

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).

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.***

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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
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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.

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Précis of important decisions of the reference period 1 May 2017 – 31 August 2017 will be published in the next edition, *Bulletin* 2017/3, for the following countries:

Austria, South Africa, Turkey, Ukraine.

Andorra

Constitutional Court

Important decisions

Identification: AND-2017-2-001

a) Andorra / **b)** Constitutional Court / **c)** / **d)** 15.05.2017 / **e)** 2016-60-RE / **f)** / **g)** *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 24.05.2017 / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Custody / Visiting rights / Abduction of a minor.

Headnotes:

The *ne bis in idem* principle is not confined to prohibiting two courts in the same state from ruling twice on the same offence but also prohibits criminal courts in different states from ruling on the same offence.

Summary:

I. In the context of a divorce between a German man and an Italian woman residing in England, the English courts granted custody of their young child to the father and visiting rights to the mother. The mother, in violation of this decision, abducted the child and set up home in Andorra. Following a request from the Federal Republic of Germany to extradite the mother, she was placed in custody while the child was placed under the guardianship of the Principality of Andorra.

The father, who was taking advantage of the visiting rights granted to him by the Principality of Andorra so that the child could develop an emotional bond with him, abducted the child and took him to Germany with him.

The German courts sentenced the father to pay a fine on grounds of abduction of a minor.

Subsequently, considering that the offence had taken place on Andorran territory, the Andorran courts sentenced the father, *in absentia*, to a conditional one-year's imprisonment for abduction of a minor.

It was the Public Prosecutor who, in the interests of the law, brought an appeal before the Constitutional Court for violation of the right to a fair trial, given that, pursuant to the principle of *ne bis in idem*, the Andorran courts should not have handed down a further judgment against this person, who had already been judged by a German court for the same offence, i.e. failure to comply with custody rights.

II. The Court declared that the principle that no person shall be sentenced twice for the same offence was enshrined in the Andorran Criminal Code and that the Court had upheld its constitutional value and its international dimension. In other words, this principle is not confined to prohibiting two courts in the same state from ruling twice on the same offence but also prohibits criminal courts in different states from ruling on the same offence. Andorra's accession to the European Convention on Human Rights is an expression of the member state's mutual confidence in their respective systems of justice and in particular their criminal justice systems; this mutual confidence is the basis of the international dimension of the *ne bis in idem* principle in criminal cases.

One of the criteria for the application of the *ne bis in idem* principle is the nature of *idem*, in other words, the nature of the identity of cases. The decisions of the European Court of Human Rights show that the *idem* taken into consideration is *idem factum* and not *idem jure*, in other words, that the identity is that of the material facts and not the identity of the legal classification of the offence.

The instant case clearly concerns *idem factum*, exactly the same material facts, i.e. failure to comply with the fact that the Principality of Andorra had been given custody of the child. Consequently, given that the offence had already been prosecuted and punished by the German criminal court, the Andorran court should not have passed judgment once again *in absentia*, pursuant to the principle of *ne bis in idem*.

Languages:

Catalan.



Identification: AND-2017-2-002

a) Andorra / **b)** Constitutional Court / **c)** / **d)** 14.07.2017 / **e)** 2017-13-RE / **f)** / **g)** *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 26.07.2017 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Judicial authorisation / Legacy / Waiver.

Headnotes:

Legislation preceding the 1993 Constitution must be interpreted in the light of the legal system established by the Constitution and the duly ratified international Conventions to which it refers.

Summary:

I. When they came of age, the applicants were informed that, in 2000, their father had waived their right to a legacy from an aunt. At that time, there was no law making it obligatory to ask for prior judicial authorisation for such an act. As the applicants had failed to reach an agreement out of court which would allow them to recover their aunt's legacy, they brought the case before the courts.

They argued that the act of waiving the legacy without judicial authorisation was incompatible with the 1993 Constitution and the Convention on the Rights of the Child, which had been incorporated into the Andorran legal system since 1995, both of which required that children be heard in any legal or administrative proceedings concerning them.

The High Court rejected their request on the grounds that, as prior to the act of renunciation there had been no law requiring judicial authorisation, Catalan practices and customs deriving from a Decree of 1716 should be applied.

