAT-2001-2-003];
- no. 2002-01-03, 20.05.2002;

- no. 2001-06-03, 22.02.2002, *Bulletin* 2002/1 [LAT-2002-1-002];
- no. 2002-16-03, 24.12.2002;
- no. 2003-21-0306, 09.02.2004, *Bulletin* 2004/1 [LAT-2004-1-002];
- no. 2005-08-01, 11.11.2005;
- no. 2005-03-0306, 21.11.2005, *Bulletin* 2005/3 [LAT-2005-3-007];
- no. 2006-05-01, 16.10.2006, *Bulletin* 2006/3 [LAT-2006-3-004];
- no. 2006-12-01, 20.12.2006, *Bulletin* 2006/3 [LAT-2006-3-006];
- no. 2007-13-03, 19.12.2007;
- no. 2007-04-03, 09.10.2007;
- no. 2009-43-01, 21.12.2009, *Bulletin* 2009/3 [LAT-2009-3-005];
- no. 2009-46-01, 02.02.2010;
- no. 2010-40-03, 11.01.2011, *Bulletin* 2011/2 [LAT-2011-2-003];
- no. 2011-05-01, 03.11.2011;
- no. 2013-06-01, 18.12.2013, *Bulletin* 2013/3 [LAT-2013-3-005];
- no. 2014-02-01, 13.06.2014;
- no. 2013-21-03, 12.12.2014;
- no. 2014-02-01, 13.06.2014;
- no. 2014-09-01, 28.11.2014;
- no. 2015-05-03, 14.10.2015;
- no. 2015-03-01, 21.12.2015;
- no. 2015-10-01, 23.11.2015;
- no. 2015-13-03, 12.02.2016.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2016-1-007

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 29.04.2016 / **e)** 2015-19-01 / **f)** On the compliance of the First, Third and Fifth Part of Section 657 of the Criminal Procedure Law with the First Sentence in Article 92 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 03.05.2016, 85 (5657) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

4.7.4.3 Institutions – Judicial bodies – Organisation – **Prosecutors / State counsel.**

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

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

Keywords of the alphabetical index:

Criminal proceedings, reopening / Prosecutor, impartiality.

Headnotes:

The aim of renewal of criminal proceedings when new circumstances have been disclosed is to ensure a balance between two elements of the right to fair trial – *res judicata* and fair judgment.

Summary:

I. Under the contested norms, a public prosecutor has the right to renew criminal proceedings in connection with newly disclosed circumstances. Such an application is to be examined by a public prosecutor depending on the location of the adjudication of the initial criminal proceedings; if a public prosecutor refuses to renew criminal proceedings, the applicant may appeal the decision to a higher-ranking public prosecutor. Their decision will not be subject to appeal.

The applicants had submitted an application regarding renewal of criminal proceedings in connection with newly disclosed circumstances. The prosecutor resolved to reject the application. The applicants appealed against the decision to a higher standing prosecutor who also refused to renew the criminal proceedings.

The applicants held that the contested norms restricted their right to a fair trial without grounds, because the application regarding newly disclosed circumstances was reviewed at the place where the criminal proceedings were examined initially, and there was no right to appeal in court against the prosecutor's decision.

II. The Constitutional Court recognised that the contested norms may cause a situation where an application on newly disclosed circumstances is examined by the same prosecutor who performed investigatory activities, supervised the investigation and criminal prosecution or brought public charges. The Court underlined that the prosecutor who brought charges in the case does not have the right to make

the final decision on whether new circumstances have been disclosed in the case.

If a prosecutor has previously performed investigatory activities or brought public charges in criminal proceedings, he has already provided assessment and expressed an opinion on the validity of charges. Therefore reasonable doubts may arise that he will not change his opinion when he reviews an application on newly disclosed circumstances or a complaint about a decision not to renew proceedings. In other words, the contested norms do not completely assuage doubts over the neutrality of those prosecutors who decide whether criminal proceedings should be renewed in the light of newly disclosed circumstances. The Court recognised the contested norms as being incompatible with the Constitution.

III. Two Justices of the Constitutional Court expressed a dissenting opinion; in their view, questions over the renewal of criminal proceedings should only be decided by the Court.

Cross-references:

Previous decisions of the Constitutional Court:

- no. 2001-17-0106, 20.06.2002, *Bulletin* 2002/2 [LAT-2002-2-006];
- no. 2002-04-03, 22.10.2002, *Bulletin* 2002/3 [LAT-2002-3-008];
- no. 2001-10-01, 05.03.2002;
- no. 2002-06-01, 04.02.2003;
- no. 2004-18-0106, 13.05.2005, *Bulletin* 2005/2 [LAT-2005-2-005];
- no. 2004-19-01, 15.02.2005, *Bulletin* 2005/1 [LAT-2005-1-003];
- no. 2005-12-0103, 16.12.2005;
- no. 2004-10-01, 17.01.2005, *Bulletin* 2005/1 [LAT-2005-1-001];
- no. 2005-13-0106, 15.06.2006, *Bulletin* 2006/2 [LAT-2006-2-003];
- no. 2006-12-01, 20.12.2006, *Bulletin* 2006/3 [LAT-2006-3-006];
- no. 2006-28-01, 11.04.2007, *Bulletin* 2007/3 [LAT-2007-3-002];
- no. 2008-43-0106, 03.06.2009;
- no. 2009-69-03, 09.03.2010;
- no. 2010-71-01, 19.10.2011;
- no. 2011-21-01, 06.06.2012, *Bulletin* 2012/2 [LAT-2012-2-004];
- no. 2012-16-01, 10.05.2013, *Bulletin* 2013/2 [LAT-2013-2-002];
- no. 2012-13-01, 14.05.2013;
- no. 2012-22-0103, 27.06.2013;
- no. 2013-11-01, 03.04.2014;
- no. 2013-08-01, 09.01.2014.

European Court of Human Rights:

- *Öcalan v. Turkey*, no. 46221/99, 12.05.2005, paragraph 210, *Reports of Judgments and Decisions* 2005-IV;
- *Gäfgen v. Germany*, no. 22978/05, 01.06.2010, paragraph 66, *Reports of Judgments and Decisions* 2010;
- *Laska and Lika v. Albania*, no. 12315/04, 17605/04, 20.04.2010, paragraph 74;
- *Cesnieks v. Latvia*, no. 9278/06, 11.02.2014, paragraphs 65, 78.

Languages:

Latvian, English (translation by the Court).



Lithuania Constitutional Court

Important decisions

Identification: LTU-2016-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 30.12.2015 / **e)** KT34-N22/2015 / **f)** On annual reports submitted by institutions to the Parliament (*Seimas*), the account of the Prosecutor General to the *Seimas* and a proposal to release him or her from duties / **g)** TAR (Register of Legal Acts), 21030, 20.10.2015, www.tar.lt / **h)** www.lrkt.lt; CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
 4.5.2 Institutions – Legislative bodies – **Powers**.
 4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies**.
 4.7.4.3 Institutions – Judicial bodies – Organisation – **Prosecutors / State counsel**.

Keywords of the alphabetical index:

State institution, head / Interference, unjustified / Independence, prosecutor / Prosecutor, dismissal.

Headnotes:

In order for the Parliament (*Seimas*) to operate efficiently in pursuance of the national interest and for it to carry out its constitutional duties, exhaustive and objective information is needed about the processes taking place in the state and society. In a democratic state under the rule of law, state officials and institutions must follow the law when carrying out their duties and when acting in the national interest, they require protection from pressures and unreasonable interference.

Summary:

I. Two groups of members of the Parliament (*Seimas*) asked the Constitutional Court to assess the constitutionality of the legal regulation governing accounting to the *Seimas* by the heads of state institutions (with the exception of courts but including

the Prosecutor General), who are appointed by the *Seimas* or whose appointment requires the assent of the *Seimas*, for the activity of their respective institution.

II. The Constitutional Court held that in order to ensure the fulfilment of its powers, the *Seimas* may provide for a legal regulation that would create legal preconditions for receiving information about the activities of state institutions whose heads are appointed by the *Seimas*, or the appointment of whose heads requires the approval of the *Seimas*. This would include circumstances where such information is received in the form of a report submitted by the heads of these institutions on the annual activities of their respective institutions.

The principle of the separation of powers and the functions of the *Seimas* do not imply any regulation to the effect that the process of accounting to the *Seimas* by the institution (or its head) would not be considered complete until the *Seimas* had approved the report containing the appropriate information which the head of the institution had submitted.

If the *Seimas* were vested with the powers to adopt a resolution to give or withhold its approval of annual activity reports submitted by the heads of state institutions, these heads would not be protected against possible pressure or unjustified interference with their activities, even though they would be performing their duties in compliance with the Constitution and law and while acting in the national interest. Such a legal regulation would be incompatible with the Constitution and its enactment would unreasonably expand the constitutional powers of the *Seimas*.

If the information provided in a report made it clear that the head of a particular state institution might have broken the law or placed personal or group interests above the interests of society, it would be in order from a constitutional perspective for the *Seimas* to consider and adopt a resolution of no confidence in the head of the institution in question, as provided for in Article 75 of the Constitution. It could also, through an act on expressing the will of the representation of the Nation concerning issues significant to the state, publicly address the President and propose that the head of a state institution appointed by the President upon the approval of the *Seimas* be dismissed from office after applying the appropriate grounds of dismissal provided for by the law (such grounds may not include the application to the President by the *Seimas*, as this application is not binding on the President).

The Constitutional Court also noted that the legislator must reconcile the constitutional provision that state institutions serve the people with the constitutional principle of the independence of prosecutors. The information (public reports) can be submitted in the form of an annual report on the activity of the Prosecution Service. The establishment of a regulation that would oblige prosecutors to submit accounts on the performance of their constitutional functions to the legislative and executive authorities, or which would oblige the Prosecutor General to submit accounts on the activity of the Prosecution Service that would need to be approved by the *Seimas*, the President of the Republic, or the Government would not be permitted.

The Prosecutor General is accountable to the *Seimas* only in having to submit an annual report on the activity of the Prosecution Service and this should be related only to the obtaining and discussion of the information necessary for the legislation and the performance of other functions of the *Seimas*. Interpreted in this way, this legal regulation creates no preconditions for the *Seimas* to interfere with the activity or restrict the independence of prosecutors performing the functions provided for in the Constitution.

The provisions of the Statute of the *Seimas* giving the power to the *Seimas* to adopt a resolution on giving or withholding assent to an annual report submitted by the head of an institution about its activities, who is either appointed by the *Seimas* or whose appointment requires the assent of the *Seimas*, were in conflict with the Constitution. The *Seimas* resolution, whereby the *Seimas* did not give its assent to the annual report of the activities of the Prosecution Service, was also ruled to be in conflict with the Constitution.

The provision of the Law on the Prosecution Service by which the Prosecutor General gives an account of the activities of the Prosecution Service to the *Seimas* by submitting an annual report of the activities of the Prosecution Service and the provision of the same Law to the effect that the *Seimas* may propose that the Prosecutor General be released from his or her duties are not in conflict with the Constitution.

Supplementary information:

In this ruling, attention was paid to the standards of the European Commission for Democracy through Law (the Venice Commission) consolidated in a Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) CDL-AD(2010)040.

Languages:

Lithuanian, English (translation by the Court).

*Identification:* LTU-2016-1-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 17.02.2016 / **e)** KT7-N4/2016 / **f)** On the temporary removal of a municipal council member from the office of mayor or deputy mayor / **g)** TAR (Register of Legal Acts), 2985, 17.02.2016, www.tar.lt / **h)** www.lrkt.lt; CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

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

5.4.9 Fundamental Rights – Economic, social and cultural rights – **Right of access to the public service.**

Keywords of the alphabetical index:

Member, municipal council / Removal, office, temporary / Criminal proceedings, immunity.

Headnotes:

Under the Constitution, the status of a municipal council member holding the office of mayor or deputy mayor does not imply any requirement that the relevant law must establish grounds and procedures for applying coercive measures (including temporary removal from office) that would differ from those established with regard to other persons.

Summary:

I. The Parliament (*Seimas*) asked the Constitutional Court to assess the legal regulation established in Article 157 of the Code of Criminal Procedure (hereinafter, the “CCP”) concerning the application of the procedural coercive measure of temporary removal from office. The Constitutional Court ruled that this Article was not in conflict with the

Constitution, insofar as it does not establish any prohibition on the removal of a municipal council member from the office of mayor or deputy mayor and does not provide for any additional criteria limiting the period of such removal.

II. Under Article 157 of the CCP, temporary removal from office may be applied only with regard to persons who are engaged in certain work activities and, consequently, become a party to employment relations or relations of a similar nature. Taking account of the relevant provisions of the Law on Local Self-Government, the above criterion is met and the regulation of Article 157 of the CCP only applies to those municipal council members who hold the office of mayor or deputy mayor (only these municipal council members may be subject to the coercive measure of temporary removal from office).

In terms of the compliance of the impugned legal regulation with the provision of Article 33.1 of the Constitution, according to which citizens have the right to participate in the governance of their state through their democratically elected representatives, and with Article 119.2 of the Constitution, the Constitutional Court noted that citizens implement their right to participate in the governance of their state when they are taking part in the formation of municipal councils. Under the Constitution, the status of municipal council members, as representatives of the respective territorial community, has certain particularities compared to the status of other persons holding no mandates in any territorial community. However, municipal council members are not granted any of the immunities established for persons who perform certain functions in the area of implementing state authority; no special procedure is applied to municipal council members for holding them criminally liable. No specific status is conferred by the Constitution on a municipal council member holding the office of mayor or deputy mayor.

According to the Constitutional Court, the legal regulation in question enabled the legislator to implement its duty stemming from the Constitution to establish procedural coercive measures applicable in criminal proceedings, as well as the procedure governing their application, without creating any preconditions for a breach of the Constitution.

When assessing the compliance of the impugned legal regulation with the provision of Article 48.1 of the Constitution, which allows everyone to freely choose a job, the Constitutional Court noted that this right implies the possibility of freely choosing not only a job or business opportunity in the area of private economic activity, but also various other work activities; this right must not only be interpreted

linguistically or understood only as the right to choose a job; this right should also be associated with relations arising after the person chooses a job and becomes engaged in it.

The CCP puts safeguards in place to ensure that the rights of a person subject to temporary removal from office, including the right to freely choose a job, would not be disproportionately limited. In view of this, the impugned legal regulation was found not to deviate from the constitutional requirements that must be observed by the legislator in establishing limitations on a person's right to freely choose a job.

In the ruling, it was also noted that the subjects who have the powers to decide as to the application of temporary removal from office (including a judge in pre-trial investigation, or a court) must ensure that the rights of those subject to this procedural coercive measure are not violated. These subjects must ensure that this measure is applied only in cases where it is necessary to reach the objectives established in the law (the timely disclosure and thorough investigation of criminal acts or the prevention of new criminal acts), and that the application of this measure does not pose a more arduous restriction on the rights or freedoms of the person than is necessary to reach the specified objectives.

Cross-references:

European Court of Human Rights:

- *Boddaert v. Belgium*, no. 12919/87, 12.10.1992, Series A, no. 235-D.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2016-1-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 15.03.2016 / **e)** KT8-N5/2016 / **f)** On the maximum amount of the maternity allowance / **g)** TAR (Register of Legal Acts), 4898, 15.03.2016, www.tar.lt / **h)** www.lrkt.lt; CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Maternity, paid leave, amount / Childhood, status, protection / Health, woman, pregnant / Leave, paid / Mother, working / Benefit, amount.

Headnotes:

The constitutional guarantee of paid leave before and after childbirth to working mothers gives rise to the duty of the legislator to establish a legal regulation by which payment for such leave would be connected with the remuneration received by the working woman before the leave, and the amount of benefits paid during this leave would correspond to the average remuneration received by the working woman within a reasonable period of time before the leave.

Summary:

I. The case was initiated by the Vilnius Regional Administrative Court. By this ruling, the Constitutional Court recognised the unconstitutionality of the provision of the Law on Sickness and Maternity Social Insurance, which provided that the maternity allowance could not be higher than the maximum amount provided for in this paragraph, as well as the unconstitutionality of the provisions adopted for implementing the said provision of the Law.

II. The Constitutional Court noted that, under Article 38.2 of the Constitution, the state must create an environment favourable to the family, motherhood, fatherhood, and childhood; the guarantee of paid leave before and after childbirth to working mothers, as consolidated in Article 39.2 of the Constitution, is a specific measure to safeguard motherhood and childhood. It is aimed at protecting the special condition and health of women during pregnancy and after childbirth, and at safeguarding the special bond between a mother and her child during the child's first weeks of life. It is also designed to create the conditions to allow a working woman to withdraw, for a reasonable period of time, from her professional activities before and after childbirth.

The legislator may choose the sources from which the leave of working mothers before and after childbirth will be paid. This may be based on social

insurance, or be drawn from state budget funds, or another financing model might be chosen. The Constitutional Court emphasised that the constitutional concept of paid leave before and after childbirth does not depend on the model chosen by the legislator for financing this leave.

The legislator provided for a model of payment for leave granted to women before and after childbirth based on social insurance. For the periods of leave for pregnancy and childbirth provided for in the Labour Code, i.e. 70 days before childbirth and 56 days (in certain cases, 70 days) after childbirth, the maternity allowance provided for in the Law on Sickness and Maternity Social Insurance is granted and paid. This allowance amounts to 100% of the compensatory earnings of the recipient of the allowance. However, under the impugned legal regulation, these may not exceed the maximum compensatory earnings.

Also under the regulation, in cases where the average remuneration received by the working woman exceeded the maximum compensatory earnings, she was granted maternity allowance calculated according to these compensatory earnings. The amount of the allowance was not connected to the remuneration received by the woman within the established period before the leave and could be significantly lower than the average of the received remuneration. In the ruling, the Constitutional Court noted that no legal regulation is consolidated, under which, in addition to the said maternity allowance of a limited amount, working women would be paid for the period of pregnancy and childbirth leave by granting them any other benefit which would bring their remuneration up to the level of the average remuneration.

The impugned legal regulation, which limited the amount of the maternity allowance, did not appropriately implement the guarantee of paid leave before and after childbirth, as consolidated in Article 39.2 of the Constitution, under which the amount of benefits paid for working mothers during the period of their leave, guaranteed for them before and after childbirth, must correspond to the average remuneration received by them within the reasonable period of time before this leave.

Supplementary information:

Because the implementation of this ruling was linked to the planning of public finances, and it was necessary to make appropriate preparations for granting and paying maternity allowances that corresponded to the average remuneration, the Constitutional Court postponed the official publication

of this ruling in the Register of Legal Acts until 2 January 2017.

Cross-references:

Court of Justice of the European Union:

- C-116/06, 20.09.2007, *Sari Kiiski v. Tampereen kaupunki*.

Languages:

Lithuanian, English (translation by the Court).



Mexico

Electoral Court

Important decisions

Identification: MEX-2016-1-001

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 06.01.2015 / **e)** SUP-REP-25-2014 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy.**

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

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

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

5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights.**

Keywords of the alphabetical index:

Government, member, neutrality, principle / Impartiality, principle / Precautionary measure.

Headnotes:

Self-promoting press releases of public servants justify the application of provisional measures to regulate political-electoral advertising, in order to ensure the fairness of the electoral process.

Summary:

I. On 19 December 2014, the Revolution Democratic Party (PRD) representative to the General Council of the National Electoral Institute (INE) submitted a written complaint to the Technical Unit of the Electoral Disputes. The complaint was against Javier Duarte, in his capacity as Governor of the State of Veracruz, for committing irregular activity, which constitutes an electoral offence as established in Article 134.7 and 134.8 of the Constitution, as well as in Article 6 of the Constitution. The Commission of Complaint and Reports of the INE upheld the complaint. Javier

Duarte subsequently challenged the Commission's decision with a petition for review before the High Chamber of the Electoral Court of Mexico.

II. The High Chamber, with reference to the interpretation of Article 134.7 and 134.8 of the Constitution of the United Mexican States, observed that the dissemination of advertising (voice, image, name or symbol) of any public servant is prohibited if it involves personalised promotion, or if it affects the fairness of electoral competition. Therefore, public servants that broadcast advertising on radio and television must also comply with this restriction and cannot evade this constitutional mandate, in order to prevent the misuse of the media.

The ruling of the Electoral Court confirmed the "Agreement of the Commission of Complaints and Reports of the National Electoral Institute, on the request to adopt precautionary measures, presented by the Revolution Democratic Party as a special sanctioning procedure measures".

The Commission of Complaint and Reports of the INE ordered the Governor to adopt the necessary measures to guarantee the fulfilment of Article 134 of the Constitution of the United Mexican States, to adopt the measures that would assist him to not violate Article 6 of the Constitution of the United Mexican States and to force the advertising coming from his government office to exclude self-promoting images, names, voices and symbols of any public servant.

Languages:

Spanish.



Identification: MEX-2016-1-002

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 16.06.2015 / **e)** SUP-REP-379-2015 and SUP-REP-383-2015 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy.**

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

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

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

5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights.**

Keywords of the alphabetical index:

Impartiality, principle / Public Servant, impartial, obligation / Election, propaganda.

Headnotes:

Public servants have a constitutional obligation to comply with the principle of impartiality. This principle has its origin in the necessity of preserving equal conditions in elections. The position of public servants should not be used to affect electoral processes in favour or against a candidate or a political party.

Summary:

I. The applicants pointed out that the public servants of the municipality of Chicontepec violated the principle of impartiality by participating in a rally for the start of the electoral campaign that took place in Plaza Tejada, Chicontepec, on a working day. In addition, the president of the municipality and other public servants gave bottles of water to the participants of the rally, which can also be considered as illegal during electoral campaigns.

II. The Specialised Chamber of the Electoral Court issued a ruling 22 May 2015, determining a violation of the principle of impartiality established in Article 134.VII, given that the public servants concerned had participated in the initial act of the campaign while exercising their public functions. Article 134.VII establishes that public servants have the obligation to allocate the public resources under their responsibility with impartiality, and therefore must not influence fair competition between political parties.

The accused called for a review of the sanctioning procedure before the High Chamber of the Electoral Court. The High Chamber determined that the grievances were unfounded, since their appointment as public servants does not end with the termination

of the work schedule, as the tasks that they perform require permanent availability consistent with the current regulations.

Public servants can go to these events on non-working days as part of their right to freedom of speech and right of political association, as long as they do not use public resources to disrupt the impartiality and equity principles present during every electoral process. In this case, however, the appellants participated in an act of campaign on a working day, and even though the office hours ended before the rally, the High Chamber determined that their actions violated the impartiality principles, and involved the improper use of public resources for a political campaign, since non-working days are legally established in advance.

The High Chamber of the Electoral Court confirmed the contested decision.

Languages:

Spanish.

*Identification: MEX-2016-1-003*

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 07.10.2015 / **e)** SUP-REC-564-2015 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.23 General Principles – **Equity.**

4.9.7.2 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Registration of parties and candidates.**

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

5.4.9 Fundamental Rights – Economic, social and cultural rights – **Right of access to the public service.**

Keywords of the alphabetical index:

Election, candidate, independent / Election, municipal / Election, proportional representation / Election, result / Election, seats, allocation.

Headnotes:

Independent candidates, who participated in municipal elections organised under relative majority rules, have the right to participate in the allocation of seats under proportional representation rules.

Summary:

I. On 12 June 2015, the Municipal Commission declared the validity of the elections for the renewal of the members of the Town Council of San Pedro Garza García, Nuevo León. The Municipal Commission gave the confirmation of majority to the National Action Party formula, and allocated the seats corresponding to the principle of proportional representation: two for the Institutional Revolutionary Party and two for the Humanist Party.

In disagreement with the distribution of the seats corresponding to proportional representation, the members of the independent candidate formula presented a nonconformity trial to the Electoral Tribunal of Nuevo León. The Electoral Tribunal of Nuevo León confirmed the contested acts.

The members of the independent candidate formula contested the decision at the Regional Chamber of the Electoral Court of Mexico. The Regional Chamber benefitted the principle of proportional representation, allocating the seats as follows: two seats for the independent candidate formula, one to the Institutional Revolutionary Party and one for the Humanist Party. However, María de la Luz González Villareal (member of the Revolutionary Institutional Party, whose seat in the Town Council was given to one of the independent candidates) lodged with other complainants an option for reconsideration to the High Chamber of the Electoral Court.

II. The High Chamber affirmed the approach issued by the Regional Chamber of Monterrey, in which all independent candidates have the right to access the Town Councils through proportional representation. Nonetheless, it did not share with the Regional Chamber the non-application of the normative precepts of Articles 191, 270, 271 and 272 of the Electoral Law of the State of Nuevo León to reach this result. These articles exclude independent candidates from the right to access seats of the Towns Councils through the principle of

proportional representation. Thereafter, the High Chamber determined to modify the contested judgment in order to revoke the non-application of these articles and to make an interpretation suitable to these provisions, in a way to allow the independent candidates to participate in the allocation under the rules of proportional representation.

In sum, the High Chamber confirmed the ruling of the Regional Chamber regarding the right of independent candidates to access seats through proportional representation, and, another benefit is that it ensures the equity principle.

Languages:

Spanish.

*Identification: MEX-2016-1-004*

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 02.12.2015 / **e)** SUP-RAP-647-2015 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

4.10.2 Institutions – Public finances – **Budget**.

Keywords of the alphabetical index:

Election, campaign, financing, control / Political party, campaign, financing / Treasury, state.

Headnotes:

In the absence of regulatory provisions for the reintegration to the public treasury of the assigned budget for campaign finance of political parties that was not exercised or duly recorded, the National Electoral Institute (hereinafter, “INE”) has an implicit faculty to regulate it.

Summary:

I. The National Regeneration Movement Party (hereinafter, "MORENA") representative to the General Council of the National Electoral Institute lodged an appeal against the Executive Secretariat of the INE to contest various resolutions of the General Council, regarding misconduct found in the following consolidated opinions:

- a. Revision of the Campaigns Income and Expense Report of the Ordinary Federal Process 2014-2015 of Federal Deputies.
- b. Revision of the Campaigns Income and Expense Report of the Ordinary Local Process 2014-2015 of Governors, Local Deputies and City Councils of the States of Baja California Sur, Campeche, Colima, Guerrero, Michoacán, Nuevo León, Querétaro, San Luis Potosí and Sonora.
- c. Revision of the Campaigns Income and Expense Report of the Electoral Process 2014-2015 of Local Deputies, City Councils and Delegation Headquarters of Distrito Federal, Guanajuato, Jalisco, Mexico, Morelos, Tabasco and Yucatan.

According to the representative of the MORENA, the reason that the majority of the members of the General Council of the National Electoral Institute did not vote in favour of political parties to repay the sums of public funding for electoral campaign violated the contents of Articles 14, 16, 17 and 41 of the Constitution of Mexico, Articles 25, 51 and 76 of the General Law of Political Parties, and Article 44 of the General Law of Institutions and Electoral Procedures.

II. The High Chamber of the Electoral Court, with reference to the interpretation of Articles 41 and 126 of the Constitution of Mexico (which concern electoral rules and budget payments, respectively); Articles 30, 44, 190, 191 of the General Law of Institutions and Electoral Procedures; Articles 25, 51 and 76 of the General Law of Political Parties and Article 54 of the Federal Law on Budget and Treasury Responsibility, determined that the political parties can only use public funding allocated for electoral campaign with such purpose. Moreover, there is an implicit obligation on political parties to reimburse to the public treasury the resources that were allocated for campaign expenses and that were not duly recorded or used. Finally, it was established that the General Council of the INE has the implicit faculty to order political parties to reimburse such sums, through the issuance of a correspondent agreement.

Therefore, the grievances presented by MORENA were found to be substantiated. The High Chamber ordered the General Council of the INE to publish an agreement containing the regulatory norms and procedures for the reimbursement by political parties of public funding not used or not duly recorded, in order to respect the principles of legality and certainty. Furthermore, the General Council of INE was instructed to publish the requirements and procedures for political parties to comply with the reimbursement at the federal or local treasuries.

Languages:

Spanish.



Identification: MEX-2016-1-005

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 02.12.2015 / **e)** SUP-RAP-758-2015 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin.**

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

5.5.4 Fundamental Rights – Collective rights – **Right to self-determination.**

5.5.5 Fundamental Rights – Collective rights – **Rights of aboriginal peoples, ancestral rights.**

Keywords of the alphabetical index:

Community, right to be consulted / Indigenous people / Indigenous people, rights.

Headnotes:

The government has the responsibility and obligation to consult with indigenous communities before approving a decision regarding legislative or administrative measures that could directly affect them.

Summary:

I. The applicant, the National Action Party (PAN), argued that the rights of political participation of the indigenous communities based in the State of Puebla were affected by the redistricting agreement approved by the National Electoral Institute (INE).

The High Chamber of the Electoral Court of Mexico has determined in various occasions that all decisions by jurisdictional, administrative, or any other authorities are obliged by constitutional mandate to fully ensure and respect human rights.

II. With reference to Article 1 of the Constitution, the High Chamber established that all authorities of the country, within their competences, should ensure the respect and protection of human rights as stated in the Constitution and in the international treaties signed by the government. Furthermore, in Article 2.B.IX of the Constitution, and diverse international human rights instruments such as the International Labour Organisation (ILO) Convention no. 169, Articles 6 and 7, and in the United Nations Declaration of the Rights of Indigenous People, Articles 3, 18, 19, 23, 27, 30.2 and 32.2, is established the right of indigenous communities to be consulted prior to a public authority decision that directly affects them. Therefore, the High Chamber considered that it is necessary to implement a prior, free and informed consultation to indigenous communities when a decision concerns their interests.

The High Chamber modified the contested agreement and ordered the National Electoral Institute to consult the indigenous communities prior to the redistricting process in the state of Puebla.

Languages:

Spanish.

*Identification:* MEX-2016-1-006

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 06.01.2016 / **e)** SUP-JDC-1-2016 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.23 General Principles – **Equity.**

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

4.9.7.2 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Registration of parties and candidates.**

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

Keywords of the alphabetical index:

Election, candidate, independent / Election, candidate, registration procedure / Legislative competence, limits / Privacy, personal, right / Privacy, protection.

Headnotes:

The obligation of disclosing the names of citizens that support an independent candidate violates the principle of hierarchical relationship regarding competence to legislate, because it exceeds what is stated in the secondary legislation, which does not foresee this legal obligation. Therefore, the administrative authority exceeded its powers when it issued the general agreement that established this obligation.

Summary:

I. On 30 December 2015, José Jorge Moreno Durán submitted to the Executive Secretariat of the Electoral Institute of Tlaxcala a lawsuit for the protection of the political electoral rights of the citizen, requesting the High Chamber of the Electoral Court to hear the case *per saltum*.

In his legal challenge José Moreno contested the application of Article 299 of the Electoral Procedures and Institutions Law of the State of Tlaxcala in the Agreements ITE-CG 22/2015, ITE-CG 38/2015 and in the “Call for Citizens who want to participate as Independent Candidates” of the Electoral Institute of Tlaxcala. In these agreements, the institute approved the regulation for the registration of the independent candidates and the minimum threshold necessary of registered citizens that an independent candidate needed to obtain his official candidacy.

II. The High Chamber determined that the grievance claimed by the actor of presenting at least 3 % of the total citizens registered in the nominal list was unfounded, since the Supreme Court of Justice had already established that the 3 % threshold foreseen in the Article 299.1 of the Electoral Procedures and

Institutions Law of the State of Tlaxcala is not unconstitutional, therefore its non-application, as the actor demanded, could not proceed.

However, the High Chamber considered that the names of the citizens who wish to support the postulation of an independent candidate must not be published, as this is not foreseen in the electoral law. Thus, the General Council of the Electoral Institute of Tlaxcala exceeded its powers and violated the principle of hierarchical subordination with the approved formats that established, as one of the requirements, authorisation for the publication of the names in the support list of the “Call for Citizens who want to participate as Independent Candidates” for the Ordinary Electoral Process 2015-2016, as well as Article 18.IV of the Regulation for the Registration of the Independent Candidates.

In sum, the High Chamber ruled that the improper publication of the names of the support list of the independent candidates was unconstitutional, therefore invalidating this requirement, and the caption “I authorise the Electoral Institute of Tlaxcala or/and the National Electoral Institute to publish my complete name in the citizen list that support the C. (name) as independent candidate” is rendered null and void.

In addition, the General Council is forced to withdraw from publishing personal information of the citizens that supported the independent candidates.

Languages:

Spanish.



Identification: MEX-2016-1-007

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 27.01.2016 / **e)** SUP-JDC-5225-2015 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Consultation, public.

Headnotes:

Direct democracy mechanisms represent a means for the exercise of universal suffrage. These mechanisms should include in their design all the principles of the vote (universal, free, secret and direct), as well as the constitutional and conventional guarantees established for its exercise. The organisation of the process should be carried out by a body that develops its functions under the principles of certainty, independence, impartiality, maximum publicity and objectivity.

Summary:

I. On the 20 August of 2015, the Governor of the State of Oaxaca requested the president of the State Electoral Institute’s collaboration in order to organise, in a joint manner, a public consultation regarding the construction of the Cultural and Convention Center, at the foothill of the Fortin Hill, in the municipality of Oaxaca de Juárez.

The consultation took place on 4 October 2015, with the following tally: 13,209 votes for the construction of the centre and 5,504 votes against. Four days later, Omar Pavel García García promoted *per saltum* a lawsuit for the protection of the political electoral rights of the citizen to the High Chamber of the Electoral Court of Mexico.

II. The High Chamber of the Electoral Court determined that the lack of inclusion of the total population of the State of Oaxaca was a violation of Article 35.I, 35.VII and 35.VIII of the Mexican Constitution (concerning the right to vote, to initiate laws and to vote in referendums, respectively), Articles 25.C and 114ter of the Constitution of the State of Oaxaca, Articles 1, 2 and 6.IV of the Law of Citizen Participation, and other international instruments on human rights that protect the participation of the citizens.

The High Chamber also determined that the ruling made by the Electoral Tribunal of the State of Oaxaca was incorrect because it did not take into account the harm made to the right to vote, by only considering that the consultation would be held in the territorial demarcation where the Cultural and Convention Center was going to be built. The Fortin Hill has a value that goes beyond the municipality of Oaxaca de Juárez, including indigenous cultural events such as “la Guelaguetza”, therefore, the impact of its construction would affect the entire state.

In sum, the High Chamber revoked the ruling of the State Electoral Tribunal of Oaxaca because the citizen consultation was carried out without considering the total population of the State of Oaxaca. The principle of universality of the vote was affected in a substantial manner. Thus, the result of the citizen consultation was left without any effects.

Languages:

Spanish.



Identification: MEX-2016-1-008

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 17.02.2016 / **e)** SUP-REC-6-2016 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy.**

5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin.**

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

5.5.4 Fundamental Rights – Collective rights – **Right to self-determination.**

5.5.5 Fundamental Rights – Collective rights – **Rights of aboriginal peoples, ancestral rights.**

Keywords of the alphabetical index:

Community, right to be consulted / Indigenous people / Indigenous people, rights / Self-government, indigenous community.

Headnotes:

The demands imposed on the General Community Assembly of Tlalixtac de Cabrera in Oaxaca for the destitution of its municipal authorities do not correspond to the existing regulations and institutions of its indigenous regulatory system.

The recognition of the right of free determination and indigenous autonomy requires that the cases related to these rights should be judged with an intercultural perspective. This implies the acknowledgement that their regulatory systems have their own rules and institutions.

Summary:

I. On 20 August 2015, in an Extraordinary General Assembly, the dismissal of all the Councilmen of the Municipality of Tlalixtac de Cabrera, Oaxaca, was determined as a result of the persistence of suspected administrative irregularities. The General Council of the Electoral Institute of Oaxaca resolved not to validate the new designations for the Community Assembly.

In disagreement with this resolution, Mariano Santiago Calderón and other citizens of the Municipality of Tlalixtac de Cabrera of Oaxaca promoted a lawsuit for the protection of the political electoral rights to Electoral Tribunal of Oaxaca. On 23 November 2015, the Electoral Tribunal of Oaxaca validated the Extraordinary General Assembly, ordering the Electoral Institute of Oaxaca to issue the records of majority to the citizens that were elected.

As a result, the Councilmen who were deposed in the Extraordinary General Assembly of 20 August brought a lawsuit for the protection of the political electoral rights of the citizens to the Regional Chamber of Xalapa. The Regional Chamber revoked the resolution of 23 November and divested the designations by the Extraordinary General Assembly of any effects.

In disagreement with this resolution, citizens of Tlalixtac de Cabrera lodged motions of reconsideration and for the protection of the political electoral rights of the citizens to the High Chamber of the Electoral Court.

II. The High Chamber determined, with reference to Article 2.A.VIII, Articles 17 and 133 of the Mexican Constitution (concerning indigenous peoples' access to State courts, with appropriate assistance, access to justice more generally, and the supremacy of the law, respectively); Article 29.1 of the System of Contested Means in Electoral Matter General Law; Articles 2, 4, 9, 14 and 15 of the Federal Law to Prevent and Eliminate the Discrimination; Articles 2, 12 and 4.1 of the International Labour Organisation Convention no. 169 on Indigenous and Tribal Peoples and Article 1.1 ACHR, that the ruling of the Regional Chamber violated the rights to the self-determination and self-governance of the indigenous community, since it restrained the right to choose and remove their own authorities in accordance with its norms, procedures and traditional practices. The Regional Chamber privileged the norms of the national and state level system over the right of free self-determination and self-governance of the indigenous community.

In sum, the High Chamber revoked the ruling made by the Regional Chamber of Xalapa and confirmed the ruling made by the Electoral Tribunal of Oaxaca. The High Chamber ordered the Electoral Institute of Oaxaca to issue the records of majority to the citizens that were elected in the Extraordinary Community Assembly celebrated on 20 August 2015.

Languages:

Spanish.



Identification: MEX-2016-1-009

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 20.04.2016 / **e)** SUP-REP-542-2015 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Election, propaganda, irregularity / Political party, electoral financing, responsibility / Social media.

Headnotes:

Political parties are to be held responsible for the dissemination of electoral advertising through social media in the closure period (days before the election) by celebrities, sympathisers, militants and candidates.

Summary:

I. Various political parties represented in the General Council of the National Electoral Institute denounced the Green Party and citizens, including the reserve candidate for Federal Deputy, Raúl Osorio Alonzo, and a leader of the Party, Arturo Escobar y Vega, for violating the electoral ban by disseminating advertising for this party through their Twitter accounts.

The Regional Specialised Chamber determined that the reserve candidate had violated the electoral ban and that the Green Party had failed in its role as guarantor, and accordingly imposing a fine. For the other denounced citizens, the Specialised Regional Chamber declared no misconduct, since they acted within their right to freedom of speech.

The National Action Party appealed for the resolution to be revoked, arguing that the Green Party was directly responsible for the reported conduct. The Green Party also wanted the resolution to be revoked, in order to avoid the fines imposed and any responsibilities held against it.

II. The High Chamber of the Electoral Court considered that in the context of an electoral process, the freedom of speech has a special protection, since in a democratic society public debate should be a priority, and the use of the internet is essential to potentiate it. Nonetheless, in the days prior to and during Election Day, political party propaganda of all sorts is prohibited.

The use of social media by celebrities, in this case through Twitter, depicted a common strategy that undermined the presumption of spontaneity, therefore considering these acts not only as an exercise of freedom of speech but as a propaganda strategy in

favour of the Green Party. However, due to the lack of the necessary evidence to consider them as sympathisers of the Green Party, in accordance with Article 242.3 of the General Institutions and Electoral Procedures Law, the celebrities were not bound to comply with the norm that establishes the electoral ban for three days before and during Election Day.

In addition, the High Chamber determined that Raúl Orozco Alonzo, who at the time was a reserve candidate for Federal Deputy for the Green Party, infringed the relative restriction on the dissemination of electoral advertising in accordance with Article 251.4 of the General Institutions and Electoral Procedures Law. The Green Party was thus held responsible for *culpa in vigilando* for his participation in the publication of the denounced post on Twitter, which disseminated advertising of its electoral platform, contrary to the rules of the electoral ban. In the case of Arturo Escobar, the High Chamber determined that his tweets could not be related in any way with the Green Party or its electoral platform, hence not violating Article 251 of the General Institutions and Electoral Procedures Law.

The High Chamber revoked the contested decision and ordered the Regional Specialised Chamber to issue another ruling that individualises the sanction to the Green Party, taking into account the responsibility of *culpa in vigilando* in the perpetration of the denounced acts of its reserve candidate and the celebrities. The sanction imposed to Raúl Osorio Alonzo were to remain intact.

Languages:

Spanish.



Identification: MEX-2016-1-010

a) Mexico / **b)** Electoral Court of the Federal Judiciary / **c)** High Chamber / **d)** 18.05.2016 / **e)** SUP-JDC-1865-2016 / **f)** / **g)** *Official Collection of the decisions of the Electoral Court of the Federal Judiciary of Mexico* / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

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

4.8.7.3 Institutions – Federalism, regionalism and local self-government – Budgetary and financial aspects – **Budget.**

5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin.**

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

5.3.4 Fundamental Rights – Collective rights – **Right to self-determination.**

5.5.5 Fundamental Rights – Collective rights – **Rights of aboriginal peoples, ancestral rights.**

Keywords of the alphabetical index:

Community, right to be consulted / Indigenous people / Indigenous people, rights / Self-government, indigenous community.

Headnotes:

The government has the responsibility and obligation to consult with indigenous communities before approving a decision regarding the direct management of their economic resources.

Summary:

I. On 30 June 2015, the civil and communal authorities of the Purépecha Community of San Francisco Pichátaro, located in the Tingambato Municipality, in the State of Michoacán, requested the proportional share of the federal budget assigned by the municipality to the city council members.

On 17 September 2015, the City Council of Tingambato issued an agreement where they denied the indigenous community representatives, Jesús Salvador González e Israel de la Cruz Meza, the original request.

II. The indigenous community representatives directly brought *per saltum* an action for the protection of their political electoral rights before the Electoral Court. The Regional Chamber of Toluca received the case and established that it did not have the precise jurisdiction on the matter and sent it to the High Chamber.

The High Chamber, with reference to the constitutional mandate of Article 2.B.I (which guarantees the right of indigenous peoples to decide their internal forms of coexistence, as well their social, economic,

political and cultural organisation), and with the interpretation of Article 7.1 of the International Labour Organisation Convention no. 169 on Indigenous and Tribal Peoples in Independent Countries, Articles 3, 4 and 20 of the United Nations Declaration on the Rights of Indigenous Peoples, Article 114.3 of the Michoacán Constitution, and Article 91 of the Municipal Organic Law of Michoacán, determined that the indigenous communities that form a social, economic and cultural unit, and recognise their own authorities in accordance with their normative systems, have the rights of self-determination, autonomy and self-government.

In addition, the High Chamber of the Electoral Court determined, with reference to the interpretation of Articles 18 and 19 of the United Nations Declaration on the Rights of Indigenous Peoples, Article 6.1 and 6.2 of the International Labour Organisation Convention no. 169 on Indigenous and Tribal Peoples, and previous judgments of the Inter-American Court of Human Rights (*Samaka Community v. Surinam* and *Kichwa of Sarayuku Community v. Ecuador*), that the indigenous community of San Francisco Pichátaro, which belongs to the Purépecha race, has the right to effectively participate in the decision making processes that could affect its rights to autonomy, self-governance and self-determination, as well in those that allow it to freely determine its political condition and to freely pursue its economic, social and cultural development through the establishment of legal minimum guarantees. One of those minimum guarantees is a prior and informative consultation on the qualitative and quantitative elements regarding the transfer of responsibilities related with its right to manage directly the economic resources that belong to the community.

The High Chamber ordered the Electoral Institute of Michoacán to carry out the consultation with the help of the municipal and community authorities. The results of the consultation will be binding for the municipal and state authorities: if the outcome of the consultation is positive, the local electoral and municipal authorities should adopt the necessary actions to establish the minimum, culturally compatible and necessary conditions to ensure the transfer of responsibilities in respect to the direct management of the public resources allocated to the community.

Languages:

Spanish.



Moldova Constitutional Court

Important decisions

Identification: MDA-2016-1-001

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 04.02.2016 / **e)** 7 / **f)** on the constitutional review of certain provisions of the Law no. 1115-XIV of 5 July 2000 amending the Constitution / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 18.03.2016/59-67 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

2.1.1.1.1 Sources – Categories – Written rules – National rules – **Constitution**.
4.1.1 Institutions – Constituent assembly or equivalent body – **Procedure**.
4.1.2 Institutions – Constituent assembly or equivalent body – **Limitations on powers**.
4.5.2 Institutions – Legislative bodies – **Powers**.
4.5.6.4 Institutions – Legislative bodies – Law-making procedure – **Right of amendment**.

Keywords of the alphabetical index:

Constitutional Justice, jurisdiction, subject of review, constitution, procedure / Constitutional Court, rules of procedure / Gridlock, constitutional / Constitutional order, annulment / Constitutional Court, ignoring.

Headnotes:

Under Article 141.2 of the Constitution, draft Constitutional laws shall be submitted to Parliament only alongside with the advisory opinion of the Constitutional Court.

On 5 July 2000, Parliament adopted Law no. 1115-XIV amending the Constitution, which has changed the method of electing the President, which was deemed unconstitutional.

Summary:

I. On 4 March 2016, the Constitutional Court delivered its judgment on the constitutional review of certain provisions of the Law no. 1115-XIV of 5 July 2000 amending the Constitution.

The case originated in the application lodged on 12 November 2015 by 18 Members of Parliament. According to the applicants, they deliberately adopted in Parliament the amendments to the Constitution where there was no Opinion issued by the Constitutional Court, contrary to the procedure expressly provided in the Constitution in terms of its revision.

II. The Court held that the constitutional provisions referring to the amendment of the Constitution are determined by the notion, nature and goal of the Constitution itself. In this respect, any revision can be operated only in compliance with the principles of supremacy of the Constitution, its stability, consistency of provisions and balance of the values enshrined by the Supreme Law, as well as the power of the Constitutional Court to deliver opinions on the initiatives to amend the Constitution within the shared competence of Parliament and of the Court in the process of amending the Constitution.

The Court underscored that no amendment to the Constitution affecting the harmony of constitutional provisions or the harmony of the values enshrined therein may be adopted.

Therefore, when amending the Constitution, it is necessary to consider that it is an integral act, all the provisions of the Constitution being interconnected to the extent that the content of certain provisions of the Constitution determine the content of other provisions thereof. The provisions of the Constitution make up a harmonious system, so that none of the constitutional provisions may be contrary to others.

A different interpretation of the constitutional text that would attribute to the Constitutional Court a mere formal role within this procedure, specifically the delivery of opinions on draft constitutional amendments, which later may be substantially modified in Parliament, would deprive of any content of the Court's competence. This competence has been conferred by the framers of the Constitution, specifically to ascertain the role and the position of the Constitutional Court in the political and legal system of the society, performing an impartial analysis of the amendments apart from the temptations of political actors to take conjectural decisions.

In this context, Opinions of the Court on the draft laws amending the Constitution are not mere formalities, but aim at safeguarding the fundamental values of the Constitution from abusive practices of political, social and institutional actors.

Given the Constitutional provisions, when Parliament is examining certain draft laws amending the Constitution, the legislature is entitled to modify these draft laws, on which there was an Opinion issued by the Constitutional Court, only to the extent these modifications do not essentially alter the contents of the respective draft laws.

The Court emphasises that a substantially amended draft law amending the Constitution shall be considered as a new draft law (a new proposal for amending or supplementing the Constitution), which may only be initiated in compliance with Articles 141-143 of the Constitution.

Therefore, following the delivery of the Opinion of the Constitutional Court, there may not be any interventions in the text of the draft law amending the Constitution and ignoring, exceeding or leading to the invalidity of such operated amendments. In case the amendments advanced by Members of Parliament are accepted by Parliament in the second reading of the draft law amending the Constitution, a repeated Opinion of the Constitutional Court shall be mandatory.

Following a comparison of the initial draft law, on which there was an Opinion of the Constitutional Court, and the draft law adopted by Parliament, it clearly results that:

- The draft law modified, in Article 78 of the Constitution, the number of votes necessary to elect the President, namely 3/5 of the votes of Members of Parliament while the draft law proposed the election of the President with the majority of the elected Members of Parliament.
- The draft law supplemented Article 78 with three new paragraphs referring to the repeated elections and the dissolution of Parliament, whereas the draft law never contained such provisions.
- The draft law supplemented Article 85.4 of the Constitution, referring to the exception to the prohibition to dissolve Parliament within the last six months of the term of the President, despite the fact that the draft law did not contain any proposal to modify this article.

The Court held that the constitutional reform of 2000 in fact has generated an imperfect system of government (existing premises for a potential conflict

between the state authorities), which directly evolved from Parliament ignoring the Opinion of the Constitutional Court.

In light of the above, following the systemic coherence of the Constitution and with a view to ensure its functionality, the Constitutional Court finds the challenged provisions were adopted with the infringement of the procedure on amending the Constitution, provided by Articles 135.1.c, 141, 142.2 and 143.1.

Thus, given the imperative of avoiding the legislative vacuum as well as taking into account the urgency in approaching the constitutional gridlock in the context of the forthcoming expiry of the term of office of the acting President, the Court ordered the revival of the legal mechanism in force prior to the modifications operated to the Constitution that would ensure the election of the President by direct vote of the citizens.

At the same time, the Court ascertained that the effects of this judgment shall have effects only for the future and do not extend over the term of office of the President elected by the vote of Parliament cast on 16 March 2012, which shall remain in office until the expiry of the term for which he had been elected. Moreover, this Judgment does not represent the basis to recognise the acts adopted by the President (elected based on provisions of Article 78) declared unconstitutional or by the person having exercised the interim office of the President declared unconstitutional solely on these grounds.