II. The Court had to decide whether or not, at the date on which the legacy had been refused, the law required that prior judicial authorisation be sought.

Although it is true that such a legal obligation did not exist, the Court reiterated its case-law, according to which Andorran legislation preceding the 1993 Constitution must be interpreted in the light of the legal system established by the Constitution and the duly ratified international Conventions to which it refers.

Given that in 2000, the year in which the right to the legacy had been waived, the Constitution and the international agreements incorporated into the Andorran legal system clearly enshrined the principle of the protection of the rights of children and in particular their right to be heard in any proceedings concerning them, the Court held that the High Court had ignored the new constitutional reality and had therefore handed down an illogical and legally unreasonable decision as it had clearly chosen to follow the doctrine of the 18th century to the detriment of current legal practice.

Languages:

Catalan.



Argentina

Supreme Court

Important decisions

Identification: ARG-2017-2-001

a) Argentina / **b)** Supreme Court / **c)** / **d)** 11.05.2017 / **e)** CSJ 3341/2015/RH001 / **f)** González Castillo, Cristián Maximiliano and others s/ robbery involving the use of a weapon / **g)** *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 340:669 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

1.5.4.3 Constitutional Justice – Decisions – Types – **Finding of constitutionality or unconstitutionality.**

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

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

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

Keywords of the alphabetical index:

Conviction, criminal, consequences / Unconstitutionality, declaration.

Headnotes:

Ancillary legal consequences imposed on convicts sentenced to imprisonment for a term of more than three years, namely, deprivation of parental rights, deprivation of the right to perform administrative acts and deprivation of the right to dispose of property by *inter vivos* transfer, cannot be considered as inhuman treatment or contrary to human dignity if the reasons given by the court to hold such an interference to be “degrading” are not convincing.

Declaring a law unconstitutional is the most delicate task entrusted to courts and constitutes an extremely serious act which should be regarded as a last resort of the legal order. For this reason, courts should not do so unless a thorough analysis of the legal provision at issue leads to the firm conviction that application infringes a constitutional right.

Summary:

I. An oral criminal court in Buenos Aires convicted Cristian Maximiliano González Castillo as co-perpetrator of repeated aggravated robbery involving the use of a weapon in conjunction with the crime of possession of a firearm for civil use without due legal authorisation, the penalty for which was imposed taking into account a previous sanction for aggravated robbery, in accordance with the provisions on accumulation of penalties.

This decision was challenged by the defence on appeal to the Federal Criminal Court of Cassation, which was partially affirmed. This court accepted the objection to the constitutional validity of Article 12 of the Criminal Code, which imposes, as collateral consequences of conviction to imprisonment for a term of more than three years, the following sanctions during the term of the sentence: deprivation of parental rights; deprivation of the right to perform acts of administration and the right to dispose of property by *inter vivos* transfer; and rendering convicts subject to guardianship as incapable persons under civil law.

The Prosecuting Attorney General filed an extraordinary appeal for review of the decision declaring the provision at issue to be unconstitutional, which was rejected and thus followed by a *recurso de queja* (appeal against improper refusal to allow an appeal) before the Supreme Court.

II. The Supreme Court allowed the appeal and reversed the challenged decision as to the contested issue on the grounds provided in the headnotes.

The Supreme Court held that ancillary legal consequences imposed on convicts sentenced to imprisonment for a term of more than three years, namely, deprivation of parental rights, deprivation of the right to perform administrative acts and deprivation of the right to dispose of property by *inter vivos* transfer, cannot be considered as inhuman treatment or contrary to human dignity if the reasons given by the court to hold such an interference to be “degrading” are not convincing.

The Court emphasised that declaring a law unconstitutional is the most delicate task entrusted to courts and constitutes an extremely serious act which should be regarded as a last resort of the legal order. For this reason, courts should not do so unless a thorough analysis of the legal provision at issue leads to the firm conviction that application infringes the constitutional right claimed by the applicant.

In the Court's view, Law no. 24,660 on the 'Execution of Punishments Involving Deprivation of Liberty' was primarily aimed at adapting penitentiary legislation to meet the new standards on prisoners' rights. Not only does it raise no objections to Article 12 of the Criminal Code, but it also explicitly states how to decide on the provision of legal representation of prisoners in terms of that rule (Article 170).

Languages:

Spanish.



Armenia Constitutional Court

Statistical data

1 May 2017 – 31 August 2017

- 48 applications were filed, including:
 - 4 applications filed by the President, concerning the constitutionality of obligations deriving from international treaties
 - 1 application filed by 1/5 of the deputies of the National Assembly concerning the constitutionality of legal provisions
 - 1 application by domestic judges, concerning the constitutionality of legal provisions
 - 1 application by the Prosecutor General, concerning the constitutionality of legal provisions
 - 41 applications filed as an individual complaint concerning the constitutionality of legal provisions
- 11 applications were admitted for review, including:
 - 1 application filed by 1/5 of the deputies of the National Assembly concerning the constitutionality of legal provisions
 - 1 application filed by domestic judges concerning the constitutionality of legal provisions
 - 1 application filed by the General Prosecutor concerning the constitutionality of legal provisions
 - 8 applications filed as individual complaints concerning the constitutionality of legal provisions
- 4 applications were considered by the Court, including:
 - 1 application filed by the General Prosecutor concerning the constitutionality of legal provisions
 - 1 application filed by domestic judges concerning the constitutionality of legal provisions
 - 2 applications filed as individual complaints concerning the constitutionality of legal provisions

Important decisions

Identification: ARM-2017-2-002

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 13.06.2017 / **e)** / **f)** On the conformity of the provisions of the Criminal Procedure Code with the Constitution / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Prosecutor, investigation, supervision.

Headnotes:

Court decisions regarding detention as a preventive measure or its prolongation must be sent to the prosecutor, although no formal requirement exists under the Criminal Procedure Code for this to happen when the motion has been put before the Court by the investigator. Such a situation hampers the ability of the prosecutor to carry out their constitutional duties. Adjustments to the provisions in question are needed in order to guarantee the judicial protection of the interests of a person and to prevent potential threats to legal security.

Summary:

I. The Attorney General challenged Article 285.5 of the Criminal Procedure Code, contending that this provision was in breach of the Constitution as it meant that prosecutors were not able to exercise their constitutional power to supervise the lawfulness of an investigation.

Under the Criminal Procedure Code, a decision by the Court upon a motion regarding the prolonging or removal of detention as a preventive measure would be sent, *inter alia*, to the authority who lodged the motion with the Court. Such a motion could be brought by both the investigator and by the prosecutor but the respective decision of the Court could only be appealed by the supervising prosecutor. At the same time, there was no obligation under the Criminal Procedure Code for the decision

of the Court to be sent to the prosecutor in cases where the motion had been brought by the investigator.

II. The Constitutional Court emphasised that such a situation stood in the way of the effective exercise of the authorities set forth in Articles 285.5 and 287.1 of the Criminal Procedure Code and jeopardised the protection of the interests of a person, along with the constitutional requirement of the performance of supervision by the prosecutor.

The Constitutional Court stated that the legislator should make the necessary clarifications in the provisions concerned so as to ensure the full exercise of the supervision of the lawfulness of an investigation by the prosecutor and the proper exercise of the authority of the prosecutor to appeal a decision by the Court on detention as a preventive measure or on its prolongation.

The Constitutional Court declared that in order to guarantee the rule of law, the investigator must inform the supervising prosecutor about a motion on detention as a preventive measure or its prolongation before lodging it with the Court. The prosecutor must also be properly informed about the decision the Court takes on such motions.

As a result of the consideration of the case, the Constitutional Court declared the norm in question to be in conformity with the Constitution within the framework of the legal positions expressed in this decision.

Languages:

Armenian.



Belarus

Constitutional Court

Important decisions

Identification: BLR-2017-2-001

a) Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 21.06.2017 / **e)** D-1089/2017 / **f)** On Ensuring the Right to Unhindered and Prompt Legal Assistance in Criminal Proceedings / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 2/2017; 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.**
 5.3.13.27.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel – **Right to paid legal assistance.**

Keywords of the alphabetical index:

Court, legal assistance / Criminal procedure, access to the file.