The Court declared unconstitutional the law amending the Constitution on the election of the President of the Republic of Moldova by Parliament with a vote of 3/5 of Members of Parliament, the law on election of the President and revived the provisions of the Electoral Code on the election of the President by direct vote of the citizens and the provisions of the Rules of Parliament that allowed the essential modification of the draft law on which the Constitutional Court delivered an Opinion.

Supplementary information:

Legal norms referred to:

- Articles 78, 85, 135, 141, 142 and 143 of the Constitution;
- Law no. 1115-XIV, 05.07.2000 amending the Constitution.

The Parliament has initiated a number of amendments to the Electoral Code and set the presidential election date for 30 October 2016.

Languages:

Romanian, Russian (translation by the Court).



Identification: MDA-2016-1-002

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 09.02.2016 / **e)** 2 / **f)** interpretation of Article 135.1.g of the Constitution / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 11.03.2016/55-58 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**
 3.10 General Principles – **Certainty of the law.**
 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 justice, types of claim, exception of unconstitutionality.

Headnotes:

To ensure the observance of fundamental rights and freedoms guaranteed by the Constitution in the settlement of litigations by the courts of law, the constituent legislator, enshrined in Article 135.1.g of the Constitution, that the Constitutional Court solves the exceptions of unconstitutionality of legal acts, as claimed by the Supreme Court of Justice.

The exception of unconstitutionality is developed by procedural rules (Article 12.1 of the Civil Procedure Code and Article 7 of the Criminal Procedure Code), according to which, if during the hearing of a case the court of law ascertains that the legal norm already applied or to be applied contradicts the provisions of the Constitution, the court of law raises the exception of unconstitutionality and notifies the Supreme Court of Justice which submits it before the Constitutional Court.

Summary:

I. On 9 February 2016, the Court delivered its judgment on the interpretation of Article 135.1a and 135.1.g of the Constitution. The case originated in the application lodged with the Court on 9 December 2015 by the Supreme Court.

The applicants requested the Court to interpret Article 135.1.g of the Constitution, explaining:

- Whether the Supreme Court is entitled to refuse trial courts applying before the Constitutional Court on the exception of unconstitutionality, raised by them in judicial proceedings, taking into account the text Article 135.1.g of the Constitution.
- What is the role of the Supreme Court in the procedure of applying before the Constitutional Court, in term of the right of trial courts of all levels to raise the exception of unconstitutionality?
- Whether the trial courts are entitled to refuse parties in raising the exception of unconstitutionality?

The Court mentioned that the exception of unconstitutionality is a procedural action of defence, by way of which the Constitutional Court is appealed on the inconsistency with the Constitution of provisions applicable in the case pending before the trial court.

The Court held that the exception of unconstitutionality may be raised by:

- the trial court, *ex officio*, which by respecting the principle of supremacy of the Constitution, is not entitled to apply a provision in regards to which there exists a doubt of constitutionality;
- the parties in the proceedings, including their representatives, the rights and interests of which may be affected by the application of an unconstitutional provision in the settlement of the case.

Stemming from the fact that the provision appealed by means of the institution of exception of unconstitutionality is subject to constitutional control applied in a specific case pending before the trial court, the procedure of solving the exception of unconstitutionality constitutes a substantive control of constitutionality.

The constitutional control by way of exception constitutes the only instrument by means of which the citizen has the opportunity to act in order to

defend himself or herself against the legislator, in case where, by law, his or her constitutional rights are infringed upon.

The Court held that the right of access to the Constitutional Court of citizens by way of exception of unconstitutionality represents an aspect of the right to a fair trial. This indirect way, allowing citizens access to constitutional justice, gives possibility to the constitutional court, as a guarantor of the supremacy of the Constitution, to exercise control over the legislative power with regard to the observance of the fundamental rights and freedoms catalogue.

The Court held that the constitutional review of the challenged provisions is the exclusive competence of the constitutional court, so that an ordinary judge shall not rule on the merits of the complaint or the constitutionality of the challenged provisions, limiting himself or herself exclusively to verifying the fulfilment of the following conditions:

- the object of the exception falls into the category of acts contained in Article 135.1.a of the Constitution;
- the exception is raised by a party or its representative, or indicates that it is raised by the trial court *ex officio*;
- the challenged provisions shall be applied in settling the case;
- there is no earlier judgment of the Court dealing with the challenged provisions.

The Court held that, in the event of refusing to raise the exception of unconstitutionality and solving the litigation without a prior judgment on this case delivered by the constitutional court, the ordinary judge would acquire prerogatives unsuitable to a trial court.

Thus, the Court underscored that based on the reasoning and essence of the institution "exception of unconstitutionality", the right to raise the exception of unconstitutionality belongs to all trial courts, respectively to judges within this courts.

The Court held that according to Article 115 of the Constitution, justice shall be administered by the Supreme Court of Justice, courts of appeal and ordinary courts. Similarly, under Article 116 of the Supreme Law, judges sitting in trial courts are independent and shall abide only by the law.

In this case, the Court ascertained that although the exception of unconstitutionality is lodged with the Constitutional Court through the Supreme Court, the legal framework does not establish its role and limits of intervention between the constitutional court and the court that raised the exception.

Thus, the Court ruled that while the right to raise the exception of unconstitutionality belongs to all judges of all levels of courts of law, and given the formal role of the Supreme Court and its lack of jurisdiction to rule on exceptions of unconstitutionality raised by courts hierarchically inferior, the constitutional provisions cannot be interpreted as restricting the right of other trial courts to apply before the court of constitutional jurisdiction.

In conclusion, the Court held that in case there is an uncertainty regarding the constitutionality of laws, decisions of the Parliament, Presidential decrees, decisions and orders of the Government, to be applied in any pending proceedings, the court of law is compelled to notify the Constitutional Court. The complaint on the constitutionality review of certain provisions to be applied in proceedings shall be submitted directly to the Constitutional Court by the judges/panels of judges of the Supreme Court, courts of appeal and ordinary courts, before which the case is pending.

Supplementary information:

Legal norms referred to:

- Articles 20 and 135 of the Constitution.

Following this judgment, the number of the exceptions of unconstitutionality lodged with the Court has increased considerably, thus only between February and May of 2016 (4 months) there were submitted 39 exceptions of unconstitutionality, compared to 63 exceptions of unconstitutionality – submitted between 1995 and 2015 (20 years of activity of the Court).

Languages:

Romanian, Russian (translation by the Court).



Identification: MDA-2016-1-003

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 23.02.2016 / **e)** 3 / **f)** on the exception of unconstitutionality) of Article 186.3, 186.5, 186.8 and 186.9 of the Code of Criminal Procedure / **g)** *Monitorul Oficial al Republicii Moldova* (Official

Gazette), 04.03.2016/49-54 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Arrest, preventive, / Arrest, preventive, extension / Arrest, preventive, extending, grounds / Arrest, preventive, duration / Criminal procedure.

Headnotes:

Under Article 25 of the Constitution, no one can be apprehended and arrested except for cases and in a manner provided for by law. The arrest shall be carried out under a warrant issued by a judge for a period of 30 days at the most, a term which can only be extended by the judge or by the court of law to 12 months at most.

The express, unequivocal provisions of Article 25 of the Constitution regulate constitutional guarantees in view of protecting the citizen against excessive enforcement of such measures.

At the same time, according to the provisions of criminal procedure, the extension of preventive arrest is permitted, and any extension of the duration of preventive arrest may not exceed 30 days during a criminal investigation and 90 days during a case hearing. Also, custody during a criminal investigation, in exceptional cases, shall not exceed 12 months.

Summary:

I. On 23 February 2016, the Constitutional Court delivered a judgment on the exception of unconstitutionality of Article 186.3, 186.5, 186.8 and 186.9 of the Code of Criminal Procedure.

The case originated in an application lodged with the Constitutional Court on 17 February 2016 by Mrs Viorica Puica, judge at the Botanica District Court of Chişinău (the applicant).

The applicant claimed that, in particular, the cumulative application of the challenged provisions allow the extension of the preventive arrest for periods that exceed the limits expressly laid down by Article 25.4 of the Constitution, *i.e.*, 30 days for a warrant of arrest and 12 months for the total duration of arrest.

II. The Court held that according to Article 25 of the Constitution, no one can be apprehended and arrested except for cases and manner provided for by law. The express, unequivocal provisions of Article 25 of the Constitution regulate constitutional guarantees in view of protecting the citizen against excessive enforcement of such measures.

The Court held that the rule resides in the liberty of the person, while the arrest represents an exceptional measure, when less restrictive measures cannot be applied, as a measure of last resort and not as a measure of punishment. Subsequently, the arrest may only be ordered in certain cases, and only for certain reasons, to be shown in a concrete and convincing way by the decision of the body ordering it.

The Court held that the arrest is a temporary measure, as it is ordered for a fixed period of time. Also, it is a temporary measure, since it lasts as long as there are present the circumstances for which it was ordered and it is withdrawn as soon as these circumstances are not present anymore.

The Court underscored the obligation of the authorities to provide for a substantive and thorough reasoning on the persistence of the grounds for maintaining an individual in custody and if there are no grounds that allow the use of a more lenient measure than the arrest.

The Court mentioned that any extension of the arrest in fact takes place according to a procedure similar to the initial use of arrest. Therefore, in case of the extension of arrest, the judge shall be guided by the same rules and grounds that determined the initial use of arrest.

The Court remarked that the national legislation, similar to Article 5.1.c ECHR, allows for the deprivation of liberty of a person only if there is "reasonable suspicion" that the person has committed an offense. A reasonable suspicion presumes the existence of facts or information that would convince an objective observer that the concerned individual might have committed the offense.

The existence of plausible reasons that would legitimate the suspicion that an individual has committed the offense, for which he or she is prosecuted, must be regarded as a general condition and independent from the four grounds that may justify the use or extension of the preventive arrest:

1. danger of absconding – the risk that the accused will fail to appear for trial;

2. risk that the accused, if released, would take action to prejudice the administration of justice;
3. prevention of repetitive offending;
4. preservation of public disorder.

The Court mentioned that these grounds are not to be met cumulatively, the presence of a single ground being sufficient to apply the measure of preventive arrest.

Therefore, a person can be placed under arrest only when the suspicions of committing a crime are corroborated with the existence of justifying grounds.

In this context, the Court held, as a principle, that the seriousness of the alleged offence itself does not justify the application of the measure of preventive arrest.

The Court held that under Article 25.4 of the Constitution, the arrest shall be carried out under a warrant issued by a judge for a period of maximum 30 days. Therefore, each extension of the preventive arrest cannot exceed 30 days, both at the prosecution stage and the trial stage of the case.

Thus, the legislator cannot regulate by law the length of arrest that exceeds constitutional legal framework.

The Court noted that by the Code of Criminal Procedure, the Parliament allowed for the extension of the length of the preventive arrest for a period of 90 days at the most.

In this context, the Court held that Article 25 of the Constitution provides, in clear terms, that detention is only possible under a warrant for a period of 30 days at the most. Any interpretation of national legislation allowing for longer periods for an arrest warrant would be contrary to the Fundamental Law.

Therefore, the Court held that the provisions of the Code of Criminal Procedure, which govern the possibility of issuing an arrest warrant for a period exceeding 30 days, are contrary to Article 25.4 of the Constitution.

The Court held that under Article 25.4 of the Constitution, the arrest may be continued for a period not exceeding 12 months.

In this context, the Court noted that the beginning of the length of the preventive arrest corresponds to the moment of apprehending the individual and ends upon the issuance of the judicial decision by which that person is released from custody, or upon sentencing him/her by the court of first instance.

The Court found that the provisions of the Code of Criminal Procedure allow the detention of the person in custody for a period exceeding the constitutional limit of 12 months (Article 25.4 of the Constitution).

Supplementary information:

Legal norms referred to:

- Articles 4 and 25 of the Constitution;
- Articles 176 and 186 of the Criminal Procedure Code.

The Court requested that within a period of 30 days following the delivery of the judgment, the courts of law to repeal the preventive measure of arrest for individuals held in custody for more than 12 months and to check the existence of grounds for continued preventive detention of individuals who are held under an arrest warrant exceeding the period of 30 days and the total period of detention does not exceed 12 months.

Languages:

Romanian, Russian (translation by the Court).



Montenegro Constitutional Court

Important decisions

Identification: MNE-2016-1-001

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 28.12.2015 / **e)** UŽ-III 305/13 / **f)** / **g)** / **h)** CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Judge, impartiality / Withdrawal, judge.

Headnotes:

The participation of a judge in a revision of a decision, who was involved in deciding a case at second-instance, is a violation of the right to fair trial insofar as it concerns judicial impartiality. In line with case-law of the European Court of Human Rights, the existence of legal rules barring such participation by judges in appeals against first-instance decisions manifests the legislator's concern to remove all reasonable doubts as to the impartiality of judges or courts and constitutes an attempt to ensure impartiality by eliminating the causes for such concerns.

Summary:

I. The applicant submitted a complaint to the Constitutional Court against the Judgment of the Supreme Court Rev. no. 249/13 of 20 March 2013, claiming a violation of his rights to equality, nondiscrimination, equal protection of the law, access

to legal remedies, and fair trial, guaranteed by Articles 8, 17.2, 19, 20 and 32 of the Constitution and Article 6.1 ECHR.

In the constitutional complaint, among others, is stated: the applicant initiated the execution of a real estate operation based on the data from the real estate cadastre (register) and he could not have known or could not have supposed that there is a contract under which he would be prevented from enforcement against the subject matter immovable property; that the ordinary court neglected the fact that the applicant had obtained from the Basic Court in Podgorica a preliminary injunction preventing the selling and encumbering the disputed property before DOO Nivel (the Society for Production, Trade and Services) filed the application for the change of registration in the real estate cadastre; that the Supreme Court decided in a panel which included a judge who had also sat on a panel of the High Court in Podgorica, when it decided upon the complaint in the same case and that the same judge may not decide in the same case in two legal actions; that by the decision of the Supreme Court he is discriminated against compared to the other citizens of Montenegro, because in its other decisions, the Supreme Court held that the property right is acquired by the registration in the real estate cadastre and not by the conclusion of the contract for sale.

In addition to other reasons for the violation of his rights, the applicant argued that the judge was the president of the tribunal of the High Court in Podgorica, which rendered Judgment Gž. no. 5411/12 of 21 December 2012, who subsequently acted in the capacity of a member of the panel of judges of the Supreme Court, which rendered the challenged judgment in which the revision is rejected as unfounded.

The Basic Court in Podgorica P. no. 2428/10 of 19 October 2012 in its judgment had established that the enforcement is impermissible, which was established in the Decision of the Basic Court in Podgorica I. no. 1846/10 of 23 March 2010. Upon the appeal of the respondent the High Court in Podgorica, in its Judgment Gž. no. 5411/12 of 21 December 2012, rejected the appeal as unfounded and confirmed the first-instance judgment.

The Supreme Court, in the challenged judgment, rejected the revision as unfounded. The Court, in its reasoning, stated: that under the contract for sale the petitioner bought the apartment from M.R.; that according to the decision of 2 June 2009, the Real Estate Administration RU Podgorica allowed the change of title registration to the benefit of the petitioner, however, the Administration did not register the petitioner as the owner; that the Basic Court in

Podgorica rendered the judgment based on the admission by which M.R. admitted the payment of debt in the amount of € 45 000 for the respondent; that upon the finality of the judgment the respondent filed a motion for enforcement asking to settle his claim by the sale of the apartment, which was allowed by the first-instance court. However, upon the plea of the petitioner as a third party, in Decision I. no. 1846/10 of 29 April 2010, the first-instance court referred the petitioner to the action for proving that the enforcement is impermissible; that inferior courts properly applied the substantive law when they accepted the filed claim and established that the enforcement is inadmissible; that it was indisputably established that the petitioner is the owner of the disputed apartment and that he acquired the ownership based on a valid contract for sale; and that the fact that the petitioner is not registered as the owner of the disputed apartment is not relevant, because the Real Estate Administration accepted the application of the petitioner by issuing the decision on the change of title registration.

Although the applicant did not question the judge's objective impartiality, he challenged the judge's bias to the objective principle because the same judge was president of the tribunal that decided on the complaint and was also the member of the panel that decided on the revision.

II. In the concrete case, the Constitutional Court established that, in this particular case, the judge, as president of the tribunal, participated in rendering the second-instance judgment deciding on the constitutional complaint of the applicant against the first-instance judgment. In the revision procedure in connection with the same legal matter, the judge participated in rendering judgment as a member of the panel.

The Constitutional Court noted that the fact that a judge, in the same case, participated in the procedure of second-instance and in the procedure of revision, may raise legitimate doubts as to the judge's impartiality and thus prejudice the principle of the court's impartiality.

The existence of procedures for ensuring impartiality of the Court, namely, the rules regulating the recusal of judges in particular cases according to the Constitutional Court is a relevant factor which must be taken into account.

According to the case-law of the European Court of Human Rights the existence of such rules in the law manifests the legislator's concern to remove all reasonable doubts as to the impartiality of judges or courts and constitutes an attempt to ensure impartiality by eliminating the causes for such concerns. Further, according to the constant case-law of the European

Court of Human Rights, the existence of impartiality for the purposes of Article 6.1 ECHR must be determined according to a subjective and objective test. Also, the fact that a particular judge had different roles in particular phases of a particular case may in certain circumstances bring the impartiality of the court into question, which is assessed in each particular case.

Following the provision of Article 69 of the Law on Civil Procedure, among others, which concerns the reasons for the exemption of a judge, it is prescribed that a judge may not adjudicate a case if he/she has participated in rendering decision of the inferior instance court or another authority.

The Constitutional Court notes that the existence of procedures for ensuring impartiality of the court, namely, the rules regulating the withdrawal of judges in particular cases is a relevant factor which must be taken into account. Accordingly, a failure to abide by these rules means that the case has been heard by a tribunal whose impartiality may be open to doubt.

In light of all of the above, the Constitutional Court held that the right of the applicant to a fair trial, in the part relating to the court's impartiality, guaranteed by the provision of Article 32 of the Constitution and Article 6.1 ECHR, was violated.

Therefore, the Constitutional Court accepted the constitutional complaint and repealed the Judgment of the Supreme Court, Rev. no. 249/13 of 20 March 2013 and returned the case to the Supreme Court for renewed proceedings.

Since the constitutional right to a fair trial was violated in the part relating to the court's impartiality, the Constitutional Court did not examine the allegations of the applicant regarding the violation of other constitutional rights stated in the constitutional complaint.

Cross-references:

European Court of Human Rights:

- *Mežnarić v. Croatia*, no. 71615/01, 15.07.2005 (paragraphs 27 and 29);
- *Oberschlick v. Austria*, no. 11662/85, 23.05.1991, Series A, no. 204.

Languages:

Montenegrin, English.



Norway Supreme Court

Important decisions

Identification: NOR-2016-1-001

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 19.02.2016 / **e)** HR 2016-389-A / **f)** / **g)** / **h)** CODICES (Norwegian).

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**.

3.11 General Principles – **Vested and/or acquired rights**.

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

Keywords of the alphabetical index:

Parliament, member, pension / Retroactive effect.

Headnotes:

A new adjustment provision in the pension scheme for Members of Parliament can be applied with retrospective effect because affected Members of Parliament expected to receive a good and secure pension, an expectation that will be satisfied, and not that the adjustment mechanism remain unchanged.

Summary:

The former Act no. 61 of 12 June 1981 relating to pension schemes for Members of Parliament was amended with effect from 1 January 2011. The pension-qualifying income, which previously corresponded to the members of Parliament's wages at any time, was after this amendment adjusted in accordance with wage growth and then reduced by 0.75%.

The Supreme Court dismissed a retired Member of Parliament's claim that the new adjustment provision violated the constitutional limits of retroactive legislation set forth in Article 97 of the Constitution.

The Supreme Court further found that the application of the new provision on the claimant's pension did not constitute a breach of Article 1.1 Protocol 1 ECHR.

The Supreme Court took into account that new provisions on how an established position shall be practiced, allow the legislator considerable leeway in relation to Section 97 of the Constitution, as opposed to what applies when burdensome effects are linked directly to past events. The Supreme Court found no evidence that the legislator had intended to give parliamentary pensions a greater protection against intervention than what applied to other comparable rights. The Supreme Court further emphasised that the change did not involve any particularly extensive intervention, and that the retrospective element was not particularly strong, even though the financial loss the change would entail was clearly noticeable. It was assumed that affected Members of Parliament mainly expected to obtain a good and secure pension, an expectation that would still be satisfied, and not that the adjustment mechanism should remain unchanged. In the view of the Supreme Court, the social considerations behind the pension reform, such as economic sustainability, equality and a fair distribution between the generations, must weigh heavily in the overall assessment. The amendment was also not deemed to be a disproportionate intervention. Article 1.1 Protocol 1 ECHR was therefore not applicable.

Languages:

Norwegian.



Poland Constitutional Tribunal

Important decisions

Identification: POL-2016-1-001

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 03.12.2015 / **e)** K 34/15 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2015, item 2129 / **h)** CODICES (Polish, English).

Keywords of the systematic thesaurus:

1.1.1.1.2 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Sources – **Institutional Acts.**

1.1.1.2 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – **Independence.**

1.1.2.4 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointment of members.**

1.1.2.5 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointment of the President.**

1.1.3.2 Constitutional Justice – Constitutional jurisdiction – Status of the members of the court – **Term of office of the President.**

1.1.3.3 Constitutional Justice – Constitutional jurisdiction – Status of the members of the court – **Privileges and immunities.**

1.1.4.1 Constitutional Justice – Constitutional jurisdiction – Relations with other Institutions – **Head of State.**

Keywords of the alphabetical index:

Election, judge, validity, term / Judge, retired, immunity / Head of State, competence, limitation / Tribunal, discontinuation of proceedings, relevance, scope.

Headnotes:

A judge of the Constitutional Tribunal may not be elected into judicial office that will be vacated during the next term of the *Sejm*.

The Constitution does not authorise the head of state to refuse to give the oath of office to a newly-elected judge of the Constitutional Tribunal. Any doubts raised by the head of state as to the constitutionality of legal provisions based on which judges have been elected to the Constitutional Tribunal may only be addressed by the Constitutional Tribunal.

The provisions of the Constitutional Tribunal Act concerning the procedure to appoint the President and Vice-President of the Constitutional Tribunal by the President of the Republic of Poland are constitutional. The fact that the Constitutional Tribunal Act does not specify the length of the term of office for the positions of the President and Vice-President of the Constitutional Tribunal does not violate the Constitution.

The Constitution provides that retired judges of the Tribunal enjoy formal immunity. Holding judges criminally liable (except in the case of misdemeanours) or depriving them of liberty is contingent on consent granted by the General Assembly of the Constitutional Tribunal.

The legal solution permitting the Tribunal to discontinue proceedings when a given case does not concern a significant legal issue requiring the Tribunal's determination is constitutional.

Summary:

I. On 3 December 2015, the Constitutional Tribunal considered an application submitted by a group of *Sejm* Deputies regarding the provisions of the Constitutional Tribunal Act of 25 June 2015 (hereinafter, the "Act") concerning, *inter alia*, the election of judges to the Tribunal, the status of judges, and proceedings before the Tribunal.

II. The Constitutional Tribunal is the only organ of public authority competent to issue final and universally binding determinations whether a law adheres to the Constitution. The Constitution does not expressly exempt any statutes from the scope of the Tribunal's competence, including any statute that regulates the functioning of the Constitutional Tribunal. Since the exemption has not been explicitly provided, it may not be presumed.

The Constitutional Tribunal not only guarantees the supremacy of the Constitution, it also safeguards the tri-division of powers. Any regulation concerning the Tribunal may not challenge its capacity to carry out its activity.

Adjudicating on the constitutionality of the Act is not tantamount to a judge's adjudication of a case. The Tribunal shall determine whether the Act conforms to the Constitution (i.e., legal norms pertaining to the Tribunal as a state organ, but not to an individual interest of any of the judges of the Tribunal). No judge of the Tribunal has a personal interest in specifying the scope of competence of that state organ. A difference exists when the Tribunal adjudicates on provisions regulating the scope of its competence and when it determines a case concerning individual interests of a particular judge of the Tribunal.

The Tribunal ruled that Article 137 of the Act is unconstitutional, insofar as the provision made it possible for the *Sejm*, during its previous parliamentary term (2011-2015), to elect two, new judges to the Constitutional Tribunal, replacing judges whose terms of office would end respectively on 2 and 8 December 2015 (during the parliamentary term of 2015-2019). By contrast, the provisions regulating the procedure for electing three judges who had been chosen to assume offices after the judges whose terms of office ended on 6 November 2015 (during the parliamentary term of 2011-2015) were deemed constitutional.

According to the Tribunal, Article 194.1 of the Constitution specifies that the *Sejm* must elect a new judge to the Constitutional Tribunal during the parliamentary term when a vacancy arises. As such, the legal basis for the election to replace the judges before their term of office ended was deemed unconstitutional. Consequently, further proceedings concerning the commencement of the newly elected judges' terms of office are subject to closure.

In contrast, the legal basis for choosing candidates and carrying out the election to fill the offices of the judges whose terms of office ended on 6 November 2015 are valid. The candidates had been elected by the *Sejm* during the parliamentary term when the vacancy in the Constitutional Tribunal occurred.

Moreover, the Tribunal noted that Article 21.1 of Act requires the President to grant the oath of office to a newly-elected judge of the Constitutional Tribunal. Any other interpretations of the provision are unconstitutional. The President is not authorised to choose judges for the Constitutional Tribunal. The provisions of the Act neither vest the head of state with powers to choose judges nor prevent a judge from commencing his or her term of office in the Constitutional Tribunal, if the judge has been elected by the *Sejm* based on Article 194.1 of the Constitution. After taking oath, a judge elected by the *Sejm* to the Constitutional Tribunal commences performing his or her judicial duties, as well as preserves the continuity of the Tribunal's judicial

activity. The lack of statutory provisions that set a time-limit for giving the oath of office must be construed in the way that the President is required to fulfil this obligation.

The Tribunal disagreed with the other allegations raised by the applicant.

The Tribunal deemed that the provisions of the Act concerning the procedure for appointing the President and Vice-President of the Constitutional Tribunal by the President of the Republic of Poland are constitutional. According to Article 194.2 of the Constitution, the President is obliged to appoint the President and Vice-President of the Constitutional Tribunal “amongst candidates” proposed by the General Assembly of the Judges of the Constitutional Tribunal. The President of the Republic of Poland is not vested with full discretion to find candidates for the positions of the President and Vice-President of the Constitutional Tribunal. The head of state is obliged to appoint to the said positions one of proposed candidates. The indicated provision is lucid and raises no interpretative doubts.

To the Tribunal, the fact that the Constitutional Tribunal Act does not specify the length of the term of office for the positions of the President and Vice-President of the Constitutional Tribunal does not violate the Constitution. Indeed, the length of the said terms depends on the length of the term of office of a given judge of the Constitutional Tribunal. This solution is clear and raises no interpretative doubts. The legislator may introduce amendments pertaining to the judges’ terms of office but must adhere to appropriate rules to introduce the changes, particularly the principles of a democratic state ruled by law.

The Tribunal also found constitutional for retired judges of the Tribunal to enjoy formal immunity. They can be held criminally liable (except in the case of misdemeanours) or deprived of liberty but only consent of the General Assembly of the Constitutional Tribunal. The protection is especially significant to judges of the Tribunal, who are appointed for a relatively short term of office. Considering that they determine the constitutionality of law enacted by politicians or resolve disputes over powers between central constitutional state authorities, they are at risk of potential repercussions from politicians who disfavour the Tribunal’s rulings.

The legal solution permitting the Tribunal to discontinue proceedings where a case does not concern a significant legal issue requiring the Tribunal’s determination is constitutional. The objective is to relieve the Tribunal from the burden of examining cases deemed insignificant from the point

of view of the legal system, as supported by the constitutional principle of the efficiency of public institutions. Indeed, the Tribunal is the only organ of the state (what is more, composed of very few persons) authorised to examine the constitutionality of law, resolve disputes over powers between central constitutional authorities, adjudicate on the constitutionality of the political parties’ purposes or activities, and determine the existence of an impediment that temporarily prevents the President from performing his or her duties. Thus, the Tribunal has vital duties pertaining to safeguarding the supremacy of the Constitution, protecting human rights and freedoms as well as preserving the rule of law and the tri-division of powers. The Tribunal emphasised that similar solutions existed in other EU Member States, and also in proceedings before the European Court of Human Rights.

III. The Tribunal issued this judgment in a bench of five judges, without dissenting opinions.

Cross-references:

Constitutional Tribunal:

- U 10/92, 26.01.1993, *Bulletin* 1993/1 [POL-1993-1-002];
- P 1/94, 08.11.1994, *Bulletin* 1994/3 [POL-1994-3-018];
- K 19/96, 24.02.1997, *Bulletin* 1997/1 [POL-1997-1-005];
- K 3/98, 24.06.1998, *Bulletin* 1998/2 [POL-1998-2-014];
- K 17/98, 26.05.1998, *Bulletin* 1998/2 [POL-1998-2-012];
- P 13/02, 03.12.2002, *Bulletin* 2003/1 [POL-2003-1-008];
- P 1/05, 27.04.2005, *Bulletin* 2005/1 [POL-2005-1-005];
- K 4/06, 23.03.2006, *Bulletin* 2006/1 [POL-2006-1-006];
- K 39/07, 28.11.2007, *Bulletin* 2008/1 [POL-2008-1-005];
- P 11/08, 16.04.2009, *Bulletin* 2011/1 [POL-2011-1-001];
- K 10/08, 27.10.2010, *Bulletin* 2011/1 [POL-2011-1-002];
- K 35/08, 16.03.2011, *Bulletin* 2011/3 [POL-2011-3-005];
- K 8/10, 11.07.2012, *Bulletin* 2013/1 [POL-2013-1-002];
- Kp 3/09, 28.10.2009, *Bulletin* 2010/1 [POL-2010-1-002];
- Kp 5/09, 18.01.2012, *Bulletin* 2013/2 [POL-2013-2-004];
- Kp 1/11, 14.06.2011, *Bulletin* 2011/2 [POL-2011-2-004].

Languages:

Polish.

*Identification:* POL-2016-1-002

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 09.12.2015 / **e)** K 35/15 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2015, item 2147 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

1.1.1.1.2 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Sources – **Institutional Acts.**

1.1.1.2 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – **Independence.**

1.1.2.4 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointment of members.**

1.1.2.5 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointment of the President.**

1.1.3.2 Constitutional Justice – Constitutional jurisdiction – Status of the members of the court – **Term of office of the President.**

1.1.4.1 Constitutional Justice – Constitutional jurisdiction – Relations with other Institutions – **Head of State.**

1.3.4.10 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the constitutionality of enactments.**

Keywords of the alphabetical index:

Election, judge, oath / Tribunal, independence.

Headnotes:

A breach, in the legislative process, of the *Sejm's* rules of procedure alone does not result in an infringement of the Constitution.

A procedure for appointments to managerial positions in the Tribunal, which provides for the reappointment of a given person, makes it possible for the executive branch to resort to unauthorised interference in the functioning of the Constitutional Tribunal.

Assigning the President the competence to appoint judges to the Constitutional Tribunal infringes on Article 194.1 of the Constitution, which prescribes the election of judges of the Constitutional Tribunal.

Solutions pertaining to the status of the President and Vice-President of the Constitutional Tribunal (terms of office) are closely linked with the principle of the independence of the Tribunal.

Summary:

I. On 9 December 2015, the Constitutional Tribunal considered joint applications filed by a group of *Sejm* Deputies, the Polish Ombudsman, the National Council of the Judiciary of Poland and the First President of the Supreme Court with regard to the Act of 19 November 2015 amending the Constitutional Tribunal Act of 25 June 2015 (hereinafter, the “amending Act”).

II. The Constitutional Tribunal addressed the allegation that the entire amending Act was unconstitutional for breaching legislative procedure. Despite awareness of numerous defects in the legislative process caused by breaches of the *Sejm's* rules of procedure and of the Act on the National Council of the Judiciary of Poland, the Tribunal did not declare the entire amending Act unconstitutional.

However, the Tribunal agreed with the allegations raised by the First President of the Supreme Court with regard to the second sentence of Article 12.1 of the Constitutional Tribunal Act of 25 June 2015 (hereinafter, the “Constitutional Tribunal Act”). The aforementioned article stipulates that “The same person may be appointed the President of the Tribunal twice”. Permitted by the legislator, the scope of interference of the executive branch may raise doubts as to the independence of judges of the Tribunal, undermine the principle of the independence of the Constitutional Tribunal, and affect the public perception of the constitutional judiciary. As such, the Tribunal ruled that it is inconsistent with Article 173 in conjunction with Article 10 of the Constitution.

The Tribunal also agreed with the applicants’ allegation about the unconstitutionality of Articles 21.1 and 12.1a of the Constitutional Tribunal Act. Pursuant to the new wording of Article 21.1, a person elected as a judge of the Constitutional Tribunal shall take the oath of office before the President within 30 days from the date of election into office. The Tribunal found that the 30-day time-limit violates the principle that a judge of the Constitutional Tribunal should take the oath of office immediately after having been elected by the *Sejm*. Such a possibility should be created by the President.

Also, paragraph 1a added to Article 21 of the Constitutional Tribunal Act is unconstitutional. The provision stipulates that “the taking of the oath of office shall commence the term of office in the case of a judge of the Tribunal”. Pointed out by the Tribunal, in accordance with the well-established practice, all state authorities have so far assumed that the nine-year term of office commences on the day when a judge of the Constitutional Tribunal has been elected by the *Sejm* (possibly a later date if the election process takes place before the vacancy occurs). However, it should not commence on the day when the judge takes the oath of office. If the basis of the commencement of office stems from the taking of oath, the term of office would commence with certain delay as well as with the President’s indirect involvement in the procedure for choosing the judges although the Constitution only authorises such involvement to the *Sejm*. Therefore, the Tribunal ruled that Article 21.1a of the Constitutional Tribunal Act is inconsistent with Article 194.1 in conjunction with Articles 10, 45.1, 173 as well as Article 180.1 and 180.2 of the Constitution.

The Tribunal deemed that Article 137a of the Constitutional Tribunal Act (proposing a candidate to serve as a judge of the Constitutional Tribunal to assume the office after the judge whose term of office ended on 6 November 2015) is inconsistent with Article 194.1 in conjunction with Article 7 of the Constitution. Article 137a stipulates that: “With regard to judges whose term of office ends in 2015, the time-limit for submitting a proposal referred to in Article 19.2 (what is meant here is a motion to put forward a candidate for a judge of the Constitutional Tribunal) shall be 7 days as of the entry into force of this provision”. The Tribunal did not assess whether the said procedure for electing judges was proper. However, it deemed that the previous application of Article 137 of the 2015 Constitutional Tribunal Act, within the scope considered in the Tribunal’s judgment of 3 December 2015 (ref. no. K 34/15), was consistent with the Constitution. It also determined that the application of Article 137a would result in a larger number of judicial appointments than provided for in Article 194.1 of the Constitution.

The Tribunal also ruled that Article 2 of the amending Act is unconstitutional. The challenged provision stipulates that the “terms of office” of the incumbent President and Vice-President of the Constitutional Tribunal shall expire after the lapse of three months from the date of entry into force of the amending Act. The Tribunal held that the challenged provision constitutes unauthorised legislative interference in the realm of the judiciary and undermines the principle that the Constitutional Tribunal is independent of the other branches of government (Article 173 of the

Constitution). The legislator may depart from the adopted solution and determine the length of the term of office in the case of the President or Vice-President of the Constitutional Tribunal. However, Article 2 constitutes legislative interference because such constitutional competence is vested in the President of the Republic of Poland. The Tribunal agreed with the applicants that the legislator’s termination of the terms of office of the incumbent President and Vice-President of the Constitutional Tribunal violates the principle of judicial independence, infringing on Article 10 in conjunction with Article 173 of the Constitution, Article 194.1 and 194.2 as well as Article 7 of the Constitution.

III. The judgment was issued in a bench of five judges, without dissenting opinions.

Cross-references:

Constitutional Tribunal:

- K 29/95, 23.04.1996, *Bulletin* 1996/1 [POL-1996-1-007];
- K 25/97, 22.09.1997, *Bulletin* 1997/3 [POL-1997-3-017];
- K 3/98, 24.06.1998, *Bulletin* 1998/2 [POL-1998-2-014];
- K 17/98, 26.05.1998, *Bulletin* 1998/2 [POL-1998-2-012];
- K 21/98, 01.12.1998, *Bulletin* 1998/3, [POL-1998-3-022];
- K 25/98, 23.02.1999, *Bulletin* 1999/1 [POL-1999-1-004];
- K 8/99, 14.04.1999, *Bulletin* 1999/1 [POL-1999-1-009];
- K 20/01, 27.05.2002, *Bulletin* 2002/2 [POL-2002-2-016];
- K 4/06, 23.03.2006, *Bulletin* 2006/1 [POL-2006-1-006];
- SK 7/06, 24.10.2007, *Bulletin* 2008/1 [POL-2008-1-004];
- K 2/07, 11.05.2007, *Bulletin* 2007/3 [POL-2007-3-005];
- K 39/07, 28.11.2007, *Bulletin* 2008/1 [POL-2008-1-005];
- K 31/12, 07.11.2013;
- K 34/15, 03.12.2015.

Languages:

Polish.



Identification: POL-2016-1-003

a) Poland / b) Constitutional Tribunal / c) / d) 09.03.2016 / e) K 47/15 / f) / g) / h) CODICES (Polish).

Keywords of the systematic thesaurus:

1.1.1.1.2 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Sources – **Institutional Acts.**

1.1.1.2 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – **Independence.**

1.1.3.5 Constitutional Justice – Constitutional jurisdiction – Status of the members of the court – **Disciplinary measures.**

1.1.3.9 Constitutional Justice – Constitutional jurisdiction – Status of the members of the court – **End of office.**

1.4.3.1 Constitutional Justice – Procedure – Time-limits for instituting proceedings – **Ordinary time-limit.**

1.5.1.1 Constitutional Justice – Decisions – Deliberation – **Composition of the bench.**

1.5.1.3.1 Constitutional Justice – Decisions – Deliberation – Procedure – **Quorum.**

1.5.1.3.2 Constitutional Justice – Decisions – Deliberation – Procedure – **Vote.**

1.6.5.1 Constitutional Justice – Effects – Temporal effect – **Entry into force of decision.**

Keywords of the alphabetical index:

Vacatio legis, appropriate legislation / Tribunal, independence, adjudication, procedure.

Headnotes:

It is inadmissible for the same provisions to be both the basis and subject of adjudication. A potential ruling of the Tribunal on the unconstitutionality of the disputed provisions would challenge the very process of adjudication (consequently, the relevant judgment). Therefore, in certain circumstances, the Tribunal may refuse to apply the binding statute as they are “independent and subject only to the Constitution” (Article 195.1 of the Constitution).

A full bench of the Tribunal comprises all judges who have the capacity to adjudicate on the day when a ruling is issued. If the Tribunal issues a ruling where a few judges are not authorised to adjudicate (requirements not met by a state authority other than the Tribunal), but all judges authorised to adjudicate participate in the issuing of the said determination, then the adjudicating bench is indeed “a full bench”.

The legislator is obliged to determine the procedure for adopting resolutions by the General Assembly of the Judges of the Tribunal (hereinafter, the “General Assembly”) such that the resolutions are adopted within time-limits set by statute. Quorum requirements to adopt a resolution as well as the requisite majority of votes must be satisfied. The composition of adjudicating benches must be determined to ensure diligence, impartiality, independence, and efficiency. The legislator shall respect the rules and independence of the Tribunal for determining the composition of adjudicating benches.

The disciplinary responsibility of judges ensures the proper position of the constitutional court, enabling the judiciary to preserve the proper ethical standards of judges, which directly affects the performance of the Tribunal’s judicial tasks. Because disciplinary responsibility falls within the ambit of the constitutional court’s independence and autonomy, the disciplinary proceedings in their entirety should be carried out within the Tribunal.

Granting executive authorities the power to submit an application for instituting disciplinary proceedings infringes the independence of judges. It would link a decision issued with regard to a given judge with authorities outside of the judiciary and may underlie political factors.

Eliminating the penalty to recall a judge of the Tribunal from office (catalogue of disciplinary penalties) and granting that competence to the *Sejm* are inconsistent with the Constitution. Limiting the scope of the disciplinary responsibility of judges of the Tribunal (excluding responsibility for acts committed prior to taking the office from the scope of responsibility) is inadmissible in the light of the principles of the Tribunal’s independence, separation of powers and independence of the Tribunal’s judges.

Summary:

I. The Constitutional Tribunal considered joint applications filed by the First President of the Supreme Court, a group of *Sejm* Deputies (application of 29 December 2015), another group of *Sejm* Deputies (application of 31 December 2015), the Polish Ombudsman, and the National Council of the Judiciary of Poland, with regard to the Act of 22 December 2015 amending the Constitutional Tribunal Act.

II. Before considering the case, the Constitutional Tribunal excluded the application of certain provisions of the Constitutional Tribunal Act after recent amendments, where the provisions made it

impossible to issue a ruling without delay. This concerns the following:

- requiring at least 13 judges of the Tribunal participates in the adjudication to constitute a full bench;
- setting hearing dates when applications are considered in order received by the Tribunal;
- setting hearing dates in cases determined by a full bench of the Tribunal no earlier than after 6 months following the service of the notification of the said dates; and
- requiring a two-thirds-majority vote of a full bench Tribunal ruling.

The Tribunal stated that the entire amending Act breaches the principle of appropriate legislation, a basic principle of a democratic state ruled by law (Article 2 of the Constitution).

Furthermore, the elements of the new mechanism to adjudicate cases within the Tribunal's jurisdictional scope are dysfunctional, creating conditions that disable the Constitutional Tribunal to carry out its activity diligently and efficiently. The new mechanism also interferes in the Tribunal's independence and separation from the other branches of government. Lastly, it infringes on the principles of a state ruled by law.

Undoubtedly, the application of all the solutions adopted in the challenged provisions would slow down the adjudication process as well as unjustifiable delay the constitutional norms, principles and values. That is, applied separately, each solution would considerably undermine the efficiency of the Tribunal's activity and prolong the time needed for the exercise of powers granted to the Tribunal. Ultimately, the solutions deprive the Tribunal of its capacity to adjudicate.

An additional element paralysing the Tribunal's activity is the fact that the new solutions entered into force on the date of publication of the amending Act, which was insufficient timing for the Tribunal to make the appropriate arrangements for the application.

Moreover, the Court reviewed the new requirement that cases pending before the Tribunal on the date of entry into force of the amending Act should be considered anew and before cases received later. Assuming those cases will be processed through the new statutory solutions, the proceedings will slow down. Also, the requirement makes it impossible for the Tribunal to review statutes adopted by Parliament during its current term, which effectively excludes the statutes from the scope of the Tribunal's jurisdiction, contrary to Article 188 of the Constitution. The

legislator's decision to apply the amended provisions, with the concurrent lack of *vacatio legis*, evidently contradicts the intentions of the authors of the amending Act, namely to "mend" or "facilitate" the Tribunal's activity. It appears that the intended (although not explicitly stated) purpose is to deprive the Constitutional Tribunal of its capacity to conduct constitutional review of law, at least for a certain period.

The Tribunal held that there is no possibility of interpreting the challenged provisions in a way that would be consistent with the Constitution. The content and actual aim (i.e., virtual paralysis of the Tribunal) are incompatible with the requirement of ensuring diligence and efficiency in the activity of that state authority. The challenged provisions are dysfunctional to such an extent that they may not be corrected in the application of law.

The Tribunal emphasised that until the relevant provisions cease to have effect as a result of the publication of this judgment in the Journal of Laws, the Tribunal is obliged, in its further judicial activity, to bypass the statutory provisions with regard to which the presumption of constitutionality has been overturned by the judgment.

The final and universally binding character of the judgment (Article 190.1 of the Constitution) means that, in light of the Constitution, other state authorities may not effectively challenge it. By contrast, the said authorities are obliged to execute and respect the judgment. At the same time, it should be stressed that the said judgment does not eliminate the possibility of introducing statutory changes by the legislator within the scope of the organisation and review procedures of the Tribunal. However, the said modifications must fall within the ambit provided by the Constitution.

III. The Tribunal issued this judgment *en banc*. Two dissenting opinions were raised.

Cross-references:

Constitutional Tribunal:

- K 6/94, 21.11.1994, *Bulletin* 1994/3 [POL-1994-3-019];
- K 19/95, 22.11.1995, *Bulletin* 1995/3 [POL-1995-3-017];
- K 22/96, 17.12.1997, *Bulletin* 1998/1 [POL-1998-1-001];
- U 5/97, 19.05.1998, *Bulletin* 1998/2 [POL-1998-2-010];
- K 25/97, 22.09.1997, *Bulletin* 1997/3 [POL-1997-3-017];

- K 26/97, 25.11.1997, *Bulletin* 1997/3 [POL-1997-3-024];
- K 41/97, 08.12.98, *Bulletin* 1998/3 [POL-1998-3-023];
- K 3/98, 24.06.1998, *Bulletin* 1998/2 [POL-1998-2-014];
- P 4/98, 16.06.1999, *Bulletin* 1999/2 [POL-1999-2-022];
- SK 19/98, 16.03.1999, *Bulletin* 1999/1 [POL-1999-1-007];
- K 25/98, 23.02.1999, *Bulletin* 1999/1 [POL-1999-1-004];
- K 8/99, 14.04.1999, *Bulletin* 1999/1 [POL-1999-1-009];
- K 20/01, 27.05.2002, *Bulletin* 2002/2 [POL-2002-2-016];
- P 13/02, 03.12.2002, *Bulletin* 2003/1 [POL-2003-1-008];
- P 13/01, 12.06.2002, *Bulletin* 2002/2 [POL-2002-2-019];
- K 55/02, 16.09.2003, *Bulletin* 2003/3 [POL-2003-3-030];
- K 4/06, 23.03.2006, *Bulletin* 2006/1 [POL-2006-1-006];
- K 6/06, 19.04.2006, *Bulletin* 2006/2 [POL-2006-2-007];
- K 8/07, 13.03.2007, *Bulletin* 2008/1 [POL-2008-1-001];
- K 2/07, 11.05.2007, *Bulletin* 2007/3 [POL-2007-3-005];
- SK 7/06, 24.10.2007, *Bulletin* 2008/1 [POL-2008-1-004];
- K 39/07, 28.11.2007, *Bulletin* 2008/1 [POL-2008-1-005];
- P 11/08, 16.04.2009, *Bulletin* 2011/1 [POL-2011-1-001];
- K 6/09, 24.02.2010, *Bulletin* 2010/2 [POL-2010-2-004];
- Kp 3/09, 28.10.2009, *Bulletin* 2010/1 [POL-2010-1-002];
- K 9/11, 20.07.2011, *Bulletin* 2012/1 [POL-2012-1-002];
- K 43/12, 07.05.2014, *Bulletin* 2014/2 [POL-2014-2-003];
- K 34/15, 03.12.2015;
- K 35/15, 09.12.2015.

Languages:

Polish.



Portugal Constitutional Court

Important decisions

Identification: POR-2016-1-001

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 13.01.2016 / **e)** 3/16 / **f)** / **g)** *Diário da República* (Official Gazette), 22 (Series I), 02.02.2016, 333 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 3.9 General Principles – **Rule of law.**
- 3.10 General Principles – **Certainty of the law.**
- 3.13 General Principles – **Legality.**
- 3.16 General Principles – **Proportionality.**

Keywords of the alphabetical index:

Political officeholders, lifelong allowances.

Headnotes:

Norms in the 2014 State Budget Law (LOE2014) regarding lifelong monthly allowances attributed to ex-political officeholders were in breach of the principle of the protection of legal certainty. The new regime subjected payment of these allowances to rules designed for benefits that are intended to respond to cases of hardship, where one of the logical conditions is that the recipient be subjected to a means test.

Application of these rules to lifelong allowances ran counter to the latter's inherent nature. Requiring the beneficiary and the other members of his or her household to account for their other incomes and causing these to affect the lifelong monthly allowance meant depriving the latter of the nature of a benefit that is awarded to former political officeholders in return for their services to the country and in the light of the special demands placed on such public servants and the potential consequences holding political office may have for their life paths. The allowances instead took on the nature of a common non-contributory payment designed, like other types of benefit, to prevent recipients from experiencing economic hardship. Although the legislator is not obliged to rigidly maintain past choices, and could

legitimately continue to revise and strengthen the applicable regime so as to make it more restrictive, an assessment was needed as to whether the new legislative solution was appropriate in the light of the requirements imposed by the Constitution; whether the reasons for changing the law were proportionate in relation to the sacrifice imposed on those affected by the amendments.

Legislation evolves and dominant social ideas change with time, which meant that in this case it could not be argued that beneficiaries were entitled to expect the previous regime to be perpetuated *ad infinitum*. However, it was legitimate for them to trust that any legislative amendment would maintain the essential nature of the original allowance – a trust that was deserving of protection.

Summary:

I. A group of Members of the Assembly of the Republic brought this case before the Constitutional Court. They challenged norms in the State Budget Law for 2014 (LOE2014) that changed the regime governing lifelong monthly allowances for former political officeholders. This regime was originally created in 1985, was itself amended five times (the last in 2005), and was then modified by successive Budget Laws. These changes gradually tightened the conditions for the award of the allowances and reduced their amount, but retained their unusual nature. The allowances were intended to dignify people who committed themselves to working in politics, by creating the conditions needed for them to do that work in a stable way. They were lifelong, monthly, non-contributory benefits payable to everyone who exercised certain functions or political offices for a certain period of time. The idea was to reward the beneficiary's commitment to the *res publica*, compensate him or her for the sacrifice derived from the expectable future loss of professional opportunities, and protect him or her from future uncertainties that might undermine his or her living conditions. Their lifelong monthly nature differentiated these allowances from any other non-contributory benefit, because the purpose of all the others is to ensure that people enjoy minimally dignified living conditions. The beneficiaries' trust (certainty) was based precisely on the circumstance that the legislator never questioned this unusual nature, which allowed them to expect that if the state ever did modify or even restrict these allowances, it would create a transitional regime for existing recipients which respected the allowances' specific nature.