Headnotes:

The Criminal Procedure Code restricts the right to legal assistance by using the words “be admitted” and “admittance” – words that may be interpreted as requiring an authorisation – in provisions concerning the moment a lawyer starts providing legal assistance to an individual with respect to the files of a reported crime or proceedings in a criminal case. Appropriate amendments and addenda should be introduced to the Criminal Procedure Code to provide for unhindered and prompt access of lawyers to criminal proceedings at all stages and to exclude the discretion of criminal prosecution bodies with respect to such access.

Summary:

The Constitutional Court initiated proceedings concerning the provisions of the Criminal Procedure Code (hereinafter, the “CPC”) regarding lawyers’

access to the files of reported crimes and proceedings in criminal cases. It did so following an application by the National Bar Association pointing to the legal uncertainty of those provisions.

When considering the case, the Constitutional Court proceeded from the following.

1. The Constitution lays down the following: all shall be equal before the law and have the right to equal protection of their rights and legitimate interests without discrimination (Article 22); everyone shall have the right to legal assistance to exercise and protect his or her rights and freedoms, including the right to make use, at any time, of assistance of lawyers and other representatives in court, other state bodies, bodies of local government, enterprises, institutions, organisations and public associations, and also in relations with officials and citizens. In the instances specified by law, legal assistance shall be rendered at the expense of state funds; obstruction to rendering legal assistance shall be prohibited (Article 62).

Consequently, the right to legal assistance, including assistance of a lawyer, shall be ensured in an unhindered and prompt manner at all stages of criminal proceedings, regardless of the procedural status of the individual. That right serves to guarantee the exercise of other rights enshrined in the Constitution, including the right to judicial protection (Article 60.1) and the right to a trial on the basis of adversarial proceedings and equality of the parties to the proceedings (Article 115.1).

The Court noted that the above constitutional regulation meets international legal standards. The Court cited as examples Article 14.3.b of the International Covenant on Civil and Political Rights of 1966 and paragraphs 1 and 7 of the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 27 August – 7 September 1990).

The Constitutional Court believes that the provisions of Article 62 of the Constitution are institutional guarantees for the legal protection of other constitutional rights and freedoms of individuals and that those provisions, in conjunction with Article 22 of the Constitution, must be implemented on the basis of equality of all before the law and non-discrimination.

2. In accordance with the CPC, defence counsel (a defender) in criminal proceedings is:

- i. a person who defends the rights and legitimate interests of the suspect or the accused and provides him or her with legal assistance (Article 44.1);

- ii. a lawyer who is a citizen of the Republic or other states in accordance with international treaties of the Republic (Article 44.2); and
- iii. admitted to criminal proceedings as from the moment when the ruling to institute criminal proceedings against the person is made, when a preventive measure is applied against a person, or when the person is detained, identified as a suspect or arraigned (Article 44.4).

Article 48.1.5 CPC provides that, defence counsel is entitled to acquaint himself or herself with rulings on institution of criminal proceedings, identification of a person as a suspect, detention, arraignment, application of preventive measures, as well as with the protocols of detention, interrogations and other investigative actions carried out with participation of a suspect or an accused in the absence of a lawyer, only from the moment of his or her “admittance” to the files of the reported crime and proceedings in the criminal case.

When drafting the above-mentioned articles of the CPC, the legislator used the words “be admitted” and “admittance” regarding the moment a lawyer starts providing assistance to the individual on the files of a reported crime and proceedings in the criminal case. One of the meanings of the word “to admit” is to allow using, doing or accessing something. The semantics of the words “be admitted” and “admittance” thus implies, among other things, obtaining authorisation to carry out an activity.

According to the Constitutional Court, law-enforcement bodies may conclude, based on a literal interpretation of the provisions of Articles 44.4 and 48.1.5 of the CPC, that provision of legal assistance by a lawyer may require an authorisation, that is to say, a lawyer should obtain an appropriate authorisation, written or oral, to have access to the files of a reported crime and proceedings in a criminal case. The wording of the provisions of Articles 44.4 and 48.1.5 of the CPC results in legal uncertainty because that wording does not prevent the criminal prosecution body that implements those provisions from carrying out arbitrary actions that may restrict access to unhindered and prompt legal assistance in criminal proceedings.

3. According to the Constitution, the Republic shall be bound by the principle of supremacy of law (Article 7.1).

The Constitutional Court has noted, in a number of its decisions, that the rule of law includes a number of elements, in particular legal certainty, which presupposes clarity, accuracy, consistency and coherence of legal rules. Observing the principle of

legal certainty in rule-making creates conditions for uniformity and foreseeability of law-enforcement, and thereby increases trust of the individuals in the State.

The Constitutional Court reiterated that the Constitution provides the legislator with sufficiently broad discretionary powers. However, in the exercise of powers, the legislator must act within the limits established by constitutional principles and rules and must take into account the need to maintain the balance and proportionality of the constitutionally protected values, goals and interests and not to allow the substitution of one value for another or their derogation.

The Rule of Law checklist adopted by the European Commission for Democracy through Law (Venice Commission) at the 106th plenary meeting (Venice, 11-12 March 2016) states that foreseeability means not only that the law must, where possible, be proclaimed in advance of implementation and be foreseeable as to its effects: it must also be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it (paragraph 58).

The Constitutional Court considers that the CPC should provide a mechanism for the unhindered and prompt access of a lawyer to criminal proceedings at all stages and exclude the discretion of the criminal prosecution bodies with respect to such access. To this end, appropriate alterations and/or addenda to the CPC should be made by the legislator.

The Constitutional Court proposed that the Council of Ministers prepare a draft law on making amendments and/or addenda to the Criminal Procedure Code aimed at regulating the access of lawyers to criminal proceedings and submit it to the House of Representatives of the National Assembly.

Languages:

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



Identification: BLR-2017-2-002

a) Belarus / **b)** Constitutional Court / **c)** *En banc* / **d)** 11.07.2017 / **e)** D-1101/2017 / **f)** On Guarantees of the Right to Protection for Certain Categories of Individuals in Administrative Proceedings / **g)** *Vesnik Kanstytucyjnaha Suda Respubliki* (Official Digest), 3/2017; 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.**
 5.2.2.8 Fundamental Rights – Equality – Criteria of distinction – **Physical or mental disability.**
 5.3.13.27.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel – **Right to paid legal assistance.**

Keywords of the alphabetical index:

Defence counsel, officially assigned / Defence, effective / Disabled person, right.

Headnotes:

The court or the body conducting administrative proceedings shall ensure the protection of the rights, freedoms and legitimate interests of the parties. Where the individual against whom proceedings for an administrative offence are brought is legally competent but unable to defend himself or herself in person owing to physical and mental impairments, he or she shall be assigned defence counsel.

Summary:

The Constitutional Court considered and determined an application highlighting a legal gap in legislation: defence counsel was not assigned to an individual, against whom proceedings for an administrative offence were brought, even though he was unable to defend himself in person owing to physical and mental impairments (major vision, hearing, speech deficiency, as well as anatomical defects or chronic conditions).

When considering the case the Constitutional Court proceeded from the following.

The Procedural and Executive Code of the Republic on Administrative Offences (hereinafter, the “Code”) sets out that the court or the body conducting administrative proceedings shall:

- i. ensure the protection of the rights, freedoms and legitimate interests of the parties;
- ii. enable such protection; and
- iii. take timely measures to meet the legal requirements of the parties. The individual against whom proceedings are brought has the right to defend himself or herself either in person or through legal assistance under the procedure established by the Code (Article 2.3.1 and 2.8.1).

The Code also defines the following preconditions for legal assistance in administrative proceedings (Article 4.5).

Legal assistance and the protection of the rights, freedoms and legitimate interests of an individual against whom proceedings are brought for an administrative offence may be provided by defence counsel (a defender) (Article 4.5.1). A lawyer who is the citizen of the Republic of Belarus or non-citizen subject to international treaties of the Republic may act in a capacity of defence counsel. When requested by the individual against whom proceedings are brought, one of his or her close relatives or legal representatives may be allowed to defend him or her if the body conducting the administrative proceedings so rules (Article 4.5.2). Defence counsel and the legal representative shall have access to proceedings from their beginning. In cases of the administrative detention of an individual on grounds of an administrative offence, defence counsel shall have access to proceedings as from the moment of detention (Article 4.5.5).