II. The Court noted that this particular legislative solution was also capable of generating a dependent relationship on the part of ex-political officeholder vis-à-vis the members of his or her household with incomes of their own, and that in doing so it created uncertainties as to whether the beneficiary would be able to maintain a dignified material situation. The Court considered that the first requisite for the applicability of constitutional protection based on the principle of legal certainty was fulfilled, not so much because of what the legislator did – it had already amended various aspects of the legal regime governing these allowances in the past – but because of what it did not do. By never changing the nature of the allowances, even when it did away with them for the future, the state fuelled the beneficiaries' expectations that that nature would continue to characterise the allowances for as long as they were due. The Constitutional Court's jurisprudence is that the second requisite if trust is to warrant protection is that the expectations which have been created are legitimate and based on reasons which are judged to be good in terms of the constitutional-law axiological framework. In this respect the Court said that it is the Constitution itself which requires the ordinary legislator to determine the rights, benefits and immunities of political officeholders, thereby legitimating the latter's expectations. Turning to the third requisite – that the citizen in question must have oriented his or her life and made decisive choices on the basis of expectations that a given legal regime would be maintained – the Court recalled that this was exactly why the allowances were established in the first place: to create room for individuals to feel free to embrace the public cause, because they felt reassured about their future.

The Court then weighed up the opposing value: that of the public interest underlying the legislator's decision to pass the norms in question (the need to adopt budgetary consolidation measures and reduce and rationalise public spending.) It said it was possible to argue that the public-interest objectives (linked to the savings the public purse would make as a result of the difference in the amount of the allowances payable if those incomes were taken into account) pursued by the norms that subjected payment of the allowances to a means test suggested that the normative solution before it was excessive, compared to the consequences the norms produced in the legal sphere of former political officeholders. This was particularly true of the way in which the norm downgraded the personal nature of the benefit in favour of a means-related status, which was unacceptable because that personal quality was an essential characteristic of the benefit's Constitutional-Law status.

The Constitutional Court declared the norms unconstitutional with generally binding force.

III. The Ruling was the object of five dissenting and one concurring opinion. The concurring Justice agreed with the Court's decision, but disagreed with the grounds given by the rest of the majority.

Cross-references:

Constitutional Court:

- nos. 128/09, 12.03.2009; 353/12, 05.07.2012 and 413/14, 30.05.2014.

Languages:

Portuguese.



Identification: POR-2016-1-002

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 02.02.2016 / **e)** 55/16 / **f)** / **g)** *Diário da República* (Official Gazette), 51 (Series II), 14.03.2016, 8944 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 3.9 General Principles – **Rule of law.**
- 3.10 General Principles – **Certainty of the law.**
- 3.13 General Principles – **Legality.**
- 3.16 General Principles – **Proportionality.**

Keywords of the alphabetical index:

Wrongful facts, liability / Compensation, right / Compensation, duty / Medical malpractice / Birth, wrongful / Life, wrongful.

Headnotes:

Questions had arisen over an interpretation of Civil Code norms regarding aspects of the liability for wrongful facts which allowed the norms to be applied to a claim for compensation made by the parents of a child born with a congenital disability which, due to medical error, was not detected in a timely manner and about which the parents were not told in time,

with the claim made in relation to the damages suffered because the parents were not told about the medical staff's knowledge of the disability at a point when that information would have enabled them to potentially make or model choices available to them within the framework of the free exercise of their reproductive options.

The constitutional right to life is not affected by whether or not parents are compensated for damages resulting from the non-transmission of knowledge about elements that are important to the exercise of their reproductive options. In such cases, the award of compensation is neither an expression nor a denial of the protection afforded to the right to life. What was at stake here was the parents' right to determine their reproductive choices from among the lawful possibilities available to them – a right that was damaged by the applicants' failure to provide them with adequate information that was contractually due to them. The right to compensation – for medical malpractice in this case – lies solely within the framework of the reparation for damages caused by a failure to provide information that was contractually owed to the parents.

Where awarding or not awarding someone a right to compensation has the effect of affirming, compressing or eliminating that right altogether, the decision to award or otherwise has implications for the substance of a right to which the Constitution affords its protection. When interpreted in such a way as to permit the compensation sought in this case, the norms in question were not in breach of the applicable constitutional precepts.

Summary:

I. This concrete review case arose from a request made by the parents of a minor for compensation for failure to fulfil a contractual responsibility to provide a result – a failure they alleged was due to negligence. A medical error during a prenatal ecographic diagnosis made it impossible for the parents to choose to terminate the pregnancy, because they were not in possession of information that was due to them. The question of constitutionality focused on the constitutional conformity of the compensatory protection granted to the minor's parents as a result of a situation which the lower courts and the Supreme Court of Justice considered deserving of compensation for wrongful birth. The appellants against those earlier decisions alleged that a number of Civil Code norms on which they were based were unconstitutional when interpreted such as to make life with disability, and deprivation of the ability to choose to terminate a pregnancy, forms of injury that warrant compensation.

II. The Constitutional Court began by opining that both the original English ‘wrongful birth’ and ‘wrongful life’ and their Portuguese equivalents ‘*nascimento indevido*’ and ‘*vida indevida*’ were unfortunate choices of terminology; what was at stake here was a question of civil liability for compensation with a far more limited scope than that suggested by the literal forcefulness of those expressions. The applicants argued that at issue were the constitutional norms regarding the rights to life and family planning. The Court rejected the view that this case was linked to a violation of the right to life, inasmuch as there was no injury to the legal asset protected by that particular constitutional norm. It also excluded the existence of an issue regarding the rights to family planning and conscious motherhood and fatherhood which, among other things, require the state to organise itself in such a way as to provide positive services (e.g. the provision of public information, or the creation of units to accompany and inform potential parents) that enable people to form the clarified will to procreate. The hypothesis of an initially desired pregnancy that might then have given rise to the option to terminate because the foetus was malformed has nothing to do with either the clarified and informed will to procreate, or the resources that should be placed at people’s disposal within the overall family planning framework. The Court said that what was at stake was the right to compensation and the corresponding obligation to compensate, which must be viewed with reference to the right whose disrespect has led to a demand for reparation in the form of compensation. The latter is not important as such, but as an expression of the protection granted or denied to a right protected by the Constitution.

The Court said that this conclusion was valid in the extra-contractual field, and could be transposed to that of contractual liability in cases in which the violation of absolute rights arises within the context of unfulfilled contractual obligations. In the past the Court had already recognised that the right to compensation for damages is an imposition derived from the principle of a democratic state based on the rule of law, and that it also forms a specific aspect of the protection afforded to individual rights.

The Court recalled that:

- i. Doctrine and case law have both used the term ‘action for wrongful birth’ to refer to suits in which parents of a child born with a congenital disability which was not detected or which they were not told about in a timely manner due to medical error, claim reparation for damages resulting from the failure to inform them of that fact.

- ii. Qualifying a birth as “unwanted” “effectively constitutes a statement that characterises a past fact which has become an immutable given in the present, the compensatory approach to which is limited to monetary compensation.
- iii. There is no question here of any modification of an existential physical reality – everything takes place on an abstract level. This is an intellectual operation to establish the assumptions on the basis of which the way in which the medical staff were duty-bound to behave will be determined.
- iv. In the discussion on the viability of ‘wrongful birth’ suits, there is no validity in the type of argument that entails denying the existence of an obligation to compensate on the grounds of the recreation of a hypothetical situation which would presuppose the absence of any compensable injury because one could retrospectively say that the subject who has allegedly been injured would never have existed in that situation.
- v. This construction can be called the ‘problem’ or ‘paradox of non-existence’, which initially contributed to courts refusing to award compensation in wrongful-birth claims, in the sense that if the medical staff had behaved in the legally required manner and the parents had been told about their gestating child’s disability in time, they would have opted for termination of the pregnancy and thus the suppression of the life in relation to which the compensation is later demanded.
- vi. With reference to the inviolable nature of human life, a denial of the ability to construct a case for damages on this basis would have to be based on a refusal to see someone’s life as a possible source of injury.

The Court noted that these reservations had been progressively rejected by legal theorists and jurisprudence alike, as they gradually characterised the reality in question. The issue here was simply the need to determine an amount or form of compensation for an unchangeable present injury, necessarily without reference to any framework of some kind of ‘natural reconstitution’. This position, which is more favourable to the viability of such suits, is underlain by the view that it is not justifiable to exclude medical malpractice from the compensatory protection available in such situations, which are seen as corresponding to obligations to secure a result, and that it would be unfair not to confer that protection on the supposed recipients of the information contained in such a diagnosis.

III. One Justice dissented from the Ruling, on the basis that the preconditions for the Constitutional Court to hear this case in the first place were not met.

Cross-references:

Constitutional Court:

- no. 363/15, 09.07.2015.

Languages:

Portuguese.



Identification: POR-2016-1-003

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 03.02.2016 / **e)** 62/16 / **f)** / **g)** *Diário da República* (Official Gazette), 46 (Series II), 07.03.2016, 8022 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Public Security Police, conduct, unlawful / Disciplinary misconduct, unlawful.

Headnotes:

A norm in the Public Security Police's (hereinafter, "PSP") Disciplinary Regulations requiring that police officers be automatically suspended if they were the object of an indictment order formally charging them with a crime that attracted a prison term of more than three years was unconstitutional.

In an earlier case the Constitutional Court had already considered a norm in the 1984 version of the Disciplinary Statute governing Public Servants and Agents of the Central, Regional and Local

Administration, whose terms were identical to the norm in question here. The Court found no unconstitutionality on that occasion, on the basis that the fact that an accused person is presumed to be innocent until their conviction transits *in rem judicatam* does not always make suspending them from active duty prior to that unlawful and that in constitutional terms such a suspension would only be unacceptable if it breached the principle of proportionality, which the Court considered not to be the case if the reason for the suspension was to protect the prestige of the public service, which could be undermined by such an indictment order.

In the present case the Court recognised that the same functional considerations, which it had already said could justify suspending public servants from effective duty, were even more valid with regard to agents and officers of the security services and forces, quite apart from anything else because they possess a particular Constitutional-Law status of their own. The Constitution expressly allows the ordinary law to impose restrictions on some of the constitutional rights, freedoms and guarantees of "full-time military personnel and militarised agents on active service and ... agents of the security services and forces", albeit only to the strict extent required by their specific functions. In addition to this, police officers are not only subject to the general duties applicable to all public-service workers, but are also bound by their own code of ethics and a special disciplinary statute.

It was thus possible to see the automatic suspension from duty of a PSP officer who was indicted in criminal proceedings as a preventive measure designed to preserve the integrity and prestige of the police force.

However, the question then arose as to the legitimacy of making such a measure an automatic consequence of the indictment order, without weighing up whether it was actually necessary in the concrete case in question. Unlike the situation applicable to public servants in general, as considered by the Court in the earlier case (and which had since been changed), the PSP's Disciplinary Regulations require that indictment orders against police officers be communicated to the entity with disciplinary competence in relation to them. Basing itself on those same facts, that entity can then bring disciplinary proceedings and impose the preventive suspension of the accused whenever maintaining him or her on active duty would be inappropriate either for the police force, or for the process of determining the truth.

Even in the light of the dimension of the principle of proportionality that requires measures to be necessary, there was nothing to justify suspending a police officer from duty in the functional interest of the force as the automatic result of a criminal procedural act when, regardless of the continuation of the penal proceedings and the future final decision therein, the Administration is able to order an instrumental preventive measure with exactly the same scope and the capacity to achieve the same general preventive goals.

The norm in question was unconstitutional as the result of a combined violation of the constitutional principles of proportionality and that accused persons must be presumed innocent until the final sentence convicting them transits *in rem judicatam*.

Summary:

I. This concrete review case came before the Constitutional Court when the Public Prosecutors' Office lodged a mandatory appeal against a decision in which the court *a quo* refused to apply a norm on the grounds of its unconstitutionality.

The 1984 Disciplinary Statute governing Public Servants and Agents of the Central, Regional and Local Administration contained an identical norm, which had also been present in previous legislation. However, the 2008 Disciplinary Statute governing Public Servants and the disciplinary regime that replaced it, which is now part of the current General Law governing Public Servants (LGT), no longer impose suspension from active duty as an automatic consequence of an indictment order. They instead simply require the Public Prosecutors' Office to communicate the order to the body, department or service in which the public servant in question works. It is then up to the unit manager with disciplinary competence to assess whether it is appropriate to bring disciplinary proceedings, if the facts of the case are relevant in that respect. So under the current disciplinary regime the issue of an indictment order in criminal proceedings – a step which indicates *a priori* that sufficient evidence of the commission of a crime has been gathered and there is a reasonable probability that the accused person will be the object of a criminal penalty – only justifies notifying the unit to which the accused belongs. If preventive measures are then taken, they may include suspending the accused from active duty.

Under the PSP's Disciplinary Regulations the scope of such suspensions was different; they effectively constituted a consequence which the law said was automatically derived from a criminal procedural act, irrespective of whether disciplinary proceedings had

first been brought, the accused had been heard, or any other form of consideration had been given to whether it was appropriate to remove the accused from his or her normal professional duties.

II. The Court emphasised that in addition to being dependent on the existence of evidence suggesting the accused was responsible for facts that form part of the commission of a crime, suspension from active duty only occurred when the infraction was punishable by more than three years in prison – i.e. the case had to be especially serious in penal terms. Under the terms of the disciplinary statute governing PSP officers, not all crimes can lead to the imposition of a disciplinary measure which entails expulsion from the force. This means that suspension from active duty as set out in the PSP Disciplinary Regulations cannot be seen as a preventive measure which is inherent in the possible imposition of a penalty of dismissal or compulsory retirement that might be the end result of the process of which the accused's indictment forms a part. This is not a restriction of rights that implies bringing forward the imposition of a penalty, or any negative ethical/legal judgement about the criminally punishable facts, nor is it an accessory penalty or a consequence linked to being convicted of a crime. Suspension from active duty as the result of the issue of an indictment order is instead a legal effect which, while it is triggered by a mere criminal procedural act, has repercussions for the public employment relationship and therefore represents a legal consequence of a purely disciplinary nature.

Only after a criminal conviction has been handed down can a prohibition on continuing to serve as a police officer or suspension from active duty be seen as a penal sanction, or the material effect of one. The effect of suspension from active duty as an automatic consequence of the issue of an indictment order is merely disciplinary.

The Court recalled that in the case of public servants, the guarantee that an accused person's defence will be heard is derived from the constitutional norm which requires that in order to take effect, administrative acts must be notified to the interested parties, and that when they affect rights or interests which are protected by law, they must set out the express grounds for taking them.

In penal matters, it cannot be said that the guarantee that the accused must be heard and have the opportunity to defend him or herself means the whole of the criminal substantive regime should extend to disciplinary proceedings.

The constitutional precept – “Accused persons in proceedings concerning administrative offences or in any proceedings in which sanctions may be imposed are assured the right to be heard and to a defence” – is only relevant on an adjectival level; the imposition of any type of disciplinary sanction without first hearing the accused or giving them the opportunity to defend themselves against the allegations that have been made is unconstitutional.

However, legal doctrine has admitted the possibility that although a literal reading of the principles of the so-called “Criminal Constitution” (the principle that penalties must be provided for by law; the principle that the law cannot be retroactive; the principle that accused persons must benefit from the most favourable applicable law; and the principle of innocence) means that they are confined to the Criminal Law, in essence and by analogy they should also apply to every field in which sanctions are possible. In its past jurisprudence the Constitutional Court had also accepted that the fact that the principle that accused persons must be presumed innocent is applicable in disciplinary proceedings is derived from the right to fair process, and that this is true not only in that in accordance with the principle of *in dubio pro reo*, the burden of proving the facts included in the alleged infraction falls on the Administration – but also in terms of the status of the accused. It would be unlawful to impose any burden or restriction on the accused’s rights which would represent and effectively constitute their conviction before their actual conviction by the courts.

The Court accordingly found the norm before it unconstitutional.

Cross-references:

Constitutional Court:

- nos. 282/86, 21.10.1986; 439/87, 04.11.1987; 123/92, 31.03.1992; 227/92, 17.06.1992; 263/94, 23.03.1994; 161/95, 23.03.1995; 160/04, 17.03.2004; 154/10, 20.04.2010 and 180/14, 26.02.2014.

Supreme Administrative Court:

- nos. 930/04, 12.05.2005; 36390, 04.12.1997; 989/07, 21.05.2008; 1079/09, 21.01.2011; 31885, 14.10.1993 and 35837, 09.05.1995.

Languages:

Portuguese.



Identification: POR-2016-1-004

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 03.02.2016 / **e)** 76/16 / **f)** / **g)** *Diário da República* (Official Gazette), 67 (Series II), 06.04.2016, 11477 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 3.9 General Principles – **Rule of law.**
- 3.10 General Principles – **Certainty of the law.**
- 3.13 General Principles – **Legality.**
- 3.14 General Principles – ***Nullum crimen, nulla poena sine lege.***

Keywords of the alphabetical index:

Administrative offence, employment-related, sanction, imposition / Accident, work-related.

Headnotes:

A norm requiring employers to notify the Inspectorate-General of Labour (hereinafter, “IGT”) of any accident that was fatal or revealed the existence of a particularly serious situation within twenty-four hours of the incident was unconstitutional; the way in which the norm was configured in terms of how employers had to behave failed to respect the constitutional principle that interventions which impose sanctions must be clearly provided for by law. The conduct that constituted an administrative offence was so imprecisely defined that it did not fulfil the demands imposed by the principles of a democratic state based on the rule of law, legal certainty, and trust.

Summary:

I. This concrete review case resulted from a mandatory appeal by the Public Prosecutors’ Office against a decision in which the court *a quo* had refused to apply a norm on the grounds of its unconstitutionality. The lower court declined to apply the final part of the norm, which required employers to notify the IGT (the then equivalent of the current Working Conditions Authority – ACT) about accidents that revealed “the existence of a particularly serious situation”.

II. The Constitutional Court recalled that the duty to notify imposed on employers in this precept formed part of the overall framework of measures designed to prevent work-related accidents and occupational illnesses. In this respect, the Constitution of the Portuguese Republic, International Labour Organisation Convention no. 155 and Directive no. 89/391/EEC of the Council of the European Union all require both public authorities and employers to ensure that work is done under hygienic, safe and healthy conditions.

The administrative offence here was the failure to notify IGT/ACT of a work-related accident suffered by a person employed by the company that originally challenged the administrative decision to impose a sanction. The description of the accident was as follows: (the employee was) "working in the line of cashiers when she picked up a till and sprained her shoulder, which left her in pain (...)" ... This resulted in the worker "taking sick leave because she was unfit for work..."

The court *a quo* took the view that, as a significant restriction on fundamental rights, any public law that can entail the imposition of administrative sanctions is subject to the guarantees which are explicitly enshrined in relation to the Criminal Law.

In its jurisprudence, the Constitutional Court has consistently and repeatedly said that the constitutional principle that sanctions must be provided for by law is applicable to the law governing mere social administrative offences. This principle implies that the law must be sufficiently specific about the facts which constitute the legal type of crime or administrative offence (or the prerequisites for one to have been committed), and must make the necessary connection between the crime or offence and the type of penalty or fine with which it can be punished.

This concept of 'typicity' precludes the legislator from using vague formulations to describe legal types of crime or administrative offence, and from either providing for penalties that are indeterminate, or penalties which are so broadly defined that it is impossible to determine what concrete punishment should be imposed.

The Court considered that the fact that administrative offences form part of the overall framework of situations in which the state has the power to punish, the maximum expression of which is to be found in the Criminal Law, means it is justifiable for the legal regime governing them to be influenced by the principles and rules that are common to the whole of the part of the public law which can entail the imposition of sanctions. The law governing mere social administrative offences is a law that imposes

sanctions and allows the Administration to participate in the exercise of the state's power to punish by imposing penalties on the citizens and other entities it administers. Thus, as elements which emanate from the *jus puniendi*, that law and that power must be governed by the various 'penal' principles and rules. The principles that are especially important in criminal matters, such as those of legality, innocence, *non bis in idem* and non-retroactivity, that penalties cannot have automatic effects, and that criminal liability cannot be transferred to someone else, can be extended to the administrative offence field simply because they are derived from principles linked to the rule of law and legal certainty. The Court recognised that there are differentiations when these principles are extended to administrative offences. The fact that unlawful acts which constitute mere social administrative offences are materially autonomous in relation to unlawful acts which constitute crimes gives rise to a specific regime for punishing the former, with different kinds of sanction, punitive procedures and agents to impose those sanctions and punishments. There can therefore be no automatic transposition of the constitutional principles governing penal legislation to the law governing mere social administrative offences. This distinction is relevant to the relationship between those areas of the law and the Constitutional-Law order. In its jurisprudence the Constitutional Court has used the criteria of the different ethical implications and the different legal assets that are at stake in the two areas to distinguish between the two types of unlawful act.

The purpose of the principle that for an act to be a crime it must be specifically provided for as such by law is to ensure that citizens are not subject to arbitrariness and excess when the state exercises its punitive power. The fact that this is a constitutional parameter means the penal norm must be precise and clearly determinate. The Court had in fact already recognised that it may sometimes prove justified for legal types to be relatively indeterminate without the principles of legality and 'typicity' being breached. However, for this to be the case the type must nevertheless be determinate enough not to undermine the essential content of the principle of legality. The principle of *nullum crimen* can only fulfil its role as a guarantee if, notwithstanding a certain degree of indeterminateness and openness, the typical regulation is materially sufficient and appropriate enough to ensure that citizens know what actions and omissions they must avoid.

In the other fields in which sanctions can be imposed, such as the law governing mere social administrative offences and disciplinary law, the intensity of the 'typicity' requirement is not as great as it is in Criminal Law. However, the typifying norm or set of

norms must describe the objective and subjective elements of the essential core of the unlawful act with sufficient clarity, otherwise they will be in breach of the principles of legality and 'typicity' and above all their teleological quality of guarantees. Accordingly, where administrative-offence types of unlawful conduct are concerned, the *lex certa* requirement is not prejudiced if unlawful acts are identified with reference to indeterminate legal concepts or general clauses, on condition that it can nevertheless be fulfilled using logical, technical or experience-based criteria that allow the nature and essential characteristics of the forms of conduct which constitute the typified infraction to be predicted with a sufficient degree of certainty.

In terms of the part of the norm before it, the Court considered that the wording left doubts as to the types of accident that ought to be communicated to the authorities.

The norm *sub iudicio* required the employer to notify IGT/ACT of any "accident that was fatal or reveals the existence of a particularly serious situation" within 24 hours of its occurrence. While the formulation "fatal accident" is easy to interpret, the expression "reveals the existence of a particularly serious situation" was incapable of expressing which work-related accidents should be communicated to the authorities that inspect safety conditions in the workplace with adequate clarity. It made it clear that not all work-related accidents had to be communicated to the authorities, but left an area of lack of definition and certainty between those that need not be communicated and those that must, which is not compatible with the minimum degree of determinability demanded of the administrative-offence type.

Besides the goals which the legislator said led to the imposition of the duty to notify, the norm did provide a guideline that was determinate enough to enable employers to accurately know what work-related accidents they were obliged to communicate. As a prerequisite for IGT/ACT to take action, the indeterminate concept "particularly serious situation" was perfectly capable of coexisting with the principle of administrative legality. It is different with norms that prohibit actions or establish omissions that are punishable by sanctions. Here the function of legality is to serve as a guarantee that is demanded by the principle of the rule of law and is only fulfilled if the prohibited forms of behaviour possess a minimum degree of determinability. The norm must be minimally clear and precise, so that agents can use the legal text to know what acts or omissions generate a liability on their part.

The Court considered that this was not the case with regard to the norm before it, and therefore found it unconstitutional.

III. One Justice dissented from the ruling. He said that when taken in its linguistic context the norm not only performed a negative function, to the extent that it made it possible to exclude situations which did not match the useful sense contained in the text, but also a positive one inasmuch as it specified a required behaviour with reference to work-related accidents which a criterion of evidence revealed to be particularly serious. In his view, if one interpreted the norm in a way that also took into account the unity of the system and the general regime governing work-related accidents, "particularly serious accidents" could be those which presumably caused a permanent, or a temporary but lengthy, incapacity for work. Among other things, the norm therefore served the purpose of excluding accidents that only subsequently, and as a result of changes in the victim's clinical condition, led to consequences which were initially not foreseeable in the light of the nature and severity of the injury, from the requirement to notify whose lack of fulfilment could constitute the commission of an administrative offence.

Cross-references:

Constitutional Commission:

- Opinion no. 32/80, *Pareceres da Comissão Constitucional*, vol. 14, accessible at: www.tribunalconstitucional.pt/tc/content/files/biblioteca/cc/cc_volume_14.pdf.

Constitutional Court:

- nos. 282/86, 21.10.1986; 158/92, 23.04.1992; 344/93, 12.05.1993; 666/94, 14.12.1994; 469/97, 02.07.1997; 168/99, 10.03.1999; 278/99, 05.05.1999; 93/01, 13.03.2001; 547/01, 07.12.2001; 41/04, 14.01.2004; 160/04, 17.03.2004; 358/05, 06.07.2005; 102/08, 19.02.2008; 115/08, 20.02.2008; 338/03, 07.07.2003; 351/11, 12.07.2011; 559/01, 07.12.2001; 461/11, 11.10.2011; 537/11, 15.11.2011; 635/11, 20.12.2011; 85/12, 15.02.2012; 397/12, 28.08.2012; 397/12, 28.08.2012; 466/12, 01.10.2012; 45/14, 09.01.2014; 180/14, 26.02.2014 and 201/14, 03.03.2014.

Languages:

Portuguese.



Identification: POR-2016-1-005

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 04.02.2016 / **e)** 81/16 / **f)** / **g)** *Diário da República* (Official Gazette), 123 (Series II), 29.06.2016, 20180 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Air Force, pilot training / Contract, termination, unilateral / Compensation, payment.

Headnotes:

A norm taken from the Regulations for the Military Service Law which can be interpreted in such a way that it is acceptable to require Air Force pilots to pay compensation as a condition for approving a unilateral request to terminate their employment contract either during the complementary training period, or before the end of the minimum length of service they are contractually bound to complete is in line with the Constitution.

The constitutional freedom to choose one's occupation is a complex fundamental right, which includes not only rights designed to defend citizens from being obliged to pursue a given occupation or prevented from choosing or exercising one, but also the right to advantages linked to the rights to work and to an education, such as the right to apply for the qualifications needed to engage in an occupation, the rights to enter and progress within the career structure linked to that occupation, and the right to actually pursue it. However, the final part of the applicable constitutional precept expressly accepts that the freedom to choose an occupation may be subject to legal restrictions which are imposed in the collective interest or are inherent in the characteristics of the person in question, provided such restrictions are justified in the light of constitutionally relevant interests and are not excessive.

Establishing a minimum period during which pilots are contractually bound to the Air Force, and subjecting any reduction in that period to payment of an amount of compensation to the state that takes account of the costs of the training provided and the expectation that the member of the armed forces will be functionally allocated to the Air Force are restrictions that are capable of being justified by the collective interest.

Summary:

I. This concrete review case resulted from an appeal against a Ruling of the Administrative Litigation Chamber of the Supreme Administrative Court.

The norm was, in the applicant's view, unconstitutional, because it allowed the Air Force to demand compensation as a condition for approving a unilateral request to terminate an employment contract, in an amount that could reach one hundred times the employee's monthly salary and about twice the total he would have earned during the whole of his contract. He suggested that this violated both the negative dimension of the constitutional freedom to choose an occupation that entitles people not to continue to perform a function and not to be obliged to pursue a given occupation, and the positive dimension of being able to choose another occupational function.

II. The Court noted that similar legal duties are imposed in other legislation. Examples include: a Labour Code norm that allows employers to require minors who unilaterally terminate an open-ended labour contract during or immediately after the training period to compensate them for the direct cost they incurred in providing the training; and a norm in the Law that regulates entry into the career and the training of judges and public prosecutors and the nature, structure and *modus operandi* of the Centre for Judiciary Studies, which imposes a legal duty on new judges and prosecutors to remain in the judiciary under a trainee regime for at least five years, and to reimburse the state in an amount equal to the allowance they received during their training if they leave of their own accord during that time.

It is common knowledge that training Air Force pilots involves the State in investing in a large range of infrastructures and human and financial resources. As that investment is paid for out of public funds, it is natural that the state expects a return in the shape of the continuation of the pilot's contractual bond for a given length of time, which is laid down by law. Otherwise the state would be using public resources drawn from taxpayers to fund the training of highly qualified professionals who could leave to go and work in the private sector at any time.

Regarding the applicant's contention that the norm was in breach of the principle of proportionality, the Court recalled its own jurisprudence, under which the way to control the prohibition of excess is to use a method based on a triple test: the principle of appropriateness (measures that restrict constitutional rights, freedoms and guarantees must prove pertinent to the pursuit of the desired goals, and must safeguard other rights and assets to which the Constitution affords its protection); the principle of "requirability" (the measures must be necessary in order to attain the goals in question, because the legislator does not have any less restrictive means to achieve them at its disposal); and the principle of fair measure, or proportionality in the strict sense of the term (measures cannot be excessive or disproportionate in relation to the goals sought).

In this case, the decision to impose payment of compensation by an Air Force officer for unilateral termination of his contract within a certain period of time was designed to compensate for the large investment the state had made in his training, thereby protecting the collective interest. This means of achieving that result was, in the Court's view, proper and not inappropriate. A civilian pilot's training course is very expensive, and if no compensation were payable in the event that Air Force pilots unilaterally terminated their contractual bonds, or if its amount were negligible, it would pay to train in the Air Force and then terminate one's contract. The measure is thus not unnecessary. In addition, and contrary to the applicant's arguments, the amount of the compensation was not excessive, given the costs of the training and the benefits to the pilot.

The Court accordingly found no unconstitutionality in the norm.

Cross-references:

Constitutional Court:

- nos. 634/93, 04.11.1993; 155/09, 25.03.2009; 94/15, 03.02.2015 and 509/15, 13.10.2015.

Languages:

Portuguese.



Identification: POR-2016-1-006

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 24.02.2016 / **e)** 106/16 / **f)** / **g)** *Diário da República* (Official Gazette), 62 (Series II), 30.03.2016, 10734 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Penalty, automatic effect / Civil rights, loss / Interpretation in accordance with the Constitution.

Headnotes:

Norms contained within the Portuguese Nationality Law and respective Regulations to the effect that the prior conviction of somebody applying for Portuguese nationality of an offence that is punishable by a prison term of three years or more constitutes grounds for denying the application must be interpreted so as to take account of the legislator's judgement that criminal convictions included on a person's criminal record should lapse after a certain length of time and that the person should be legally rehabilitated accordingly.

If the norms were to render it impossible for those implementing the law to weigh up whether these grounds for denying an application for nationality should apply in a concrete case, or to take account of the time that had passed since the conviction in question, they would be unconstitutional. The norms as currently drafted do not mean that the conviction for a crime possesses an automatic effect (which would be prohibited by the Constitution.) Instead, they represent the exercise of the competence which the Constitution grants the ordinary legislator to define the criteria for access to Portuguese citizenship, subject to the limits imposed by the relevant International and Constitutional Laws.

The ordinary legislator's decisions over the length of time which must pass before the inclusion of penal convictions on a person's criminal record definitively lapses on the one hand, and to the objective criteria for acquiring nationality on the other, are apparently contradictory. The judgement the legislator made in the first of these two areas would appear to be neutralised by its judgement in the second. This contradiction needs to be brought into line with the Constitution and the fundamental right to nationality.

It would not be constitutionally admissible to interpret the norms in a way that ignored the legislator's judgement with regard to the lapse of penal convictions included on a person's criminal record and the person's ensuing legal rehabilitation.

In this case, the Constitutional Court handed down an interpretative decision, the terms of which the court *a quo* was then required to adopt in the concrete case in question.

Summary:

I. This concrete review case was brought before the Constitutional Court when the Public Prosecutors' Office was legally required to lodge an appeal against a decision in which the court *a quo* refused to apply norms on the basis of their unconstitutionality. At issue was the fundamental right to a nationality and the constitutional prohibition on requiring penalties to have automatic effects.

II. The Court began by noting that the norms in question could not mean that a conviction for a crime which is punishable by a prison term of three years or more has any automatic consequences. These norms form part of the normative regime governing the acquisition of Portuguese nationality – an area in which the Constitution requires the ordinary legislator to establish the criteria and prerequisites for the award and acquisition of citizenship. The Constitutional-Law nature of the right to gain access to citizenship means the legislator is obliged to create the conditions needed to exercise that fundamental right. Although it falls to the Portuguese State to define who its nationals are, the extent to which the ordinary legislator is free to shape the relevant legislation is conditioned by the imperatives derived from the content of the fundamental right to citizenship, a right of a personal nature, and is subject to the regime applicable to constitutional rights, freedoms and guarantees. The legislator is also under a duty to give due consideration to the other values enshrined in the Constitution, and must respect a number of international law principles, one of which is that where the grant of nationality is concerned, there must be an effective link between the individual and the politically organised community of which he or she is a part.

The circumstances which according to the law constitute grounds for denying requests for nationality constitute negative prerequisites for the right to acquire citizenship. One of them is any conviction capable of leading to a prison term of three years or more. Inasmuch as this negative prerequisite for denying applications for nationality is an *ex lege* effect of the legal norms in question, it is

not prohibited by the constitutional principle that penalties cannot have automatic consequences. As noted above, the Constitution expressly leaves it to the ordinary legislator to configure the legal bond implicit in citizenship. The legal definition of the respective criteria, prerequisites and regime is essential to the practical implementation of the fundamental right to citizenship. It is up to the legislator, not the Administration or the courts, to evaluate and select the criteria and prerequisites for awarding and acquiring Portuguese nationality.

In this particular case, the Court said that *prima facie*, the choice of an objective criterion (based on conviction for crimes whose penal characteristics were determined with regard to a given limit) that results from a general, abstract evaluation made by the legislator and not from a case-by-case judgment by those applying the norm, was justified.

It therefore found that there was no unconstitutionality in the norm, when interpreted in accordance with the Constitution.

Supplementary information:

One Justice concurred with the majority decision, but reached that conclusion by a different path.

Cross-references:

Constitutional Court:

- nos. 345/02, 11.07.2002; 154/04, 16.03.2004; 599/05, 02.11.2005 and 605/13, 24.09.2013.

Languages:

Portuguese.



Identification: POR-2016-1-007

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 19.03.2016 / **e)** 193/16 / **f)** / **g)** *Diário da República* (Official Gazette), 86 (Series II), 04.05.2016, 14168 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

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

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:

Parental responsibilities / Legal counsel, mandatory.

Headnotes:

Public authorities must only interfere with the right of parents and children to interact and spend time with each other and for the children to remain in the care of the parents as a last resort, with a view to safeguarding an even greater value, namely the protection of the children's physical and psychological integrity and their ability to develop their personality, when those assets are endangered by actions or omissions on the part of their parents. The Constitution guarantees that children cannot be separated from their parents unless the latter fail to fulfil their fundamental duties to the former, and then only by means of a court decision. Cases in which this right is challenged are subject to procedural requirements and formats that are more demanding than usual.

The general rule imposed under the principle of universal access to the law and the courts is that legal counsel is merely facultative. However, when the law does require that parties must be assisted by lawyers, that requirement is based on powerful reasons of a substantial nature. This is the case of judicial decisions in which the court determines whether, in the light of a failure to fulfil the fundamental duties to which the exercise of parental responsibilities is subject, children should be separated from their parents. The adversarial principle requires that the parties to proceedings must effectively participate in them, so the obligatory assistance of a lawyer may be justified in order to ensure a minimum degree of fair process and the possibility of a minimally effective defence. The principle of personal participation also requires that before the court takes its decision, parents be

properly assisted by someone in a position to decipher what is happening and clearly and fully explain the procedural consequences to them.

A norm in the Law governing the Protection of Children and Young Persons at Risk, stating that it was not obligatory for the parents of children or young persons in proceedings involving protecting children and promoting their interests and in which the minors may be entrusted to the care of a person chosen to be their adoptive parent, or of an institution with a view to their future adoption, to be awarded legal counsel from at least the day scheduled for the judicial debate was unconstitutional. It was in violation of the constitutional right to an adversarial process – a right derived in turn from the right to a fair trial, and in the case under deliberation from the right of parents and children to interact and spend time with each other, and for children to be entrusted to care of their parents, unless there are imperative reasons for this not to be the case.

Summary:

I. In a case linked to protecting children and promoting their interests, the Sintra Family Court ordered that seven underage siblings be placed in institutional care with a view to their future adoption, and that their parents be prevented from exercising their parental responsibilities. The measure was to remain in place until the issue of the adoption order. All of the minors' relatives were prevented from visiting them. The children's parents appealed this decision to the Lisbon Court of Appeal. After various procedural vicissitudes that included the non-admission of that appeal, and another appeal on the grounds of unconstitutionality that was upheld by the Constitutional Court, the Supreme Court of Justice concluded that the facts before it provided sufficient grounds for the care order and that the various instances involved had not breached the applicable provisions of the law.

In February 2016 the applicants in the present review case appended a Judgment which the European Court of Human Rights had handed down in relation to an application made by one of them (the mother) to the case file. Within the context of that application, the European Court of Human Rights was asked for interim measures involving the parents' right to visit those of their children who were in institutional care, and for contact to be restored between the siblings who had been entrusted to different institutions. The European Court of Human Rights upheld this application.

With regard to the primary substance of the application contesting the care order and the lack of access to the children, the Portuguese Republic

postulated an exception due to the “premature nature of the claim”, given that the present appeal on the grounds of unconstitutionality was still pending at the time. The European Court of Human Rights rejected this argument, and went on to consider the case solely on the basis of Article 8 ECHR, which it found had been violated.

In the Portuguese courts the ‘promotion and protection’ proceedings were classified as “especially complex” under the terms of the Law governing the Protection of Children and Young Persons at Risk (hereinafter, “LPCJP”).

II. The Constitutional Court declined to consider various issues posed by the applicants, on the grounds that they failed to meet both the requisite that questions of unconstitutionality must have been raised before the court *a quo* during the proceedings and in a procedurally appropriate manner, such that the court *a quo* had to consider them, and the requisite that the *ratio decidendi* for the court *a quo*'s decision had to have included the application of the norms or normative dimensions that were accused of being unconstitutional before it. The Constitutional Court recalled that appellants must set out a criterion for decision that is capable of being generalised, and this prerequisite can only be deemed to have been fulfilled when the interested party at least identifies the norm he or she alleges to be unconstitutional, mentions the constitutional norm or principle he or she considers to have been breached, and justifies clearly and precisely the constitutional-level reasons which they consider to invalidate the norm and should preclude the court from applying it.

However, the Constitutional Court did admit the following:

1. the question of the constitutionality of a number of LPCJP and Code of Civil Procedure norms, when interpreted such that in cases which could lead to the imposition of a measure as serious as placing a minor in the care of a person chosen to adopt him or her, or of an institution with a view to his or her future adoption, it was up to the interested persons or parties to refute the presumption of which they had been notified under the terms of the law;
2. the question of the constitutionality or otherwise of an LPCJP norm, when interpreted to mean that it was not obligatorily necessary for parents to be represented by legal counsel in proceedings linked to protecting children and promoting their interests where there is a possibility that the children may be placed in care for future adoption.

One of the consequences of the ‘promotion and protection’ measure in question was that the children’s parents were precluded from exercising their parental responsibilities, living and spending time with their children, and visiting or contacting them in any way. The measure thus affected both the parents’ fundamental right to live and spend time with their children and care for them, and the children’s fundamental right to live and spend time with their parents and be in their care. These rights that are included in the category of constitutional rights, freedoms and guarantees. Any restrictions on them must be imposed by law. The Constitution also guarantees that parents can only be separated from their children against the former’s will by decision of a court.

Accordingly, because the norm before it failed to ensure that parents in the situation described in the present case were represented by counsel, which would have been necessary for there to be fair process in the concrete case, and that the ensuing care order affected the parents and the children’s fundamental rights, the Constitutional Court found it to be unconstitutional.

Cross-references:

Constitutional Court:

- nos. 91/09, 11.02.2009; 252/97, 18.03.1997; 497/89, 13.07.1989; 498/99, 21.09.1999; 245/97, 18.03.1997; 243/13, 10.05.2013 and 501/04, 12.07.2004.

European Court of Human Rights:

- *Soares de Melo v. Portugal*, no. 72850/14, 16.02.2016;
- *Kutzner v. Germany*, no. 46544/99, paragraph 56, 26.02.2002, *Reports of Judgments and Decisions* 2002-I 2002 I;
- *Kříž v. Czech Republic* (Dec.), no. 26634/03, 29.11.2005;
- *Pontes v. Portugal*, no. 19554/09, paragraph 67, 10.04.2012 (see *Soares de Melo v. Portugal*, paragraph 65).

Languages:

Portuguese.



Romania

Constitutional Court

Important decisions

Identification: ROM-2016-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 20.01.2016 / **e)** 22/2016 / **f)** Decision on the objection of unconstitutionality against the provisions of the Law supplementing Law no. 393/2004 on the Statute of local elected representatives / **g)** *Monitorul Oficial al României* (Official Gazette), 160, 02.03.2016 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

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

3.21 General Principles – **Equality.**

3.23 General Principles – **Equity.**

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

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

Keywords of the alphabetical index:

Justice, principle / Mayor, remuneration.

Headnotes:

A provision which provides for the payment of old-age benefits in respect of mayors, deputy mayors, presidents and vice-presidents of county councils but not of other local elected officials, does not meet the requirements of clarity, precision and foreseeability in terms of legal nature of such benefits, it creates an unacceptable unequal legal treatment between local elected representatives, and also calls into question the observance by the legislator of the constitutional principle of justice.

Summary:

I. On the basis of Article 146.a of the Constitution and of Article 15.1 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, the Romanian Government referred to the Constitutional Court an objection of unconstitutionality regarding the provisions of the Law supplementing Law no. 393/2004 on the

Statute of local elected representatives. In essence, the legislative proposal aimed to establish some old-age benefits (hereinafter, “allowance”) in respect of mayors, deputy mayors, presidents and vice-presidents of county councils. To qualify for this allowance, the right holder must fulfil three conditions: standard pension age; at least one full mandate, and he or she must not have been irrevocably sentenced for committing, as mayor, vice-mayor, president or vice-presidents of county councils, corruption offences from amongst those provided for in Chapter I – Corruption Offences under Title V – Corruption and Service Offences included in the special section of Law no. 286/2009 on the Criminal Code, with subsequent amendments and supplementations. As grounds for the objection of unconstitutionality, it was argued that the wording of the impugned law is vague, unclear, ambiguous, imprecise and unpredictable because it does not mention the way in which the allowance is granted and it does not establish to what extent a person who has held over time two or more of the positions for which the allowance is granted is eligible for allowance for each of those positions. It was further claimed establishes a regime of privileged treatment for mayors, deputy mayors, presidents and vice-presidents of county councils which is deeply immoral, whereas persons who have been convicted for corruption offences in exercising public functions other than the four specifically listed positions will qualify for the allowance.

II. Having examined the objection of unconstitutionality, the Court found as well founded the objection based on the fact that the law is not clear, precise and predictable as regards the calculation of allowances granted to persons who held over time two or more of the positions for which the allowance is granted. Furthermore, the latter concept, as detailed in impugned law, does not fall, from a conceptual point of view, in the legislative system, nor is it defined therein. The law also does not define clearly its regulatory scope. The wording of the law does not appear to indicate whether this text relates only to mayors, deputy mayors, presidents and vice-presidents of county councils that have been democratically elected, that is, after the revolution of 22 December 1989, or does it also apply to those holding these positions without being democratically elected by citizens in the regime preceding the revolution of 22 December 1989.

The Court also noted that, under Law no. 57/1968 on the organisation and functioning of People’s Councils, republished in Official Gazette no. 96 of 3 October 1980, People’s Councils were composed of members elected by universal, equal, direct and secret ballot in electoral constituencies, one Deputy for each constituency, from amongst citizens with voting rights, who had reached the age of 23, without distinction

based on nationality, race, gender or religion (Articles 1 and 43); People's Councils were either county councils or Bucharest councils, with a term of 5 years, or of the cities, Bucharest sectors, towns, communes, with a terms of 2 years and a half (Article 44.1), whilst the chairs of the committees and of executive offices of the People's Councils of cities, towns and communes were at the same time mayors of such cities, towns and communes (Article 56). However, all these aspects demonstrate only the existence of administrative structures elected for managing local issues, which had no democratic legitimacy. These structures were not attached to democratic values, aiming at "strengthening the Socialist system, enshrining socialism principles in all localities of the country" (Article 1.3), where their activity was taking place "under the direction of the Romanian Communist Party, the leading political force of the entire society" (Article 2). That being so, the Court found that there was a terminological equivalence, but not also an equivalence in terms of democratic legitimacy and powers, between the position of a mayor before and after 1989, whilst, by contrast, the positions of president, first vice-president or vice-president of the Executive Board of County People's Council or first vice-president or vice-president of the Executive Board/ Committee of the People's Council at cities, towns or communes level, as the case may be, have no equivalence in terminology or in terms of democratic legitimacy or powers with the position of the president/vice-president of the county council or with the position of deputy mayor. Moreover, it is questionable whether a retirement allowance may be paid to People's Board members by the Romanian State by reason of the principles governing the Constitution of 1991, whereas that would mean to disregard "justice" as the supreme value of the Romanian State laid down in Article 1.3 of the Constitution.

Regarding the unconstitutionality issues with regard to Article 16.1 of the Constitution which enshrines the principle of equal treatment, the Court held that, as regards the category of persons elected by the electorate, namely the President of Romania, the parliamentarians and the local elected officials, it is the exclusive right of the legislator to grant such allowances, as it has the power, pursuant to Article 61.1 of the Constitution, to establish such allowances only in respect of one or other of the three subcategories listed. However, when deciding that the allowance is granted to a certain subcategory, the legislator may not make any distinction within the respective subcategory as regards the entitlement of one or the other of those included in the subcategory concerned to such allowance, but in breach of Article 16.1 of the Constitution. Thus, the Court found that that by granting that allowance only to local elected representatives (mayors, deputy mayors,

presidents and vice-presidents of county councils), the legislator has infringed Article 16.1 of the Constitution, setting a differentiated legal treatment within the same legal subcategory.

The Court further found that the impugned law has increased the expenditure foreseen in the State Budget Law for 2016, and that would have not caused any issue of constitutionality if the expenditure set forth in the examined law had been included in the State budget for 2016. But, the law was adopted after the enactment of the State Budget Law, and no correlation had been made between the provisions of the two laws. The indication in the examined law of the fact that "the old-age benefits shall be granted from the State budget, through the budget of the Ministry of Regional Development and Public Administration" is only a formal indication of the source of funding, which, however, does not meet the requirements of the constitutional text of reference, namely those of Article 138.5 of the Constitution, which requires that the indicated source of funding be effectively able to cover the expenditure under the terms of the annual budget law.

In conclusion, the Court found that law subject to constitutional review violated Article 1.5 of the Constitution, since the rules therein did not fulfil the requirements of clarity, precision and foreseeability in terms of the legal nature of the "old-age benefits", the scope of its beneficiaries and the method for determining and calculating the allowance. Moreover, the law was contrary to the constitutional provisions contained in Articles 16.1 and 138.5, whereas, on the one hand, it created an unacceptable unequal legal treatment between local elected representatives and, on the other hand, it established the budgetary expenditure without establishing an actual funding source, contrary to the requirements of certainty and budgetary predictability inherent in the regulatory content of the constitutional text referred to.

III. The Court unanimously upheld the objection of unconstitutionality raised and stated that the provisions of the provisions of the Law supplementing Law no. 393/2004 on the Statute of local elected representatives are unconstitutional.

Languages:

Romanian.



Identification: ROM-2016-1-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 16.02.2016 / **e)** 51/2016 / **f)** Decision on the exception of unconstitutionality of the provisions of Article 142.1 of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 190, 14.03.2016 / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

- 3.9 General Principles – **Rule of law.**
- 3.10 General Principles – **Certainty of the law.**
- 3.11 General Principles – **Vested and/or acquired rights.**
- 3.12 General Principles – **Clarity and precision of legal provisions.**
- 3.13 General Principles – **Legality.**

Keywords of the alphabetical index:

Law, precision.

Headnotes:

Taking into account the intrusiveness of technical surveillance measures, it is imperative that they are carried out on the basis of a clear legislative framework that is precise and foreseeable for persons subjected to such measures, similar to criminal prosecution bodies and the courts. Therefore such measure can be carried out by the prosecutor and criminal investigation bodies and by trained officers working in the police but not by “other specialised State organs” provided for in Article 142.1 of the Code of Criminal Procedure. Attributing these powers also to “other specialised State organs” is unconstitutional, in that it lacks sufficient clarity, precision and foreseeability so as to allow legal subjects to understand which of these organs are empowered to carry out such measures with the consequent violation of the fundamental rights provided by Article 26 of the Constitution (personal, family and private life) and Article 28 of the Constitution (secrecy of correspondence) and the provisions of Article 1.3 of the Constitution according to which Romania is a State governed by the rule of law in which human rights shall be guaranteed.

Summary:

I. On the basis of Article 146.d of the Constitution, the Constitutional Court has been requested to assess the constitutionality of the provisions of Article 142.1 of the Code of Criminal Procedure, which read as follows:

“The prosecutor shall enforce an electronic surveillance measure or may order that this be

enforced by the criminal investigation body or trained personnel working in the police, or by other specialised state bodies”.

It is argued that the impugned text violates the constitutional provisions of Article 1.5 of the Constitution on the Romanian State, Article 20 of the Constitution relating to international treaties on human rights, Article 21 of the Constitution on free access to the courts, Article 53 of the Constitution on the restriction of certain rights or freedoms, as well as the provisions of Articles 6 and 8 ECHR concerning the right to a fair trial, and the right to respect for private and family life. It has been shown that the impugned phrase has enabled the Romanian Intelligence Service, which is an authority with responsibilities only in the area of national security and not in the area of prosecution, to carry out this activity to enforce the technical surveillance warrant.

II. Having examined the exception of unconstitutionality, the Court first established the legal framework applicable to special methods of surveillance, the conditions in which the Judge for Rights and Liberties orders the technical surveillance, the offences for which technical surveillance can be ordered, the procedure for issuing the technical surveillance warrant, and the enforcement of the technical surveillance warrant.

The Court concluded that acts carried out by the State bodies under the second sentence of Article 142.1 of the Code of Criminal Procedure are part of the evidentiary process taken as the basis for reporting on technical surveillance activities, which constitutes evidence. For that reason, no agency other than criminal prosecution bodies may take part in such activities. The latter are those specifically mentioned in Article 55.1 of the Code of Criminal Procedure, namely: the prosecutor, the criminal investigation bodies of the judicial police and the special criminal investigation bodies. However, the legislator has included in Article 142.1 of the Code of Criminal Procedure, besides the prosecutor, also the criminal investigation body and the trained personnel working in the police and in other specialised State bodies.

These specialised State bodies have not been defined elsewhere in either explicit or indirect manner in the Code of Criminal Procedure. Likewise, the criticised norm does not provide for a specific scope to their activity, although there are numerous specialised bodies and agencies in Romania whose work is carried out subject to special regulations. And so, apart from the Romanian Intelligence Service to which the authors of the exception refer and whose powers, according to Articles 1 and 2 of Law no. 14/1992 on the organisation and functioning of the Romanian Intelligence Service,

published in the Official Gazette of Romania, Part I, no. 33 of 3 March 1992, and Articles 6 and 8 of Law no. 51/1991 concerning national security of Romania, republished in the Official Gazette of Romania, Part I, no. 190 of 18 March 2014, only concern national security, excluding those of criminal investigation, as established under Article 13 of Law no. 14/1992, there are also other agencies having responsibilities in the area of national security, as well as a variety of specialised State bodies with responsibilities in various other fields such as, by way of example, the National Environmental Guard, the Forest Guards, the National Authority for Consumer Protection, the State Inspectorate in Constructions, the Competition Council, or the Financial Surveillance Authority, none of which has any duties related to criminal investigation. In light of these arguments, the Court holds that the phrase “or other specialised State organs” appears to lack sufficient clarity, precision and foreseeability as to allow legal subjects to understand which of these organs are empowered to carry out measures with so high a degree of intrusion into the private lives of individuals.

The Court further finds that no regulation under the national legislation in force, except for Article 142.1 of the Code of Criminal Procedure, does not contain any rule whatsoever affording competencies to some other State body, outside the field of criminal prosecution, to carry out interceptions and to enforce a technical surveillance warrant, respectively. Starting from the particularities of the instant case under review, the Court stated that regulation in this area is only possible by statutory law and not by lower ranking regulations which are adopted by administrative organs instead of the legislative authority, and are characterised by a higher degree of instability or inaccessibility.

Taking into account these arguments and also the intrusiveness of the technical surveillance measures, the Court found that it is imperative to have them carried out on the basis of a clear legislative framework that is precise and foreseeable for the person who is subject to this measure just like for the criminal prosecution bodies and the courts. Otherwise, it would lead to the possibility of discretionary action in violation of certain fundamental rights which are essential in a State governed by the rule of law: the respect for personal, family and private life, and the secrecy of correspondence. It is widely accepted that the rights set forth in Articles 26 and 28 of the Constitution are not absolute rights, yet limitation of those rights must be in compliance with Article 1.5 of the Constitution, which requires a high degree of precision in the terms and concepts used, given the nature of the fundamental rights affected by the limitation. Consequently, the constitutional standards of protection for the personal, family and private life and for the secrecy of correspondence

require that such limitations be achieved through a regulatory framework that determines in a clear, precise and foreseeable manner which bodies shall be authorised to carry out operations that interfere with the sphere of constitutionally protected rights.

The Court therefore held that the legislator’s choice is justified insofar as it concerns the technical surveillance warrant being enforced by the prosecutor and criminal investigation bodies, which are judicial bodies according to Article 30 of the Code of Criminal Procedure, and by trained officers working in the police, since these may have received the assent to act as judicial police officers subject to Article 55.5 of the Code of Criminal Procedure. Nevertheless, this option is not justified where it relates to the phrase “other specialised State organs” included under Article 142.1 of the Code of Criminal Procedure, without further specification anywhere in the Code of Criminal Procedure or other special laws.

For all these reasons, the Court found unconstitutional the phrase “or other specialised State organs” contained in the provisions of Article 142.1 of the Code of Criminal Procedure in relation to the provisions of Article 1.3 in terms of the rule of law, i.e. its component relating to the obligation to ensure the citizens’ rights, and Article 1.5 establishing the principle of legality.

On what concerns the effects of this decision, the Court recalls the *erga omnes* binding, non-retrospective nature of its decisions, as provided for in Article 147.4 of the Constitution. It means that, since normative acts enjoy a presumption of constitutionality throughout their period of effectiveness, this decision is not applicable in respect of the cases settled by means of a final judgement before the date of its publication, though it shall be duly applicable in cases still pending before the courts. In what concerns final judgments, this decision may serve as grounds for a judicial review under Article 453.1.f of the Code of Criminal Procedure in the instant case as well as in cases where similar exceptions of unconstitutionality have been raised before the date of its publication in the Official Gazette of Romania, Part I.

III. Two judges formulated dissenting opinions.

Languages:

Romanian.



Russia

Constitutional Court

Important decisions

Identification: RUS-2016-1-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 25.02.2016 / **e)** 6 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), no. 51, 11.03.2016 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Death penalty, sentence / Life imprisonment, sentence.

Headnotes:

Denying women accused of criminal offences the right to a jury trial is unconstitutional.

Summary:

I. Until such time as it is abolished, the death penalty may be prescribed by federal law as exceptional punishment for especially grave crimes against life, with the accused having the right to have his case considered in a law court by jury.

The Code of Criminal Procedure provides for trial by jury in cases where the accused faces a sentence of life imprisonment.

Under an amendment to the Code of Criminal Procedure, there has been a change in judicial powers and responsibilities with the result that, in a number of instances, cases which used to be handled by the Russian Federation regional courts at first instance are now tried by the federal district courts.

Under Russia's Criminal Code, women cannot be sentenced to death or life imprisonment.

Criminal proceedings against women therefore take place solely in the district courts. Juries exist only in the regional courts. There are no juries in district courts. Women accordingly do not have the right to a jury trial.

The applicant is a women accused of murdering her daughter (the punishment for this offence is life imprisonment). She requested a jury trial but was refused.

According to the applicant, the provision in question is contrary to the Constitution of the Russian Federation as it deprives women defendants of the right to have their case tried by a jury. She points out that, under the Constitution, Russian citizens are all equal before the law and the courts. Men and women have the same rights and freedoms and equal opportunities to exercise them.

II. The Russian Federation Constitutional Court ruled that any differences in legal regulation must respect the balance of constitutional values and provide the safeguards enshrined in the Constitution.

The Court held that the provision in question was in breach of the Constitution.

According to the Constitutional Court, denying women a jury trial "is not in keeping with the principle of legal equality and therefore leads to discrimination and restriction of their right to judicial protection".

It ordered the legislator to amend the legislation so as to afford women the right to a jury trial.

Languages:

Russian.



Identification: RUS-2016-1-002

a) Russia / **b)** Constitutional Court / **c)** / **d)** 19.04.2016 / **e)** 12 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), no. 95, 05.05.2016 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

2.2.1.4 Sources – Hierarchy – Hierarchy as between national and non-national Sources – **European Convention on Human Rights and constitutions**.

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

Keywords of the alphabetical index:

Custodial sentence / Alternative sanctions.

Headnotes:

Decisions of the European Court of Human Rights are to be enforced with due regard to the supremacy of the Russian Constitution in the domestic legal system.

The European Convention on Human Rights and decisions of the European Court of Human Rights interpreting the Convention do not take precedence over the national Constitution. Under the Constitution of the Russian Federation, prisoners do not have the right to vote. The European Court of Human Rights decision does not therefore apply in this case.

Summary:

I. On 4 July 2013, the European Court of Human Rights delivered the final judgment in “*Anchugov and Gladkov v. Russia*”. In this judgment, it found Russia to be in violation of the Convention for imposing an automatic, blanket ban on prisoners’ voting rights.

The ban is provided for in Article 32 of the Russian Federation Constitution which states that “citizens held in places of deprivation of liberty pursuant to a court sentence shall be deprived of the right to vote”.

When called upon to implement this decision, therefore, the Russian Ministry of Justice asked the Constitutional Court to verify its compatibility with the Russian Constitution.

II. The Court ruled that decisions of the European Court of Human Rights are to be enforced with due regard to the supremacy of the Russian Constitution in the domestic legal system.

The European Convention on Human Rights and decisions of the European Court of Human Rights interpreting the Convention do not take precedence over the national Constitution. Under the Constitution

of the Russian Federation, prisoners do not have the right to vote. The European Court of Human Rights decision does not apply in this case, therefore.

The European Court of Human Rights decision does not apply in the present case as S. Anchugov and V. Gladkov were in detention at the time of the elections. It is, however, open to the legislator, whilst maintaining this distinction between two categories – custodial sentences and alternative sanctions – to make adjustments to the composition of the categories and to reduce the penalty for certain offences, potentially causing them to move from one category to the other. In Russia, persons who receive non-custodial sentences retain their right to vote.

Cross-references:

European Court of Human Rights:

- *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, 04.07.2013.

Languages:

Russian.



Serbia

Constitutional Court

Important decisions

Identification: SRB-2016-1-001

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 29.10.2015 / **e)** UŽ-7936/2013 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), no. 96/2015 / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

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

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

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

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

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

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

Keywords of the alphabetical index:

Remedy, non-pecuniary damage / Registry, birth, death / Hospital, newborn, missing.

Headnotes:

Given the principle of legal certainty in penal law, it would be questionable to adopt measures and establish mechanisms to “open” criminal cases that had been time-barred.

A civil complaint for compensation arising from a violation of “a personal right” may be recognised as such violation and compensation for the suffered non-pecuniary damage may be provided.

Summary:

I. The applicant (G.R.) filed a constitutional appeal alleging several violations: the right to a legal remedy (Article 36.2 of the Constitution), rights of the child (Article 64.2 of the Constitution), right to respect for

family life (Article 8 ECHR), and the right to an effective legal remedy (Article 13 ECHR).

In the constitutional appeal, the applicant describes the circumstances surrounding the premature birth and death of his twins. Doubting the credibility of the statement of their death, he filed several requests with various institutions to learn about it.

II. The Constitutional Court examined the impugned acts as well as the competent state bodies’ actions to look into the “missing babies” including:

- the National Assembly had set up a parliamentary committee to confirm the cases of missing new-borns from maternity hospital wards in several towns;
- the Ombudsman produced a report on cases of “missing babies” with recommendations thereto;
- the National Assembly set up a working group to draft a law aimed at creating formal and legal conditions for competent bodies to take action upon notifications of new-borns missing from maternity hospital wards.

The Constitutional Court noted that the above working group of the National Assembly reported that there is no constitutional possibility to prosecute earlier cases of missing new-borns from maternity hospitals according to subsequently adopted laws. Also, there is no basis to amend the provisions of the Criminal Law and the Law on Criminal Procedures, the Law on Police and the Law on Ministries. In the area of healthcare, the regulations concerning registers of births and deaths should not be amended, because they adequately regulate the acting of administrative bodies.

Moreover, the Constitutional Court also referred to the judgment of the European Court of Human Rights in the case of *Zorica Jovanović v. Serbia* (no. 21794/08, 26 March 2013). The case concerns the alleged death of a healthy new-born (applicant’s son), who was born and died at a State-run hospital. The applicant alleged that her son did not die, but that he was unlawfully abducted during her stay at the hospital and given for adoption. The body of her son was never released to her or her family. They did not receive an autopsy report or a notification when and where the baby was allegedly buried. The European Court of Human Rights found that the applicant suffered a violation of the right to respect for her family life on account of the State’s continuing failure to provide her with credible information as to the fate of her son.

Assessing whether Article 64.2 of the Constitution was violated, the Constitutional Court noted that the right is guaranteed to a child and a constitutional appeal may be lodged on behalf of the child by its legal representative. Therefore, the constitutional appeal in this part does not meet the procedural requirements.

Regarding allegations that the right to respect for family life was violated, the Constitutional Court considered the applicant's statement that the State had failed to fulfil its positive obligation and "conduct an effective investigating procedure of relevance for family life". The applicant supported his allegations with the European Court of Human Rights' ruling from the judgment in *Zorica Jovanović v. Serbia*.

Applied broadly to Article 8 ECHR in respect of the State's positive obligations to ensure the respect for family life, the Constitutional Court, in conformity with Article 18.3 of the Constitution, has applied the aforementioned standpoints to the present case.

The Constitutional Court firstly concluded that the facts and circumstances of the present constitutional appeal are not in its essence sufficiently similar to those in the stated case of the Strasbourg court. Namely, the applicant's wife prematurely gave birth to two boys who, immediately after delivery, and for the purpose of being provided adequate healthcare, were sent to a specialised unit for new-borns, which treats babies in neonatal period who have certain life-threatening medical conditions. At the applicant's request, the competent bodies have established that the delivery, case-history, clinical diagnosis, discharge list, transference and the reception of the new-borns, as well as the transportation of the corpses receipt were registered in adequate registers with all relevant data, and that no irregularities have been found in the keeping of registers.

Regarding the applicant's allegations that his criminal complaint was dismissed without adequate investigation, the Constitutional Court noted that the rejection of the request to initiate criminal proceedings was a legal consequence of the applicant's failure to comply with the court's order. This is in regards to the fact that the applicant neither in his request stated all legally prescribed elements nor offered evidence, which is a legally envisaged prerequisite for the court to initiate an investigation.

Considering the above, while acknowledging the extreme sensitivity of the issues, the Constitutional Court deemed groundless the applicant's allegations of a violation of the right to respect for family life from Article 8 ECHR.

Regarding the violation of the right to a legal remedy under Article 36.2 of the Constitution and Article 13 ECHR, the Constitutional Court observed that the statute of limitation to the criminal prosecution in *Zorica Jovanović v. Serbia* took place as a consequence of the applicant's own passivity within the legally prescribed time-frames. It was established by law precisely with the aim of ensuring respect for the principle of legal certainty in penal law. In the present case, rejection of the applicant's request for conducting an investigation was a direct consequence of the applicant's omission regarding the conditions prescribed by procedural law.

According to the Constitutional Court, which was noted by the European Court of Human Rights in the said judgment, a civil complaint for compensation of damages due to a violation of "a personal right" which, according to the case-law, also includes a violation of the right to respect for family life, may recognise a violation of "a personal right" and provide compensation for the suffered non-pecuniary damage.

Bearing in mind the aforementioned, the Constitutional Court deemed groundless the allegations that the right to a legal remedy groundless was violated.

Cross-references:

European Court of Human Rights:

- *Zorica Jovanović v. Serbia*, no. 21794/08, 26.03.2013, *Reports of Judgments and Decisions* 2013.

Languages:

English, Serbian.



Slovakia

Constitutional Court

Important decisions

Identification: SVK-2016-1-001

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 04.11.2015 / **e)** PL. ÚS 14/2014 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), 58/2012 / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 3.20 General Principles – **Reasonableness**.
 3.21 General Principles – **Equality**.
 3.22 General Principles – **Prohibition of arbitrariness**.
 3.25 General Principles – **Market economy**.
 4.10 Institutions – **Public finances**.
 4.10.7 Institutions – Public finances – **Taxation**.
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state**.

Keywords of the alphabetical index:

Income tax, minimum / Entrepreneur, person, natural or legal / Enterprise, profit, loss, burden, liquidation / State obligation, competition.

Headnotes:

The constitutional principle of the protection of economic competition does not entail the State's obligation to preserve unsuccessful entrepreneurs from being closed down because loss-making entrepreneurs inevitably leave markets in regular economic competition. It follows that the duty to pay a minimum income tax imposed upon entrepreneurs that make a tax loss does not run counter to the principle of protection of economic competition, even if it leads to liquidation of such entrepreneurs.

Summary:

I. The case originated in a motion submitted by 35 members (hereinafter, "MPs") of the National Council (hereinafter, the "Parliament"), who challenged the constitutional conformity of several provisions of Law no. 595/2003 Coll. on Income Tax.

The provisions in question stipulated that legal-entity entrepreneurs were obliged to pay the minimum income tax (hereinafter, "MIT") for assessment periods in which their real income taxes were lower than the MIT or when they made a tax loss. The sum of the paid MIT exceeding the real income tax could be offset against income taxes in three consecutive assessment periods.

The Members of Parliament argued that these provisions detrimentally affected loss-making or low profit-making entrepreneurs, as the money paid to settle the MIT might otherwise be used for their businesses. In some instances, the duty to pay the MIT could lead to a liquidation of such entrepreneurs. Moreover, the MIT was prescribed only for legal entities, that are corporations which were treated differently from legal entities that are natural-persons. The Members of Parliament also claimed that the MIT itself could not serve its aim to deter entrepreneurs from evading the income tax, and it was imposed upon all legal entities irrespective of whether they avoided the income tax. This legal framework breached the constitutional requirement of proportionality for the reason that it put an excessive burden on legal-entity entrepreneurs.

Based on these arguments the Members of Parliament contended that the MIT was not in line with the Constitution, which enshrines the principle of protection of economic competition, the right to engage in entrepreneurial activity, and according to which all restrictions on fundamental rights must be applied equally to all similar cases in a manner that safeguards the essence of these rights, while any restrictions must also be aimed at the intended purpose.

II. The Constitutional Court reasoned that Article 55 of the Constitution, according to which the state protects economic competition based on the principles of a socially and ecologically oriented market economy, could not be interpreted as obliging the State to preserve unsuccessful entrepreneurs from closing down. Loss-making entrepreneurs inevitably leave markets in regular economic competition, so the mere possibility of an entrepreneur being put into liquidation due to paying the MIT could not justify the conclusion that the MIT violated the respective constitutional principles. It should be borne in mind that constitutional principles, which have to be respected when passing or applying laws, are not constitutional rights, and that they do not guarantee the right to enter or participate in economic competition. The ideal or absolute economic competition does not exist, as it only takes place on the so-called relevant markets which are distinguished by location, time or traded goods.

Various entrepreneurs enter into relevant markets regardless of their legal form, and it is possible that only corporations are present in some of the relevant markets. Thus, the Court opined, the restriction of the MIT to legal entities did not contravene the relevant constitutional principle either.

The Constitutional Court went on to say that the MIT was in line with the right to engage in entrepreneurial activity according to Article 35 of the Constitution. The reason is that the exercise of this right also involved the responsibility for its possibly unsuccessful outcome. The former right could be claimed only within the limits of the laws that execute it (Article 51 of the Constitution), which conform to the Constitution if they represent reasonable means to achieve a legitimate aim and if they are not manifestly disproportionate to this aim. The Court opined that the purpose of the MIT to prevent tax avoidance was legitimate, a reasonable means to achieve this objective, and used in other countries. The rate of the MIT (from 480 euros up to 2 880 euros, dependant on gross annual income) was several times lower than the average income tax in the Slovak Republic. The MIT could not have a chilling effect on entrepreneurs, as the reason for their activity was to gain profit, not to make a loss. The challenged provisions were therefore not disproportionate to their intended purpose.

In the Court's opinion, the distinction between natural persons and corporations with regard to the duty to pay the MIT was neither arbitrary nor discriminatory, due to the fact that natural-persons are economically more vulnerable than corporations.

The Court also addressed the Members of Parliament's objection that the procedural rules had been violated in the course of passing the Law by amending the draft proposed by the government directly in Parliament without the ministries having the opportunity to comment on these amendments. The Court reasoned that Parliament is the sole legislative body in the Slovak Republic (Article 72 of the Constitution) and as such it has the competence to amend any proposed draft legislation.

For all these reasons, the Court dismissed the motion.

Supplementary information:

One of the judges filed a concurring opinion in which he stated that the reasoning of the decision was too strict concerning the constitutional conformity of levying various fees and deductions. However, this had no effect on the correctness of the decision in the case at hand.

Cross-references:

Constitutional Court:

- no. PL. ÚS 13/97, *Bulletin* 1998/2 [SVK-1998-2-007].

Languages:

Slovak.



South Africa Constitutional Court

Important decisions

Identification: RSA-2016-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 23.09.2015 / **e)** CCT 184/14 / **f)** City of Tshwane Metropolitan Municipality v. Link Africa (Pty) Limited and Others / **g)** www.constitutionalcourt.org.za/Archimages/23391.pdf / **h)** [2015] ZACC 29; CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Common law, constitutional application / Telecommunication, licence, extent / Property right, limitation / Property, public, use / Telecommunication, network, modification, consent.

Headnotes:

When a statutory right must be exercised with “due regard to applicable law”, the contours of the right should be interpreted, so far as possible, so that they are in line with the common law.

Summary:

I. The respondent, Link Africa, is a licence holder under the Electronic Communications Act 36 of 2005 (hereinafter, the “Act”). In November 2013, it notified the applicant, City of Tshwane Metropolitan Municipality, of its decision to install fibre optic cable networks in the City’s existing underground infrastructure.

The applicant sought a declaration that Section 22 of the Act required the respondent to obtain the applicant’s consent before the installation and an order directing the respondent to remove cables

already installed. Alternatively, the applicant challenged the constitutional validity of certain provisions of the Act on the basis that they allow for arbitrary deprivation of property (in violation of the right to property protected by the Bill of Rights) and force municipalities to accept services from licence holders contrary to a procurement provision in the Constitution.

The High Court held that Section 22 does not require the landowner’s consent before a licence-holder can undertake actions authorised by that Section. Further, the High Court held that the Act does not authorise arbitrary deprivation of property and that, on the facts of this case, the respondent’s proposed conduct would not constitute a deprivation; rather, the proposed installation would benefit business and City residents.

The High Court and the Supreme Court of Appeal dismissed the applicant’s application for leave to appeal.

The applicant advanced the same arguments in the Constitutional Court as it did in the High Court. There were a number of intervening parties, including all holders of licences in terms of the Act and a private landowner.

II. Cameron J and Froneman J wrote the majority judgment (with Khampepe J, Madlanga J, Theron AJ, and Molemela AJ concurring). The majority held that the Act must be interpreted in accordance with the spirit, purport and object of the Bill of Rights in a manner that preserves its constitutional validity where possible. The majority looked at Section 22 of the Act which provided rights to licence holders that were to be exercised with “due regard...to applicable law and the environmental policy of the Republic”. By interpreting Section 22 in line with the common law rules regulating servitudes over land, the majority held that any deprivation of property would not be arbitrary. The majority held that the Act did allow a licence holder to exercise powers without the prior consent of a property owner but that this did not mean that it allowed an arbitrary deprivation of property.

III. The minority judgment, written by Jafta J and Tshiqi J (with Moseneke DCJ and Nkabinde J concurring) held that Section 22 was constitutionally invalid. The minority judgment found that there was no requirement for a licence holder to obtain consent from the property owner before exercising its rights under the Act. The minority would hold that the provision is constitutionally invalid because it permitted a licence holder to enter onto another’s property without consent and also allows arbitrary

deprivation of property. The minority disagreed with the majority judgment's interpretation of the common law. It also stated that the majority did not take the correct approach to adjudicating a constitutional challenge based on a right in the Bill of Rights.

The appeal was dismissed and the applicant was ordered to pay the respondent's costs.

Supplementary information:

Legal norms referred to:

- Sections 34, 25.1, 151, 155, 156 and 217.1 of the Constitution of the Republic of South Africa;
- Sections 22 and 24 of the Electronic Communications Act 36 of 2005;
- Section 3 of the Expropriation Act 63 of 1975.

Cross-references:

Constitutional Court:

- *Cool Ideas 1186 CC v. Hubbard and Another* [2014] ZACC 16;
- *Msunduzi Municipality v. Dark Fibre Africa* [2014] ZASCA 165;
- *Willoughby's Consolidated Co Ltd v. Copthall Stores Ltd* 1913 AD 267;
- *Hollman and Another v. Estate Latre* 1970 (3) SA 638 (A);
- *Motswagae and Others v. Rustenburg Local Municipality and Another* [2013] ZACC 1;
- *Linvestment CC v. Hammersley and Another* [2008] ZASCA 1;
- *Van Rensburg v. Coetzee* 1979 (4) SA 655 (AD);
- *Mobile Telephone Networks (Pty) Ltd v. SMI Trading CC* [2012] ZASCA 138;
- *Shoprite Checkers (Pty) Limited v. Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape and Others* [2015] ZACC 23;
- *Mkontwana v. Nelson Mandela Metropolitan Municipality* [2004] ZACC 9;
- *Mobile Telephone Networks (Pty) Ltd v. SMI Trading CC* [2012] ZASCA 138.

Languages:

English.



Identification: RSA-2016-1-002

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 29.09.2015 / **e)** CCT 214/15 / **f)** Kevin John Eke v. Charles Henry Parsons / **g)** <http://41.208.61.234/uhtbin/cgiisirs/20160126120438/SIRSI/0/520/J-CCT214-14> / **h)** [2015] ZACC 30; CODICES (English).

Keywords of the systematic thesaurus:

5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings**.
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
 5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing**.

Keywords of the alphabetical index:

Access to courts, meaning / Court order, final, court's power to vary.

Headnotes:

Where a settlement agreement has been made an order of court, the issues of the underlying dispute become *res judicata* and liability would be determined from the settlement order itself.

Courts must not be mechanical in their adoption of terms of a settlement agreement into a court order, the terms of must be scrutinised to ensure that court orders so granted are competent.

A court order must bring finality to the dispute, be framed in unambiguous terms and be capable of enforcement.

Summary:

I. The applicant, Mr Kevin Eke, purchased a member's interest in a close corporation from the respondent, Mr Charles Parsons. When Mr Eke failed to pay the full purchase price, Mr Parsons instituted an action against him in the Eastern Cape High Court, Port Elizabeth (High Court) for the balance of the purchase price in the sum of R5 million. After Mr Eke entered an appearance to defend, Mr Parsons applied for summary judgment, stating that Mr Eke had no valid defence to the action. Prior to the hearing, the parties reached a settlement agreement which was then made an

order of court, and the summary judgment application was postponed indefinitely.

In terms of the order, Mr Eke agreed to pay R10.3 million to Mr Parsons. The order also stated that if Mr Eke breached any of his obligations, Mr Parsons would be entitled to apply to re-enrol and set down the summary judgment application to claim the full outstanding amount. It was also recorded that Mr Eke would not be entitled to oppose the summary judgment application.

Mr Eke breached the settlement agreement and Mr Parsons re-enrolled the summary judgment application in the High Court. The High Court held that when the settlement agreement was made an order of court, its terms were elevated and the contractual rights contained in the agreement were converted to an executable order which was final. Therefore, the defences against the original summons were not available to Mr Eke, as liability would be determined from the settlement order itself. Mr Parsons was thus entitled to ask the Court to ensure compliance with the order. The Court also found that Mr Eke's undertaking not to oppose the summary judgment application was not contrary to public policy and therefore, enforceable. The High Court granted Mr Parsons summary judgment. Subsequently the Supreme Court of Appeal dismissed Mr Eke's application for leave to appeal.

II. The issues before the Constitutional Court were the determination of the status and effect of making a settlement agreement an order of court; whether the re-enrolment of the summary judgment application was in accordance with the Uniform Rules of Court; and whether the provision in the settlement agreement that Mr Eke would not be entitled to oppose the second summary judgment application was unenforceable.

In the main judgment, written by Madlanga J (with Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Molemela AJ and Tshiqi AJ concurring), the Constitutional Court held that an order made pursuant to a settlement agreement is an order like any other and the terms of that settlement agreement become an enforceable court order. The party in whose favour the court order is granted, is entitled to approach a court for enforcement. Addressing the argument whether the second summary judgment application was in accordance with the Uniform Rules of Court, the main judgment found that rules governing the court process should not be disregarded; even though courts may depart from a strict observance of the rules when it serves the interests of justice. It found that in this instance, justice dictated that the settlement agreement, which was made an order of

Court, had to be given effect. Finally, the Court held that despite Mr Eke's concession not to oppose the second summary judgment application, he did in fact raise defences that the High Court considered and thus he was not denied access to court.

III. A concurring judgment written by Jafta J (with Nkabinde J and Theron AJ concurring) differed from the main judgment on two issues. First, it found that the question of permissibility of re-enrolment of Mr Parsons summary judgment application did not arise because the respondent did not institute a second application but merely sought to enforce the terms of an order of court granted earlier. The judgment held that because the clause in the settlement agreement prohibiting Mr Eke from opposing the second application was made an order of court, it did not offend public policy or infringe on his right of access to courts. It concluded that the court order in this case fell short of the requirements for a court order and therefore constituted an improper exercise of discretion by the High Court, however, this did not justify Mr Eke's failure to honour the agreement.

Cross-references:

Constitutional Court:

- *Barkhuizen v. Napier* [2007] ZACC 5;
- *Carmichele v. Minister of Safety and Security* [2001] ZACC 22;
- *Du Plessis and Others v. De Klerk and Another* [1996] ZACC 10;
- *Brisley v. Drotzky* [2002] ZASCA 35;
- *South African Broadcasting Corp Ltd v. National Director of Public Prosecutions and Others* [2006] ZACC 15;
- *Finishing Touch 163 (Pty) Ltd v. BHP Billiton Energy Coal South Africa Ltd and Others* [2012] ZASCA 49;
- *Firestone South Africa (Pty) Ltd v. Genticuro AG* 1977 (4) SA 298 (A);
- *Arendsnes Sweefspoor CC v. Botha* [2013] ZASCA 86;
- *Kgobane and Another v. Minister of Justice and Another* 1969 (3) SA 365 (A);
- *Federated Employers Fire & General Insurance Co. Ltd. and Another v. McKenzie* 1969 (3) SA 360 (A);
- *Lane and Fey NNO v. Dabelstein and Others* [2001] ZACC 14;
- *Van der Walt v. Metcash Trading Limited* [2002] ZACC 4;
- *Pheko and Others v. Ekurhuleni Metropolitan Municipality (no.2)* [2015] ZACC 10;
- *Fose v. Minister of Safety and Security* [1997] ZACC 6.

Languages:

English.

*Identification: RSA-2016-1-003*

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 30.09.2015 / **e)** CCT 121/14 / **f)** My Vote Counts NPC v. Speaker of the National Assembly and Others / **g)** *South African Law Reports* 2016 (1) SA 132 (CC) (Law Report) / **h)** [2015] ZACC 31; CODICES (English).

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of Fundamental Rights and freedoms.**

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

4.5.10.2 Institutions – Legislative bodies – Political parties – **Financing.**

4.14 Institutions – **Activities and duties assigned to the State by the Constitution.**

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

Keywords of the alphabetical index:

Constitutional Court, competence exclusive / Political party, funding / Subsidiarity, principle, constitutional proceedings.

Headnotes:

Parliament is required to enact national legislation to give effect to Section 32.2 of the Constitution, the right of access to information.

When Parliament enacts legislation to give effect to a constitutional right, the principle of subsidiarity dictates that a litigant must rely on this legislation or challenge the constitutionality of the legislation and cannot rely directly on the right.

Summary:

I. The applicant is a non-profit company that seeks to improve the transparency and accountability of the political system of South Africa. The applicant applied directly to the Constitutional Court on the basis of the Court's exclusive jurisdiction and, in the alternative, for direct access.

The applicant alleged that Parliament had a constitutional obligation to pass legislation that would compel political parties to disclose the sources of their private funding and that Parliament had failed to meet this obligation. The respondents, the Speaker of the National Assembly and the Chairperson of the National Council of Provinces (collectively, Parliament), opposed the application. All political parties represented in Parliament at the time of the application were cited as respondents, but none opposed the application.

The applicant relied on Section 32.2 of the Constitution, which provides that "[n]ational legislation must be enacted to give effect to [the right of access to information that is held by another person and that is required for the exercise or protection of any rights]..." The applicant argued this provision read with Section 19.3, the right to vote, meant that Parliament was under a constitutional obligation to enact legislation that would enable access to information regarding the sources of political parties' private funding. The applicant argued that this information should be disclosed by political parties, proactively and regularly, as it is necessary to enable an informed exercise of the right to vote.

Parliament contended that it had complied with its constitutional obligations through the enactment of the Promotion of Access to Information Act 2 of 2000 (PAIA). The applicant, however, asserted that PAIA did not sufficiently provide access to the relevant information.

II. Both the majority and minority judgments held that the Constitutional Court's exclusive jurisdiction applied. Section 167.4.e of the Constitution confers exclusive jurisdiction on the Court to "decide that Parliament...has failed to fulfil a constitutional obligation".

Khampepe J, Madlanga J, Nkabinde J and Theron AJ wrote for the majority (with Mogoeng CJ, Molemela AJ and Tshiqi AJ concurring). The majority held that the applicant was seeking to prescribe how Parliament should legislate, rather than challenge the validity of legislation, and that this would conflict with the separation of powers. The majority found that Parliament enacted PAIA for the

purpose of giving effect to the right of access to information, as envisaged in Section 32.2 of the Constitution. According to the majority, the applicant alleged that in enacting PAIA, Parliament did not fully satisfy its constitutional obligations under Section 32.2 of the Constitution. The principle of subsidiarity in South African law holds that when Parliament enacts legislation to give effect to a constitutional right, a litigant must rely on this legislation or challenge the constitutionality of this legislation before it can rely on the right itself. Applying the principle of subsidiarity the majority held that the applicant should have brought a constitutional challenge to PAIA in the High Court before approaching the Constitutional Court. Because it had failed to do so, the majority dismissed the application.

III. Cameron J wrote for the minority (with Moseneke DCJ, Froneman J and Jappie AJ concurring). The minority held that information relating to political parties' private funding was required for the exercise and protection of the right to vote, emphasising the importance of political parties to a functioning democracy. According to the minority, the applicant's case did not concern the validity of PAIA but rather alleged that Parliament needed to enact further legislation to fulfil its constitutional obligation. The minority held that the principle of subsidiarity did not apply because the applicant did not challenge the validity of PAIA itself but, rather, alleged that Parliament had failed to comply with its constitutional obligations by not enacting appropriate legislation (whether through PAIA or otherwise). The minority further held that Parliament had failed to fulfil its constitutional obligation because PAIA did not provide for the extent of access to information about political parties' private funding that was required for the exercise of the right to vote.

The Court dismissed the application and made no order as to costs.

Supplementary information:

Legal norms referred to:

- Sections 19, 32, 167.4.e, 167.6, 172 and 236 of the Constitution of the Republic of South Africa, 1996;
- Promotion of Access to Information Act 2 of 2000.

Cross-references:

Constitutional Court:

- *Women's Legal Centre Trust v. President of the Republic of South Africa and Others* [2009] ZACC 20;
- *Doctors for Life International v. Speaker of the National Assembly and Others* [2006] ZACC 11;
- *Chirwa v. Transnet Limited and Others* [2007] ZACC 23;
- *Gcaba v. Minister for Safety and Security* [2009] ZACC 26;
- *Independent Newspapers (Pty) Ltd v. Minister for Intelligence Services: In re: Masetlha v. President of the Republic of South Africa and Another* [2008] ZACC 6;
- *Brümmer v. Minister for Social Development and Others* [2009] ZACC 21;
- *PFE International Inc (BVI) and Others v. Industrial Development Corporation of South Africa Ltd* [2012] ZACC 21;
- *Agri South Africa v. Minister for Minerals and Energy* [2013] ZACC 9;
- *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15;
- *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26;
- *Minister of Health and Another v. New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14;
- *NAPTOSA and Others v. Minister of Education, Western Cape and Others* [2000] ZAWCHC 9;
- *Mazibuko and Others v. City of Johannesburg and Others* [2009] ZACC 28;
- *South African National Defence Union v. Minister of Defence and Others* [2007] ZACC 10;
- *MEC for Development Planning and Local Government: Gauteng v. Democratic Party and Others* [1998] ZACC 9.

Languages:

English.



Identification: RSA-2016-1-004

a) South Africa / b) Constitutional Court / c) / d) 30.11.2015 / e) CCT 64/15 / f) Kham and Others v. Electoral Commission and Another / g) www.constitutionalcourt.org.za/Archimages/23637.pdf / h) [2015] ZACC 37; CODICES (English).

Keywords of the systematic thesaurus:

4.9.7.1 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Electoral rolls.**

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

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, electoral commission, decision, annulment / Election, electoral law, infringement / Election, error, impact, elected people, representation / Election, fair / Election, vote count, irregularity, relevance / Election, voter's list, inaccuracies, right to challenge.

Headnotes:

When the constitutional right of independent candidates to participate in elections is impaired, it is essential to hold the Electoral Commission (IEC) to the high standards imposed by the Constitution.

When registering a voter to vote in a particular voting district after the date of the order, the Electoral Commission is obliged to obtain sufficient particularity of the voter's address to enable it to ensure that the voter is, at the time of registration, ordinarily resident in that voting district. The Electoral Commission is obliged by the Electoral Act to provide all candidates in municipal elections a copy of the segment of the national voters' roll, which must comply with certain criteria.

Summary:

I. The applicants were unsuccessful candidates in the wards in which each of them had stood for election. Before the elections, the applicants had lodged objections with the respondent, the Electoral Commission (hereinafter, "IEC"), concerning voter registrations in their respective wards. After he had lost a by-election in September 2013, Mr Kham lodged an objection with the IEC but it was rejected.

In the December by-elections in six wards, the applicants complained of the delay in receiving the segments of the national voters' roll to be used for the purposes of the by-elections. Furthermore, those segments did not include residential addresses for any of the voters, rendering it difficult, if not impossible, for candidates to find, visit and canvass voters.

The applicants approached the Electoral Court for an order that the December by-elections be postponed and for further relief. However the Electoral Court was unable to convene to hear the application. Accordingly, the by-elections proceeded as scheduled and the six applicants who were candidates lost. After the December by-elections and in response to the present litigation, the IEC conducted its own investigation into the allegations that voters not entitled to registration in these wards had been registered and that their participation had affected the result of the by-elections. It concluded that there were a number of such registrations and that some of those voters had voted, but that in no case had they done so in sufficient numbers to affect the result of the elections.

When the case was eventually heard by the Electoral Court the applicants contended that the IEC's investigation demonstrated that the by-elections had not been free and fair and that they should be set aside and fresh by-elections held. The IEC opposed this. The Electoral Court rejected the applicants' claims and dismissed the application.

Before the Constitutional Court, the applicants confined themselves to seeking an order setting aside the by-election results in eight wards relying on the irregularities that emerged from the IEC's own investigation. Their complaint was that on the evidence of irregularities in the IEC's own affidavit, the by-elections could not be said to have been free and fair and accordingly they should be set aside.

II. In a unanimous judgment written by Wallis AJ, the Constitutional Court held that the process of electing councillors to public office is of cardinal importance for the healthy operation of a democracy at local government level. As such elections take place in wards, it is vitally important and a legal requirement for the chief electoral officer, when registering a voter on the voters' roll, to register that voter in the voting district in which they are ordinarily resident. This requirement had not been observed by the IEC. In addition, the obligation to provide all candidates with a copy of the relevant segment of the voters' roll containing the addresses of voters in the ward with their addresses ("where such addresses are available") was also ignored. That was a serious

breach of the IEC's statutory obligations. Without voters' addresses, the ability of candidates to canvass voters was significantly impaired. In the respects identified above, the IEC fell short of these standards.

The Court further held that the constitutional right of the independent candidates to participate in the elections was impaired as it was necessary to give full weight to the constitutional commitment to free and fair elections and its safeguard of the right to offer oneself for election to public office. The court was of the view that it is essential to hold the IEC to the high standards that its constitutional duties impose upon it.

The Court granted leave to appeal to the first to seventh applicants and refused it in respect of the eighth applicant. It declared that the by-elections conducted in the Tlokwe Municipality on 12 September 2013 in ward 18 and on 10 December 2013 in wards 1, 4, 11, 12, 13 and 20, were not free and fair. The outcome of those by-elections was set aside and the IEC ordered to hold fresh by-elections. It was further declared that when registering a voter to vote in a particular voting district after the date of the order the Electoral Commission is obliged to obtain sufficient particularity of the voter's address to enable it to ensure that the voter is at the time of registration ordinarily resident in that voting district. It also declared that the Electoral Commission is obliged by the Electoral Act to provide all candidates in municipal elections a copy of the segment of the national voters' roll, which must comply with certain criteria. Accordingly, the application for leave to appeal was granted and the appeal upheld.

Supplementary information:

Legal norms referred to:

- Preamble, Sections 1.d, 19, 172.1.a, 172.1.b, 190.1.a and 190.1.b of the Constitution of the Republic of South Africa, 1996;
- Sections 12.2.a, 18, 19.1, 20.2.a and 20.2.b of the Electoral Commission Act 51 of 1996;
- Sections 3.2, 8, 11.3, 64.1.c, 60.1, 65, 90 and 91 of the Local Government: Municipal Electoral Act 57 of 2000;
- Promotion of Access to Information Act 4 of 2000;
- Sections 15.2, 15.3, 20.1.a, 20.1.b and Schedule 2 of the Electoral Act 73 of 1998;
- Section 25 and Item 2 in Schedule 1 to the Local Government: Municipal Structures Act 117 of 1998.

Cross-references:

Constitutional Court:

- *African Christian Democratic Party v. Electoral Commission and Others* [2006] ZACC 1;
- *August and Another v. Electoral Commission and Others*, [1999] ZACC 3;
- *Chevron SA (Pty) Limited v. Wilson t/a Wilson's Transport and Others* [2015] ZACC 15;
- *Chirwa v. Transnet Ltd* [2007] ZACC 23;
- *Democratic Alliance v. African National Congress and Another* [2015] ZACC 1;
- *Fose v. Minister of Safety and Security* [1997] ZACC 6;
- *Gcaba v. Minister of Safety and Security* [2009] ZACC 26;
- *New National Party of South Africa v. Government of the Republic of South Africa and Others* [1999] ZACC 5;
- *Rail Commuters Action Group v. Transnet Ltd t/a Metrorail* [2004] ZACC 20;
- *S v. Lawrence*; *S v. Negal*; *S v. Solberg* [1997] ZACC 11;
- *Opitz v. Wrzesnewskyj* 2012 SCC 55; [2013] 3 SCR 76;
- *Cusimano v. Toronto (City)* 2011 ONSC 7271;
- *Gooch v. Hendrix* 851 P 2d 1321 (Cal. Sup. Ct. 1993);
- *McEwing v. Canada (Attorney General)* [2013] 4 FCR 63; 2013 FC 525;
- *Fair v. Hernandez* (1981) 116 Cal. App. 3d 868, 881 [172 Cal. Rptr. 379];
- *Namat Aliyev v. Azerbaijan*, no. 18705/06, ECHR 2010.

Languages:

English.



Identification: RSA-2016-1-005

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 18.02.2016 / **e)** CCT 124/16 / **f)** Minister of Home Affairs v. Abdul Rahim and Others / **g)** www.saflii.org/za/cases/ZACC/2016/3.html / **h)** [2016] ZACC 3; CODICES (English).

Keywords of the systematic thesaurus:

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

5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum.**

Keywords of the alphabetical index:

Arrest, placement, legality / Asylum, foreigner, subsidiary protection / Deportation, detention pending / Detention, lawfulness / Detention, placement, legal ground.

Headnotes:

“Illegal foreigners” as statutorily defined must be detained at places specifically determined by the Director-General for Home Affairs.

Absent a determination, the detention of foreigners is wrongful and unlawful and sounds in damages.

Summary:

I. The respondents, all foreign nationals, were arrested and detained for deportation immediately after their temporary asylum-seeker permits expired and their applications for asylum were unsuccessful. Pending deportation, they were detained in various facilities. These included St Albans and North End Prisons, KwaZakhele and New Brighton Police stations in Port Elizabeth. They remained there for different periods, from 4 days to 35 days, before release.

They instituted action against the applicant, the Minister of Home Affairs, in the High Court of South Africa, Eastern Cape Local Division, Port Elizabeth (High Court) for damages in consequence of being detained in places which had not been “determined” by the Director-General in terms of Section 34.1 of the Immigration Act 13 of 2002. The High Court found that places used for the detention of illegal foreign nationals did not have to be formally determined by the Director-General. All prisons and police detention facilities could lawfully be used for this purpose.

The Supreme Court of Appeal reversed. It found that in terms of Section 34.1 the places in which illegal foreigners are detained have to be expressly “determined” by the Director-General. Since no determination had been made, the detention of the respondents was unlawful. The Court itself assessed and awarded damages ranging from R 3 000 to R 25 000 per individual depending on the duration of their detention.

In the Constitutional Court, the Minister of Home Affairs argued that Section 34.1 does not impose an obligation on the Director-General to determine specific places of detention. It is sufficient to detain illegal foreigners in state-run or controlled facilities. However, should it be held that there is an obligation, the detention of the respondents, even without a determination, cannot give rise to a claim for damages. The respondents contended that illegal foreigners must be detained at places specifically “determined” under Section 34.1. This was supported by People Against Suffering, Oppression and Poverty (PASSOP) who were admitted as *amicus curiae* (friend of the Court). In a cross-appeal, the respondents challenged the amounts of damages awarded by the Supreme Court of Appeal as too low.

II. In a unanimous judgment by Nugent AJ, the Court found that Section 34.1 makes it clear that the Director-General is required to apply his or her mind to what places are appropriate for the detention of illegal foreigners. Absent a determination, the respondents were detained unlawfully. In addition, the unlawful act was wrongful and thus entitled the respondents to damages. This Court did not interfere with the amounts of damages awarded by the Supreme Court of Appeal. Accordingly, the application for leave to appeal and cross-appeal were dismissed.

Supplementary information:

Legal norms referred to:

- Section 34.1 of the Immigration Act 13 of 2002;
- Section 21 of the Refugees Act 130 of 1998.

Cross-references:

Constitutional Court:

- *Affordable Medicines Trust and Others v. Minister of Health and Another*, Bulletin 2005/1 [RSA-2005-1-002];
- *Biowatch Trust v. Registrar, Genetic Resources, and Others*, Bulletin 2009/2 [RSA-2009-2-006];
- *Bernstein and Others v. Bester and Others NNO*, Bulletin 1996/1 [RSA-1996-1-002];
- *Country Cloud Trading CC v. MEC, Department of Infrastructure Development, Gauteng*, Bulletin 2014/3 [RSA-2014-3-013];
- *Gouda Boerdery BK v. Transnet Ltd*, [2004] ZASCA 85;
- *Mashongwa v. Passenger Rail Agency of SA*, [2015] ZACC 36;
- *Minister of Safety and Security v. Seymour*, [2006] ZASCA 71;

- *Minister of Safety and Security v. Van Duivenboden*, [2002] ZASCA 79;
- *S v. Bhulwana; S v. Gwadiso*, *Bulletin* 1995/3 [RSA-1995-3-008];
- *S v. Coetzee*, *Bulletin* 1997/1 [RSA-1997-1-002];
- *Trencon Construction (Pty) Ltd v. Industrial Development Corporation of South Africa Ltd and Another*, *Bulletin* 2015/2 [RSA-2015-2-010];
- *Trustees for the Time Being of Two Oceans Aquarium Trust v. Kantey & Templar (Pty) Ltd*, [2005] ZASCA 109;
- *Zealand v. Minister for Justice and Constitutional Development and Another*, *Bulletin* 2008/1 [RSA-2008-1-003].

Languages:

English.



Identification: RSA-2016-1-006

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 18.03.2016 / **e)** CCT 86/15 / **f)** Democratic Alliance v. Speaker of National Assembly and Others / **g)** www.judiciary.org.za/doc/Court-Case-18-March-2016_Judgment_DA-v-Speaker.pdf / **h)** [2016] ZACC 8; CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Parliament, member, privileges and immunities / Parliament, ability to function, protection / Parliament, member, detention, arrest, condition / Parliament, member, freedom of expression.

Headnotes:

The privilege of free speech conferred on Members of Parliament may be constitutionally limited only by the “rules and orders” of two houses of Parliament.

A provision of an Act of Parliament limiting the parliamentary privilege of free speech – though emanating from Parliament – is constitutionally invalid.

Not all conduct or speech that tests the patience of a presiding officer can be limited, only conduct that goes beyond robust debate, inherent in parliamentary debate, which leads to a disruption.

Summary:

I. On 12 February 2015, whilst the President was delivering the State of the Nation Address in Parliament, members of an opposition political party – the Economic Freedom Fighters (hereinafter, “EFF”) – became dissatisfied with the manner in which the Speaker of the National Assembly dealt with their questions and interjections. The Speaker requested that the EFF members leave the Chamber, but this was met with defiance. The Speaker directed police officials to remove them in terms of Section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004. This provides that “A person who creates or takes part in any disturbance in the precincts while Parliament or a House or committee is meeting, may be arrested and removed from the precincts, on the order of the Speaker”.

When members of the Official Opposition, the Democratic Alliance (hereinafter, “DA”), learnt that police officers, and not parliamentary officials, had removed the EFF members, the DA challenged the constitutionality of the action in the Western Cape Division of the High Court, Cape Town (hereinafter, “High Court”). The DA challenged the constitutional validity of Section 11 on the ground that it was incompatible with the constitutional privilege of free speech and immunity from arrest enjoyed by Members of Parliament. Furthermore, the DA contended that the provision violated the separation of powers by empowering the Speaker or Chairperson to order members of the security forces to arrest members of Parliament.