Thus, the Code provides for an individual against whom proceedings are brought to have defence counsel from the beginning of administrative proceedings and in cases of administrative detention – from the moment he or she is declared to be in administrative detention. However, it does not entitle an individual against whom proceedings for an administrative offence have been brought, to have defence counsel assigned to him or her in cases where he or she is unable to defend himself or herself in person owing to physical or mental impairments.

Current legislation provides for legal representation in administrative proceedings.

As established by Article 4.3.1 of the Code, the interests of minors or participants in the proceedings who are legally incompetent must be represented by the legal representative. In the absence of legal representation, a judge or an official of the body conducting administrative proceedings shall allow a tutorship or guardianship authority to act as the legal representative of the individual against whom proceedings are brought or the injured party.

However, the Code does not prescribe legal representation to be allowed or assigned in administrative proceedings for an individual who has physical or mental impairments that prevent him or her from defending himself or herself in person, but who has not been declared legally incompetent under the established procedure.

The Constitutional Court concluded that legal provisions of the Code do not safeguard the right to protection of rights through the assignment of defence counsel to an individual in proceedings related to an administrative offence in cases where he or she is unable to defend himself or herself in person owing to physical or mental impairments. In the Constitutional Court's opinion, such regulation de facto does not enable the individual to enjoy in full his or her constitutional right to legal assistance to exercise and protect his or her rights and freedoms, including the right to make use, at any time, of the assistance of lawyers and his or her other representatives in court, other state bodies, bodies of local government, enterprises, institutions, organisations and public associations, and also in relations with officials and citizens, as prescribed in Article 62 of the Constitution.

In view of the foregoing the Court declared that there is a gap in legislation having constitutional and legal significance.

The Constitutional Court held that there is a need to eliminate the gap in the Procedural and Executive Code on Administrative Offences with respect to the right to protection of rights and to provide for defence counsel to be assigned in administrative proceedings where the individual against whom proceedings are brought is unable to defend himself or herself in person owing to physical or mental impairments. This must be done in order to comply with the constitutional principles of the rule of law and equality before the law – in the light of the right to equal protection of rights and legitimate interests without discrimination – and in order to ensure an individual's constitutional right to legal assistance to exercise and to protect his or her rights and freedoms.

The Constitutional Court proposed that the Council of Ministers prepare the relevant draft law on making amendments and addenda to the Procedural and Executive on Administrative Offences and submit the draft law to the House of Representatives of the National Assembly.

Languages:

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



Belgium

Constitutional Court

Important decisions

Identification: BEL-2017-2-004

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 06.07.2017 / **e)** 85/2017 / **f)** / **g)** *Moniteur belge* (Official Gazette), 08.09.2017 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

2.1.1.4.9 Sources – Categories – Written rules – International instruments – **International Covenant on Economic, Social and Cultural Rights of 1966.**

3.11 General Principles – **Vested and/or acquired rights.**

5.2 Fundamental Rights – **Equality.**

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

Keywords of the alphabetical index:

Treaty, standstill obligation / International Covenant on Economic, Social and Cultural Rights, standstill obligation / Case-law, development, reversal / Right to education, access, equal access / Education, higher, enrolment / Education, access, standstill, fraud, sanction / Education, examinations, fraud, sanction.

Headnotes:

A ban on enrolment imposed on higher education establishments in respect of a student having been excluded by another establishment, during the five preceding academic years on grounds of fraudulent enrolment or assessment-related fraud, does not constitute a disproportionate restriction of the right (of access) to education. Similarly, the resulting difference in treatment between students who commit fraud and students who commit (other) serious misconduct is reasonably justified.

Significant restriction of the right of fully equal access to higher education, as a result of a ban on enrolment, is justified on grounds of public interest. The provision is not contrary, therefore, to the

standstill obligation arising from Article 13.2.c of the International Covenant on Economic, Social and Cultural Rights.