The High Court held that Section 11 was constitutionally invalid to the extent that it permitted a Member of Parliament to be arrested for conduct that was protected by the immunity against arrest and the privilege protecting free speech. The High Court did not rule on whether Section 11 violated the principle of separation of powers. It ordered a “notional severance” to bring the provision within constitutional bounds. This subjected Section 11 to a condition such that it would no longer permit violations of the immunity against arrest. It suspended the order of invalidity for 12 months to allow Parliament to remedy the defect.

In the Constitutional Court, the DA sought confirmation of the High Court's order of statutory invalidity and leave to appeal against the remedy, as well as the Court's decision not to address the separation of powers issue. Parliament and the Government sought leave to appeal. They contended that the provision did not infringe Members' constitutional privileges, but instead prohibited only conduct or speech that stops, or threatens to stop, parliamentary proceedings. This is not constitutionally protected. Additionally, they argued that the provision did not offend the doctrine of separation of powers.

II. The majority judgment by Madlanga J (Moseneke DCJ, Cameron J, Khampepe J, Van der Westhuizen J and Zondo J concurring) held that, if the word "person" in Section 11 of the Act includes Members of Parliament, the section is constitutionally invalid. It then considered whether it did. Throughout the statute "person" preponderantly includes members. When interpreted both contextually and purposively, "person" in Section 11 therefore includes members of Parliament. Hence members could be deprived of further participation in parliamentary proceedings, thereby limiting their constitutionally guaranteed privilege of free speech in Parliament. The limitation may be constitutionally permissible as otherwise Parliament might be incapacitated by unruly members, but the limitation by means of an Act of Parliament was constitutionally impermissible. This was because in terms of Sections 58.1 and 71.1 of the Constitution parliamentary free speech could be subjected only to the rules and orders of Parliament. Moreover, the immunity from arrest enjoyed by Members is not qualified by the Constitution. The High Court's declaration of constitutional invalidity by way of notional severance was not confirmed. Instead, the omission of the words "other than a member" after the word "person" in Section 11 was found to be inconsistent with the Constitution. The majority judgement rectified the constitutional defect by reading-in these words.

III. A concurring judgment by Nugent AJ agreed with the majority insofar as it emphasised the importance of members' free speech in Parliament and that Section 11 of the Act is unconstitutional inasmuch as it relates to members of Parliament. Nugent AJ, however, held that "arrest" in Section 11 of the Act has a wider meaning than that described in the majority judgment. He held that "arrest" is not confined to arrest with the objective of prosecution. The mere act of seizure or forcible restraint, for whatever purpose, constitutes an arrest. This is constitutionally impermissible.

In a dissenting judgment Jafta J (Nkabinde J concurring) held that "person" in the provision is capable of being read down in a manner consistent

with the Constitution. If interpreted restrictively, it excludes Members of Parliament. So construed, Section 11 of the Act is consistent with Sections 58.1 and 71.1 of the Constitution.

Supplementary information:

Legal norms referred to:

- Sections 58.1 and 71.1 of the Constitution of the Republic of South Africa, 1996;
- Section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004.

Cross-references:

- *Cool Ideas 1186 CC v. Hubbard and Another*, *Bulletin* 2014/2 [RSA-2014-2-009];
- *Democratic Alliance and Another v. Masondo NO and Another* [2002] ZACC 28;
- *Democratic Alliance v. Speaker of the National Assembly and Others* [2015] ZAWCHC 60;
- *Dikoko v. Mokhatla*, *Bulletin* 2006/2 [RSA-2006-2-007];
- *Oriani-Ambrosini v. Sisulu, Speaker of the National Assembly*, *Bulletin* 2012/3 [RSA-2012-3-017];
- *S v. Zuma and Others*, *Bulletin* 1995/3 [RSA-1995-3-001];
- *Speaker of the National Assembly v. De Lille and Another* [1999] ZASCA 50;
- *Swartbooie and Others v. Brink and Others*, *Bulletin* 2003/1 [RSA-2003-1-003].

Languages:

English.



Identification: RSA-2016-1-007

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 30.03.2016 / **e)** CCT 29/15 / **f)** Links v. MEC for Health, Northern Cape (Pty) Limited / **g)** www.judiciary.org.za/doc/Court-Case-29-March-2016_CCT-29-15_Media-Summary_Dirk-Links-v-MEC-Department-of-Health-Northern-Cape-Province.pdf / **h)** [2016] ZACC 10; CODICES (English).

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

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

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:

Common law, development / Common law, principle, constitutionality / Creditor, rights / Debt, enforcement, prescription / Prescription, period, start.

Headnotes:

The interpretation of the Prescription Act which limits a litigant's constitutional right to access courts falls within the jurisdiction of the Constitutional Court. Section 39.2 of the Constitution requires that every court, tribunal or forum shall promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing the common law or customary law.

For a debt to be due in terms of Section 12.3 of the Prescription Act 68 of 1969, the creditor must have knowledge of the identity of the debtor and of the facts from which the debt arises, unless that creditor is deemed to have that knowledge if he could have acquired it by exercising reasonable care.

In a claim for delictual liability, negligence and causation are essential elements. Negligence and causation have both factual and legal elements. A litigant lacks knowledge of the necessary facts contemplated in Section 12.3 of the Prescription Act until he or she has knowledge of the facts that might lead to the conclusion that there may be negligence on the part of the debtor and that this negligence had caused the harm.

Summary:

I. The applicant, Mr Dirk Links, dislocated his left thumb on 26 June 2006. He went to Kimberley Hospital for treatment, where plaster of Paris was cast on his left hand and forearm. Within 10 days he returned because of severe pain. On the second occasion he was admitted. On or about 5 July 2006, a surgical procedure for the removal of tissue in cases of compartment syndrome (fasciotomy) was

conducted. He was operated upon under general anaesthetic, and his left thumb was amputated. He was kept in hospital until the end of August 2006. It was only on his discharge that the doctor informed him that he would never be able to use his left arm again. This information was not communicated to him before, even though he had been at the hospital for about two months.

Mr Links approached Legal Aid South Africa in Kimberley to investigate the possibility of a legal claim. Legal Aid delayed for about three years. He later instructed a private law firm, which instituted an action for damages against the Health Department on the basis that the hospital staff had been negligent in treating him.

The main issue on prescription was whether three years had lapsed from the date on which Mr Links had knowledge of the facts from which the debt arose. The Department argued that the date of knowledge was 5 August 2006 when Mr Links' thumb was amputated. This meant that the claim had prescribed before the summons was served on the MEC on 6 August 2009. Mr Links contended that by the end of August 2006, when he was discharged from hospital, he did not know all the facts from which the debt arose. He did not know, for example, the reason for the amputation, nor did he know the reason for the permanent loss of the use of his left arm.

The High Court concluded that Mr Links knew all the facts from which the debt arose on the day of the amputation, 5 August 2006. It dismissed his claim. Mr Links appealed to the Full Court of the High Court which dismissed his appeal. He approached the Supreme Court of Appeal but that court dismissed his application for leave to appeal. He then applied to the Constitutional Court.

II. In a unanimous judgment by Zondo J the Court held that one of the facts from which a claim such as Mr Links' arises, is the negligent cause of the amputation of his thumb and permanent loss of the use of his left arm. There was no evidence that Mr Links knew any facts from which he may have inferred negligence by 5 August 2006. By that date he did not have knowledge of all the facts from which the debt arose. Mr Links could not know the reasons or cause for the amputation and permanent loss of the use of his left arm without access to independent medical advice. As he was in hospital from the beginning of July to the end of August 2006 he could not have access to it. The Court held that his claim had not prescribed by 6 August 2009. It granted leave to appeal and upheld the appeal with costs.

Supplementary information:

Legal norms referred to:

- Sections 12, 34, 39.2 and 167.3.b of the Constitution of the Republic of South Africa, 1996;
- Section 3 of the Institution of Legal Proceedings Against certain Organs of State Act 40 of 2002;
- Section 12.3 of the Prescription Act 68 of 1969.

Cross-references:

Constitutional Court:

- *Claasen v. Bester*, [2011] ZASCA 197;
- *Drennan Maud & Partners v. Town Board of the Township of Pennington*, [1998] ZASCA 29;
- *Evins v. Shield Insurance Co Ltd*, 1980 (2) SA 814 (A);
- *Lee v. Minister for Correctional Services*, *Bulletin* 2012/3 [RSA-2012-3-022];
- *Macleod v. Kweyiya*, [2013] ZASCA 28;
- *Minister of Finance and Others v. Gore NO*, [2006] ZASCA 98;
- *Nedcor Bank Bpk v. Regering van die Republiek van Suid-Afrika*, [2000] ZASCA 65;
- *Road Accident Fund and Another v. Mdeyide*, [2010] ZACC 18;
- *Sentrachem Ltd. v. Prinsloo*, [1996] ZASCA 133;
- *Truter and Another v. Deysel*, [2006] ZASCA 16.

Languages:

English.

*Identification: RSA-2016-1-008*

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 31.03.2016 / **e)** CCT 143/15 and CCT 171/15 / **f)** Economic Freedom Fighters v. Speaker of the National Assembly and Others; Democratic Alliance v. Speaker of the National Assembly and Others / **g)** http://www.judiciary.org.za/doc/Court-Case-31-March-2016_Judgment_CCT-143-15-and-CCT-171-15-EFF-v-Speaker-of-the-National-Assembly-and-Others1.pdf / **h)** [2016] ZACC 11; CODICES (English).

Keywords of the systematic thesaurus:

- 1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**
- 1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**
- 3.4 General Principles – **Separation of powers.**
- 3.9 General Principles – **Rule of law.**
- 4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction.**
- 4.10 Institutions – **Public finances.**
- 4.12.3 Institutions – Ombudsman – **Powers.**

Keywords of the alphabetical index:

Constitutional Court, jurisdiction, exclusive / Constitutional Court, access, direct / Ombudsman, powers / Ombudsman, remedial action / President, residence, private, security spenders / President, minister, reprimand.

Headnotes:

Exclusive jurisdiction can be exercised in cases where a general constitutional duty imposed on the President or Parliament is coupled with a duty to act, conferred through the exercise of another institution's constitutional power.

Remedial action taken by the Public Protector is binding on the parties against whom the remedial action is taken, unless set aside by a court of law.

Summary:

I. The State arranged for security upgrades to Nkandla, the private residence of the President of South Africa, Mr Jacob Zuma. Included were items not related to security. Several citizens, including a Member of Parliament, lodged complaints with the Public Protector regarding the alleged excessive expenditure.

The Public Protector investigated the complaints and issued a report on 19 March 2014. She found that the President had unduly benefitted from the construction of a cattle kraal, chicken run, swimming pool, amphitheatre and visitors' centre. She took remedial action, ordering the President to direct the South African Police Service, along with National Treasury, to determine the reasonable cost of the five listed items and for the President to pay a reasonable portion. The President was also directed to report to the National Assembly and to reprimand the Ministers involved in the expenditure.

The President reported to the National Assembly. But it commissioned several reports and established *Ad hoc* Committees to review (not implement) the Public Protector's report. A report by the Minister of Police concluded that all of the non-security features identified by the Public Protector were, in fact, security features. As a result, the President was not liable for any payments. The National Assembly took a resolution to adopt the Minister of Police's findings absolving the President of liability.

The Economic Freedom Fighters (hereinafter, "EFF") and Democratic Alliance (hereinafter, "DA") brought two separate applications to the Constitutional Court against the Speaker of the National Assembly, the President and the Minister of Police. The Public Protector was joined as an interested party. The EFF asked the Court to exercise its exclusive jurisdiction on the basis that only the Constitutional Court could hear a matter in which the President and National Assembly breached their constitutional obligations. The DA, which had lodged proceedings at first instance in the High Court, also brought an application for direct access conditional on the Court granting access to the EFF.

The applicants advanced three arguments. First, the President breached his constitutional duty to "uphold, defend and protect the Constitution". Second, the National Assembly contravened its constitutional duty to exercise oversight over the President and hold him to account. Third, the powers of the Public Protector are binding unless set aside by a court of law.

The National Assembly argued the Public Protector's power to take appropriate remedial action was limited by the Public Protector Act 23 of 1994 to nonbinding recommendations. Furthermore, it argued that the relief sought violated the doctrine of separation of powers. The Court did not have jurisdiction to hear the matter because the National Assembly had not breached a specific obligation imposed solely on it by the Constitution. The President argued that the Court lacked jurisdiction on the same basis. He also maintained that he complied with the Public Protector's remedial action.

The Public Protector contended that her power to take appropriate remedial action was binding and enforceable until set aside by a court. The Minister of Police maintained that he did not act unlawfully because he was following orders from the President and the National Assembly to conduct an investigation into whether the listed items were non-security in nature.

At the hearing, the President abandoned his previous arguments. He now conceded that he was liable to pay a reasonable portion of the money spent. He also conceded that the Public Protector's power to take appropriate remedial action is binding.

II. A unanimous judgment, by Mogoeng CJ, addressed the Constitutional Court's exclusive jurisdiction and the nature of the Public Protector's power to take appropriate remedial action. The Court found that it had exclusive jurisdiction over both the President and the National Assembly because they had both failed to fulfil constitutional obligations specifically imposed on them. It also found that the Public Protector's power to take appropriate remedial action was binding and enforceable unless set aside by a court of law. The binding nature of remedial action does not prevent a party against whom remedial action is taken from investigating the correctness of the report. But if a party concludes that the Public Protector's findings are incorrect, that party must approach a court to have the findings and remedial action set aside. Otherwise, they remain binding.

In the result, the Court granted direct access to the EFF and the DA. The Court ordered National Treasury to report on the reasonable amount the President would have to pay within strict timelines. The President was directed to reprimand the Ministers involved. Finally, the Court declared that the President and National Assembly acted inconsistently with their constitutional duties.

Supplementary information:

Legal norms referred to:

- Sections 42.3, 55.2, 83, 167; 172.2.a, 181 and 182 of the Constitution of the Republic of South Africa, 1996;
- Sections 1, 3 and 4 of the Executive Members' Ethics Act 82 of 1998;
- Sections 6 and 8 of the Public Protector Act 23 of 1994.

Cross-references:

Constitutional Court:

- *Doctors for Life International v. Speaker of the National Assembly and Others*, Bulletin 2006/2 [RSA-2006-2-008];
- *Fose v. Minister of Safety and Security*, Bulletin 1997/2 [RSA-1997-2-005];

- *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, Bulletin 1999/3 [RSA-1999-3-008];
- *South African Broadcasting Corporation Soc Ltd and Others v. Democratic Alliance and Others*, [2015] ZASCA 156;
- *The Public Protector v. Mail & Guardian Ltd and Others*, [2011] ZASCA 108; 2011 (4) SA 420 (SCA).

Languages:

English.



Spain Constitutional Court

Important decisions

Identification: ESP-2016-1-001

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 01.02.2016 / **e)** STC 11/2016 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), 57, 07.03.2016; www.boe.es/boe/dias/2016/03/07/pdfs/BOE-A-2016-2328.pdf / **h)** <http://hj.tribunalconstitucional.es/es/Resolucion/Show/24819>; CODICES (Spanish).

Keywords of the systematic thesaurus:

- 5.1.1.1 Fundamental Rights – General questions – Entitlement to rights – **Nationals**.
- 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:

Abortion / Family, definition, life / Foetus, viability / Right to private and family life, protection / Right to private life, interference.

Headnotes:

The refusal to hand over the remains of foetuses of less than 180 days of gestation in order to incinerate them violates the right to personal and family privacy.

Summary:

I. The *amparo* appellant suffered an abortion during the week 22nd of gestation. After being discharged from the hospital, she requested a judicial authorisation to receive the foetal remains with the purpose of incinerating them. However, her request was rejected since the judge considered that the registration of the foetus in the Civil Registry was a necessary condition to hand over the remains. The judgment stated that, given the Civil Registry Law, the Ruling of the Sanitary Mortuary Police (Decree 2263/1974, 20 July) and the Basque Country's Ruling of Mortuary Sanitation (Decree 202/2004, 19 October) only demand registration of foetuses of more than 180 days of

gestation, the authorisation could not be granted, because the foetus was under the limit foreseen in the aforementioned regulations to be registered.

After exhausting all available legal remedies, the *amparo* appeal was filed. The *amparo* appellant pleaded that the contested decisions had violated her rights to ideological freedom (Article 16.1 of the Constitution), equality (Article 14 of the Constitution) and family privacy (Article 18.1 of the Constitution). With regard to the right to ideological freedom, she argued that this fundamental right protects all personal convictions and not only those related to religion. Consequently, she had the right to bury her son in a civil and familiar ceremony. In this respect, she referred to a similar case-law where the judicial authorisation was granted, because of the applicant's religion (Muslim).

II. The Constitutional Court upholds the *amparo* appeal. In accordance with the doctrine of the European Court of Human Rights on the right to a private and family life (Article 8 ECHR), the judgment puts the case in the frame of the fundamental right to personal and family privacy, proclaimed by Article 18.1 of the Constitution and concludes that the contested decisions violated this constitutional provision. Specifically, the judgment states that those decisions imposed a disproportionate restriction of this fundamental right. On the one hand, the judgment holds that even though the legislation only demands registration of fetuses of more than 180 days of gestation, this does not imply a prohibition on handing over the remains of aborted fetuses under this gestation period. On the other, it states that there was no sanitary impediment to grant the authorisation. The Basque Country's Ruling of Mortuary Sanitation does not forbid the incineration of remains when any sanitary risk is generated, but establishes it as mandatory.

III. The judgment has one concurring and two dissenting opinions. The former holds that, although the individual protection was correctly granted, the violated right was not the right to personal and family privacy but the right to equality. On the contrary, the dissenting judges disagree on the scope given by the judgment to the fundamental right to personal and family privacy based on the case-law of the European Court of Human Rights on the right to a private and family life. In their opinion, it is not possible to make a direct application of the doctrine settled by the European Court of Human Rights and in this way, unduly extend the scope of application of a constitutional right.

Cross-references:

- Articles 16.1, 18.1 and 14 of the Constitution;
- Article 8 ECHR.

Constitutional Court:

- no. 64/2001, 17.03.2001;
- no. 159/2009, 29.06.2009;
- no. 60/2010, 07.10.2010.

European Court of Human Rights:

- *Marić v. Croatia*, no. 50132/12, 12.06.2014;
- *Hadri-Vionnet v. Switzerland*, no. 55525/00, 14.02.2008;
- *Abdulayeba v. Russia*, no. 8552/05, 16.01.2014;
- *Sabanchiyeva and others v. Russia*, no. 38450/05, 06.06.2013, *Reports of Judgments and Decisions 2013* (extracts);
- *Maskadova and others v. Russia*, no. 8071/05, 06.06.2013;
- *Girard v. France*, no. 22590/04, 30.06.2011;
- *Elli Poluhas Dodsbo v. Sweden*, no. 61564/00, 17.01.2006, *Reports of Judgments and Decisions 2006-I*;
- *Pannullo and Forte v. France*, no. 37794/97, 30.10.2001, *Reports of Judgments and Decisions 2001-X*.

Languages:

Spanish.



Identification: ESP-2016-1-002

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 01.02.2016 / **e)** STC 13/2016 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), 57, 07.03.2016; www.boe.es/boe/dias/2016/03/07/pdfs/BOE-A-2016-2330.pdf / **h)** <http://hj.tribunalconstitucional.es/es/Resolucion/Show/24817> ; CODICES (Spanish).

Keywords of the systematic thesaurus:

1.5.4.4 Constitutional Justice – Decisions – Types – **Annulment**.
5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty**.

Keywords of the alphabetical index:

Personal liberty, right / Hospitalisation, forced / Hospital, psychiatric, confinement / Medical examination, compulsory.

Headnotes:

Forced hospitalisation of a person with mental disorder must be based on a medical report and is subjected to judicial control.

Summary:

I. Social workers found an old woman at home in a severe risk of health. She seemed to suffer from *Diogenes syndrome* (hoarding), cognitive impairment and malnutrition. The woman was rushed into a geriatric hospital perforce. The social workers informed the first instance judge about the hospitalisation that was confirmed both at first instance and appeal.

II. The Constitutional Court upholds the *amparo* appeal. The judgment states that health authorities must communicate – timely and orderly – to the Judges all urgent compulsory hospitalisations. According to the legal regulations applicable to the case, this communication must be sent within 24 hours after the confinement of the patient. Furthermore, the decision must be supported by a medical report certifying a mental disorder.

In this case, the formal requirements were not fulfilled. The reason is that the judge was informed not by a practitioner, but by a social worker and no medical report was provided. Non-fulfilment of the formal requirements resulted in a violation of the right to personal freedom.

Cross-references:

- Article 17.1 of the Constitution;
- Article 763 of the Spanish Organic Law of Civil Procedure, no. 1/2000, 07.01.2000.

Constitutional Court:

- no. 141/2012, 02.07.2012.

Languages:

Spanish.

*Identification: ESP-2016-1-003*

a) Spain / b) Constitutional Court / c) Second Chamber / d) 01.02.2016 / e) STC 16/2016 / f) / g) *Boletín Oficial del Estado* (Official Gazette), 10, 12.01.2016; www.boe.es/boe/dias/2016/03/07/pdfs/BOE-A-2016-2333.pdf / h) <http://hj.tribunalconstitucional.es/es/Resolucion/Show/24796>; CODICES (Spanish).

Keywords of the systematic thesaurus:

3.20 General Principles – **Reasonableness**.
 4.7.3 Institutions – Judicial bodies – **Decisions**.
 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.
 5.3.13.18 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Reasoning**.
 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:

Child, international abduction / Child, abduction, Hague Convention no. 28 / Child, best interest.

Headnotes:

In proceedings concerning children, Courts must provide adequate and sufficient grounds to explain how their decisions safeguard the best interests of the child.

Summary:

I. The *amparo* appellant, who lived in Switzerland, moved to Spain with her underage daughter without the consent of the latter's father. The father initiated a proceeding for the return of his daughter to Switzerland. Applying Article 13.b of the Hague Convention on the civil aspects of international child abduction of 25 October 1980, the First Instance Court denied the return, because it considered that there was a serious risk for the child, taking into account the mother's complaints of gender-based violence against the father. The father appealed the decision and obtained a favourable ruling. The Court

of Appeals decided that no exceptional circumstances concurred to deny the petition and ordered the return of the child to Switzerland. The mother promoted the *amparo* appeal, claiming that the contested judicial decision violated the right to an effective judicial protection. In particular, she complained that it infringed on the right to a congruent and adequately reasoned judicial resolution.

II. As a preliminary matter, applying the judgment of the European Court of Human Rights of 20 January 2015 (*Arribas Antón v. Spain*), the judgment identifies the “special constitutional significance” concurring in the case and that justified the admission of the appeal by the Constitutional Court. Specifically, the special constitutional significance of the case consists in the absence of constitutional doctrine on the duty of enhanced argumentation of the rulings adopted in proceedings concerning children.

The Constitutional Court grants protection to the appellant. The judgment states that the contested decision infringed on the right to and effective judicial protection, in terms of the right to obtain a congruent and adequately reasoned decision. The reason is that it did not take into account adequately the situation of the child and particularly, her integration in the new family environment. When proceedings concern a minor, Courts must not only consider all the circumstances relevant for the child in order to render the decision, but also specifically argue the reasons why they consider that the decision taken is the most appropriate in the interest of the minor.

Cross-references:

- Article 24.1 of the Constitution;
- Articles 49.1, 50.1 of the Organic Law on the Constitutional Court, no. 2/1979, 03.10.1979;
- Articles 1, 12, 13.a, 13.b, 20 of the Hague Convention on the civil aspects of international child abduction, 25.10.1980;
- Article 8 ECHR;
- Organic Law on legal protection of the child, no. 1/1996, 15.01.1996;
- United Nations Convention of the Rights of the Child, 20.11.1989.

Constitutional Court:

- no. 176/2008, 22.12.2008;
- no. 64/2010, 18.10.2010;
- no. 138/2014, 07.10.2014;
- no. 155/2009, 25.06.2009.

European Court of Human Rights:

- *Arribas Antón v. Spain*, no. 16563/11, 20.01.2015;
- *Neulinger and Shuruk v. Switzerland*, no. 41615/07, 06.07.2010, *Reports of Judgments and Decisions* 2010;
- *Ferrari v. Romania*, no. 1714/10, 28.04.2015.

Languages:

Spanish.



Identification: ESP-2016-1-004

a) Spain / b) Constitutional Court / c) Plenary / d) 03.03.2016 / e) STC 39/2016 / f) / g) *Boletín Oficial del Estado* (Official Gazette), 85, 08.04.2016; www.boe.es/boe/dias/2016/04/08/pdfs/BOE-A-2016-3405.pdf / h) <http://hj.tribunalconstitucional.es/es/Resolucion/Show/24843>; CODICES (Spanish).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing**.
 5.3.32 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**.
 5.4.17 Fundamental Rights – Economic, social and cultural rights – **Right to just and decent working conditions**.

Keywords of the alphabetical index:

Video surveillance, workplace, legitimate / Employee, right to information.

Headnotes:

Employers can control their employees using video surveillance, provided that they comply with privacy and data protection rules. Employees must be informed about the use of video surveillance appliances, but not necessarily about the purpose of that use.

Summary:

I. A company installed a video surveillance camera at its premises. Although the employees were not personally informed, a notice board stipulated that the installation was placed in a visible place. A worker was fired since the camera recorded her stealing money from a cash register. Even though she complained that the company had violated her fundamental rights to privacy and data protection, her dismissal was confirmed by the Labour Courts.

II. As a preliminary question, applying the judgment of the European Court of Human Rights of 20 January 2015 (*Arribas Antón v. Spain*), the Constitutional Court states that the special constitutional significance of the case lies in the necessity of clarifying the doctrine about the information that employees have the right to receive concerning the installation of video surveillance appliances.

The Constitutional Court rejected the appeal. Applying the doctrine established by the Court in its Ruling 292/2000, the judgment stated that the regulations of personal data had been respected. On the one hand, the data was used for the purpose of verifying compliance with the labour obligations. On the other hand, as an information board was placed in a visible area, the company fulfilled the information duty. In this sense, the judgment emphasised that it is not mandatory to inform employees about the exact purpose of video surveillance. Moreover, it finds proportional the measure taken by the employer since there were reasonable suspicions of irregularities and the video surveillance was limited to the cash register area.

Cross-references:

- Article 18 of the Constitution;
- Organic Law on the Protection of Personal Data, no. 15/1999, 13.12.1999.

Constitutional Court:

- no. 98/2000, 10.04.2000;
- no. 292/2000, 30.11.2000;
- no. 29/2013, 11.02.2013.

Languages:

Spanish.

Identification: ESP-2016-1-005

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 14.03.2016 / **e)** STC 45/2016 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), 97, 22.04.2016; www.boe.es/diario_boe/txt.php?id=BOE-A-2016-3898 / **h)** <http://hj.tribunalconstitucional.es/es/Resolucion/Show/24883>; CODICES (Spanish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Strike, essential service / Strike, minimum service / Strike, restriction in public services / Strike, identification of the participants / Health, service.

Headnotes:

A worker designated to be in charge of minimum services during a strike is not allowed to reject this position, even though he or she could be replaced by workers who do not take part in the strike.

Summary:

I. During a strike in the health sector, a member of the medical staff of a hospital requested to be relieved from her duties as personnel in charge of maintaining minimum services. She claimed that these services could be covered by members of the staff who did not support the strike. Such request was denied twice. The management of the hospital replied that otherwise it would be very difficult to guarantee the continuity of the minimum services.

II. The Constitutional Court rejected the *amparo* appeal. The judgment concluded there was no infringement of the right to strike, because the challenged resolutions had sufficient reasoning. The current strike legislation does not contemplate procedures that could have given information to the management of the hospital about possible non-striking personnel. Hence, it was hard or impossible to determine the number of non-striking workers during the strike. In light of the above, the rejection was justified.

Moreover, even if during the strike this personnel had been identified, there would be no infringement. As long as workers can join the strike at any moment, despite their previous decisions, there would be a risk to the minimum services guarantee.

Finally, the judgment held that the special constitutional significance of the *amparo* appeal stands on clarifying the constitutional case-law on situations when workers in charge of maintaining the minimum services ask to be replaced by workers who are not supporting the strike.

Cross-references:

- Article 28 of the Constitution.

Constitutional Court:

- no. 123/1990, 02.07.1990;
- no. 11/1981, 08.04.1981;
- no. 53/1986, 05.05.1986;
- no. 43/1990, 15.03.1990.

Languages:

Spanish.



Identification: ESP-2016-1-006

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 17.03.2016 / **e)** STC 56/2016 / **f)** / **g)** *Boletín Oficial del Estado* (Official Gazette), 97, 22.04.2016; www.boe.es/boe/dias/2016/04/22/pdfs/BOE-A-2016-3909.pdf / **h)** <http://hj.tribunalconstitucional.es/es/Resolucion/Show/24890>; CODICES (Spanish).

Keywords of the systematic thesaurus:

- 3.3 General Principles – **Democracy**.
- 3.10 General Principles – **Certainty of the law**.
- 4.3.1 Institutions – Languages – **Official language(s)**.
- 4.3.4 Institutions – Languages – **Minority language(s)**.
- 5.2.2.10 Fundamental Rights – Equality – Criteria of distinction – **Language**.
- 5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law**.
- 5.3.40 Fundamental Rights – Civil and political rights – **Linguistic freedom**.

Keywords of the alphabetical index:

Language, minority, safeguards / Language, regional or minority, Charter.

Headnotes:

The legislator of the past cannot tie the legislator of the future. The existence of a law concerning regional languages does imply neither its petrification nor its consideration as a criterion for validity of subsequent regulations.

Summary:

I. More than 50 deputies lodged an action of unconstitutionality concerning various provisions of the Law of the Parliament of Aragon 3/2013, 9 May, about use, protection and promotion of languages and language modalities of Aragon.

The contested provisions:

- a. identify the languages of Aragon following exclusively a territorial criterion (they refer to “Pyrenean and Pre-pyrenean” and “Oriental” languages), and make no reference to the denominations “Catalan” and “Aragonese”;
- b. unify the Academy of Aragonese and the Aragonese Academy of Catalan in the Aragonese Academy of Language;
- c. give to the Government of the Autonomous Community the power to identify the areas where languages and language modalities of Aragon are used; and
- d. recognise the right of people to express in their own language, without imposing concrete duties on the public powers.

The action of unconstitutionality was based on three reasons. Firstly, the deputies held that the new Law constitutes a regressive regulation of the linguistic rights recognised by the Aragonese Statute of Autonomy. Secondly, some of the contested dispositions ignored the mandate of the Statute of Autonomy according to which those linguistic rights must be regulated by a Law of the regional Parliament. And thirdly, the new Law established a discrimination of minority languages speakers as it did not assure the compliance of the obligations imposed by Articles 8 to 14 of the European Charter for Regional or Minority Languages.

II. The judgment upheld the constitutionality of the Law.

Referring to the consideration of the new Law as a regressive regulation of the linguistic rights protected by the Aragonese Statute of Autonomy, the judgment stated that the legislator of the past cannot tie the legislator of the future and that the principle of certainty of the law does not forbid derogatory reforms, provided that those reform do not affect consolidated situations. In relation to the identification of the languages using a territorial criterion avoiding their traditional names (“Aragonese” and “Catalan”), the judgment stressed the importance of a change of regulations that took place while awaiting the resolution of the appeal: a new law, passed by the Aragonese parliament in January 2016 expressly recovered those traditional names.

Secondly, the judgment rejected that the contested provisions had ignored the mandate of the Statute of Autonomy, foreseeing that the linguistic rights must be regulated by a Law of the regional Parliament. That statutory provision did not rule out completely the intervention of the executive in this issue. It was the very law that defined two linguistic areas and established the procedure to declare the zones and townships belonging to each of those, referring to the regional Government the concrete identification of those zones and townships.

Thirdly, the vagueness of the law did not result in a discrimination of minority languages speakers. In particular, there was no violation of the European Charter for Regional or Minority Languages, because the obligations laid down in Articles 8 to 14 of the Charter do not enjoy immediate applicability with respect to non-official languages.

Cross-references:

- Articles 3, 9.3, 10.2, 14, 96.1 and 147.1 of the Constitution;
- Article 7.2 of the Statute of Autonomy of Aragon;
- Articles 8 to 14 and 15 of European Charter for Regional or Minority Languages.

Constitutional Court:

- no. 82/1986, 26.06.1986;
- no. 49/2015, 05.03.2015;
- no. 83/1984, 24.07.1984;
- no. 183/2014, 06.11.2014.

Languages:

Spanish.



Sweden

Supreme Administrative Court

Important decisions

Identification: SWE-2016-1-001

a) Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 18.12.2015 / **e)** 312-15 / **f)** / **g)** HFD 2015 ref. 79 / **h)** CODICES (Swedish).

Keywords of the systematic thesaurus:

4.7.9 Institutions – Judicial bodies – **Administrative courts.**

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

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

Keywords of the alphabetical index:

Appeal, right.

Headnotes:

A decision to permit wolf hunting could be appealed against to an administrative court, in spite of a provision stating that there was no right to appeal.

Summary:

I. According to the Swedish Game Ordinance (1987:905), a decision of a county administrative board to permit wolf hunting can be appealed against to the Swedish Environmental Protection Agency. According to the ordinance, there is no possibility of appeal against the Agency’s decision. An organisation for preservation of the wolf nevertheless appealed against such a decision.

II. The Supreme Administrative Court found that, regardless of the provision stating that there was no right to appeal, there must be a way to bring the question if the state has fulfilled its obligations according to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the “Habitats Directive”) before national courts. The Supreme Administrative

Court therefore stated that there was a right to appeal against the decision of the Environmental Protection Agency to an administrative court.

Languages:

Swedish.



Switzerland Federal Court

Important decisions

Identification: SUI-2016-1-001

a) Switzerland / **b)** Federal Court / **c)** First Court of Criminal Law / **d)** 03.03.2016 / **e)** 6B_1140/2014 / **f)** X v. Central Public Prosecutor's Office of the Canton of Vaud and others / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 142 IV 129 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Person, stopping / Search, body, conditions / Insult, public official, punishment / Police, powers / Authority, abuse.

Headnotes:

Article 241.4 of the Swiss Code of Criminal Procedure. Security searches.

According to Article 241.4 of the Swiss Code of Criminal Procedure, the police can search a person who has been stopped or arrested, in particular in order to guarantee the safety of persons. A security search can be carried out even where the person who has been stopped went to the police station voluntarily, is not suspected of any offence or has been able to prove his identity (recital 2).

Summary:

I. In a judgment of 9 April 2014, the Police Court of Lausanne District convicted X. of insults and use of violence or threats against authorities and public officials, among other charges. The Criminal Appeals Court of the Vaud Cantonal Court upheld the judgment at first instance with regard to this point. Among other findings, it found that, on 1 August 2012, X. had vigorously resisted a body search which railway police officers wanted to carry out, to the

extent that he had to be restrained and handcuffed by the latter. X. struggled violently and kicked them several times and, once he had been restrained, he insulted the officers and threatened to take revenge on them. In February 2013 X. painted graffiti and tags on several buildings in Lausanne, including those of two building management companies. X. lodged a criminal law appeal against this judgment before the Federal Court.

Article 285.1 of the Swiss Criminal Code provides that a person who uses violence or threats to prevent an authority, a member of an authority or a public official from carrying out an official act, coerces it/them to carry out such an act or assaults it/them while it/they are doing so is liable to be punished. However, under the case law, a person who resists a manifestly unlawful act on the part of an authority is not liable to punishment, provided that his resistance is intended to restore legal order. It is not, therefore, sufficient that the legal requirements for the act should not be met; the authority or public official must also commit an abuse of power, i.e. exercise powers of coercion for a purpose which is alien to their duties or in a manner which is manifestly disproportionate.

The Cantonal Court noted that the appellant, who had proved his identity, was not suspected of any offence. The incident involved a mere security check of which the appellant had been notified and which the police officers were permitted to carry out, especially given the state the appellant and his friend were in when they were questioned.

II. According to Article 241.4 of the Swiss Code of Criminal Procedure, the police can search a person who has been stopped or arrested, in particular in order to guarantee the safety of persons. In this case, according to the cantonal authorities, the purpose of the search was not to establish the person's identity, but to guarantee the safety of persons. In this regard, it can be noted that, by contrast with the act of taking someone into custody, stopping someone, within the meaning of Article 215 of the Code of Criminal Procedure, does not entail that the person concerned should be suspected of an offence. It is therefore of no relevance that the appellant attended the police station voluntarily, that he was not suspected of an offence and that his identity was not in doubt. In any event, the search did not appear to be manifestly unlawful, with the result that the appellant could not rely on the aforementioned case law, as there was no misuse of powers on the part of the authority which would have justified his refusal to comply by using violence against the police officers. It also follows that in the absence of any reprehensible behaviour on the part of the police officers, Article 177.2 of the Swiss Criminal Code, which provides that the court may

dispense with imposing a penalty on the offender if the insulted party directly provoked the insult through reprehensible behaviour, is not applicable in this case. The Cantonal Court did not, therefore, violate federal law when it convicted the appellant of violence or threats against the authorities and public officials and insults. The appeal was dismissed on this point.

Languages:

French.



Identification: SUI-2016-1-002

a) Switzerland / **b)** Federal Court / **c)** First Civil Law Chamber / **d)** 29.03.2016 / **e)** 4A_576/2015 / **f)** A.A. and B.A. v. C. / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 142 III 263 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
 3.16 General Principles – **Proportionality**.
 3.17 General Principles – **Weighing of interests**.
 3.18 General Principles – **General interest**.
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.
 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

Keywords of the alphabetical index:

Building, residential, part, use / Tenant, right / Video surveillance / Data processing.

Headnotes:

Federal Law on Data Protection; Articles 28 *et seq.* of the Swiss Civil Code; video surveillance of a rental building.

Assessment whether it is permissible to install a video surveillance system in a building with rented flats (recital 2).

Summary:

I. A.A. and B.A. are the owners of a rental building consisting of three parts, each with its own entrance, and comprising 24 flats. They had a video surveillance system installed with twelve cameras inside and outside the building and in the car park in order to prevent acts of vandalism and break-ins. Although the majority of the tenants approved of the measure, tenant C. brought an action in order to have the surveillance cameras removed. The Court of First Instance ordered the landlords to remove the camera which had been positioned in the entrance hall of the building where C's flat was located. The tenant appealed this decision. The appeal court went further and required the landlords also to remove the two cameras positioned in the passageways leading to the laundry rooms. The landlords took the case to the Federal Court, which dismissed their appeal.

II. The law governing leases does not contain any rules concerning the processing of tenants' data by landlords. The Federal Law on Data Protection, which is intended to protect the privacy and fundamental rights of data subjects, applies to lease contracts. This law supplements the provisions of the Swiss Civil Code concerning the protection of privacy. Processing means any operation concerning personal data – regardless of the means and processes used – including collection, storage, use, alteration, communication, archiving or destruction of data. All data which relates to an identified or identifiable person is personal data. The recording of images making it possible to identify certain persons by means of a video surveillance system installed in a rental building thus indisputably falls within the scope of the Federal Law on Data Protection. Consequently, a landlord who intends to use such a system must abide by the general principles that govern data protection, especially proportionality and the stipulations concerning the processing of data by private persons. In particular, he must ensure that the privacy rights of the persons concerned are not unlawfully violated. The Federal Law on Data Protection provides that an invasion of privacy is unlawful unless it is justified by the victim's consent, by an overriding private or public interest or by law. Whether or not this applies is a question that must be resolved – if the tenants do not agree – on a case-by-case basis by weighing the interests at stake, taking all of the circumstances of the case under consideration into account. Therefore, video surveillance of the entrance to an anonymous block where there is a potential risk of attacks can be advisable and tolerable for all of the persons concerned. However, this should not normally be the case – in the absence of any concrete signs of danger – for a small rental building in which the neighbours know each other.

In this case, the Federal Court confirmed the lower court's analysis and dismissed the landlords' appeal. It held that constant surveillance of the entrance made it possible to analyse the behaviour of the tenant concerned, which constituted a significant violation of his privacy. Given the clear circumstances of the case, characterised by the presence of only a small number of tenants and the absence of any signs of a real danger, the invasion of the tenants' privacy was disproportionate with regard to the three cameras in the indoor part of the entrance to the building and the passageways leading to the laundry rooms. In arriving at this conclusion, it took account of the fact that the interest of the landlords and the tenants who approved the measure in ensuring the effective prevention of crimes and their solution was already adequately safeguarded by the other cameras.

Languages:

German.



“The former Yugoslav Republic of Macedonia” Constitutional Court

Important decisions

Identification: MKD-2016-1-001

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 16.01.2016 / e) U.br.19/2016 / f) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 58/2016, 28.03.2016 / g) / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

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

3.21 General Principles – **Equality.**

4.4.3.3 Institutions – Head of State – Powers – **Relations with judicial bodies.**

Keywords of the alphabetical index:

Pardon, power to grant, restriction.

Headnotes:

Under the Constitution, the President of the Republic is the only constitutional body authorised to grant pardons.

Under the principle of separation of powers, this prerogative cannot be limited by law or transferred to any other State authority.

Limiting the possibility for granting pardons for certain criminal offences violates the principle of separation of powers and the principle of equality of citizens.

Summary:

I. The applicant in this matter, a lawyer from Ohrid, asked the Court to review the constitutionality of the Law on Changing and Supplementing the Law on Pardon (“*Official Gazette of the Republic of Macedonia*”, no.12/2009). He claimed that in enacting this legislation, the legislator had encroached on the constitutional prerogative of the President to grant pardons, contravening the constitutional principle of the separation of powers.

He also argued that by not allowing pardon for certain criminal offences, the legislator had violated the principle of equality of citizens as the perpetrators of certain criminal offences had no opportunity of being granted pardon. Any restriction of the president’s right to grant pardons was, in the applicant’s view, contrary to the Constitution. He asked the Court to repeal the Law on Changing and Supplementing the Law on Pardon in its entirety.

II. The Constitutional Court noted that the legislation did in fact provide for a limitation of the President’s power to give pardon. There were a number of offences where he could not grant it, namely to persons convicted of criminal offences against elections and voting, criminal offences against sexual freedom and morality committed against children and minors; criminal offences against public health, offences entailing the unauthorised production and sale of narcotic drugs and psychotropic substances or enabling their use, and criminal offences against humanity and international law.

This provision is a new legal solution which is not stipulated in the 1993 Pardon Law. Under the text of the 1993 Law, the President grants pardon to individually named persons for criminal offences provided for by the laws of the Republic of Macedonia, in accordance with the provisions of the Criminal Code and the provisions of this Law.

The prevention of the commission of the criminal offences mentioned above could not, in the Constitutional Court’s view, justify the restriction of the President’s right to grant pardon in the manner envisaged by the Law on Changing and Supplementing the Pardon Law.

The Court went on to observe that a pardon, by its nature, is neither an act of punishment nor a sanction, through which prevention might be achieved. It simply expresses a milder attitude towards the offender; it is an irrevocable and final act of mercy by the President of the Republic, who does not decide in the capacity of a judicial authority, but as a state body that has obtained its legitimacy from the citizens through direct elections.

The pardon is an inviolable constitutional and legal right, which the President can use in a procedure defined by law and for reasons that may not be of a criminal-legal nature (for instance, reasons of equity or social, health, political reasons); it does not fall within the factual and legal assessment of the court. A pardon may be given prior to the sentencing in the form of exemption from criminal prosecution or after the judgment pronouncing the sentence becomes final.

In addition, the way in which the criminal offences are defined in the Criminal Code provides no basis for the legislator to exclude certain offences from the possibility for pardon.

Under Article 7 of the Criminal Code, a criminal offence is an unlawful act the characteristics of which are determined by law. The legal definition of a criminal offence makes no division or gradation between them.

It is no accident, therefore, that Article 1 of the basic text of the Law on Pardon of 1993 does not limit the criminal offences that may not be pardoned, but states that the President "grants pardons for criminal offences stipulated by the laws of the Republic of Macedonia, according to the provisions of the Criminal Code and this Law."

The Court does not find controversial the social danger of the criminal offences the challenged law exempts from the possibility of being pardoned. However, it cannot be accepted as a criterion or reason for such an exemption; social danger is also a characteristic of the other criminal offences that are not exempted, and some of them attract the most severe penalties provided by the Criminal Code.

The fact that the President has such competence does not mean that pardon will be granted for any offender for any criminal offence committed; this power is to be used in cases where the President deems that a pardon is appropriate, taking into account the characteristics of the offender and the offence committed. Thus, the social danger of the criminal offence committed had already been sanctioned by envisaging it as a criminal offence and by the final judgment imposing a sanction envisaged by the legislator.

According to the Court, the restriction placed on the President's right to grant pardon by the disputed legislation interferes with his constitutional authority to grant pardons. It also raises questions over the boundaries and criteria for such limitation. There is a suggestion too that it could result in the meaning of the constitutional institute of pardon being lost, as it would be made dependent upon the legislator's perceptions.

The challenged Law also violates the constitutional right of equality of citizens under Article 9 of the Constitution. Those convicted of crimes, which the legislator has envisaged may not be pardoned, are deprived of the possibility of being pardoned, unlike those convicted of offences which do have scope for pardon, resulting in a difference in treatment of

persons who have the same status (convicted offenders) and are in the same legal position.

The Court also noted that the Law on Changing and Supplementing the Law on Pardon authorises the President to set up a Commission on Pardons and to determine its composition and the number of members of the Commission. This is a new legal solution not provided for by the Law on Pardon of 1993.

While there is an indisputable need for the existence of a professional body to assist the President in the exercise of his constitutional jurisdiction, the Court noted that the potential for problems from a constitutional standpoint, because the legislator has no constitutional power to regulate matters relating to the internal organisation and work of the President as one of the bodies of state power.

The Court concluded that the Law on Changing and Supplementing the Law on Pardon contains provisions that violate the fundamental value of the constitutional order – the division of state powers into legislative, executive and judicial. It restricts the jurisdiction of the President for granting pardon, violates the constitutional right of equality of citizens and, without any constitutional grounds, regulates issues pertaining to the organisation and work of the President of the Republic as a body. As a result, the Court found that the Law was out of line with Articles 8.1.3 8.1.4, 9 and 84.9 of the Constitution and repealed it.

III. Judges Natasha Gaber-Damjanovska, Ismail Darlista, Sali Murati and Gzime Starova disagreed with the majority. They submitted a joint separate opinion which is attached to the Decision.

Languages:

Macedonian.



Turkey

Constitutional Court

Important decisions

Identification: TUR-2016-1-001

a) Turkey / **b)** Constitutional Court / **c)** General Assembly / **d)** 13.07.2015 / **e)** 2015/68 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24.07.2015, 29424 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 3.25 General Principles – **Market economy.**
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**
 5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education.**
 5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession.**

Keywords of the alphabetical index:

Freedom of enterprise, restriction / Limitation of right, justification.

Headnotes:

Excluding private tuition schools from the scope of “private teaching institutions” and ordering the closure of existing private training centres is not in line with Article 42 of the Constitution entitled “right and duty of education and learning”, Article 48 entitled “Freedom of labour and contract” and Article 13 entitled “restriction of fundamental rights and freedoms”.

Summary:

I. In this case, the applicant challenged the constitutionality of Article 2.1.b of the Law on the Private Teaching Institution no. 5580 (hereinafter, the “Law”) and Provisional Article 5.1, which provided that private tuition schools (“*dershane*”) shall be excluded from the scope of “private teaching institutions” included in the Law and that the existing private tuition schools shall cease performing their activities after 1 September 2015. In the petition submitted to the Court, it was briefly argued that the contested

provisions were introduced due to a pressing social need, but that abolition of the private tutoring centres, which encompass the right to education and learning, the freedom of enterprise, and the right to freedom of labour, is disproportionate and infringes upon the very essence of these rights. It was also maintained that the State is obliged to strike a fair balance between the public interest expected from the restriction and individual rights and freedoms. It was therefore contended that these provisions are contrary to Articles 2, 5, 13, 17, 35, 42, 48 and 49 of the Constitution, which concern, respectively the rule of law as a principle of the State, permissible restriction of fundamental rights, the rights to life and prohibition against sanctions contrary to human dignity, the right to property, the right to education, the right to freedom of labour, and the right and duty to work.

II. Rendering its judgment on 13 July 2015, the Constitutional Court examined the provisions in dispute under Article 42 of the Constitution concerning the “right and duty of education and learning”, Article 48 on “freedom of labour and contract” and Article 13 on “restriction of fundamental rights and freedoms”.

The Constitutional Court considered in its assessment, with regard to the right to education and learning, that in democratic countries the legislator has broad discretion over the determination of education policies and its choice of institutional alternatives to implement these policies. The position of institutions offering preparatory education for exams in education policy as well as the law to which these institutions shall be subject and the power to determine its limits also fall within the scope of the legislator’s discretion.

Whereas the power to determine fundamental policies and implement them is vested with the legislator, the legislator’s power in respect thereof is limited by the Constitution, and the regulations to be introduced should not violate constitutional principles and fundamental rights and freedoms. In this sense, fundamental rights and freedoms form the constitutional boundaries of democratic political powers. The right to education and learning in Article 42 of the Constitution is capable of enabling a person to retain and improve his or her material and spiritual self, along with other rights.

The duty of the State, which is responsible for the supervision and inspection of education in accordance with the same Article, is to enable everyone to enjoy the right to education and learning in the best possible way. Regulation of the activities of private enterprises offering services in the field of education is required under the State’s obligation to

enable the proper functioning of education. While the State has no absolute obligation to establish institutions where out-of-school education can be received, it should refrain from arrangements causing total elimination of services offered by the private sector in this field within the framework of legislation, unless this is necessary. In other words, no arrangement which abolishes education and learning rights of persons and which eliminates the freedom of enterprise, in such a way as to render their exercise impossible or restrict them disproportionately, can be introduced.

As a matter of fact, out-of-school education provides an environment where individuals are able to act freely and where they can improve their material and spiritual self in accordance with their preferences. The State should not interfere in this field, unless it is necessary in a democratic society. However, it is evident that the legislator has discretionary power in making arrangements in the field of out-of-school education, as Article 42 of the Constitution stipulates that education shall be conducted under the supervision and inspection of the State. This power of the State enables the legislator to introduce arrangements in matters such as the name, structure, and sphere of activity of the mentioned institutions and the rules they are to obey.

Seeking closure of private tuition schools, which meet a need created by the system of education and exams, and which have been granted with a legal status by the State, through a complete ban of these institutions by means of the challenged legal provisions, instead of taking measures to prevent the drawbacks related to such institutions, eliminates the possibility for persons to receive educational support from out-of-school private institutions within the scope of preparation for exams. Accordingly, it violates the right to education and learning.

The Constitutional Court, making an assessment within the scope of the freedom of enterprise guaranteed under Article 48 of the Constitution, considered that this freedom safeguards the right to economic enterprise of every real and legal person freely in the field of his or her choice. As expressed in the legislative intent of the Article, this freedom “has been regulated as an economic and social right with a view to providing the individual personally with his or her economic peace and prosperity”. Again as provided therein, “Article 48 has both provided a guarantee for free enterprise, and has indicated in its second paragraph the restrictions that might be introduced”. Accordingly, the State can impose restrictions on the freedom of private enterprise in cases of public interest and as required by the national economy, and for social purposes.

When it is considered that private tuition schools are enterprises which operate in the field of education, it is obvious that State supervision and inspection of them should be stricter. In this regard, it is possible for the administration to impose sanctions on businesses acting contrary to the laws and to cancel their work permits when the relevant legal conditions are satisfied. However, a complete ban or shutdown of a private enterprise continuing its operation within the statutory framework for reasons unrelated to free market conditions depending on supply and demand – hence, on the free will of the individual – without a pressing social need with respect to the democratic social order, leaves the freedom of private enterprise unprotected.

Without introducing an arrangement of the specified nature and putting forward a compelling reason in respect of the order of a democratic society, and without resorting to less restrictive means which could accomplish the purpose of the restriction as well, the indiscriminate closure of private training centres is a restriction on the freedom of enterprise, which is disproportionate and not necessary in a democratic society.

Consequently, the Court held that the provisions, which exclude private tuition schools from the definition of “private educational institutions”, and which order the current tuition schools that fail to convert to ordinary private schools to cease their activities after 1 September 2015, are contrary to Articles 13, 42 and 48 of the Constitution. The Court accordingly decided to annul these provisions.

Languages:

Turkish.



Identification: TUR-2016-1-002

a) Turkey / **b)** Constitutional Court / **c)** Second Section / **d)** 08.10.2015 / **e)** 2015/85 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24.11.2015, 29542 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.

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

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 Fundamental Rights – Civil and political rights – **Electoral rights.**

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

Keywords of the alphabetical index:

Election, ineligibility / Political rights, loss / Election, right to be elected, restriction.

Headnotes:

Restrictions on political rights of citizens cannot be contrary to the principle of proportionality, such as the right to elect and to be elected and the right to engage in political activity.

Summary:

I. In the application lodged with the Court, five provisions of the Turkish Criminal Code were challenged as contrary to the Constitution. First, it was argued briefly that, although the constitutional provisions on eligibility to be a parliamentarian prescribe that persons who have been sentenced to imprisonment for one year or above, except for negligence offences, shall not be elected as a parliamentarian, the contested provision sets forth that persons may be deprived of “their capacity to be elected” even when they are sentenced to imprisonment for a term of less than one year. It was therefore contended that this provision is in breach of the Constitution.

The second challenged provision prescribes that a person may be deprived of his or her capacity to elect, to be elected, and his or her other political rights as legal consequences of a sentence of imprisonment imposed on him or her due to intentionally committing an offence. The provision was claimed to be unconstitutional as it contradicts with the basic constitutional principles on political rights.

The third provision in dispute provides that a person may be deprived of enjoying his or her other political rights as legal consequences of being sentenced to imprisonment due to an intentional offence. The provision is claimed to be unconstitutional as it prescribes that a person may be deprived of enjoying

his or her other political rights as legal consequences of being sentenced to imprisonment due to an intentional offence; however it is not clearly specified which rights they are and, thereby, leads to ambiguity.

The fourth provision challenged as unconstitutional provides that a person may not use his or her rights set out in Article 53 of the Law until the imprisonment sentence imposed on him or her is fully executed. The unconstitutionality was claimed to arise due to the provision prescribing that a person may not use his or her right to elect and to be elected until execution of the imprisonment sentence imposed on him or her is fully completed, even during the period he or she is conditionally released and therefore is not in a penitentiary institution, which constitutes a contradiction of the explicit provision of Article 76.2 of the Constitution.

The fifth, and final, provision challenged in the application provides that persons who are sentenced to short-term imprisonment due to an offence they have intentionally committed, and pronouncement of whose imprisonment sentence is suspended, cannot be deprived of the right to vote or to be elected under Article 53.1 of the Law. Although Article 76.2 of the Constitution sets out that those who have been convicted for theft cannot be elected as a parliamentarian regardless of the type, duration and suspension of the sentence imposed, Article 53 of the Law shall not be applicable to the persons whose short-term imprisonment sentence is suspended and, thereby, those whose short-term imprisonment sentence imposed for the offence of theft is suspended may obtain the right to be elected as a parliamentarian in spite of the arrangement set out in Article 76 of the Constitution. Accordingly, it was maintained that this provision is in breach of the Constitution.

II. Regarding the first provision, the Constitutional Court emphasised that being sentenced to imprisonment for a term of less than one year, except for the offences cited under Article 76 of the Constitution (i.e. “dishonourable” offences such as embezzlement, theft and bribery, as well as terrorism and disclosure of state secrets), is not prescribed as one of the reasons to be disqualified from being elected as a parliamentarian. It therefore annulled the provision containing the said phrase insofar as it contains the phrase “capacity to be elected...” in Article 53.1.b of the Law by finding it contrary to Article 76 of the Constitution as it sets forth that persons may be deprived of “their capacity to be elected” even when they are sentenced to imprisonment for a term of less than one year due to an intentional offence.

Regarding the second provision, in the Constitutional Court's view, democratic society calls for a system where citizens enjoy their right to elect to the greatest extent possible as a means of determining the national will. The State shall not interfere with the right to elect unless it is necessary for the democratic order of society. Although this right may be restricted for legitimate aims, such restriction shall not be imposed in a manner which would eliminate the citizens' right to elect or render it dysfunctional.

A person who has the right to elect enjoys this right by casting a vote. Accordingly, it is evident that the right to elect cannot be dissociated from the right to vote, which may be defined as putting it into practice. Article 67 of the Constitution prescribes that convicts in penitentiary institutions, except for those convicted of negligence offences, cannot vote. As the said provision regulates that only those who are held in the penitentiary institutions for committing an intentional offence cannot vote, there is no constitutional provision which prevents convicts who are not held in the penitentiary institutions from casting votes.

When the provision in dispute is examined, it is observed that it prescribes that, regardless of whether they are held in the penitentiary institutions or not, those who are sentenced to imprisonment due to an intentional offence shall be deprived of their right to elect. The restriction imposed by this provision on the right to elect goes beyond the boundaries of "the right to vote", which is clearly defined in the Constitution as a manifestation of the right to elect. It restricts the right to elect categorically in cases of being sentenced to imprisonment due to an intentional offence without taking into account whether the convict is in a penitentiary institution or not. Consequently, the Constitutional Court annulled the provision containing the phrase in dispute insofar as it contains the phrase "right to elect and..." set out in sub-paragraph b of the same paragraph by finding it contrary to Articles 13 and 67 of the Constitution as the said provision of the Law constitutes a disproportionate restriction, which is not necessary in a democratic social order.

Regarding the third provision, in the Constitutional Court's opinion, political rights are fundamental rights that are related to the establishment and functioning of the State. These rights constitute the basis of democracy as they provide individuals with the ability to act directly to have an influence on the basic rules and structures of the society.

The Court observed that the restriction imposed on

the contested provision covers all political rights cited from Articles 66 to 74 of the Constitution (which includes the right to participate in political activities, to form political parties, etc.) except for the rights to elect and to be elected. Although one may accept that a criminal can be denied of certain rights which especially require the existence of trust, as stated in the legislative intent of the Law, depriving the individual of all political rights enshrined in the Constitution cannot be considered necessary for the aims pursued by the said provision. Consequently, the Constitutional Court decided to annul the provision insofar as it relates to the phrase in dispute by finding it contrary to the principle of proportionality.

As regards the fourth provision, in the Constitutional Court's view, the provision in dispute, which prescribes that a person may not use his or her right to elect until the imprisonment sentence imposed due to an intentional offence is fully executed, contradicts the explicit provision of the Constitution by restricting the right to elect for a period which exceeds the actual execution period elapsing in the penitentiary institutions. It is therefore in breach of the Constitution in this respect.

On the other hand, although Article 76.2 of the Constitution does not prescribe the status of "being sentenced to imprisonment for a period of less than one year" as one of the reasons for being disqualified from becoming a parliamentarian, the provision in dispute provides that those sentenced to imprisonment for less than one year due to an intentional offence may be deprived of the right to be elected. Therefore, this provision contradicts the Constitution.

Consequently, the Constitutional Court decided to annul the provision in dispute insofar as it relates to the phrase "the capacity to elect and to be elected..." included in Article 53.1.b of the Law by finding it contrary to Articles 67 and 76 of the Constitution, concerning the right to vote and eligibility for election as a deputy respectively.

Regarding the fifth challenged provision, in the Constitutional Court's opinion, persons whose short-term imprisonment sentence is suspended shall not be deprived of the right to be elected by virtue of the provision in dispute. In this context, the provision has broadened the explicit and detailed arrangements set out in Article 76 of the Constitution on the eligibility to become a parliamentarian with regard to suspended short-term imprisonment sentences. However, the intent of the drafters of the provision set out in Article 76 of the Constitution is to ensure that those who exercise legislative power bear certain qualifications. In this context, the eligibility criteria for being elected as a parliamentarian may be changed only

through a constitutional amendment. Therefore, the contested provision, which may be regarded as an amendment to the provisions concerning eligibility for election as a parliamentarian enshrined in the Constitution, is unconstitutional insofar as it relates to the phrase "...the capacity of being elected..." mentioned in the second paragraph. Consequently, the Constitutional Court decided to annul the provision in dispute insofar as it relates to the phrase "...the capacity of being elected..." cited in subparagraph b of the first paragraph for being contrary to Article 76 of the Constitution.

Languages:

Turkish.



Identification: TUR-2016-1-003

a) Turkey / **b)** Constitutional Court / **c)** Second Section / **d)** 08.12.2015 / **e)** 2014/87 / **f)** K.2015/112 / **g)** *Resmi Gazete* (Official Gazette), 28.01.2016, 29263 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 3.10 General Principles – **Certainty of the law**.
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

Keywords of the alphabetical index:

Personal data, collection / Personal data, processing / Private life, right.

Headnotes:

Legal provisions regulating broadcasting on the internet and crimes committed through internet broadcasting, which empowered the Telecommunications Communication Presidency to compel production of communications data from content, hosting and access providers without this power being subject to any legal restriction or obstacle constitute a breach of "the confidentiality of private life" and of the criteria for lawful restriction of rights, particularly the criteria of

foreseeability and certainty.

Summary:

I. According to some of the provisions of Law no. 5651 "Regulating Broadcasting in the Internet and Fighting Against Crimes Committed through Internet Broadcasting", content, hosting and access providers are obliged to deliver any information requested by the Telecommunications Communication Presidency (hereinafter, the "TIB") in the manner required by the TIB and to take measures requested by the TIB.

In the petition lodged with the Constitutional Court, it was argued that the challenged provisions have been introduced in order to enable the TIB to obtain communication data of all internet users without being subject to any legal restriction or obstacle; and that any arrangement which would restrict access of the TIB to personal information to be delivered by the content, hosting and access providers to the TIB when requested is not prescribed in these provisions. It was also argued that although the provisions in dispute hold the content, hosting and access providers liable to take measures requested by the TIB, it is not clearly set out what these measures are and therefore they are ambiguous in nature. For the above-mentioned reasons, it was contended that these provisions are in breach of Articles 2, 13, 20, 36 and 40 of the Constitution: these guarantee, respectively, the state based on the rule of law; that restrictions of fundamental rights must be by law, necessary in a democratic society and proportionate, and must not infringe their essence; the right to private and family life; the right of access to justice and to a fair trial; and the right to legal remedies for rights infringements.

II. Rendering its judgment on the action for annulment, the Constitutional Court examined the provisions in dispute under Article 2 of the Constitution, in which the principle of the state based on the rule of law is prescribed, and under Article 20 of the same, which is entitled "the confidentiality of private life".

In the Constitutional Court's view, it is inevitable that the TIB needs certain information and documents, including personal data, in order to regulate publications and broadcasts on the internet and to combat offences committed by means of such publications and broadcasts and in order to perform the duties assigned to it. However, the scope of the information to be requested by the TIB from content, hosting and access providers with a view to performing its duties set out in the Law no. 5651 and framework of the liabilities which the TIB may impose are not set out in the challenged provisions. In this

context, the scope of the TIB's power to demand information from content, hosting and access providers is not restricted by means of ensuring guarantees necessary for the protection of personal data. In addition, liabilities whose scope cannot be ascertained are imposed on content, hosting and access providers for ensuring that they take the requested measures.

In Article 4.3 of the Law, which is requested to be annulled, a general definition is given by means of stating "within the scope of the performance of the duties assigned to the Presidency by this Law and other Laws". However, this general definition is not set out in Articles 5.5 and 6.1.d of the Law, which are requested to be annulled. In this context, the challenged provisions do not clearly set out under which conditions and for which grounds the information requested by the TIB shall be delivered to the Presidency by content, hosting and access providers, or how long the information provided shall be stored by the TIB, as well as the content of the information requested and measures to be notified to content, hosting and access providers. Therefore, the provisions are not definite and foreseeable.

The provisions in dispute permit access to individuals' personal data without their explicit consent and the processing and delivery of such information to the TIB in spite of the guarantees introduced in Article 20 of the Constitution for the protection of private life. Article 20.3 of the Constitution provides as follows: "personal data can be processed only in cases envisaged by law or with the person's explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law". The precise nature of "cases envisaged by law" for the protection of personal data in the above-cited Article of the Constitution is not clearly defined in Law no. 5651. The challenged provisions provide that all kinds of personal data, information and documents pertaining to individuals shall be unconditionally submitted to the TIB without being subject to adequate restriction in terms of subject-matter, aim and scope in spite of the guarantee prescribed in the Constitution. In this way, individuals are left unprotected against the State's administrative authorities. Therefore, as these provisions are not definite and foreseeable, they impose a disproportionate restriction on the right to request the protection of personal data and are in breach of Article 20 of the Constitution.

Consequently, the Constitutional Court found the provisions, which set out the internet content, hosting and access providers' liability to deliver the information requested by the TIB to the TIB and to take measures notified by the TIB, in breach of

Articles 2, 13 and 20 of the Constitution and decided to annul these provisions.

Languages:

Turkish.



Identification: TUR-2016-1-004

a) Turkey / **b)** Constitutional Court / **c)** General Assembly / **d)** 25.02.2016 / **e)** 2015/1856 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 10.03.2016, 29649 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

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

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:

Liberty, personal, right.

Headnotes:

Detention of journalists, without the existence of "strong evidence" of having committed an offence, constitutes a violation of the right to personal liberty and security as well as the rights to freedom of expression and free press.

Summary:

I. Some trucks, alleged to have been weapon-laden, were stopped and searched at Hatay and Adana provinces in January 2014. The incidents related to the stopping and search of these trucks and the contents and destination of their freight were discussed by the public and a newspaper named *Aydınlık*, in its issue on 21 January 2014, published a news article alleging that these trucks were carrying weapons and ammunition and a photograph related

to such allegations. Approximately sixteen months after such publication, Can Dündar, one of the applicants, published in the daily newspaper *Cumhuriyet's* issue of 29 May 2015 photographs and information related to the weapons and ammunitions alleged to have been found on the trucks. Another news article on the same incident was prepared by Erdem Gül, the other applicant, and published in the same newspaper on 12 June 2015.

After the publication of the news by Can Dündar, the Chief Public Prosecutor's Office made a press statement on 29 May 2015 and announced that a prosecution had been initiated on the charges of "providing documents regarding the security of the state, political and military espionage, unlawfully making confidential information public and making propaganda of a terrorist organisation". Approximately six months after such announcement, the applicants were invited by phone on 26 November 2015 to give their statements and they were detained on charges of "deliberate support for the organisational objectives of an armed terrorist organisation without being a member and providing for espionage purposes the information that was meant to be kept confidential for the sake of the state's security or its domestic or international political interests and disclosing such information". The applicants objected to the said decision on their detention. However, their objections were dismissed. Upon the rejection of their objections, the applicants lodged an individual application to the Constitutional Court.

The applicants claimed that they were deprived of their liberty in an unlawful way, that there is no justification for their detention, that the only grounds for the decision on their detention is the news that they published and that no evidence except for the news articles were adduced against them. Accordingly, they alleged that their right to personal liberty and security, and rights to freedom of expression and free press, have been violated.

II. In this context, the Constitutional Court stated that the individual application relates to the allegations as to the applicants' detention violates freedom of expression and press and that the applicants exhausted legal remedies by objecting to the decision on their detention.

Firstly, the Constitutional Court stated that its review on the merits of the allegations declared admissible is limited to the "lawfulness of detention" and "the effects of detention measure on the freedom of expression and press", independently of the investigation and prosecution of the applicants and possible outcomes of their trial. The Court emphasised that this review is not on the merits of the applicants' case on trial before the

relevant court of instance and, therefore, does not include whether publication of the news articles at the centre of the application constitutes a crime or not.

The constitutionality review as to whether the right to personal liberty and security has been violated or not must be carried out, in the first place, with regard to the existence of "strong evidence of having committed an offence", which is cited among the essential conditions of a detention measure in the third paragraph of Article 19 of the Constitution. Considering that the subject of the individual application is a detention measure and that there is an on-going trial procedure concerning the applicants, such review shall be carried out limited to whether the concrete facts indicating the strong suspicion of crime were adduced in the grounds of the decision on detention. The Court also deemed it necessary to examine whether the detention measure is "necessary" within the context of the principle of proportionality, which is one of the criteria for the restriction of rights under Article 13 of the Constitution.

The aim of the guarantees laid down in Article 19 of the Constitution is to prevent the arbitrary deprivation of individuals' liberty. The Constitution and the Law stipulates that an individual can only be detained on the ground that there exists strong evidence of their having committed a crime and other detention requirements. Nevertheless the court did not show any concrete evidence as indication of strong suspicion of the applicants having committed the alleged crimes except the publication of the relevant news articles in the reasoning of the detention decision. A measure as severe as detention which does not meet the criteria of lawfulness cannot be considered proportionate and necessary in a democratic society. The detention measure was implemented approximately six months after the beginning of the investigation concerning the said news and without considering the fact that similar news items were published approximately sixteen months earlier in another newspaper. The circumstances of the case and the grounds of the decision on detention do not explain which "pressing social need" leads to such detention measure interfering with the applicants' right to liberty and security. Consequently, the Constitutional Court ruled, by majority, that the applicant's right to personal liberty and security guaranteed under Article 19 of the Constitution had been violated as conditions of "strong evidence" and "being necessary" required for detention measure were not reasoned in the relevant decision.

Considering the questions addressed to the applicants by the Chief Public Prosecutor's Office and

grounds of the decision on their detention, there are no facts – except for publishing news in the newspaper – which may constitute a basis for the charges against them. In this context, the detention measure implemented against the applicants, irrespective of the content of the news, constitutes an interference with the freedom of expression and press.

However, not every interference with fundamental rights and freedoms leads to a violation of the relevant right or freedom on its own. In order to determine whether an interference violates the freedom of expression and press, it must also be tested whether such interference meets the criteria of being prescribed by law, having a legitimate aim, being necessary in a democratic society, and being proportionate.

Under Articles 26.2 and 28.5 of the Constitution, freedom of expression and press may be restricted for the purposes of “national security”, “preventing crime”, “punishing offenders”, “withholding information duly classified as a state secret”, and “preventing disclosure of state secret information”. Considering the grounds in the justification of the decision on detention and the characteristics of the crimes charged against the applicants, it is seen that the aim pursued with detention of the applicants is compatible with the aforementioned purposes of restriction cited under the Constitution.

The fact that the interference has a legal basis and a legitimate aim is not sufficient alone to justify that the interference does not cause a violation. The facts of the case must also be reviewed with respect to “being necessary in a democratic society” and “being proportionate”. The Constitutional Court shall carry out such review on the basis of detention process and the grounds of decision on detention.

Taking into account the assessments of the right to personal liberty and security and considering that the only fact adduced as a basis for the charged crimes was the publication of the relevant news articles, a measure as severe as detention which does not meet the criteria of lawfulness cannot be considered proportionate and necessary in a democratic society. The detention measure was implemented approximately six months after the beginning of the investigation on the said news and without considering the fact that similar news were published approximately sixteen months earlier in another newspaper. The circumstances of the case and the grounds of the decision on detention do not explain which “pressing social need” leads to such detention measure interfering with the applicants’ freedom of expression and why it is necessary in a

democratic society for the protection of national security.

Moreover, it is evident that implementing a detention measure without adducing concrete facts other than the published news and grounding the necessity of such measure might lead to a chilling effect both on the applicants and the press in general.

Consequently, the Constitutional Court ruled by majority that the applicants’ freedom of expression and press had been violated in conjunction with their right to personal liberty and security.

Languages:

Turkish.



Ukraine

Constitutional Court

Important decisions

Identification: UKR-2016-1-001

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 20.01.2016 / **e)** 1-v/2015 / **f)** Compliance of the draft Law on introducing amendments to the Constitution (on justice) with the provisions of Articles 157 and 158 of the Constitution / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law.**
 4.4.3.3 Institutions – Head of State – Powers – **Relations with judicial bodies.**
 4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**
 4.7.1 Institutions – Judicial bodies – **Jurisdiction.**
 4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status.**
 4.7.4.3 Institutions – Judicial bodies – Organisation – **Prosecutors / State counsel.**
 4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**
 4.7.7 Institutions – Judicial bodies – **Supreme Court.**
 4.7.8 Institutions – Judicial bodies – **Ordinary courts.**
 4.7.15.1 Institutions – Judicial bodies – Legal assistance and representation of parties – **The Bar.**
 4.7.16.2 Institutions – Judicial bodies – Liability – **Liability of judges.**
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**
 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

Keywords of the alphabetical index:

Constitution, amendment / Reorganisation, court / Judge, dismissal, grounds.

Headnotes:

Proposed legislation introducing amendments to the Constitution would not pave the way to the rights and freedoms of individuals being ruled out or fettered.

Summary:

I. Questions had arisen over the constitutionality of legislation introducing amendments to the Constitution (on justice) (registration no. 3524).

II. The Constitutional Court began by observing that consolidation of the provision on the possible definition in the law on mandatory pre-trial dispute resolution is an additional legal remedy for an individual which does not rule out the possibility of further appeal to the Court.

Article 124.6 of the Constitution, proposed by the draft Law, allows for the possibility of recognising the jurisdiction of the International Criminal Court as provided for by the Rome Statute of the International Criminal Court. The Court noted that the proposed amendment probably allowed for the recognition of the jurisdiction of the International Criminal Court under the conditions stipulated by the Statute.

The proposed new wording does not encompass the provisions enshrined in Article 124.5 of the Constitution, according to which judicial decisions are adopted by the courts in the name of Ukraine and are mandatory for execution throughout the entire national territory. The Constitutional Court noted that the proposed wording of Article 124 of the Constitution does not provide for the abolition or restriction of human and citizens' rights and freedoms.

Under Article 125.2 of the Constitution, the Supreme Court is the highest judicial body in the system of courts of general jurisdiction. The draft Law provides that the Supreme Court will be the highest court in the system of judiciary. It proposes replacing the word "judicial body" with "court" in Article 125 of the Constitution, substituting the phrase "the system of judiciary in Ukraine" for "the system of courts of general jurisdiction" and it proposes that the title "Supreme Court of Ukraine" should apply without the word "Ukraine".

Under Article 126.3 of the Constitution, a judge cannot be detained or arrested without the consent of Parliament until a guilty verdict is handed down by a court. The proposed wording gives the High Council of Justice the power to consent to a judge being detained, kept in custody or arrested pending the verdict unless the judge has been detained *in flagrante delicto* or immediately afterwards. The amendments to Article 126.3 of the Constitution were the subject matter of proceedings of the Constitutional Court, in which it examined the compliance of the draft Law on amendments to the Constitution regarding the immunity of People's Deputies and judges with Articles 157 and 158 of the

Constitution and held that consenting to temporary restrictions on the freedom and the right to free movement of judges does not pose a threat or obstacle to human rights and freedoms.

The draft Law also proposed consolidating within the Constitution a provision making it impossible to make judges liable for decisions they have rendered, unless a crime or a disciplinary offence has been committed; the Constitutional Court suggested that this did not represent a fetter on individual rights and freedoms.

The draft Law proposed consolidating within the Constitution the perpetuity of a person holding the office of judge. The term of office of a judge of the Constitutional Court is a subject of regulation of the proposed wording of Article 148.6 of the Constitution.

It also proposed consolidating in the Constitution an exhaustive list of grounds for dismissing judges from office and for terminating their powers. The Constitutional Court noted that the proposed grounds were in line with items 50 and 52 of the annex to the Committee of Ministers Recommendation CM/Rec(2010)12, which suggests that appointment to the office on a permanent basis should be suspended only in cases of significant violations of disciplinary or criminal provisions established by law, or if the judge could no longer carry out his or her duties; early resignation should only be possible at the judge's request or in connection with his or her state of health; judges cannot receive new appointments or be transferred to another judicial office without their consent, unless disciplinary sanctions have been applied or an overhaul of the system of judiciary has been implemented. The Constitutional Court accordingly found that the proposed wording of Article 126 of the Constitution did not entail the abolition or restriction of individual rights and freedoms.

The draft Law provided for an increase in the age limit for candidates seeking office as judges to thirty years and a new upper age limit for appointment to the office of judge of sixty-five years. It also proposed changes to the requirements for the work experience a person needs in order to be appointed as a judge, and provides for the abolition of the requirement of residence in Ukraine for at least ten years (which hampered the appointment of citizens who had worked abroad for many years) and the establishment of requirements such as competence and virtue. The draft Law wording of Article 127.3 and 127.4 of the Constitution also allowed for possible new requirements being added for appointment to the office of judge.

Under Article 85.1.27 of the Constitution, the competence of Parliament will include the election of judges for an unlimited term. Under the proposed wording, the subject authorised to appoint judges is the President, who must realise his or her powers exclusively upon the submission of the High Council of Justice and in the manner prescribed by law. The Venice Commission has mentioned the need to exclude Parliament from the process of election of judges and the admissibility of the participation of the Head of State in this process.

The proposed wording of Article 128 of the Constitution contains provisions on establishing a competitive selection process as a preliminary to judicial appointment. This did not, in the Constitutional Court's view, pose a threat or an obstacle to human rights and freedoms.

Amendments proposed by the draft Law to Article 130.1 of the Constitution provided that in terms of the preparation of the State budget, expenditure for the maintenance of courts and the proposals of the High Council of Justice must be taken into account. The proposed wording of Article 130 of the Constitution also contained a provision whereby judges' remuneration is to be defined by the Law on the judiciary. The proposed amendments to Article 130 of the Constitution did not cover Article 130.2 of the Constitution, according to which judicial self-government will operate to regulate the internal organisational activity of courts, as stipulated by the supplement of the Constitution with Article 130¹ of the Constitution, which covers by its content Article 130.2 of the Constitution. This suggested wording does not therefore hamper or abolish individual rights and freedoms.

The proposed wording of Article 131 of the Constitution will set out the *modus operandi* of the High Council of Justice, determine its powers and composition, the entities authorised to elect its members and their term of office and other basic requirements for the implementation by the High Council of Justice of the proper functioning of courts. The Constitutional Court noted that this suggested wording will not lead to the abolition or restriction of individual rights and freedoms.

The proposed wording of Article 148 of the Constitution introduced the selection of candidates for the office of judge of the Constitutional Court on a competitive basis under a legally-established procedure, along with a change to qualification requirements in terms of experience. Those seeking office as a Constitutional Court judge would also need to possess high moral qualities and to have attained the status of a lawyer with the recognised level of

competence. The proposed wording of Article 148 of the Constitution stipulated that a judge of the Constitutional Court would take office with effect from the date of taking the oath at the special plenary sitting of the Court. The Constitutional Court found that the proposed wording of Article 148 of the Constitution would not entail the abolition or restriction of human and citizen's rights and freedoms.

The proposed wording of Article 149 of the Constitution set out guarantees of inviolability and independence for Constitutional Court judges. The provisions relating to dismissal from office and termination of powers and the requirements of incompatibility were set out in Article 148.5 of the Fundamental Law in the proposed wording, and in Article 149¹ of the Constitution, which, it is proposed, will be added to the Constitution. The draft Law also proposed to consolidate in the Constitution a provision which would mean that a Constitutional Court judge would not be legally liable for voting on decisions or opinions of the Constitutional Court, unless a crime or disciplinary offence had been committed. There was no evidence that the proposed Article 149 of the Constitution would hamper or cancel out individual rights and freedoms.

The amendments to Article 151.1 of the Constitution proposed by the draft Law will require the Constitutional Court to provide opinions on the constitutional compliance of international treaties of Ukraine that are in effect, or international treaties submitted to Parliament for agreement upon the submission not only of the President or the Cabinet of Ministers, but also at least 45 People's Deputies. Article 151 of the Constitution also contains a suggested new provision which will require the Constitutional Court, upon submission by the President or at least 45 People's Deputies, to provide opinions on the constitutionality of questions, which are being suggested for submission to the all-Ukrainian referendum on people's initiative.

The draft Law proposed establishing an exhaustive list of powers of the prosecutor's office, the procedure for appointing the Prosecutor General, his or her term of office and the procedure for his or her early dismissal. Under Article 123 of the Constitution, the organisation and operation of the public prosecution bodies of Ukraine are to be defined by law. A similar provision is contained in Article 131¹ of the Constitution, which is proposed to be supplemented to the Fundamental Law; it would not, according to the Constitutional Court, pose an obstacle or threat to individual rights and freedoms.

The proposed Article 131² of the Constitution stipulated that the function of the Bar is to provide professional legal assistance. Paragraph 2 of Article 131² of the Constitution provides the guarantee for the independence of the Bar. Paragraph four indicates that only an advocate may present a person before the court, and defend them against prosecution. This is consistent with the proposed amendment to Article 59.1 of the Constitution, regarding the universal right to professional legal assistance. The Constitutional Court noted that a lawyer would presumably have the necessary professional skills and the ability to ensure the realisation of the right to protection from criminal prosecution and the representation of his or her client's interests in court. Everyone is at liberty to select the defender of his or her rights from the advocates at the Bar.

The proposed grounds for dismissing a judge of the Constitutional Court from office and terminating his or her powers are in line with the rules pertaining to judges at courts within the judicial system of Ukraine (proposed wording of Article 126 of the Constitution.) Features of constitutional regulation include maintaining certain grounds for termination of powers (the term of office is limited to nine years) and an increase in the age limit for Constitutional Court judges to 70 years. The draft Law also provides for the right of the Constitutional Court to decide independently on dismissal of a judge of the Constitutional Court from office in the manner prescribed by law. The proposed provision is aimed at strengthening the guarantees of independence of judges of the Constitutional Court from the entities authorised to appoint them and would not pose a threat or an impediment to human and citizen's rights and freedoms.

The proposed Article 151¹ of the Constitution allowed an individual to lodge a constitutional complaint with the Constitutional Court once domestic remedies were exhausted. The introduction of the constitutional complaint is an improvement of the mechanism of individual access to constitutional justice; it would not therefore entail the abolition or restriction of individual rights and freedoms.

Under Article 106.1 of the Constitution, the President appoints and dismisses the Prosecutor General with the consent of Parliament (Article 106.1.11 of the Constitution), as well as one-third of the composition to the Constitutional Court (Article 106.1.22 of the Constitution). Comparative analysis of Article 106.1.11 of the Constitution and the wording proposed by the draft Law indicates that amendments to this item correspond to the amendments, which are proposed to be introduced to Article 85.1.25 of the Constitution.

The proposed amendments to Article 106.1.22 of the Constitution regarding the exclusion of the power of the President to dismiss one-third of the composition of the Constitutional Court conform to the proposed Article 149¹ of the Constitution, which grants the Constitutional Court the authority to dismiss judges of the Constitutional Court.

The proposed amendments to Article 150 of the Constitution, which defines the powers of the Constitutional Court, provided for exclusion of the official interpretation of laws of Ukraine from the powers of the Constitutional Court, which is consistent with the proposed amendments to Article 147.1 of the Constitution. The draft Law also proposed to amend Article 150.1 of the Constitution by item 3 on the implementation by the Constitutional Court of other powers provided by the Constitution. Such powers of the Constitutional Court are enshrined in Articles 151 and 159 of the Constitution.

Under Article 152 of the Constitution, laws and other legal acts will be deemed unconstitutional by the Constitutional Court, in whole or in part, if they are unconstitutional or in the event of a breach of the procedure established by the Constitution for their review, adoption or entry into force (Article 152.1 of the Constitution). Laws and other legal acts or their separate provisions, once declared unconstitutional, lose legal force from the day the Constitutional Court rules them to be unconstitutional (Article 152.2 of the Constitution). The draft Law proposed granting the Constitutional Court the right to set out in its decisions special features of the loss of legal effect by laws, other legal acts or their particular provisions. Also, the proposed wording of Article 152.1 and 152.2 of the Constitution suggested applying the notion “acts” instead of the term “legal acts”. These proposed amendments to Article 152 of the Constitution do not pose an obstacle or threat to individual rights and freedoms.

III. Constitutional Court judges M. Hultai, O. Kasminin, O. Lytvynov, M. Melnyk, S. Sas, I. Slidenko, O. Tupytskyi, N. Shaptala, S. Shevchuk, S. Vdovichenko expressed dissenting opinions.

Supplementary information:

- Opinion of the Constitutional Court no. 3-v/2001, 11 July 2001, in a case regarding a constitutional appeal by the President for providing an opinion on conformity of the Constitution to the Rome Statute of the International Criminal Court (the Rome Statute case);

- Joint expert opinion “On the law on the judicial system and the status of judges of Ukraine”, prepared by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe Adopted by the Venice Commission at its 82th Plenary Session (Venice, 12-13 March 2010);
- Joint opinion “On the law on the judicial system and the status of judges of Ukraine”, prepared by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe Adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010);
- Basic Principles on the Independence of the Judiciary, endorsed by the United Nations General Assembly Resolutions 40/32, 29 November 1985 and 40/146, 13 December 1985;
- Appendix to the Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, CM/Rec(2010)12, 17 November 2010;
- Opinion of the Constitutional Court no. 2-v/2013, 19 September 2013, in the case upon the appeal of the parliament (*Verkhovna Rada*) on providing an opinion regarding conformity of the draft Law on introducing amendments to the Constitution on strengthening guarantees of independence of judges to Articles 157 and 158 of the Constitution;
- Opinion of the Constitutional Court no. 1-v/2015, 16 June 2015, in the case upon the appeal of the *Verkhovna Rada* for providing an opinion on compliance of the draft Law on introducing amendments to the Constitution concerning the immunity of People’s Deputies and judges with the provisions of Articles 157 and 158 of the Constitution.

Languages:

Ukrainian.



Identification: UKR-2016-1-002

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 30.01.2016 / **e)** 2-v/2015 / **f)** Compliance of the draft Law on introducing amendments to the Constitution (on justice) with the provisions of Articles 157 and 158 of the Constitution / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**

4.7.4.3 Institutions – Judicial bodies – Organisation – **Prosecutors / State counsel.**

Keywords of the alphabetical index:

Constitution, amendment / Prosecutor-general, no confidence.

Headnotes:

Draft legislation on changes to the Constitution does not represent a threat or an obstacle to individual rights and freedoms.

Summary:

I. Following the Resolution on including the revised draft Law on amendments to the Constitution (on justice) in the agenda of the 3rd session of the parliament (*Verkhovna Rada*) of the VIIIth convocation, and on its submission for consideration to the Constitutional Court, no. 950-VIII, 28 January 2016, Parliament sought an opinion from the Constitutional Court as to the conformity of the revised draft Law on amendments to the Constitution (reg. no. 3524) in the wording dated 26 January 2016 (hereinafter, the “draft Law”) with Articles 157 and 158 of the Constitution.

Item 1 of Article 85.1 of the Constitution gives Parliament the power to introduce amendments to the Constitution within the limits and through the procedure envisaged by Chapter XIII of this Constitution. Under Article 159 of the Constitution, a draft Law on introducing amendments to the Constitution will be considered by Parliament once an opinion is available from the Constitutional Court on the conformity of the draft Law with the requirements of Articles 157 and 158 of the Constitution.

Comparative analysis of the draft Law and the draft Law on amendments to the Constitution (on justice) (Reg. no. 3524) in the wording dated 25 November 2015, namely the proposed amendments to

Articles 29, 55, 59, 85, 92, 106, 108, 110, 111, 124-129, 130, 131, 136, 147, 148, 149, 150, 151, 152, 153, Chapter XV “Transitional Provisions” of the Constitution, its supplement with Articles 129¹, 130¹, 131¹, 131², 148¹, 149¹, 151¹, 151² and exclusion of Chapter VII “The Prosecution Office” and final and transitional provisions from the Constitution indicated the identity of proposed amendments, apart from the wording of item 25 of Article 85.1 of the Fundamental Law and Article 131¹, which, it is suggested, will be supplemented to the Constitution by the draft Law.

The Constitutional Court noted that under Article 158 of the Constitution, draft legislation introducing constitutional amendments, considered by Parliament but not adopted, may be submitted to Parliament no sooner than one year from the date of the adoption of the decision on this draft Law (paragraph 1); within the term of its authority, Parliament may not amend the same provisions of the Constitution twice (paragraph 2).

The *Verkhovna Rada* of the eighth convocation has not considered the draft Law during the year and has not changed these provisions of the Constitution during its term of office.

According to the Resolution of the *Verkhovna Rada* on including the revised draft Law on amendments to the Constitution (on justice) on the agenda of the 3rd session of the *Verkhovna Rada* of the VIIIth convocation, and on its submission for consideration to the Constitutional Court, no. 950-VIII, 28 January 2016, the draft Law no. 3524 in the wording dated 25 November 2015 is deemed to be withdrawn. Therefore, the draft Law corresponds to the requirements of Article 158 of the Constitution.

Article 157.2 of the Constitution prevents amendments to the Constitution in conditions of martial law or a state of emergency.

The Constitutional Court noted that at the point when the draft Law was being examined, a decision to introduce martial law or a state of emergency in Ukraine or in its particular areas under the procedure defined by the Constitution (item 31 of Article 85.1, items 20, 21 of Article 106.1) had not been taken.

The Constitutional Court therefore found the draft Law to be in compliance with the requirements of Article 157 of the Constitution.

Under Article 157.1, the Constitution should not be amended if these changes might result in the abolition or restriction of individual rights and freedoms, or if they are aimed at the liquidation of the independence or violation of the territorial indivisibility of Ukraine.

The draft Law in the part of amendments to the Constitution, which are identical to the amendments proposed by draft Law no. 3524 in the wording dated 25 November 2015 does not foresee the abolition or restriction of individual rights and freedoms. In its assessment as to whether that would be the case, the Constitutional Court examined those provisions which differ by their content from those proposed by draft Law no. 3524 in its wording dated 25 November 2015, namely concerning the amendments to Article 85.1 of the Constitution and supplement of the Fundamental Law with Article 131¹.

Under the draft Law, item 25 of Article 85.1 of the Constitution should be read as follows:

“25. Granting consent for appointment and dismissal by the President of the Prosecutor General; declaring no confidence in the Prosecutor General leading to his or her resignation from office.”

According to item 25, Parliament’s competences will include granting consent for the appointment and dismissal by the President of the Prosecutor General and declaring no confidence in the Prosecutor General leading to his or her resignation from office.

Under the draft Law, this competence will be preserved.

At the same time the proposed wording of item 25 of Article 85.1 does not contain the word “Ukraine” in the title of the office of the Prosecutor General, which is consistent with Article 131¹, by which the draft Law proposes to supplement the Constitution. This provides that the prosecutor’s office in Ukraine is headed by the Prosecutor General.

The Constitutional Court found that the wording of item 25 of Article 85.1 proposed by the draft Law did not pose an obstacle or a threat to individual rights and freedoms.

Under the draft Law, the proposed Article 131¹ provides that in Ukraine, the office of Public Prosecutor will have the powers of public prosecution in the Court; organising and procedurally directing during pre-trial investigation, deciding other matters in criminal proceedings in accordance with the law, supervising undercover and other investigation and detection operations of law enforcement agencies; representing the interests of the State in court in exceptional cases and under the procedure prescribed by law.

The organisation and functioning of the Public Prosecutor’s office shall be determined by law.

The Public Prosecutor’s office will be headed by the Prosecutor General, who will be appointed and dismissed by the President upon the consent of the *Verkhovna Rada*.

The term of office of the Prosecutor General will be six years.

The same person cannot hold the post of Prosecutor General for two consecutive terms.

Paragraph 5 of the above Article provides that the Prosecutor General can only be dismissed early from office on grounds prescribed by the Constitution and by law. This is consistent with the preservation by Parliament of the prescribed competence to express no confidence in the Prosecutor General, which will result in his or her resignation, as stipulated by item 25 of Article 85.1 of the Constitution in the wording proposed by the draft Law. This, according to the Constitutional Court, will not pose an obstacle or a threat to individual rights and freedoms.

Article 157.1 of the Constitution precludes constitutional amendments aimed at the liquidation of the independence or violation of the territorial indivisibility of Ukraine. The amendments proposed in the draft Law were not, in the Constitutional Court’s view, aimed at the liquidation of the independence or violation of the territorial indivisibility of Ukraine.

The Constitutional Court therefore recognised that the revised draft Law on introducing amendments to the Constitution (on justice) (registration NO. 3524) in the wording dated 26 January 2016 was in line with the requirements of Articles 157 and 158 of the Constitution, the text of which is laid out in item 1 of the reasoning part of the Opinion.

III. Judges of the Constitutional Court O. Kasminin, O. Lytvynov, M. Melnyk and I. Slidenko expressed dissenting opinions.

Languages:

Ukrainian.



Identification: UKR-2016-1-003

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 15.03.2016 / **e)** 1-rp/2015 / **f)** Official interpretation of the provision “at the next regular session of the Parliament (*Verkhovna Rada*) of Ukraine”, contained in Article 155 of the Constitution / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

4.5.4.1 Institutions – Legislative bodies – Organisation – **Rules of procedure.**

4.5.4.3 Institutions – Legislative bodies – Organisation – **Sessions.**

Keywords of the alphabetical index:

Parliament, session, regular / Constitution, amendment.

Headnotes:

The process of a two stage consideration by Parliament of amendments to the Constitution has been established in order to allow time for the preliminary approval of the draft Law on amendments to the Constitution and its final adoption as a law, which prevents the adoption of draft legislation on constitutional amendments at the same regular session and allows the People’s Deputies time for additional analysis of the content of this draft Law and to examine the possible consequences of these amendments. It allows for a balanced approach to the adoption of such legislation and is in line with the Constitution.

Summary:

I. Fifty-one People’s Deputies sought an interpretation from the Constitutional Court of the provision “at the next regular session of the parliament (*Verkhovna Rada*)”, contained in Article 155 of the Constitution. They asked whether this provision meant that the draft Law on introducing amendments to the Constitution could only be adopted at the session of the *Verkhovna Rada* directly following the session at which the draft Law had received preliminary approval, or whether it could be adopted at any subsequent session following the session at which approval was given.

Under Article 155 of the Constitution, a draft Law on introducing amendments to the Constitution of Ukraine, except Title I – “General Principles” Title III – “Elections. Referendum” and Title XIII – “Introducing

Amendments to the Constitution”, previously adopted by the majority of the constitutional composition of Parliament is deemed to be adopted, if at the next regular session of Parliament at least two-thirds of the constitutional composition of Parliament has voted in favour of it.

Under Article 158.1 of the Constitution, the draft Law on introducing amendments to the Constitution, which was considered by Parliament, but not adopted, may be submitted to Parliament no sooner than one year from the day of the adoption of the decision on this draft Law. A draft Law on introducing amendments to the Constitution is considered by Parliament upon the availability of an opinion of the Constitutional Court on the conformity of the draft Law with the requirements of Articles 157 and 158 (Article 159 of the Constitution). The draft Law can be submitted repeatedly.

The rationale behind this constitutional process is to set a specific time interval between the preliminary approval of the draft Law and the final consideration and vote to adopt it by at least two-thirds of the constitutional composition of the *Verkhovna Rada*.

Compliance with the constitutional procedure of the adoption of the draft Law on amendments to the Constitution as a law is one of the guarantees of its legitimacy and in turn ensures balance in amendments to the Constitution and stability.

The operational procedure of Parliament is established by the Constitution and the Law on the Rules of Procedure of the *Verkhovna Rada* (Article 82.5 of the Constitution). The Rules of Procedure of the *Verkhovna Rada* must comply with the Constitution; the organisation and operational procedure of Parliament are to be determined exclusively by laws (Articles 8.2, 92.1.21 of the Constitution).

Article 82.1 of the Constitution stipulates that Parliament works in sessions; sessions are numbered and the Constitution applies the terms “first session” and “last session” (Articles 79.3, 82.3, 83.4 and 87.2).

Under Article 83 of the Constitution, regular sessions of Parliament commence on the first Tuesday of February and on the first Tuesday of September each year (Article 83.1); special sessions, with a stipulated agenda, are called by the Chairman of the Parliament upon the demand of the President or at least one-third of the constitutional composition of the *Verkhovna Rada* (Article 83.2). Thus, the Constitution defines the following types of sessions regular or ordinary, with parliamentary business conducted in the usual way, and special or extraordinary.

The Constitutional Court assumes that the notion “regular session”, as applied in Article 155 of the Constitution should be understood as a kind of parliamentary session conducted according to Article 83.1 of the Constitution. Such constitutional regulation of amendments to the Constitution prevents preliminary approval of the draft Law on amendments to the Constitution and its adoption as a law at special sessions of the *Verkhovna Rada*.

The systematic and logical interpretation of the wording of Article 155 “at the next regular session of the *Verkhovna Rada*” leads to the conclusion that it should be interpreted in conjunction with Article 158.1 of the Constitution, under which a draft Law on amendments to the Constitution, which had been considered by Parliament and not adopted, could be submitted to Parliament no less than one year from the date of adoption of the decision on this draft Law.

The process of a two stage consideration by Parliament of amendments to the Constitution has been established in order to allow time for the preliminary approval of the draft Law on amendments to the Constitution and its final adoption as a law, which prevents the adoption of draft legislation on constitutional amendments at the same regular session and allows the People’s Deputies time for additional analysis of the content of this draft Law and to examine the possible consequences of these amendments.

Article 155 of the Constitution, regarding the adoption of the draft Law on amendments to the Constitution, provides for a balanced approach to the consideration and adoption of this draft legislation.

III. Judges of the Constitutional Court O. Kasminin, O. Lytvynov, M. Melnyk, S. Sas, I. Slidenko and S. Shevchuk expressed dissenting opinions.

Cross-references:

Constitutional Court:

- no. 17-rp/2002, 17.10.2002, the constitutional petition of 50 People’s Deputies regarding the official interpretation of the provisions of Articles 75, 82, 84, 91 and 104 of the Constitution (regarding the authority of the *Verkhovna Rada*).

Languages:

Ukrainian.



United States of America Supreme Court

Important decisions

Identification: USA-2016-1-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 25.01.2016 / **e)** 14-280 / **f)** Montgomery v. Louisiana / **g)** 136 *Supreme Court Reporter* 718 (2016) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

4.8.8.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods.**

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

Keywords of the alphabetical index:

Juvenile offender / Parole / Rules, procedural and substantive, distinction / Punishment, cruel and unusual / Punishment, proportional / Constitutional rules, new, retroactive application.

Headnotes:

As a general matter, a new constitutional rule of criminal procedure does not apply to convictions that were final when the rule was announced; however, new substantive rules of constitutional law and watershed rules of criminal procedure that implicate the fundamental fairness and accuracy of a criminal proceeding are not subject to this general retroactivity bar.

When a new substantive rule of federal constitutional law controls the outcome of a criminal case, the federal constitution requires state courts to give retroactive effect to that rule, regardless of when a conviction became final.

For purposes of determining whether a new constitutional rule is substantive and therefore must be given retroactive effect, a procedural rule is designed to enhance the accuracy of a conviction or sentence by regulating the manner of determining a defendant's culpability, whereas a substantive rule forbids the imposition of criminal punishment for a certain type of conduct or prohibits use of a certain category of punishment for a class of defendants because of their status or offense.

A new constitutional rule rendering automatic life imprisonment without parole an unconstitutional penalty for juvenile offenders is a rule of substantive law that must be given retroactive effect.