Summary:

I. Article 43 of the French Community decree of 25 June 2015 places French Community higher education establishments (universities, elite colleges or higher arts colleges) under obligation to refuse to enrol a student who has been excluded by another establishment during the five preceding academic years on grounds of fraudulent enrolment or assessment-related fraud. In the previous version of the challenged provision, higher education establishments were authorised to refuse enrolment, but not obliged to do so. The ASBL Federation of French-speaking Students requested the annulment of the aforementioned Article 43.

II. The applicant claimed a violation of the right to education, the principle of equality and the standstill obligation as regards access to higher education.

The Court reiterated that the right to education, guaranteed by the first sentence of Article 24.3.1 of the Constitution, does not constitute an obstacle to the regulation of access to education in relation to the needs and possibilities of the community and the individual, particularly as regards education dispensed beyond compulsory schooling. Article 2 of the First Additional Protocol to the European Convention on Human Rights, which enshrines *inter alia* the right of access to existing higher education establishments, both public and private, by its nature calls for state regulation taking account *inter alia* of the needs and resources of the community, as well as the specific characteristics of the level of education under consideration.

By placing a higher education establishment under obligation to refuse to enrol a student who has been excluded by another establishment on grounds of fraudulent enrolment or assessment-related fraud, the challenged provision restricts access to education and constitutes a restriction of the right to education. However, that restriction is predictable and reasonably proportionate to the legitimate aim pursued in respect of the guarantees attached to the ban on enrolment (limited duration, mandatory reasons, administrative and court appeal). The measure stems from the legislator's concern to prevent certain unacceptable behaviour being trivialised and to punish it severely.

The Court then held that the difference in treatment resulting from the challenged provision, in this case between students who commit fraud and students

who commit (other) serious misconduct is not contrary to Articles 10, 11 and 24.4 of the Constitution, taken in conjunction with Article 2 of the First Additional Protocol to the European Convention on Human Rights. Although, in both cases, the conduct concerned is unacceptable to the point of potentially resulting in a decision to exclude a student from a higher education establishment, fraudulent enrolment or assessment-related fraud imply the committing of acts intended, by their deceitful nature, to cause particular damage to the public interest represented by the credibility of the education system.

Finally, with regard to the standstill obligation resulting from Article 13.2.c of the International Covenant on Economic, Social and Cultural Rights, the Court expressly modified its case-law. While it is true that that obligation does not give rise to a right of access to higher education, it stops the member States from taking measures running counter to the objective of fully equal access to higher education. The standstill obligation prohibits the competent legislator from significantly reducing the level of protection afforded by the applicable legislation, unless there are public interest grounds for doing so.

Contrary to the findings in Judgments nos. 33/92, 40/94, 28/2007, 56/2008 and 53/2013, this supposes taking into consideration the legislation that was applicable before the challenged provision was adopted, and not the legislation existing on 21 July 1983, when the aforementioned Covenant entered into force. The Court considered that the significant restriction of the right of fully equal access to higher education was based on grounds of public interest.

Cross-references:

Constitutional Court:

- no. 40/1994, 19.05.1994, *Bulletin* 1994/2 [BEL-1994-2-010];
- no. 28/2007, 21.02.2007, *Bulletin* 2007/1 [BEL-2007-1-002];
- no. 37/2013, 14.03.2013, *Bulletin* 2013/1 [BEL-2013-1-004].

Languages:

French, Dutch, German.



Identification: BEL-2017-2-005

a) Belgium / b) Constitutional Court / c) / d) 06.07.2017 / e) 86/2017 / f) / g) *Moniteur belge* (Official Gazette), 04.10.2017 / h) CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law.**

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

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

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

Keywords of the alphabetical index:

Official, right to be heard / Good administration, general principle / State employee, termination of service, right to be heard / Dismissal, right to be heard / Temporary civil servant, dismissal / Interpretation, conformity.

Headnotes:

The *audi alteram partem* general principle of good administration makes it incumbent upon a public authority to give a prior hearing to an individual against whom a serious measure is envisaged on grounds linked to their character or conduct.