Summary:

I. In 1963, when he was seventeen years old, Henry Montgomery murdered a deputy sheriff in the State of Louisiana. After his trial, the jury rendered a verdict of "guilty without capital punishment," which carried an automatic sentence of life without parole (release from prison but with conditions on future behaviour).

In a 2012 decision, *Miller v. Alabama*, the U.S. Supreme Court found unconstitutional the imposition of automatic sentences of life imprisonment without parole for homicide offenders who were juveniles (under the age of eighteen) when their crimes were committed. The Court ruled that such automatic sentences, denying sentencing authorities the opportunity to consider the mitigating qualities of youth, violated the prohibition in the Eighth Amendment to the U.S. Constitution against infliction of "cruel and unusual punishments."

Subsequent to *Miller*, Montgomery initiated a collateral review proceeding (an action under state law to attack a sentence that has become finalised) in Louisiana state court, arguing that *Miller* rendered his automatic life-without-parole sentence illegal. The trial court denied his motion, and the Louisiana Supreme Court denied his application for a supervisory writ. The Louisiana Supreme Court ruled that *Miller* did not have retroactive effect in Louisiana collateral review proceedings.

II. The U.S. Supreme Court accepted review of the Louisiana Supreme Court's decision, and reversed it. The U.S. Supreme Court concluded that *Miller* had established a new substantive rule of constitutional law that is binding on all courts, including state courts conducting collateral review proceedings.

The Court first addressed whether it had jurisdiction to decide whether the Louisiana Supreme Court correctly declined to give retroactive effect to *Miller*.

According to its court-appointed *amicus curiae* (friend of the court), it lacked jurisdiction because Louisiana's collateral review process was created by state law and under Louisiana's full control, and the Louisiana Supreme Court's decision did not implicate a federal right. Therefore, according to the *Amicus*, the matter of retroactivity was a question of state law beyond the U.S. Supreme Court's power to review.

The Court rejected the *Amicus*' argument. The Court first reviewed the framework established in its case law, starting with *Teague v. Lane* in 1989, for retroactive application of new constitutional rules of criminal procedure recognised by the courts. Under that framework, a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the rule was announced. However, two categories of rules are not subject to this general retroactivity bar: new substantive rules of constitutional law; and watershed rules of criminal procedure that implicate the fundamental fairness and accuracy of a criminal proceeding. The Court noted that it had set forth this framework while interpreting federal legislation in cases that involved federal court proceedings. Therefore, based solely on this, a state court might not be required to apply the *Teague* framework in a proceeding governed by state law. However, the Court declared that in the instant case it was deciding whether the U.S. Constitution requires state collateral review courts to give retroactive effect to new rules of constitutional law. Such a determination would always be binding on state courts under the U.S. Constitution's Supremacy Clause; therefore, the question of retroactivity in state proceedings was not beyond the Court's power to review.

Proceeding from this analysis, the Court reasoned that *Teague*'s ruling on the retroactivity of new substantive rules is best understood as resting upon constitutional premises. Therefore, when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.

Regarding the question presented in the instant case, the Court rejected Louisiana's argument that the *Miller* rule is procedural and concluded instead that it is substantive. According to the Court, a procedural rule is designed to enhance the accuracy of a conviction or sentence by regulating the manner of determining a defendant's culpability. A rule that is substantive, on the other hand, forbids the imposition of criminal punishment for a certain type of conduct or prohibits use of a certain category of punishment for a class of defendants because of their status or offense. Under this standard, the Court concluded,

the rule announced in *Miller* was substantive: it rendered life imprisonment without parole an unconstitutional penalty for juvenile offenders, a class of defendants because of their status.

III. The Court's opinion was authored by Justice Kennedy and joined by five other Justices. Justice Scalia filed a dissenting opinion that two other Justices joined, and Justice Thomas, who joined Justice Scalia's opinion, also authored his own separate dissenting opinion.

Supplementary information:

The Supremacy Clause in the U.S. Constitution, Article VI.2, states in relevant part: "This Constitution...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

According to published estimates, between one and two thousand current prisoners in the U.S. were sentenced before issuance of the *Miller* decision to life without parole for crimes committed when under the age of eighteen.

Cross-references:

Supreme Court:

- *Miller v. Alabama*, nos. 10-9646 and 10-9647, 25.06.2012, *Bulletin* 2012/2 [USA-2012-2-004];
- *Teague v. Lane*, no. 87-5259, 04.10.1988, 489 U. S. 288, 109 *Supreme Court Reporter* 1060, 103 L. Ed. 2d 334 (1989).

Languages:

English.



Identification: USA-2016-1-002

a) United States of America / **b)** Supreme Court / **c)** / **d)** 25.01.2016 / **e)** 15-493 / **f)** James v. City of Boise / **g)** 136 *Supreme Court Reporter* 685 (2016) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.6.3 General Principles – Structure of the State – **Federal State.**

4.8.6.3 Institutions – Federalism, regionalism and local self-government – Institutional aspects – **Courts.**

4.8.8.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods.**

Keywords of the alphabetical index:

Interpretation, judicial / Legislative act, interpretation.

Headnotes:

In the federal system, all courts, federal and state, are bound by the highest federal court's interpretations of federal law.

In the federal system, all courts, federal and state, are bound by federal law including the highest federal court's interpretation of a federal legislative act even in the absence of an explicit text on the matter in question in that act.

Summary:

I. Melene James filed suit in a state court of the State of Idaho against the City of Boise, Idaho, and officers of the Boise Police Department. Her claims were based on a federal civil rights statute, Section 1983 of Title 42 of the United States Code that provides remedies for individuals when state actors have violated their federal constitutional rights. The trial court dismissed her claims. In addition, the court required James to pay the defendants' attorney fees. In so doing, it invoked another federal law, Section 1988 of Title 42 of the United States Code, under which courts may award attorney fees to prevailing parties in Section 1983 cases.

On appeal, the Idaho Supreme Court affirmed the trial court's ruling against the plaintiff, including the award of attorney fees in favour of the defendants. The Supreme Court's decision as to attorney fees was based solely on its interpretation of federal law; it expressly declined to award fees under state law.

II. The U.S. Supreme Court accepted review of the Idaho Supreme Court's decision as to the award of attorney fees, and reversed it. The U.S. Supreme Court ruled that the Idaho Court had erred in failing to adhere to the U.S. Supreme Court's interpretation of Section 1988, a federal legislative act.

In a 1980 decision, *Hughes v. Rowe*, the U.S. Supreme Court interpreted Section 1988 to permit a prevailing defendant to recover attorney fees only if the plaintiff's lawsuit was "frivolous, unreasonable, or without foundation". The explicit text of Section 1988 did not contain this limitation. In the instant case, the Idaho Supreme Court awarded attorney fees without making a determination as to whether James's lawsuit was frivolous, unreasonable, or without foundation. Instead, the Idaho Supreme Court concluded that it was not bound by the interpretation of Section 1988 in *Hughes*. The Idaho Court stated that while the U.S. Supreme Court has authority to limit the discretion of lower federal courts, it does not have the authority to limit the discretion of state courts when a limitation is not contained in the text of the federal legislative act.

The U.S. Supreme Court rejected the Idaho Court's reasoning, stating that all courts, federal and state, are bound by the U.S. Supreme Court's interpretations of federal law. If state courts were permitted to disregard the U.S. Supreme Court's positions on federal law, a situation would be created in which the laws, treaties, and Constitution of the United States would be different in different states, and perhaps would never have precisely the same construction, obligation, or efficacy in any two states. Quoting U.S. Supreme Court Justice Joseph Story in 1816, the Court declared that "The public mischiefs that would attend such a state of things would be truly deplorable".

III. The U.S. Supreme Court's decision was rendered in a *per curiam* opinion issued in the name of the Court and not identifying a particular Justice as the author.

Cross-references:

Supreme Court:

- *Hughes v. Rowe*, 10.11.1980, no. 79-6000, 449 U. S. 5, 101 *Supreme Court Reporter* 173, 66 L. Ed. 2d 163(1980) (*per curiam*).

Languages:

English.



Identification: USA-2016-1-003

a) United States of America / b) Supreme Court / c) / d) 21.03.2016 / e) 14-10078 / f) Caetano v. Massachusetts / g) 136 *Supreme Court Reporter* 1027 (2016) / h) CODICES (English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Arms, right to keep and carry / Arms, stun gun, regulation / Weapon, right to keep and carry.

Headnotes:

Constitutional guarantee of the individual right to keep and carry arms extends to weapons that were not in existence at the time of the adoption of the guarantee's text.

The scope of the constitutional guarantee of the individual right to keep and carry arms is not limited to weapons that are useful in warfare.

Summary:

I. Jaime Caetano acquired a stun gun, a non-lethal electrical weapon, to protect herself against an ex-boyfriend who had been threatening her. Following an incident in which the ex-boyfriend confronted her and she displayed the stun gun, she was arrested and subsequently charged with violating a law of the Commonwealth of Massachusetts that prohibits the possession of electrical weapons.

Caetano moved to dismiss the charge on grounds of the Second Amendment to the U.S. Constitution, which states in full that: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.". In its *District of Columbia v. Heller* decision in 2008, the U.S. Supreme Court ruled that the Second Amendment guarantees an individual right to keep and carry weapons. The trial court denied the motion and Caetano was found guilty following a trial.

On appeal, the Massachusetts Supreme Judicial Court upheld the trial court's denial of Caetano's Second Amendment claim. The Judicial Court ruled that the scope of the Second Amendment's protection does not extend to stun guns, and set forth three

explanations to support its holding. First, the Court stated that stun guns were not in common use in the late 1700's, at the time of the Second Amendment's enactment. Second, citing the *Heller* decision's reference to a historical tradition of prohibiting the carrying of "dangerous and unusual weapons", the Judicial Court concluded that stun guns are "unusual" because they are a thoroughly modern invention. Third, the Court stated that it had found nothing in the record to suggest that stun guns are readily adaptable to use in the military.

II. The United States Supreme Court accepted review of the Judicial Court decision. The Supreme Court concluded that each of the Judicial Court's explanations was inconsistent with the *Heller* decision and vacated the Judicial Court's judgment. It remanded the case to the Judicial Court for further proceedings to be consistent with the Supreme Court's decision.

As to the Judicial Court's first explanation, the Supreme Court stated that it was not consistent with the Court's conclusion in *Heller* that the Second Amendment extends to weapons that were not in existence at the time of the founding of the United States. The Court also concluded that the second explanation was inconsistent with *Heller* for the same reason. In regard to the third explanation, the Court stated that *Heller* had rejected the proposition that the Second Amendment protects only those weapons useful in warfare.

III. The Supreme Court's decision was rendered in a *per curiam* opinion issued in the name of the Court and not identifying a particular Justice as the author. However, Justice Alito also authored a separate opinion, joined by Justice Thomas, in which he concurred in the Court's judgment but added that the Court also should have reviewed the Massachusetts stun gun law and ruled that it was constitutionally invalid.

Cross-references:

Supreme Court:

- *District of Columbia v. Heller*, no. 07-290, 26.06.2008, *Bulletin* 2008/2 [USA-2008-2-005].

Languages:

English.



Identification: USA-2016-1-004

a) United States of America / b) Supreme Court / c) / d) 20.04.2016 / e) 14-770 / f) Bank Markazi v. Peterson / g) 136 *Supreme Court Reporter* 1310 (2016) / h) CODICES (English).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
 4.5.2 Institutions – Legislative bodies – **Powers.**
 4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**

Keywords of the alphabetical index:

Foreign affairs, political branches, controlling role / Judicial independence / Legislation, retroactive / Legislation, specifically applicable.

Headnotes:

The constitutional allocation of powers prohibits the legislative branch from telling the judiciary how to apply pre-existing law to particular circumstances.

The legislative branch may amend a law that is applicable in a particular judicial proceeding and make the amended prescription retroactively effective, thereby requiring a court to apply a new legal standard in a pending proceeding.

A legislative act does not unconstitutionally impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts.

A legislative act need not be generally applicable to be constitutionally valid; the judiciary has upheld laws that govern one or a very small number of specific subjects as valid exercises of legislative power.

Summary:

I. In multiple separate civil lawsuits in various U.S. courts, over one thousand victims of terrorist acts, their estate representatives, and their families sued Bank Markazi, the Central Bank of Iran, seeking money damages. They claimed that the government of Iran sponsored the terrorist acts. Although successful in obtaining evidence-based money judgments totalling approximately 1.75 billion U.S.

dollars, however, the plaintiffs were unable to enforce the judgments because the Bank's assets within the United States were immune from execution under the rule of foreign sovereign immunity. While the U.S. Congress had established certain exceptions to the general rule of such immunity in the 1976 Foreign Sovereign Immunities Act, the plaintiffs encountered difficulty in enforcement proceedings in convincing the courts that their claims fell within the scope of those exceptions.

In 2012, the Congress sought to assist the plaintiffs by enacting provisions contained in the "Iran Threat Reduction and Syria Human Rights Act of 2012". Focused specifically and entirely on judgment enforcement actions initiated in 2008 that had been consolidated in a single enforcement proceeding in the U.S. District Court in the Southern District of New York, *Peterson v. Islamic Republic of Iran*, the 2012 Act specifically identified which assets of the Bank of Markazi, held in a U.S. bank, should be deemed available for execution [*to satisfy judgments*] as exceptions to the general rule of sovereign immunity. The judgment holders subsequently updated their motions to include execution claims based on the 2012 Act. Bank Markazi opposed the updated motions, arguing that the 2012 Act was an unconstitutional violation of the principle of separation of powers, in that it invaded the realm of independent judicial authority by changing existing law to dictate a particular result in a pending judicial proceeding.

The District Court granted the judgment holders' motions. It concluded that the 2012 Act permissibly changed the law applicable in a pending litigation. On appeal, the U.S. Court of Appeals for the Second Circuit affirmed the District Court's decision.

II. The United States Supreme Court accepted review of the Second Circuit decision, and affirmed it. The Supreme Court concluded that the 2012 Act was a permissible exercise of legislative power.

The Court stated that Article III of the U.S. Constitution, which establishes an independent judicial branch with the authority "to say what the law is" in particular cases and controversies, prohibits the legislative branch from telling a court how to apply pre-existing law to particular circumstances. In its case law, however, the Court has ruled that Congress may amend a law that is applicable in a particular judicial proceeding and make the amended prescription retroactively effective. The 2012 Act, according to the Court, did just that, by requiring a court to apply a new legal standard in a pending post-judgment enforcement proceeding. A legislative act does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts.

The Court rejected Bank Markazi's argument that the 2012 Act was invalid because it prescribed a rule for a single, pending legal proceeding. According to the Court, the 2012 Act was not an instruction governing a single proceeding; instead, it facilitated execution of judgments in sixteen lawsuits. While consolidated for administrative purposes at the execution stage, the judgment-execution claims were extensions of the original separate actions for damages and each retained its separate character. In any event, Bank Markazi's argument was based on an incorrect assumption: that legislation must be generally applicable. The Court stated that it and lower courts have upheld as a valid exercise of legislative power laws that governed one or a very small number of specific subjects.

The Court added that its decision was supported by the fact that the Congress, in enacting the 2012 Act, and the President in signing it, were exercising their authority in the realm of foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper. Measures taken by the political branches to control the disposition of foreign-state property, including blocking specific foreign-state assets or making them available for attachment, have never been rejected as invasions upon the Article III judicial power. The Court noted that, before enactment of the Foreign Sovereign Immunities Act in 1976, the executive branch regularly made case-specific determinations whether sovereign immunity should be recognised, and courts accepted those determinations as binding. This practice was never deemed to be an encroachment on the federal courts' jurisdiction.

III. Six Justices joined the Court's opinion. Chief Justice Roberts filed a dissenting opinion, joined by Justice Sotomayor. Chief Justice Roberts argued that a basic principle was at stake, not just a technicality, and that the Court's decision had yielded too much power by failing to place more stringent limitations on the legislative branch's authority to determine winners and losers in litigation.

Supplementary information:

The government of Iran reacted vocally to the U.S. Supreme Court decision.

Languages:

English.



Court of Justice of the European Union

Important decisions

Identification: ECJ-2016-1-001

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 15.02.2016 / **e)** C-601/15 / **f)** J. N. v. Staatssecretaris van Veiligheid en Justitie / **g)** ECLI:EU:C:2016:288 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

3.16 General Principles – **Proportionality.**

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

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

Keywords of the alphabetical index:

Asylum, request, refusal / Charter of Fundamental Rights of the European Union, compatible interpretation / Confinement, administrative / National security, protection / Public order, protection / Public safety, notion.

Headnotes:

There is no factor of such a kind as to affect the validity of Article 8.3.1.e of Directive 2013/33 laying down standards for the reception of applicants for international protection, which provides for the possibility of detaining an applicant for reasons relating to the protection of national security or public order, in the light of Articles 6, 52.1 and 52.3 of the Charter of Fundamental Rights of the European Union.

In fact, given that the protection of national security and public order is the objective pursued by that provision, a measure ordering detention which is based on that provision genuinely meets an objective of general interest recognised by the European Union. Moreover, the protection of national security and public order also contributes to the protection of the rights and freedoms of others. Article 6 of the Charter of Fundamental Rights of the European Union states in this regard that everyone has the right not only to liberty but also to security of person.

As regards the proportionality of the interference with the right to liberty to which detention gives rise, the detention of an applicant where the protection of national security or public order so requires is, by its very nature, an appropriate measure for protecting the public from the threat which the conduct of such a person represents and is thus suitable for attaining the objective pursued of Article 8.3.1.e of Directive 2013/33. Furthermore, it can be seen both from the wording and context of Article 8.3.1.e of Directive 2013/33 and from its legislative history that the possibility of detaining an applicant for reasons relating to the protection of national security or public order is subject to compliance with a series of conditions whose aim is to create a strictly circumscribed framework in which such a measure may be used. On that point, Article 9.1 of Directive 2013/33 provides that an applicant is to be detained only for as short a period as possible and may be kept in detention only for as long as the grounds set out in Article 8.3 of that directive are applicable.

Finally, it should be added that the strict circumscription of the power of the competent national authorities to detain an applicant on the basis of Article 8.3.1.e of Directive 2013/33 is also ensured by the interpretation which the case-law of the Court gives to the concepts of 'national security' and 'public order' found in other directives and which also applies in the case of Directive 2013/33.

In fact, the concept of 'public order' entails, in any event, the existence – in addition to the disturbance of the social order which any infringement of the law involves – of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The concept of 'public security' covers both the internal security of a Member State and its external security. Consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security.

Summary:

I. J.N. first applied for asylum in the Netherlands in 1995. That application was rejected in 1996. In 2012 and 2013 J.N. made further applications for asylum. In 2014 the State Secretary for Security and Justice rejected the last of those applications, ordered J.N. to leave the EU immediately and imposed a ten-year entry ban on him. The appeal against that decision was dismissed by final judgment.

Between 1999 and 2015 J.N. was convicted on 21 charges and was sentenced to fines and terms of imprisonment for various offences (mostly theft). More recently, in 2015, J.N. was arrested for theft and failure to comply with the entry ban imposed on him. He was sentenced to a further term of imprisonment and was subsequently held in detention as an asylum seeker: the reason for that was that J.N., while serving his prison sentence, had made a fourth application for asylum.

Against that background the *Raad van State* (Council of State, Netherlands) referred a question to the Court for a preliminary ruling. It has made particular mention of the case-law of the European Court of Human Rights concerning the situations in which an asylum seeker may be detained. The *Raad van State* is uncertain in these circumstances about the validity of Directive 2013/33, under which an asylum seeker may be detained when the protection of national security or public order so requires.

II. The Court pointed out that, in accordance with its own case-law by virtue of which the introduction of an asylum application by a person who is subject to a return decision automatically causes all return decisions that may previously have been adopted in the context of that procedure to lapse, the principle that Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals must be effective requires that a procedure opened under that directive, in the context of which a return decision, accompanied, as the case may be, by an entry ban, has been adopted, can be resumed at the stage at which it was interrupted, as soon as the application for international protection which interrupted it has been rejected at first instance. Indeed, Member States must not jeopardise the attainment of the objective pursued by that directive, namely the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals.

In addition, the Court specified that in adopting Article 8.3.1.e of Directive 2013/33, laying down standards for the reception of applicants for international protection which provided for the

possibility of detaining an applicant for reasons relating to the protection of national security or public order, the EU legislature did not disregard the level of protection afforded by the second limb of Article 5.1.f ECHR, which permits the lawful detention of a person against whom action is being taken with a view to deportation or extradition.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, Swedish.

*Identification:* ECJ-2016-1-002

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 01.03.2016 / **e)** C-443/14 and C444/14 / **f)** Kreis Warendorf v. Alo; Osso v. Region Hannover / **g)** ECLI:EU:C:2016:127 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.4.5 Sources – Categories – Written rules – International instruments – **Geneva Convention on the Status of Refugees of 1951**.
5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status**.
5.3.10 Fundamental Rights – Civil and political rights – **Rights of domicile and establishment**.

Keywords of the alphabetical index:

Social payment / Refugee, subsidiary protection.

Headnotes:

Articles 29 and 33 of Directive 2011/95 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, must be interpreted as precluding the imposition of a residence condition on a beneficiary of subsidiary protection status in

receipt of certain specific social security benefits, for the purpose of achieving an appropriate distribution of the burden of paying those benefits among the various institutions competent in that regard, when the applicable national rules do not provide for the imposition of such a measure on refugees, third-country nationals legally resident in the Member State concerned on grounds that are not humanitarian or political or based on international law or nationals of that Member State in receipt of those benefits.

That said, national rules could legitimately provide for a residence condition to be imposed on beneficiaries of subsidiary protection status, without such a condition being imposed on refugees, third-country nationals legally resident in the territory of the Member State concerned on grounds that are not humanitarian or political or based on international law and nationals of that Member State, if those groups are not in an objectively comparable situation as regards the objective pursued by those rules.

However, the movement of recipients of those benefits or the fact that such persons are not equally concentrated throughout the Member State concerned may thus mean that the costs entailed are not evenly distributed among the various competent institutions, irrespective of the potential qualification of such recipients for subsidiary protection status.

Article 33 of Directive 2011/95 must be interpreted as not precluding a residence condition from being imposed on a beneficiary of subsidiary protection status, in receipt of certain specific social security benefits, with the objective of facilitating the integration of third-country nationals in the Member State that has granted that protection – when the applicable national rules do not provide for such a measure to be imposed on third-country nationals legally resident in that Member State on grounds that are not humanitarian or political or based on international law and who are in receipt of those benefits – if beneficiaries of subsidiary protection status are not in a situation that is objectively comparable, so far as that objective is concerned, with the situation of third-country nationals legally resident in the Member State concerned on grounds that are not humanitarian or political or based on international law, it being for the referring court to determine whether that is the case.

Such a different situation can be observed if the fact that a third-country national in receipt of welfare benefits is a beneficiary of international protection – in this case subsidiary protection – means that he will face greater difficulties relating to integration than another third-country national who is legally resident in Germany and in receipt of such benefits.

Summary:

I. Mr Alo and Ms Osso are Syrian nationals who travelled, in 1998 and 2001 respectively, to Germany where they both made unsuccessful applications for asylum. Nevertheless, the German authorities allowed both Mr Alo and Ms Osso to remain in Germany. They have both been in receipt of social security benefits from the start of their asylum proceedings.

After both applicants submitted a further application for asylum in 2012, the *Bundesamt für Migration und Flüchtlinge* (Federal Office for Migration and Refugees) determined in both cases that deportation to Syria was prohibited. On the basis of these decisions Mr Alo and Ms Osso have the status of beneficiaries of subsidiary protection. Consequently, Mr Alo and Ms Osso were granted residence permits, to which were attached place of residence conditions. These conditions were reiterated in the further residence permits granted in 2014 to both applicants.

Both Mr Alo and Ms Osso respectively, brought actions for the annulment of the restrictions on the place of residence.

II. The Court held that Article 26 of the Geneva Convention Relating to the Status of Refugees, the cornerstone of the international legal regime for the protection of refugees and the application of which is preferred by the competent authorities of the Member States on the basis of the mutual definitions and criteria of the provisions of Directive 2011/95, under which refugees are guaranteed the right to freedom of movement, expressly provides that that freedom includes not only the right to move freely in the territory of the State that has granted refugee status, but also the right of refugees to choose their place of residence in that territory. There is nothing to suggest that the EU legislature chose to include only the first of those rights in Directive 2011/95, but not the second. A different interpretation would create – despite the absence of an express provision to that effect in the directive – a distinction (contrary to the objective of establishing a uniform status for all beneficiaries of international protection and that it accordingly chose to afford beneficiaries of subsidiary protection the same rights and benefits as those enjoyed by refugees) between the content of the protection afforded in this respect to, on the one hand, refugees and, on the other, beneficiaries of subsidiary protection status.

Therefore, the Court stated that Article 33 of Directive 2011/95/EU must be interpreted as meaning that a residence condition imposed on a beneficiary of subsidiary protection status constitutes a restriction

of the freedom of movement guaranteed by that article, even when it does not prevent the beneficiary from moving freely within the territory of the Member State that has granted the protection and from staying on a temporary basis in that territory outside the place designated by the residence condition.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, Swedish.



Identification: ECJ-2016-1-003

a) European Union / **b)** Court of Justice of the European Union / **c)** Second Chamber / **d)** 10.03.2016 / **e)** C-94/14 / **f)** Flight Refund Ltd v. Deutsche Lufthansa AG / **g)** ECLI:EU:C:2016:148 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.4.10.7 Constitutional Justice – Procedure – Interlocutory proceedings – **Request for a preliminary ruling by the Court of Justice of the EU.**

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

Keywords of the alphabetical index:

Air transport, contract / Judicial co-operation, international / Injunction, opposition / Payment procedure, competent court.

Headnotes:

EU law must be interpreted as meaning that, in circumstances where a court is seized of a procedure concerning the designation of the Court of the Member State of origin of a European order for payment having territorial jurisdiction and examines, in those circumstances, the international jurisdiction of the courts of that Member State to hear the contentious proceedings concerning the debt which gave rise to such an order for payment against which

the defendant has entered a statement of opposition within the time-limit prescribed for that purpose:

- since Regulation no. 1896/2006 creating a European order for payment procedure does not provide any indications as to the powers and obligations of that court, those procedural questions continue, pursuant to Article 26 of that regulation, to be governed by the national law of that Member State;
- Regulation no. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters requires the question of the international jurisdiction of the courts of the Member State of origin of the European order for payment to be decided by application of procedural rules which enable the effectiveness of the provisions of that regulation and the rights of the defence to be guaranteed, whether it is the referring court or a court which the referring court designates as the court having territorial and substantive jurisdiction to hear a claim such as that at issue in the main proceedings under the ordinary civil procedure which rules on that question;
- if a court rules on the international jurisdiction of the courts of the Member State of origin of the European order for payment and finds that there is such jurisdiction in the light of the criteria set out in Regulation no. 44/2001, that regulation and Regulation no. 1896/2006 require such a court to interpret national law in such a way that it permits it to identify or designate a court having territorial or substantive jurisdiction to hear that procedure; and
- if a court finds that there is no such international jurisdiction, that court is not required of its own motion to review that order for payment by analogy with Article 20 of Regulation no. 1896/2006, in so far as a procedural situation is governed not by the provisions of Regulation no. 1896/2006 but by national law, the aforementioned regulation, including Article 20 thereof, cannot apply, even by analogy, to that situation.

Summary:

I. An airline passenger assigned her rights to compensation for a delayed flight to Flight Refund (hereinafter, “Flight Refund”), a company specialised in the recovery of such claims. Flight Refund then applied to a Hungarian notary for a European order for payment against *Deutsche Lufthansa AG* (hereinafter, “Lufthansa”). Flight Refund based its claim, in the principal amount of EUR 600, on the ground that, following the assignment of the claim, it had a right to damages from Lufthansa owing to a

delay of more than three hours on flight LH 7626 between, according to the information supplied to the notary, the airports of Newark (United States) and London Heathrow (United Kingdom).

That notary issued an order for payment against Lufthansa without ascertaining the place where the contract was made, the place for its performance, the place where the damage arose, the place of business of the carrier through which the contract was made, or the flight destination. The notary declared herself competent to issue that order for payment on the basis of Article 33 of the Montreal Convention, on the ground that Hungary is a signatory to that Convention.

Deutsche Lufthansa exercised its right to oppose that order and argued that it did not operate the flight to which Flight Refund referred in its application for the order. Flight Refund's representative had, at the request of the notary concerned, declared that he was unable to designate the competent national court once the European order for payment procedure had become ordinary civil proceedings, that notary applied to the *Kúria* (Supreme Court) to designate the competent court, since, on the basis of the relevant provisions of the Code of civil procedure and in the light of the information available to her, she could not identify that court.

II. In its judgment, the Court recalled that a statement of opposition by the defendant to the European order for payment, the effects of which are governed by Article 17.1 of Regulation no. 1896/2006, cannot extend the jurisdiction of the courts of the Member State of origin of the order for payment, within the meaning of Article 24 of Regulation no. 44/2001, and thus mean that the defendant has accepted, by entering such a statement of opposition, even if it includes statements on the substance of the case, the jurisdiction of the courts of that Member State to hear the contentious proceedings concerning the disputed claim.

The Court also held that since it is clear from the scheme of Regulation no. 1896/2006 that that regulation does not seek to harmonise the procedural law of the Member States and, having regard to the restricted scope of Article 17.1 of that regulation that provision must be interpreted, in so far as it provides for the automatic continuation of the proceedings, if a statement of opposition is entered by the defendant, in accordance with the rules of ordinary civil procedure, in that it does not lay down any particular requirement as regards the nature of the courts before which the procedure must be continued or the rules which such a court must apply.

Furthermore, the Court stated that the national rules applicable to the procedure before the referring court in the present case must permit that court to examine the question of international jurisdiction, applying the rules laid down in Regulation no. 44/2001, in the light of all the information which it needs for that purpose. If that were not the case, that court would be free either to interpret its rules of procedure as permitting it to meet those requirements or to designate a court having substantive jurisdiction to hear the substance of a claim under the ordinary civil procedure, as the court having territorial jurisdiction, and required, in this case, to rule, if necessary, on its own international jurisdiction in the light of the criteria set out in Regulation no. 44/2001.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, Swedish.



Identification: ECJ-2016-1-004

a) European Union / **b)** Court of Justice of the European Union / **c)** Fifth Chamber / **d)** 10.03.2016 / **e)** C-235/14 / **f)** Safe Interenvios SA v. Liberbank SA e.a. / **g)** ECLI:EU:C:2016:154 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.4.10.7 Constitutional Justice – Procedure – Interlocutory proceedings – **Request for a preliminary ruling by the Court of Justice of the EU.**

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

3.26 General Principles – **Fundamental principles of the Internal Market.**

Keywords of the alphabetical index:

Approximation of laws / Money laundering / Terrorism, financing / Presumption, irrefutable / Service, freedom to provide.

Headnotes:

Articles 5, 7, 11.1 and 13 of Directive 2005/60/EC 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing as amended by Directive 2010/78/EU must be interpreted as not precluding national legislation which, first, authorises the application of standard customer due diligence measures in so far as the customers are financial institutions whose compliance with due diligence measures is supervised when there is a suspicion of money laundering or terrorist financing within the meaning of Article 7.c of that directive and, secondly, requires the institutions and persons covered by that directive to apply, on a risk-sensitive basis, enhanced customer due diligence measures in situations which by their nature can present a higher risk of money laundering or terrorist financing within the meaning of Article 13.1 of the directive, such as that of the transfer of funds. Furthermore, even in the absence of such a suspicion or such a risk, Article 5 of Directive 2005/60 allows the Member States to adopt or retain in force stricter provisions where those provisions seek to strengthen the fight against money laundering and terrorist financing.

Directive 2005/60 must be interpreted as meaning that the institutions and persons covered by that directive may not compromise the task of supervising payment institutions with which the competent authorities are entrusted pursuant to Article 21 of Directive 2007/64 on payment services in the internal market as amended by Directive 2009/111 and may not take the place of those authorities. Directive 2005/60 must be interpreted as meaning that, whilst a financial institution may, in performing the supervisory obligation which it owes in respect of its customers, take account of the due diligence measures applied by a payment institution in respect of its own customers, all the due diligence measures that it adopts must be appropriate to the risk of money laundering and terrorist financing.

Articles 5 and 13 of Directive 2005/60 must be interpreted as meaning that national legislation adopted pursuant either to the discretion which Article 13 of that directive grants the Member States or to the power in Article 5 of the directive, must be compatible with EU law, in particular the fundamental freedoms guaranteed by the Treaties. Whilst such national legislation designed to combat money laundering or terrorist financing pursues a legitimate aim capable of justifying a restriction on the fundamental freedoms and whilst to presume that transfers of funds by an institution covered by that directive to States other than the State in which it is established always present a higher risk of money

laundering or terrorist financing is appropriate for securing the attainment of that aim, that legislation exceeds, however, what is necessary for the purpose of achieving the aim which it pursues, since the presumption which it establishes applies to any transfer of funds, without providing for the possibility of rebutting the presumption in the case of transfers of funds not objectively presenting such a risk.

Summary:

I. The dispute concerned three banks (Banco Bilbao Vizcaya Argentaria, S.A. (hereinafter, "BBVA"), Banco de Sabadell, SA and Liberbank, SA (hereinafter, collectively, "the banks") in a dispute against a payment services institution (Safe Interenvios, S.A., hereinafter, "Safe").

Safe is a company that transfers customers' funds to Member States other than the Member State in which it is established and to third countries through accounts which it holds with credit institutions.

After discovering irregularities regarding the agents who transferred funds through the accounts which Safe held with the banks, the latter requested information from Safe, pursuant to national legislation. When Safe refused to provide them with that information, the banks closed the accounts which it held with them. BBVA disclosed those irregularities to the Executive Service of the Commission for the Prevention of Money Laundering and Financial Crime of the Bank of Spain (*Servicio Ejecutivo de la Comisión de Prevención de Blanqueo de Capitales e Infracciones Monetarias del Banco de España; 'Sepblac'*), stating that it suspected Safe of money laundering.

Safe challenged BBVA's decision to close its account and similar decisions by the other two banks, on the ground that closure of the accounts was an act of unfair competition which prevented it from operating normally by transferring funds to States other than the State in which it is established.

II. In its judgment, the Court stated that notwithstanding the derogation in Article 11.1 of the Directive 2005/60, Articles 7 and 13 of the directive require the Member States to ensure that the institutions and persons covered by the directive apply, in situations concerning customers that are themselves institutions or persons covered by the directive, the standard customer due diligence measures pursuant to Article 7.c of the directive and enhanced customer due diligence measures pursuant to Article 13 thereof in situations which by their nature can present a higher risk of money laundering or terrorist financing.

Nonetheless, according to the Court, in accordance with Article 8.2 of Directive 2005/60, the institutions and persons covered by that directive must be able to demonstrate to the competent authorities mentioned in Article 37 of the directive that the extent of the measures adopted in performing their customer due diligence obligation – whose extent may be determined on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction – is appropriate in view of the risks of money laundering and terrorist financing. In this respect, such measures must have a concrete link with the risk of money laundering and terrorist financing and be proportionate to that risk. It follows that a measure such as the breaking off of a business relationship, provided for in Article 9.5.1 of the Directive 2005/60, should, in the light of Article 8.2 of that directive, not be adopted in the absence of sufficient information connected with the risk of money laundering and terrorist financing.

Finally, the Court emphasised that where a Member State relies on overriding reasons in the general interest in order to justify rules which are liable to obstruct the exercise of the freedom to provide services, such justification, provided for by EU law, must be interpreted in the light of the general principles of EU law, in particular the fundamental rights now guaranteed by the Charter of Fundamental Rights of the European Union. Thus, the national rules in question can fall under the exceptions provided for only if they are compatible with the fundamental rights the observance of which is ensured by the Court.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, Swedish.



Identification: ECJ-2016-1-005

a) European Union / **b)** Court of Justice of the European Union / **c)** Fourth Chamber / **d)** 17.03.2016 / **e)** C-695/15 / **f)** Mirza / **g)** ECLI:EU:C:2016:188 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum.**

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:

National, third-country / International protection / Sending to safe third country, condition.

Headnotes:

1. Article 3.3 of Regulation (EU) no. 604/2013 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) must be interpreted as meaning that the right to send an applicant for international protection to a safe third country may also be exercised by a Member State after that Member State has accepted that it is responsible, pursuant to that regulation and within the context of the take-back procedure, for examining an application for international protection submitted by an applicant who left that Member State before a decision on the substance of his first application for international protection had been taken.

Article 3.3 of the Dublin III Regulation must be interpreted as not precluding the sending of an applicant for international protection to a safe third country when the Member State carrying out the transfer of that applicant to the Member State responsible has not been informed, during the take-back procedure, either of the rules of the latter Member State relating to the sending of applicants to safe third countries or of the relevant practice of its competent authorities.

Furthermore, the fact that the Member State responsible does not communicate to the Member State carrying out the transfer information concerning its legislation relating to safe third countries and its relevant administrative practice does not impair the applicant's right to an effective remedy against the transfer decision and against the decision on the application for international protection.

Article 18.2 of the Dublin III Regulation must be interpreted as not requiring that, in the event that an applicant for international protection is taken back, the procedure for examining that applicant's application be resumed at the stage at which it was discontinued.

In so far as it requires the applicant to be entitled to request that a final decision on his application for international protection be taken, whether it be in connection with the procedure which was discontinued or in connection with a new procedure which is not to be treated as a subsequent application, the second subparagraph of Article 18.2 of the Dublin III Regulation seeks to guarantee for the applicant an examination of his application which satisfies the requirements laid down by Directive 2013/32 on common procedures for granting and withdrawing international protection for first-time applications at first instance. However, that provision does not seek either to prescribe the manner in which the procedure must be resumed in such a situation or to deprive the Member State responsible of the possibility of declaring the application inadmissible.

Summary:

I. Mr Shiraz Baig Mirza, Pakistani citizen, entered Hungarian territory illegally from Serbia in August 2015. On 7 August 2015, he lodged a first application for international protection in Hungary. During the procedure opened following his application, Mr Mirza left the place of residence which had been assigned to him by the Hungarian authorities. By decision of 9 October 2015, they discontinued the examination of that application which they considered to have been implicitly withdrawn.

Subsequently, Mr Mirza was taken in for questioning in the Czech Republic when he attempted to return to Austria. The Czech authorities asked Hungary to take him back, which Hungary agreed to do. Mr Mirza then submitted a second application for international protection in Hungary. On 19 November 2015, the Hungarian authorities rejected that application as inadmissible, without examining its substance. They considered that, for the applicant, Serbia had to be classified as a safe third country.

Mr Mirza brought an action against that decision before the *Debreceni Közigazgatási és Munkaügyi Bíróság* (Administrative and Labour Court of Debrecen, Hungary). That court has asked the Court whether Mr Mirza may be sent to a safe third country despite the fact that the Czech authorities appear not to have been informed of the Hungarian legislation

and practice consisting in transferring applicants for international protection to safe third countries.

II. First, the Court stated that Article 18 of the Dublin III Regulation does not restrict the scope of Article 3.3 of that regulation, in particular with regard to a Member State which, in the course of a take-back procedure, accepts that it is responsible for examining the application for international protection submitted by an applicant who left that Member State before a decision on the substance had been taken at first instance.

According to the Court, preventing a Member State from exercising the right laid down in Article 3.3 of that regulation would have the consequence that an applicant who fled, without waiting for a final decision on his application, to a Member State other than that in which he had submitted that application would, in the event of his being taken back by the Member State responsible, be in a more favourable position than an applicant who waited until the end of the examination of his application in the Member State responsible.

The Court emphasised that as regards the transfer decision, it is apparent from Article 27 of the Dublin III Regulation that the applicant has the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.

The Court held that so far as concerns the decision relating to the application for international protection, the applicant has, in the Member State responsible, the right to an effective remedy, pursuant to Article 46 of Directive 2013/32 on common procedures for granting and withdrawing international protection, before a court or tribunal of that Member State enabling him to contest the decision based on the rules of national law relating to safe third countries on the basis, depending on his individual situation, of Articles 38 or 39 of that directive.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, Swedish.



Identification: ECJ-2016-1-006

a) European Union / **b)** Court of Justice of the European Union / **c)** Fourth Chamber / **d)** 21.04.2016 / **e)** C-558/14 / **f)** Mimoun Khachab v. Subdelegación del Gobierno en Alava / **g)** ECLI:EU:C:2016:852 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
 5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.
 5.3.9 Fundamental Rights – Civil and political rights – **Right of residence**.
 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life**.

Keywords of the alphabetical index:

Family reunification, right / National, third-country.

Headnotes:

Article 7.1.c of Council Directive 2003/86/EC on the right to family reunification must be interpreted as allowing the competent authorities of a Member State to refuse an application for family reunification on the basis of a prospective assessment of the likelihood of the sponsor retaining, or failing to retain, the necessary stable and regular resources which are sufficient to maintain himself and the members of his family, without recourse to the social assistance system of that Member State, in the year following the date of submission of that application, that assessment being based on the pattern of the sponsor's income in the six months preceding that date.

The assessment of whether a sponsor has a reasonable prospect of obtaining a right of permanent residence necessarily requires, in accordance with Article 3.1 of this directive, the competent authority of the Member State concerned to carry out an examination of future developments in the sponsor's situation in relation to the obtaining of that right of residence.

In addition, according to Article 16.1.a of that directive, the competent authority of the Member State concerned may withdraw an authorisation of family reunification where the sponsor no longer has stable and regular resources which are sufficient, as referred to in Article 7.1.c. The fact that it is possible to withdraw that authorisation means that that authority may require the sponsor to have such resources beyond the date of submission of his application.

Regarding the setting of the length of the period prior to the submission of the application on which the prospective assessment of the sponsor's resources may be based at six months, it should be noted that Directive 2003/86 is silent on that point. In any event, such a period is not capable of undermining the objective of that directive.

Summary:

I. Mr Khachab holds a long-term residence permit in Spain. He has been married to Ms Aghadar since 2009.

By decision of 26 March 2012, the Central Government Assistant Representative's Office in Alava refused his application for a temporary residence permit for his spouse on grounds of family reunification because Mr Khachab had provided no evidence that he had resources sufficient to maintain his family once reunited.

On 29 January 2013, the national court of first instance confirmed that decision stating that Mr Khachab was not in any form of employment when it was taken and he had worked for a construction undertaking for only 63 days during the six months preceding submission of the application, for which he received a wage of EUR 929. The contracts of employment produced by Mr Khachab relating to the period prior to it were for a limited term. The national court of first instance inferred that it could not be concluded that Mr Khachab would continue to have resources sufficient to maintain his family in the year following submission of the application.

Mr Khachab appealed against this judgment complaining, in particular, that it failed to take account of a new fact, namely that, since 26 November 2012, he has worked as a citrus fruit collector and therefore has resources sufficient to maintain his family. The *Abogado del Estado español* claimed that the appeal should be dismissed, arguing that the new facts could not be taken into account and that it was apparent from the administrative case file that there was no likelihood of the applicant retaining sufficient resources in the year following submission of his application.

II. In its judgment the Court stated that Article 17 of Directive 2003/86 requires that applications for reunification be examined on a case-by-case basis, and that the competent national authorities, when implementing this directive and examining applications for family reunification, must make a balanced and reasonable assessment of all the interests in play.

In this respect, the Court held that the period of one year, during which the sponsor should probably have resources which are sufficient, appears reasonable and does not go beyond what is necessary to enable assessment, on a case-by-case basis, of the risk that the sponsor may need to have recourse to the social assistance system of that State once family reunification has taken place. Indeed, that one-year period corresponds to the minimum period of validity of the residence permit which the sponsor must have in order to be able to apply for family reunification.

Languages:

Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, Swedish.



European Court of Human Rights

Important decisions

Identification: ECH-2016-1-001

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 23.02.2016 / **e)** 11138/10 / **f)** Mozer v. the Republic of Moldova and Russia / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

- 1.4.4 Constitutional Justice – Procedure – **Exhaustion of remedies.**
- 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.**
- 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**
- 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**
- 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:

Detention, unlawful / State control / State, lack of recognition by the international community.

Headnotes:

Detention ordered by “courts” of separatist region of the Republic of Moldova

The Court cannot automatically regard as unlawful, for the limited purposes of the Convention, the decisions taken by the courts of an unrecognised entity purely because of the latter’s unlawful nature and the fact that it is not internationally recognised. However, it is in the first place for the Contracting Party which has effective control over the unrecognised entity at issue to show that its courts

“form part of a judicial system operating on a constitutional and legal basis reflecting a judicial tradition compatible with the Convention”. In the absence of such evidence and of adequate procedural safeguards concerning such matters as the length of detention, rights of appeal and independence of the courts, the entity’s courts could not order the applicant’s “lawful arrest or detention” for the purposes of Article 5.1.c ECHR.

Summary:

I. In November 2008 the applicant, a Moldovan national belonging to the German ethnic minority, was arrested by the authorities of the self-proclaimed “Moldavian Republic of Transnistria” (hereinafter, the “MRT”), which has not been recognised by the international community, on suspicion of defrauding the company he worked for. He was held in custody until his trial before the “Tiraspol People’s Court”, which in July 2010 convicted him and sentenced him to seven years’ imprisonment, suspended for five years. It ordered his release subject to an undertaking not to leave the city. The applicant later left for treatment in Chişinău (Republic of Moldova) before travelling to Switzerland.

In his application to the European Court of Human Rights, the applicant, who suffered from bronchial asthma, respiratory deficiency and other conditions, complained that he had been deprived of medical assistance and held in inhuman conditions by the “MRT authorities” (Article 3 ECHR), that his arrest and detention were unlawful (Article 5.1 ECHR), that his right to meet his parents and a pastor had been unduly restricted (Articles 8 and 9 ECHR) and that he had no effective domestic remedy available (Article 13 ECHR). He submitted that both Moldova and Russia were responsible for the alleged violations of his Convention rights.

II.1.a. Jurisdiction of Moldova: There was no reason to distinguish the present case from previous cases (such as *Ilaşcu and Others v. Moldova and Russia* and *Catan and Others v. Moldova and Russia*) concerning Moldovan jurisdiction in respect of events in the territory controlled by the “MRT”. Although Moldova had no effective control over the acts of the “MRT” in Transnistria, the fact that the region was recognised under public international law as part of Moldova’s territory gave rise to an obligation under Article 1 ECHR for Moldova to use all the legal and diplomatic means available to it to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention to those living there.

The Court therefore found within the jurisdiction of Moldova (unanimously).

b. Jurisdiction of Russia: In the absence of new information to show that the situation had changed during the relevant period (November 2008 to July 2010), the Court maintained its previous findings that the “MRT” was only able to continue to exist, and to resist Moldovan and international efforts to resolve the conflict and bring democracy and the rule of law to the region, because of Russian military, economic and political support. The “MRT’s” high level of dependency on Russian support provided a strong indication that Russia continued to exercise effective control and a decisive influence over the “MRT” authorities.

The Court therefore found that the applicant falls within the jurisdiction of Russia.

2. The Court dismissed the Moldovan Government’s objection that, in order to exhaust Moldovan domestic remedies, the applicant should have applied for compensation under Law no. 1545 (1998). It noted that Law no. 1545 did not appear to apply to the unlawful actions of authorities created by the “MRT”, that no examples of an individual obtaining compensation from Moldova after the quashing of an “MRT court” conviction had been submitted, and that nothing in Law no. 1545 allowed the applicant to claim compensation for the delayed use or failure by the Moldovan authorities to make use of diplomatic or other means at the State level.

The Court therefore dismissed the preliminary objection.

3. The Court reiterated that decisions taken by the courts, including the criminal courts, of unrecognised entities may be considered “lawful” for the purposes of the Convention provided they form part of a judicial system operating on a constitutional and legal basis compatible with the Convention. It was in the first place for Russia, as the Contracting Party with effective control over the unrecognised entity, to show that the “MRT” courts satisfied that test. In *Ilaşcu and Others* the Court had found that the test was not satisfied in view, in particular, of the patently arbitrary nature of the circumstances in which the applicants in that case were tried and convicted. In the absence of information from the Russian Government and in view of the scarcity of official information concerning the legal and court system in the “MRT”, the Court was not in a position to verify whether the “MRT” courts and their practice now fulfilled the requirements. What was, however, clear was that the “MRT” legal system created in 1990 had not undergone the thorough analysis to which Moldovan law was subjected before Moldova joined the Council of Europe in 1995. Accordingly, there was no basis for assuming that the “MRT” legal system reflected a judicial tradition

considered compatible with Convention principles. That conclusion was reinforced by, among other things, the circumstances of the applicant's arrest and detention (especially the order for his detention for an undefined period and the examination of his appeal in his absence) and media reports which raised concerns about the independence and quality of the "MRT" courts. Neither the "MRT" courts nor any other "MRT" authority had thus been able to order the applicant's "lawful arrest or detention" within the meaning of Article 5.1.c ECHR.

a. Responsibility of Moldova: The Court had held in *Ilaşcu and Others* that Moldova's positive obligations to take appropriate and sufficient measures to secure the applicant's rights under Article 5.1 ECHR related both to measures needed to re-establish its control over the Transdniestrian territory, as an expression of its jurisdiction, and to measures to ensure respect for individual applicants' rights.

As regards the obligation to re-establish control, there was nothing to indicate that the Moldovan Government, which had taken all measures in its power to re-establish control over Transdniestrian territory, had changed their position during the period of the applicant's detention. As to the obligation to ensure respect for the applicants' rights, the Moldovan Government had made considerable efforts to support the applicant, in particular, through appeals to various intergovernmental organisations and foreign countries including Russia, a decision of the Moldovan Supreme Court of Justice quashing the applicant's conviction and an investigation into the allegations of unlawful detention. Moldova had thus fulfilled its positive obligations.

The Court therefore found no violation of Article 5.1 ECHR by Moldova.

b. Responsibility of Russia: While there was no evidence that persons acting on behalf of the Russian Federation had directly participated in the measures taken against the applicant, Russia's responsibility under the Convention was nevertheless engaged by virtue of its continued military, economic and political support for the "MRT", which could not otherwise survive.

The Court therefore found a violation of Article 5.1 ECHR by Russia.

4. The applicant complained of a lack of medical assistance and of the conditions of his detention.

It was indisputable that the applicant suffered greatly from his asthma attacks. Although the doctors considered the applicant's condition to be

deteriorating and the specialists and equipment required to treat him to be lacking, the "MRT" authorities had not only refused to transfer him to a civilian hospital for treatment but had also exposed him to further suffering and a more serious risk to his health by transferring him to an ordinary prison. In view of the lack of any explanation for the refusal to offer him appropriate treatment, the Court found that the medical assistance received by the applicant was not adequately secured.

The Court further found on the basis notably of reports of the European Committee for the Prevention of Torture (CPT) and the United Nations Special Rapporteur on Torture that the conditions of the applicant's detention amounted to inhuman and degrading treatment, in particular on account of severe overcrowding, a lack of access to daylight and a lack of working ventilation which, coupled with cigarette smoke and dampness in the cell, had aggravated the applicant's asthma attacks.

For the reasons set out under Article 5.1 ECHR, the Court found that responsibility for the violation lay solely with Russia.

The Court therefore found no violation of Article 3 ECHR by Moldova and a violation of Article 3 ECHR by Russia.

5. The applicant complained that he had been unable to meet his parents for a considerable length of time and that during the meetings that had eventually been authorised they had not been allowed to speak their native German.

The Court noted that no reasons for refusing family meetings were apparent from the file and it was clear that the applicant had been unable to meet his parents for six months after his initial arrest. No explanation was given as to why it had been necessary to separate the applicant from his family for such a considerable length of time. Likewise, it was unacceptable in principle that a prison guard was present during family visits. It was clear that the guard was there specifically to monitor what the family discussed, given that they were at risk of having the meeting cancelled if they did not speak a language he understood. No explanation was given as to why the meetings had to be monitored so closely. Thus, regardless of whether there had been a legal basis for the interference with the applicant's rights, the restriction of prison visits from his parents did not comply with the other conditions set out in Article 8.2 ECHR.

For the reasons set out under Article 5.1 ECHR (see above), the Court found that responsibility for the violation lay solely with Russia.

The Court therefore found no violation of Article 8 ECHR by Moldova and a violation of Article 8 ECHR by Russia.

6. The applicant complained that he had also been prevented from seeing his pastor. The Court reiterated that a refusal to allow a prisoner to meet a priest constitutes interference with the rights guaranteed under Article 9 ECHR. It was not clear whether there was a legal basis for the refusal and no reasons had been advanced to justify it. The Court considered that it had not been shown that the interference with the applicant's right pursued a legitimate aim or was proportionate to that aim.

For the reasons set out under Article 5.1 ECHR (see above), the Court found that responsibility for the violation lay solely with Russia.

The Court therefore found no violation of Article 9 ECHR by Moldova and a violation of Article 9 ECHR by Russia.

7. The applicant had been entitled to an effective domestic remedy within the meaning of Article 13 ECHR in respect of his complaints under Articles 3, 8 and 9 ECHR. The Court had already found when considering the Moldovan Government's preliminary objection that a claim for compensation before the Moldovan courts under Law no. 1545 (1998) could not be considered an effective remedy. The Russian Government had not claimed that any effective remedies were available to the applicant in the "MRT". The applicant thus did not have an effective remedy in respect of his complaints under Articles 3, 8 and 9 ECHR.

a. Responsibility of Moldova: The nature of the positive obligations to be fulfilled by Moldova did not require the payment of compensation for breaches by the "MRT". Accordingly, the rejection of the preliminary objection concerning the non-exhaustion of domestic remedies did not affect the Court's analysis concerning the fulfilment of Moldova's positive obligations.

The positive obligation incumbent on Moldova was to use all the legal and diplomatic means available to continue to guarantee to those living in the Transdniestrian region the enjoyment of the rights and freedoms defined in the Convention. Accordingly, the "remedies" which Moldova was required to offer the applicant consisted in enabling him to inform the Moldovan authorities of the details of his situation and

to be kept informed of the various legal and diplomatic actions taken. Moldova had created a set of judicial, investigative and civil service authorities which worked in parallel with those created by the "MRT". While the effects of any decisions taken by these authorities could only be felt outside the Transdniestrian region, they had the function of enabling cases to be brought in the proper manner before the Moldovan authorities, which could then initiate diplomatic and legal steps to attempt to intervene in specific cases, in particular by urging Russia to fulfil its obligations under the Convention in its treatment of the "MRT" and the decisions taken there.

Moldova had made procedures available to the applicant commensurate with its limited ability to protect the applicant's rights. It had thus fulfilled its positive obligations.

b. Responsibility of Russia: For the reasons set out under Article 5.1 ECHR (see above), Russia's responsibility was engaged.

The Court therefore found no violation of Article 13 ECHR by Moldova and a violation of Article 13 ECHR by Russia.

8. The applicant complained of a breach of Article 17 ECHR by both respondent States on account of their tolerance of the unlawful regime installed in the "MRT".

The Court considered that the complaint as formulated by the applicant fell outside the scope of Article 17 ECHR. In any case, there was no evidence to suggest that either of the respondent States had set out to deliberately destroy any of the rights relied on by the applicant, or to limit any of those rights to a greater extent than was provided for in the Convention.

The Court therefore found the complaint under Article 17 ECHR inadmissible as manifestly ill-founded.

Cross-references:

European Court of Human Rights:

- *Airey v. Ireland*, no. 6289/73, 09.10.1979, Series A, no. 32;
- *Akdivar and Others v. Turkey*, no. 21893/93, 16.09.1996, *Reports of Judgments and Decisions* 1996-IV;
- *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, 07.07.2011, *ECHR* 2011;

- *Asproftas v. Turkey*, no. 16079/90, 27.05.2010;
- *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, 14.12.2006, ECHR 2001-XII;
- *Bouyid v. Belgium* [GC], no. 23380/09, 28.09.2015, ECHR 2015;
- *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, 19.10.2012, ECHR 2012 (extracts);
- *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, 17.07.2014, ECHR 2014;
- *Chahal v. the United Kingdom*, no. 22414/93, 15.11.1996, Reports 1996-V;
- *Chiragov and Others v. Armenia* [GC], no. 13216/05, 16.06.2015, ECHR 2015;
- *Cyprus v. Turkey* [GC], no. 25781/94, 10.05.2001, ECHR 2001-IV;
- *De Souza Ribeiro v. France* [GC], no. 22689/07, 13.12.2002, ECHR 2012;
- *Del Río Prada v. Spain* [GC], no. 42750/09, 21.10.2013, ECHR 2013;
- *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, 01.10.2010, ECHR 2010-I;
- *Enea v. Italy* [GC], no. 74912/01, 17.09.2009, ECHR 2009;
- *Engel and Others v. the Netherlands*, no. 23/11/1976, 08.06.1976, Series A, no. 22;
- *Gherghina v. Romania* [GC] (dec.), no. 42219/07, 09.07.2015;
- *Gladkiy v. Russia*, no. 3242/03, 21.12.2010;
- *Idalov v. Russia* [GC], no. 5826/03, 22.05.2012;
- *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, 08.07.2004, ECHR 2004-VII;
- *Ivanțoc and Others v. Moldova and Russia*, no. 23687/05, 15.11.2011;
- *Khoroshenko v. Russia* [GC], no. 41418/04, 30.06.2015, ECHR 2015;
- *Kudła v. Poland* [GC], no. 30210/96, 26.10.2000, ECHR 2000-XI;
- *L.C.B. v. the United Kingdom*, no. 23413/94, 09.06.1998, Reports 1998-III;
- *Labita v. Italy* [GC], no. 26772/95, 06.04.2000, ECHR 2000-IV;
- *Lavents v. Latvia*, no. 58442/00, 28.11.2002;
- *Lawless v. Ireland (merits)*, no. 332/57, 01.07.1961, Series A, no. 3;
- *Loizidou v. Turkey (preliminary objections)*, no. 15318/89, 23.03.1995, Series A, no. 310;
- *Loizidou v. Turkey (merits)*, no. 15318/89, 18.12.1996, Reports 1996-VI;
- *Makaratzis v. Greece* [GC], no. 50385/99, 20.12.2004, ECHR 2004-XI;
- *Messina v. Italy (no. 2)*, no. 25498/94, 28.09.2000, ECHR 2000-X;
- *Orban and Others v. France*, no. 20985/05, 15.01.2009;
- *Osman v. the United Kingdom*, no. 23452/94, 28.10.1998, Reports 1998-VIII;
- *Pakhomov v. Russia*, no. 44917/08, 30.09.2010;
- *Peers v. Greece*, no. 28524/95, 19.04.2001, ECHR 2001-III;
- *Petrakidou v. Turkey*, no. 16081/90, 27.05.2010;
- *Poltoratskiy v. Ukraine*, no. 38812/97, 29.04.2003, ECHR 2003-V;
- *Sargsyan v. Azerbaijan* [GC], no. 40167/06, 16.06.2015, ECHR 2015;
- *Sejdovic v. Italy* [GC], no. 56581/00, 01.03.2006, ECHR 2006-II;
- *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, 17.07.2014, ECHR 2014 (extracts);
- *Union européenne des droits de l'homme and Josephides v. Turkey* (dec.), no. 7116/10, 02.04.2013;
- *Vučković and Others v. Serbia (preliminary objection)* [GC], nos. 17153/11 and 29 others, 25.03.2014;
- *Yaşa v. Turkey*, no. 22495/93, 02.09.1998, Reports 1998-VI.

Languages:

English, French.



Identification: ECH-2016-1-002

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 23.03.2016 / **e)** 47152/06 / **f)** *Blokhin v. Russia* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

5.3.13.28 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to examine witnesses.**

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

Keywords of the alphabetical index:

Medical care.

Headnotes:

Thirty-day placement of minor in detention centre for young offenders to “correct his behaviour”

Detention for educational supervision pursuant to Article 5.1.d ECHR must take place in an appropriate facility with the resources to meet the necessary educational objectives and security requirements. However, the placement in such a facility does not necessarily have to be an immediate one. Sub-paragraph d does not preclude an interim custody measure being used as a preliminary to a regime of supervised education, without itself involving any supervised education. In such circumstances, however, the interim custody measure must be speedily followed by actual application of a regime of educational supervision in a setting (open or closed) designed – and with sufficient resources – for the purpose (see paragraph 167 of the judgment).

Summary:

I. The applicant, who at the material time was twelve years old and suffering from attention-deficit hyperactivity disorder (hereinafter, “ADHD”), was arrested and taken to a police station on suspicion of extorting money from a nine-year old. The authorities found it established that the applicant had committed offences punishable under the Criminal Code but, since he was below the statutory age of criminal responsibility, no criminal proceedings were opened against him. Instead he was brought before a court which ordered his placement in a temporary detention centre for juvenile offenders for a period of thirty days in order to “correct his behaviour” and to prevent his committing further acts of delinquency. The applicant alleged that his health deteriorated while in the centre as he did not receive the medical treatment his doctor had prescribed.

II. Article 3 ECHR: In line with established international law, the health of juveniles deprived of their liberty shall be safeguarded according to recognised medical standards applicable to juveniles in the wider community. The authorities should always be guided by the child’s best interests and the child should be guaranteed proper care and protection. Moreover, if the authorities are considering depriving a child of his or her liberty, a medical assessment should be made of the child’s state of health to determine whether or not he or she can be placed in a juvenile detention centre.

In the instant case, there had been sufficient evidence to show that the authorities were aware that the applicant was suffering from ADHD upon his admission to the temporary detention centre and was in need of treatment. Moreover, the fact that he was hospitalised the day after his release, and kept in the psychiatric hospital for almost three weeks, indicated that he was not given the necessary treatment for his condition at the temporary detention centre. The applicant had thus established a prima facie case. For their part, the Government had failed to show that the applicant received the medical care required by his condition during his thirty-day stay at the temporary detention centre where he was entirely under the control and responsibility of the staff. There had thus been a violation of the applicant’s rights under Article 3 ECHR on account of the lack of necessary medical treatment at the temporary detention centre, having regard to his young age and particularly vulnerable situation as an ADHD sufferer.

The Court therefore found a violation of Article 3 ECHR.

Article 5.1 ECHR: The Grand Chamber confirmed the Chamber’s finding that the applicant’s placement for thirty days in the temporary detention centre amounted to a deprivation of liberty within the meaning of Article 5.1 ECHR. The Chamber had noted in particular that the centre was closed and guarded, with twenty-four-hour surveillance to ensure inmates did not leave the premises without authorisation and a disciplinary regime enforced by a duty squad.

The Grand Chamber agreed with the Chamber that the applicant’s placement did not come within any of sub-paragraphs a, b, c, e and f of Article 5.1 ECHR. It therefore focused its examination on whether the placement was in accordance with Article 5.1.d ECHR (detention for the purposes of educational supervision).

The Grand Chamber reiterated that the words “educational supervision” must not be equated rigidly with notions of classroom teaching: in the context of a young person in local authority care, educational supervision must embrace many aspects of the exercise, by the local authority, of parental rights for the benefit and protection of the person concerned. Further, detention for educational supervision must take place in an appropriate facility with the resources to meet the necessary educational objectives and security requirements.

Turning to the facts of the applicant’s case, it noted that placement in a temporary detention centre was a short-term, temporary solution and could not be compared to a placement in a closed educational institution, which was a separate and long-term measure intended to try to help minors with serious problems. The Grand Chamber failed to see how any meaningful educational supervision, to change a minor’s behaviour and offer appropriate treatment and rehabilitation, could be provided during a maximum period of thirty days.

While the Grand Chamber accepted that some schooling was provided in the centre, it considered that schooling in line with the normal school curriculum should be standard practice for all minors deprived of their liberty and placed under the State’s responsibility, even when they were placed in a temporary detention centre for a limited period of time. Such schooling was necessary to avoid gaps in their education. The provision of such schooling did not, however, substantiate the Government’s argument that the applicant’s placement in the centre was “for the purpose” of educational supervision. On the contrary, the centre was characterised by its disciplinary regime rather than by the schooling provided.

It was also of importance that none of the domestic courts had stated that the applicant’s placement was for educational purposes. Instead, they referred to “behaviour correction” and the need to prevent the applicant from committing further delinquent acts, neither of which was a valid ground covered by Article 5.1.d ECHR. Since the detention did not fall within the ambit of any of the other sub-paragraphs of Article 5.1 there had been a violation of that provision.

The Court therefore found a violation of Article 5 ECHR.

Article 6.1 in conjunction with Article 6.3.c and 6.3.d ECHR: The applicant complained that the proceedings relating to his placement in the temporary detention centre had been unfair in that he had been questioned by the police without his

guardian, a defence lawyer or a teacher present and had not had the opportunity to cross-examine witnesses against him during the proceedings.

a. Applicability: The Grand Chamber saw no reason to depart from the Chamber’s findings that the proceedings against the applicant constituted criminal proceedings within the meaning of Article 6 ECHR. Like the Chamber, it stressed the need to look beyond appearances and the language used and to concentrate on the realities of the situation. The placement for thirty days in the temporary detention centre for juvenile offenders had clear elements of both deterrence and punishment (the Chamber had noted that the centre was closed and guarded to prevent inmates leaving without authorisation and that inmates were subject to constant supervision and to a strict disciplinary regime).

The Grand Chamber also rejected the Government’s contention that the complaints should be considered under Article 5.4 ECHR. In the Grand Chamber’s view, since the proceedings taken against the applicant concerned the determination of a criminal charge, the applicant’s complaints should be seen in the context of the more far-reaching procedural guarantees enshrined in Article 6 ECHR rather than Article 5.4 ECHR.

Article 6 ECHR was therefore applicable.

b. Merits: The applicant was only twelve years old when the police took him to the police station and questioned him and thus well below the age of criminal responsibility (fourteen years) set by the Criminal Code for the offence he was accused of. He had therefore been in need of special treatment and protection by the authorities. It was clear from a variety of international sources that any measures against him should have been based on his best interests and that from the time of his apprehension by the police he should have been guaranteed at least the same legal rights and safeguards as those provided to adults. Moreover, the fact that he suffered from ADHD, a mental and neurobehavioural disorder, made him particularly vulnerable and in need of special protection.

i. Right to legal assistance: The Court considered it established that the police did not assist the applicant in obtaining legal representation. Nor was the applicant informed of his right to have a lawyer and his grandfather or a teacher present. This passive approach adopted by the police was clearly not sufficient to fulfil their positive obligation to furnish the applicant – a child suffering from ADHD – with the necessary information enabling him to obtain legal representation. The fact that the domestic law did not

provide for legal assistance to a minor under the age of criminal responsibility when interviewed by the police was not a valid reason for failing to comply with that obligation. Indeed, it was contrary to the basic principles set out in international sources requiring minors to be guaranteed legal, or other appropriate, assistance.

Furthermore, the confession statement, made in the absence of a lawyer, was not only used against the applicant in the proceedings to place him in the temporary detention centre but actually formed the basis, in combination with the witness statements, for the domestic courts' finding that his actions contained elements of the criminal offence of extortion, thus providing grounds for his placement in the centre. The absence of legal assistance during the applicant's questioning by the police had irretrievably affected his defence rights and undermined the fairness of the proceedings as a whole, in breach of Article 6.1 and 6.3.c ECHR.

ii. Right to obtain the attendance and examination of witnesses: Neither the child from whom the applicant was alleged to have extorted money nor the child's mother was called to the hearing to give evidence and provide the applicant with an opportunity to cross-examine them, despite the fact that their testimonies were of decisive importance to the pre-investigation inquiry's conclusion that the applicant had committed extortion. There was no good reason for their non-attendance. Moreover, in view of the fact that the applicant had retracted his confession, it was important for the fairness of the proceedings that those witnesses be heard. That safeguard was even more important when, as here, the matter concerned a minor under the age of criminal responsibility in proceedings determining such a fundamental right as his right to liberty. Having regard to the fact that the applicant risked being deprived of his liberty for thirty days – a not negligible length of time for a twelve-year-old boy – it was of utmost importance that the domestic court guarantee the fairness of the proceedings by ensuring that the principle of equality of arms was respected. In the absence of any counterbalancing factors to compensate for the applicant's inability to cross-examine the witnesses at any stage of the proceedings, the applicant's defence rights, in particular the right to challenge and question witnesses, had been restricted to an extent incompatible with the guarantees provided by Article 6.1 and 6.3.d ECHR.

The instant case, in which the minor applicant had enjoyed significantly restricted procedural safeguards under the Minors Act 1999 compared to those afforded criminal defendants by the Code of Criminal Procedure, illustrated how the legislature's intention

to protect children and ensure their care and treatment could come into conflict with reality and the principles requiring proper procedural safeguards for juvenile delinquents.

In the Grand Chamber's view, minors, whose cognitive and emotional development in any event required special consideration, and in particular young children under the age of criminal responsibility, deserved support and assistance to protect their rights when coercive measures were applied in their regard albeit in the guise of educational measures. Adequate procedural safeguards had to be in place to protect the best interests and well-being of the child, certainly when his or her liberty was at stake. To find otherwise would be to put children at a clear disadvantage compared with adults in the same situation. In this connection, children with disabilities may require additional safeguards to ensure they are sufficiently protected. This does not mean, however, that children should be exposed to a fully-fledged criminal trial; their rights should be secured in an adapted and age-appropriate setting in line with international standards, in particular the Convention on the Rights of the Child.

In sum, the applicant had not been afforded a fair trial in the proceedings leading to his placement in the temporary detention centre.

The Court therefore found a violation of Article 6 ECHR.

Supplementary information:

- Council of Europe Recommendation no. R (87)20; Council of Europe Recommendation (2003)20; Council of Europe Guidelines on child friendly justice, Guidelines 1, 2, and 28-30; the Article 40 of the Convention on the Rights of the Child, 1989, and General Comment no. 10, point 33; and Rule 7.1 of the Beijing Rules.
- Council of Europe Guidelines on child friendly justice, Guideline 27; Article 23 of the Convention on the Rights of the Child 1989, and General Comment no. 9 (The rights of children with disabilities), points 73 and 74.
- Convention on the Rights of the Child, Article 40.2.b.ii and the comments thereto; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules"), Rule 7.1; and Council of Europe Recommendation no. R (87) 20, point 8.

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- *Akimov v. Azerbaijan*, no. 19853/03, paragraph 92, 27.09.2007;
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- *Koniarska v. the United Kingdom*, (dec.), no. 33670/96, 12.10.2000;
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- *Poitrimol v. France*, no. 14032/88, 23.11.1993, Series A, no. 277 A;
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- *Walker v. the United Kingdom* (dec.), no. 34979/97, 25.01.2000, *ECHR* 2000-I;

- *Wenerski v. Poland*, no. 44369/02, paragraphs 56 to 65, 20.01.2009.

Languages:

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a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 29.03.2016 / **e)** 56925/08 / **f)** *Bedat v. Switzerland* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Information, confidential, divulgation / Freedom of expression, freedom to impart information / Freedom of expression, freedom to receive information / Journalist, work, on-going criminal proceedings, penalty / Judicial power, authority, impartiality / Private life, protection / Secrecy of preliminary judicial investigation.

Headnotes:

Conviction of a journalist for publishing information covered by the confidentiality of judicial investigations

While emphasising that the rights guaranteed by Article 10 ECHR and Article 6.1 ECHR deserve equal respect in principle, the Court reiterated that it was legitimate for special protection to be afforded to the secrecy of a judicial investigation, in view of what was at stake in criminal proceedings, both for the

administration of justice and for the right of persons under investigation to be presumed innocent. The secrecy of investigations was geared to protecting, on the one hand, the interests of the criminal proceedings by anticipating risks of collusion and the danger of evidence being tampered with or destroyed and, on the other, the interests of the accused, notably from the angle of presumption of innocence, and more generally, his or her personal relations and interests. Such secrecy was also justified by the need to protect the opinion-forming and decision-making processes within the judiciary.

The publication of an article slanted in such a way as to paint a highly negative picture of the accused at a time when the investigation was still under way had entailed an inherent risk of influencing the on-going proceedings in one way or another. A government could not be expected to provide *ex post facto* proof that this type of publication had actually influenced the conduct of a given set of proceedings. The risk of influencing proceedings justified *per se* the adoption by the domestic authorities of deterrent measures such as prohibition of the disclosure of secret information. The lawfulness of those measures under domestic law and their compatibility with the requirements of the Convention should be capable of being assessed at the time of the adoption of the measures.

Summary:

I. On 15 October 2003 the applicant, a journalist, had published in a daily newspaper an article concerning criminal proceedings against a motorist who had been taken into custody for ramming his car into a group of pedestrians, killing three of them and injuring eight, before throwing himself off the Lausanne Bridge. The article had painted a picture of the accused, presented a summary of the questions put by the police officers and the investigating judge and the accused's replies, and been accompanied by several photographs of letters which he had sent to the investigating judge. The article had also included a short summary of statements by the accused's wife and GP. Criminal proceedings had been brought against the journalist on the initiative of the public prosecutor for having published secret documents. In June 2004 the investigating judge had sentenced the applicant to one month's imprisonment, suspended for one year. Subsequently, the Police Court had replaced his prison sentence with a fine of 4,000 Swiss francs (CHF) (approximately 2,667 euros [EUR]). The applicant's appeals against his conviction had proved unsuccessful.

II. The conviction of the applicant had amounted to an interference, prescribed by law, with his exercise of the right to freedom of expression as secured under Article 10.1 ECHR. The impugned measure had pursued legitimate aims, namely preventing “the disclosure of information received in confidence”, maintaining “the authority and impartiality of the judiciary” and protecting “the reputation (and) rights of others”.

The applicant’s right to inform the public and the public’s right to receive information came up against equally important public and private interests protected by the prohibition on disclosing information covered by investigative secrecy. Those interests were the authority and impartiality of the judiciary, the effectiveness of the criminal investigation and the right of the accused to the presumption of innocence and protection of his private life. The Court considered that it was necessary to specify the criteria to be followed by the national authorities of the States Parties to the Convention in weighing up those interests and therefore in assessing the “necessity” of the interference in cases of violation of investigative secrecy by a journalist.

a. How the applicant had come into possession of the information at issue – even though it had not been alleged that the applicant had obtained the information illegally, as a professional journalist he could not have been unaware of the confidentiality of the information which he was planning to publish.

b. Content of the impugned article – although the impugned article had not taken a specific stance on the intentional nature of the offence which the accused had allegedly committed, it had nevertheless painted a highly negative picture of him, adopting an almost mocking tone. The headings used by the applicant, as well as the large close-up photograph of the accused accompanying the text, left no room for doubt that the applicant had wanted his article to be as sensationalist as possible. Moreover, the article had highlighted the vacuity of the accused’s statements and his many contradictions, often explicitly describing them as “repeated lies”, and concluding with the question whether M. B. had not, by means of “this mixture of naivety and arrogance”, been “doing all in his power to make himself impossible to defend”. Those had been precisely the kind of questions which the judicial authorities had had to answer, at both the investigation and the trial stages.

c. Contribution of the impugned article to a public-interest debate – the subject of the article, to wit the criminal investigation into the Lausanne Bridge tragedy, had been a matter of public interest. This

completely exceptional incident had triggered a great deal of public emotion among the population, and the judicial authorities had themselves decided to inform the press of certain aspects of the on-going inquiry.

However, the question was whether the information which had been set out in the article and had been covered by investigative secrecy could have contributed to the public debate on this issue or had been solely geared to satisfying the curiosity of a particular readership regarding the details of the accused’s private life.

In this connection, after an in-depth assessment of the content of the article, the nature of the information provided and the circumstances surrounding the case, the Federal Court, in a lengthily reasoned judgment which had comprised no hint of arbitrariness, had held that the disclosure neither of the records of interviews nor of the letters sent by the accused to the investigating judge had provided any insights relevant to the public debate and that the public interest in this case had at the very most “involved satisfying an unhealthy curiosity”.

For his part, the applicant had failed to demonstrate how the fact of publishing records of interviews, statements by the accused’s wife and doctor and letters sent by the accused to the investigating judge concerning banal aspects of his everyday life in detention could have contributed to any public debate on the on-going investigation.

Accordingly, the Court saw no strong reason to substitute its view for that of the Federal Court, which had a certain margin of appreciation in such matters.

d. Influence of the impugned article on the criminal proceedings – although the rights guaranteed by Article 10 ECHR and by Article 6.1 ECHR respectively merited equal respect *a priori*, it was legitimate for special protection to be afforded to the secrecy of a judicial investigation, in view of the stakes of criminal proceedings, both for the administration of justice and for the right of persons under investigation to be presumed innocent. The secrecy of criminal investigations was geared to protecting, on the one hand, the interests of the criminal proceedings by anticipating risks of collusion and the danger of evidence being tampered with or destroyed and, on the other, the interests of the accused, notably from the angle of presumption of innocence, and more generally, his or her personal relations and interests. Such secrecy was also justified by the need to protect the opinion-forming process and the decision-making process within the judiciary.

Even though the impugned article had not openly supported the view that the accused had acted intentionally, it had nevertheless been slanted in such a way as to paint a highly negative picture of the latter, highlighting certain disturbing aspects of his personality and concluding that he had been doing “all in his power to make himself impossible to defend”.

The publication of an article oriented in that way at a time when the investigation had still been on-going entailed the inherent risk of influencing the conduct of proceedings in one way or another, potentially affecting the work of the investigating judge, the decisions of the accused’s representatives, the positions of the parties claiming damages, or the objectivity of any tribunal called upon to try the case, irrespective of its composition.

A government could not be expected to provide *ex post facto* proof that this type of publication had actually influenced the conduct of a given set of proceedings. The risk of influencing proceedings justified *per se* the adoption by the domestic authorities of deterrent measures such as prohibition of disclosure of secret information.

The lawfulness of those measures under domestic law and their compatibility with the requirements of the Convention had to be capable of being assessed at the time of the adoption of the measures, and not, as the applicant submitted, in the light of subsequent developments revealing the actual impact of the publications on the trial, such as the composition of the trial court.

The Federal Court had therefore been right to hold, in its judgment of 29 April 2008, that the records of interviews and the accused’s correspondence had been “discussed in the public sphere, before the conclusion of the investigation (and) out of context, in a manner liable to influence the decisions taken by the investigating judge and the trial court”.

e. Infringement of the accused’s private life – the criminal proceedings brought against the applicant by the cantonal prosecuting authorities had complied with the positive obligation incumbent on Switzerland under Article 8 ECHR to protect the accused person’s private life.

Furthermore, the information disclosed by the applicant had been highly personal, and even medical, in nature, including statements by the accused person’s doctor and letters sent by the accused from his place of detention to the investigating judge responsible for the case. This type of information had called for the highest level of

protection under Article 8 ECHR; that finding was especially important as the accused had not been known to the public and the mere fact that he had been the subject of a criminal investigation, albeit for a very serious offence, had not justified treating him in the same manner as a public figure, who voluntarily exposed himself to publicity.

At the time of publication of the impugned article the accused had been in prison, and therefore in a situation of vulnerability. Moreover, nothing in the case file had suggested that he had been informed of the publication of the article and of the nature of the information which it had provided. In addition, he had probably been suffering from mental disorders, thus increasing his vulnerability. In those circumstances, the cantonal authorities could not be blamed for considering that in order to fulfil their positive obligation to protect the accused’s right to respect for his private life, they could not simply wait for the latter himself to take the initiative in bringing civil proceedings against the applicant, and for consequently opting for an active approach, even one involving prosecution.

f. Proportionality of the penalty imposed – the recourse to criminal proceedings and the penalty imposed on the applicant had not amounted to disproportionate interference in the exercise of his right to freedom of expression. The applicant had originally been given a suspended sentence of one month’s imprisonment. His sentence had subsequently been commuted to a fine of CHF 4,000, which had been set having regard to the applicant’s previous record and had been paid not by the applicant but by his employer. This penalty had been imposed for breaching the secrecy of a criminal investigation and its purpose, in the instant case, had been to protect the proper functioning of the justice system and the rights of the accused to a fair trial and respect for his private life.

In those circumstances, it could not be maintained that such a penalty had risked deterring the exercise of freedom of expression by the applicant or by any other journalist wishing to inform the public about on-going criminal proceedings.

The Court therefore found no violation of Article 10 ECHR.

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- *Von Hannover v. Germany*, no. 59320/00, 24.06.2004, ECHR 2004-VI;
- *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, 07.02.2012, ECHR 2012;
- *Worm v. Austria*, no. 22714/93, 29.08.1997, ECHR 1997-V;
- *X and Y v. the Netherlands*, no. 8978/80, 26.03.1985, Series A, no. 91.

Languages:

English, French.



Identification: ECH-2016-1-004

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 30.03.2016 / e) 5878/08 / f) Armani da Silva v. the United Kingdom / g) *Reports of Judgments and Decisions* / h) CODICES (English, French).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Right to life, investigation, effective.

Headnotes:

Alleged failure to conduct effective investigation into fatal shooting of person mistakenly identified as suspected terrorist.

The principal question to be addressed when determining whether the use of lethal force was justified for the purposes of Article 2 ECHR was whether the person had an honest and genuine belief that the use of force was necessary. In addressing that question, the Court had to consider whether the belief was subjectively reasonable, having full regard to the circumstances that pertained at the relevant time (see paragraphs 244 and 248 of the judgment).

Summary:

I. The applicant was a relative of Mr Jean Charles de Menezes, who was mistakenly identified as a terrorist suspect and shot dead on 22 July 2005 by two special firearms officers in London. The shooting occurred the day after a police manhunt was launched to find those responsible for four unexploded bombs that had been found on three underground trains and a bus in London. It was feared that a further bomb attack was imminent. Two weeks earlier, the security forces had been put on maximum alert after more than 50 people had died when suicide bombers detonated explosions on the London transport network. Mr de Menezes lived in a block of flats that shared a communal entrance with another block where two men suspected of involvement in the failed bombings lived. As he left for work on the morning of 22 July, he was followed by surveillance officers, who thought he might be one of the suspects. Special firearms officers were dispatched to the scene with orders to stop him boarding any underground trains. However, by the time they arrived, he had already entered Stockwell

tube station. There he was followed onto a train, pinned down and shot several times in the head.

The case was referred to the Independent Police Complaints Commission (hereinafter, "IPCC"), which in a report dated 19 January 2006 made a series of operational recommendations and identified a number of possible offences that might have been committed by the police officers involved, including murder and gross negligence. Ultimately, however, it was decided not to press criminal or disciplinary charges against any individual police officers in the absence of any realistic prospect of their being upheld. Subsequently, a successful prosecution was brought against the police authority under the Health and Safety at Work Act 1974. The authority was ordered to pay a fine of 175,000 pounds sterling (GBP) plus costs, but in a rider to its verdict that was endorsed by the judge, the jury absolved the officer in charge of the operation of any "personal culpability" for the events. At an inquest in 2008 the jury returned an open verdict after the coroner had excluded unlawful killing from the range of possible verdicts. The family also brought a civil action in damages which resulted in a confidential settlement in 2009.

II. Article 2 ECHR (procedural aspect): The Court's case-law had established a number of requirements for an investigation into the use of lethal force by State agents to be "effective": those responsible for carrying out the investigation had to be independent from those implicated in the events; the investigation had to be "adequate"; its conclusions had to be based on thorough, objective and impartial analysis of all relevant elements; it had to be sufficiently accessible to the victim's family and open to public scrutiny; and it had to be carried out promptly and with reasonable expedition.

The investigation in the instant case was conducted by an independent body (hereinafter, the "IPCC") which had secured the relevant physical and forensic evidence (more than 800 exhibits were retained), sought out the relevant witnesses (nearly 890 witness statements were taken), followed all obvious lines of enquiry and objectively analysed all the relevant evidence. The deceased's family had been given regular detailed briefings on the progress and conclusions of the investigation, had been able to judicially review the decision not to prosecute, and were represented at the inquest at the State's expense, where they had been able to cross-examine the witnesses and make representations. There was nothing to suggest that a delay that had occurred in handing the scene of the incident to the IPCC had compromised the integrity of the investigation in any way.

Although the applicant had not complained generally about the investigation, these considerations were important to bear in mind when considering the proceedings as a whole, in view of the applicant's specific complaints which solely concerned two aspects of the adequacy of the investigation: a. whether the investigating authorities were able properly to assess whether the use of force was justified and b. whether the investigation was capable of identifying and – if appropriate – punishing those responsible.

a. Whether the investigating authorities were able properly to assess whether the use of force was justified – The applicant had argued that the investigation had fallen short of the standard required by Article 2 ECHR because the authorities were precluded by domestic law from considering the objective reasonableness of the special firearms officers' belief that the use of force was necessary.

The Court observed that the principal question to be addressed in determining whether the use of lethal force was justified under the Convention was whether the person purporting to act in self-defence had an honest and genuine belief that the use of force was necessary. In addressing that question, the Court would have to consider whether the belief was subjectively (as opposed to objectively) reasonable, having full regard to the circumstances that pertained at the relevant time. If the belief was not subjectively reasonable (that is, was not based on subjective good reasons), it was likely that the Court would have difficulty accepting that it was honestly and genuinely held.

The test for self-defence in England and Wales was not significantly different and did not fall short of that standard. In any event, all the independent authorities who had considered the actions of the two officers responsible for the shooting had carefully examined the reasonableness of their belief that Mr de Menezes was a suicide bomber who could detonate a bomb at any second. Consequently, it could not be said that the domestic authorities had failed to consider, in a manner compatible with the requirements of Article 2 ECHR, whether the use of force had been justified in the circumstances.

b. Whether the investigation was capable of identifying and – if appropriate – punishing those responsible – The Court would normally be reluctant to interfere with a prosecutorial decision taken in good faith following an otherwise effective investigation. It had, however, on occasion, accepted that “institutional deficiencies” in a criminal justice or prosecutorial system could breach Article 2 ECHR.

In the instant case, the Court found, having regard to the criminal proceedings as a whole, that the applicant had not demonstrated the existence of any “institutional deficiencies” in the criminal justice or prosecutorial system giving or capable of giving rise to a procedural breach of Article 2 ECHR on the facts. In particular:

- The Court had never stated that the prosecutorial decision must be taken by a court and the fact that the decision not to prosecute was taken by a public official (the Crown Prosecution Service – CPS) was not problematic in and of itself, provided there were sufficient guarantees of independence and objectivity. Nor was there anything in the Court's case-law to suggest that an independent prosecutor had to hear oral testimony before deciding whether or not to prosecute.
- The threshold evidential test applied by the CPS in deciding whether to prosecute had been within the State's margin of appreciation. In setting the threshold evidential test the domestic authorities were required to balance a number of competing interests, including those of the victims, the potential defendants and the public at large and those authorities were evidently better placed than the Court to make such an assessment. The threshold applied in England and Wales was not arbitrary, having been the subject of frequent reviews, public consultations and political scrutiny. There was no uniform approach among Contracting States and while the threshold adopted in England and Wales might be higher than that in certain other countries, this simply reflected the jury system that operated there. Nor did Article 2 ECHR require the evidential test to be lowered in cases where deaths had occurred at the hands of State agents. The authorities of the respondent State had been entitled to take the view that public confidence in the prosecutorial system was best maintained by prosecuting where the evidence justified it and not prosecuting where it did not. In any event, a number of safeguards had been built into the system in cases of police shootings and deaths in custody.
- The Court was not persuaded that the scope of judicial review of decisions not to prosecute (the domestic courts could only interfere with a prosecutorial decision if it was wrong in law) was too narrow. There was no uniform approach among member States with regard either to the availability of review or, if available, the scope of that review.

In conclusion, while the facts of the case were undoubtedly tragic and the frustration of the family at the absence of any individual prosecutions was understandable, it could not be said that “any question of the authorities’ responsibility for the death ... was left in abeyance”.

As soon as it was confirmed that Mr de Menezes had not been involved in the attempted attack on 21 July 2005, the Metropolitan Police Service (hereinafter, “MPS”) had publicly accepted that he had been killed in error by special firearms officers. A representative of the MPS had flown to Brazil to apologise to his family face to face and to make an *ex gratia* payment to cover their financial needs. They were further advised to seek independent legal advice and assured that any legal costs would be met by the MPS. The individual responsibility of the police officers involved and the institutional responsibility of the police authority were considered in depth by the IPCC, the CPS, the criminal court, and the coroner and jury during the inquest. Later, when the family brought a civil claim for damages, the MPS agreed to a settlement with an undisclosed sum being paid in compensation.

The decision to prosecute the police authority did not have the consequence, either in law or in practice, of excluding the prosecution of individual police officers as well. Neither was the decision not to prosecute any individual officer due to any failings in the investigation or the State’s tolerance of or collusion in unlawful acts; rather, it was due to the fact that, following a thorough investigation, a prosecutor had considered all the facts of the case and concluded that there was insufficient evidence against any individual officer to meet the threshold evidential test.

The institutional and operational failings identified had resulted in the conviction of the police authority for offences under the Health and Safety at Work Act 1974. There was no evidence to indicate that the “punishment” (a fine of GBP 175,000 and costs of GBP 385,000) was excessively light for offences of that nature. This was not a case of “manifest disproportion” between the offence committed and the sanction imposed.

Accordingly, having regard to the proceedings as a whole, it could not be said that the domestic authorities had failed to discharge the procedural obligations under Article 2 ECHR to conduct an effective investigation into the shooting of Mr de Menezes which was capable of leading to the establishment of the facts, a determination of whether the force used was or was not justified in the circumstances and of identifying and – if appropriate – punishing those responsible.

The Court therefore found no violation of Article 2 ECHR.

Cross-references:

European Court of Human Rights:

- *A. v. Croatia*, no. 55164/08, 14.10.2010;
- *Akhmadov and Others v. Russia*, no. 21586/02, 14.11.2008;
- *Ali and Ayşe Duran v. Turkey*, no. 42942/02, 08.04.2008;
- *Andronicou and Constantinou v. Cyprus*, no. 25052/94, 09.10.1997, *Reports of Judgments and Decisions* 1997-VI;
- *Avşar v. Turkey*, no. 25657/94, 10.07.2001, *ECHR* 2001-VII (extracts);
- *Bennett v. the United Kingdom* (dec.), no. 5527/08, 07.12.2010;
- *Brecknell v. the United Kingdom*, no. 32457/04, 27.11.2007;
- *Bubbins v. the United Kingdom* no. 50196/99, 17.03.2005, *ECHR* 2005-II;
- *Caraher v. the United Kingdom* (dec.), no. 24520/94, 11.01.2000, *ECHR* 2000-I;
- *Enukidze and Girgvlani v. Georgia*, no. 25091/07, 26.04.2011;
- *Ergi v. Turkey*, no. 23818/94, 28.07.1998, *Reports* 1998-IV;
- *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, 24.03.2011, *ECHR* 2011 (extracts);
- *Golubeva v. Russia*, no. 1062/03, 17.12.2009;
- *Gül v. Turkey*, no. 22676/93, 14.12.2000;
- *Güleç v. Turkey*, no. 21593/93, 27.07.1998, *Reports* 1998-IV;
- *Gürtekin and others v. Cyprus* (dec.), nos. 60441/13, 68206/13 and 68667/13, 11.03.2014;
- *Hugh Jordan v. the United Kingdom*, no. 24746/94, 04.05.2001;
- *İlhan v. Turkey* [GC], no. 22277/93, 27.06.2000, *ECHR* 2000-VII;
- *Jaloud v. the Netherlands* [GC], no. 47708/08, 20.11.2014, *ECHR* 2014;
- *Kasap and Others v. Turkey*, no. 8656/10, 14.01.2014;
- *Kaya v. Turkey*, no. 22729/93, 19.02.1998, *Reports* 1998-I;
- *Kolevi v. Bulgaria*, no. 1108/02, 05.11.2009;
- *Makaratzis v. Greece* [GC], no. 50385/99, 20.12.2004, *ECHR* 2004-XI;
- *Mastromatteo v. Italy* [GC], no. 37703/97, 24.10.2002, *ECHR* 2002-VIII;
- *McCann and Others v. the United Kingdom*, no. 18984/91, 27.09.1995, Series A, no. 324;
- *McKerr v. the United Kingdom*, no. 28883/95, 04.05.2001, *ECHR* 2001-III;

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- *Mileusnić and Mileusnić-Espenheim v. Croatia*, no. 66953/09, 19.02.2015;
 - *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, 14.04.2015;
 - *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, 06.07.2005, ECHR 2005-VII;
 - *Oğur v. Turkey* [GC], no. 21594/93, 20.05.1999, ECHR 1999-III;
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 - *Opuz v. Turkey*, no. 33401/02, 09.06.2009, ECHR 2009;
 - *Perk v. Turkey*, no. 50739/99, 28.03.2006;
 - *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, 15.05.2007, ECHR 2007-II;
 - *Salman v. Turkey* [GC], no. 21986/93, 27.06.2000, ECHR 2000-VII;
 - *Šilih v. Slovenia* [GC], no. 71463/01, 09.04.2009;
 - *Suleymanova v. Russia*, no. 9191/06, 12.05.2010;
 - *Tanrıkulu v. Turkey* [GC], no. 23763/94, 08.07.1999, ECHR 1999-IV;
 - *Velcea and Mazăre v. Romania*, no. 64301/01, 01.12.2009;
 - *Wasilewska and Katucka v. Poland*, nos. 28975/04 and 33406/04, 23.02.2010;
 - *Yaşa v. Turkey*, no. 22281/93, 02.09.1998, Reports 1998-VI;
 - *Zavoloka v. Latvia*, no. 58447/00, 07.07.2009.

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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¹ This chapter – as the Systematic Thesaurus in general – should be used sparingly, as the keywords therein should only be used if a relevant procedural question is discussed by the Court. This chapter is therefore not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only look for decisions in this chapter, the subject of which is also the keyword.

² Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

³ For example, rules of procedure.

⁴ For example, age, education, experience, seniority, moral character, citizenship.

⁵ Including the conditions and manner of such appointment (election, nomination, etc.).

⁶ Including the conditions and manner of such appointment (election, nomination, etc.).

⁷ Vice-presidents, presidents of chambers or of sections, etc.

⁸ For example, State Counsel, prosecutors, etc.

⁹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

¹⁰ For example, assessors, office members.

¹¹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

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¹² Including questions on the interim exercise of the functions of the Head of State.

¹³ Referrals of preliminary questions in particular.

¹⁴ Enactment required by law to be reviewed by the Court.

¹⁵ Review *ultra petita*.

¹⁶ Horizontal distribution of powers.

¹⁷ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁸ Decentralised authorities (municipalities, provinces, etc.).

¹⁹ For questions other than jurisdiction, see 4.9.

²⁰ Including other consultations. For questions other than jurisdiction, see 4.9.

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²¹ Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).

²² As understood in private international law.

²³ Including constitutional laws.

²⁴ For example, organic laws.

²⁵ Local authorities, municipalities, provinces, departments, etc.

²⁶ Or: functional decentralisation (public bodies exercising delegated powers).

²⁷ Political questions.

²⁸ Unconstitutionality by omission.

²⁹ Including language issues relating to procedure, deliberations, decisions, etc.

³⁰ For the withdrawal of proceedings, see also 1.4.10.4.

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³¹ Pleadings, final submissions, notes, etc.

³² May be used in combination with Chapter 1.2. Types of claim.

³³ For the withdrawal of the originating document, see also 1.4.5.

³⁴ Comprises court fees, postage costs, advance of expenses and lawyers' fees.

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³⁵ For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

³⁶ Only for issues concerning applicability and not simple application.

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⁴¹ Includes the principle of social justice.

⁴² See also 4.8.

⁴³ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

⁴⁴ Including maintaining confidence and legitimate expectations.

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⁴⁶ Prohibition of punishment without proper legal base.

⁴⁷ Including compelling public interest.

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⁴⁹ Including questions of treason/high crimes.

⁵⁰ Including prohibition on monopolies.

⁵¹ For sincere co-operation and subsidiarity see 4.17.2.1 and 4.17.2.2, respectively.

⁵² Including the body responsible for revising or amending the Constitution.

⁵³ For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵⁴ For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵⁵ For example, the granting of pardons.

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⁵⁶ For regional and local authorities, see Chapter 4.8.

⁵⁷ Bicameral, monocameral, special competence of each assembly, etc.

⁵⁸ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁹ In particular, commissions of enquiry.

⁶⁰ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁶¹ Obligation on the legislative body to use the full scope of its powers.

⁶² Representative/imperative mandates.

⁶³ Including the convening, duration, publicity and agenda of sessions.

⁶⁴ Including their creation, composition and terms of reference.

⁶⁵ State budgetary contribution, other sources, etc.

⁶⁶ For the publication of laws, see 3.15.

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⁶⁷ For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

⁶⁸ For local authorities, see 4.8.

⁶⁹ Derived directly from the Constitution.

⁷⁰ See also 4.8.

⁷¹ The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

⁷² Civil servants, administrators, etc.

⁷³ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

⁷⁴ Other than the body delivering the decision summarised here.

⁷⁵ Positive and negative conflicts.

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⁷⁶ Notwithstanding the question to which to branch of state power the prosecutor belongs.

⁷⁷ For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

⁷⁸ Comprises the Court of Auditors in so far as it exercises judicial power.

⁷⁹ See also 3.6.

⁸⁰ And other units of local self-government.

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⁸¹ See also keywords 5.3.41 and 5.2.1.4.

⁸² Organs of control and supervision.

⁸³ Including other consultations.

⁸⁴ For questions of jurisdiction, see keyword 1.3.4.6.

⁸⁵ Proportional, majority, preferential, single-member constituencies, etc.

⁸⁶ For example, *Panachage*, voting for whole list or part of list, blank votes.

⁸⁷ For aspects related to fundamental rights, see 5.3.41.2.

⁸⁸ For the creation of political parties, see 4.5.10.1.

⁸⁹ For example, names of parties, order of presentation, logo, emblem or question in a referendum.

⁹⁰ Tracts, letters, press, radio and television, posters, nominations, etc.

⁹¹ For the access of media to information, see 5.3.23, 5.3.24, in combination with 5.3.41.

⁹² Impartiality of electoral authorities, incidents, disturbances.

⁹³ For example, signatures on electoral rolls, stamps, crossing out of names on list.

⁹⁴ For example, in person, proxy vote, postal vote, electronic vote.

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⁹⁵ This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.

⁹⁶ For example, Auditor-General.

⁹⁷ Includes ownership in undertakings by the state, regions or municipalities.

⁹⁸ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

⁹⁹ For example, Court of Auditors.

¹⁰⁰ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

¹⁰¹ *Staatszielbestimmungen*.

¹⁰² Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

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¹⁰³ Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

¹⁰⁴ Positive and negative aspects.

¹⁰⁵ For rights of the child, see 5.3.44.

¹⁰⁶ The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

¹⁰⁷ Includes questions of the suspension of rights. See also 4.18.

¹⁰⁸ Including all questions of non-discrimination.

¹⁰⁹ Taxes and other duties towards the state.

¹¹⁰ "One person, one vote".

¹¹¹ 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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¹¹² For example, discrimination between married and single persons.

¹¹³ This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

¹¹⁴ Detention by police.

¹¹⁵ Including questions related to the granting of passports or other travel documents.

¹¹⁶ May include questions of expulsion and extradition.

¹¹⁷ 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.

¹¹⁸ In the meaning of Article 6.1 of the European Convention on Human Rights.

¹¹⁹ This keyword covers the right of appeal to a court.

¹²⁰ Including the right to be present at hearing.

¹²¹ Including challenging of a judge.

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¹²² Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

¹²³ This keyword also includes the right to freely communicate information.

¹²⁴ Militia, conscientious objection, etc.

¹²⁵ Aspects of the use of names are included either here or under "Right to private life".

¹²⁶ Including compensation issues.

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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.

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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