This principle is binding on a public authority owing to the latter's special nature, as it necessarily acts as a guardian of the public interest and it must take decisions with complete knowledge of the facts when taking a serious measure linked to the conduct or character of the person addressed.

The *audi alteram partem* principle implies that an employee at risk of a serious measure as a result of a negative assessment of their conduct is informed beforehand and has the opportunity to effectively put forward their views.

Summary:

I. The Court was asked for a preliminary ruling concerning provisions of the Law of 3 July 1978 on work contracts by the French-speaking Labour tribunal of Brussels. The tribunal was dealing with a case brought by an individual who had been employed on a temporary contract by a municipality and dismissed

without a prior hearing. The tribunal asked the Court to rule on the compatibility with the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution) of the challenged provisions, which were interpreted as impeding the right of a worker employed by a public authority to be heard prior to dismissal, a right guaranteed to staff under the public service regulations in line with the *audi alteram partem* principle.

II. The Court firstly pointed out that the fact that the workers employed by a public authority and the staff statutorily governed by public service regulations were in differing legal situations stemming from their employment contract and staff regulations respectively did not constitute sufficient grounds to consider that these categories of persons were not comparable: the question, in both cases, was to determine the conditions under which they could be validly dismissed from their jobs.

The Court then pointed out that, as a rule, it was for the court appealed against to interpret the provisions it was applying, unless those provisions had been manifestly misunderstood, which was not the case here, and that the Court of cassation had furthermore ruled in a judgment of 12 October 2015 that the challenged provisions did not place employers under an obligation to give employees a hearing before dismissing them.

The Court then observed that the specific characteristics presented by the statutory service regulations as distinct from a temporary work contract could be regarded, depending on the case, as advantages (such as greater work stability or a more advantageous pension system) or disadvantages (such as the necessity for change, duty of confidentiality and neutrality or the rules on dual mandates or incompatibilities).

However, those specific characteristics must be considered only in relation to the scope and purpose of the challenged provisions. In this connection, it did not appear that the situation of a public authority employee being dismissed would be any different depending on whether they had been recruited as a member of statutory staff or on a temporary work contract where the application of the *audi alteram partem* general principle of good administration was concerned.

After specifying the scope of the *audi alteram partem* general principle of good administration, the Court concluded that the objective difference between statutory work relations and temporary contractual relations could not serve as justification, in the case of public authority staff, for differing treatment in the exercise of the right guaranteed by this principle.

The Court concluded that, in the interpretation submitted to it by the court appealed against, the challenged provisions contravened Articles 10 and 11 of the Constitution. It did point out, however, that these provisions were open to another interpretation. Where interpreted as not impeding the right of a worker employed by a public authority to be heard prior to dismissal on grounds linked to their character or conduct, the challenged provisions did not violate constitutional rules. The two interpretations are set out in the judgment with findings of violation and non-violation respectively.

Languages:

French, Dutch, German.



Identification: BEL-2017-2-006

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 06.07.2017 / **e)** 87/2017 / **f)** / **g)** *Moniteur belge* (Official Gazette), 09.10.2017 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.2 Fundamental Rights – **Equality**.
 5.3 Fundamental Rights – **Civil and political rights**.
 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.
 5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings**.
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

Keywords of the alphabetical index:

Proceedings, interest / Interest, collective / Action for annulment, admissibility, interest / Jurisdictional dispute, class action, protection of rights and freedoms / Bar, interest, defence of persons subject to the jurisdiction of courts / Interpretation, conformity / Civil procedure, capacity to appear before court (*locus standi*), capacity to take part in court proceedings.

Headnotes:

The Order of French- and German-speaking Bars may have an interest in taking direct action to defend the collective interest of persons subject to jurisdiction of the court as subjects of court decisions affecting fundamental freedoms. In this respect there may be no discrimination in relation to other associations claiming a collective interest linked to the protection of fundamental freedoms which are authorised to lodge proceedings before courts and tribunals by claiming this collective interest.

Summary:

I. The Court was asked for a preliminary ruling by two first-instance courts concerning Article 495 of the Judicial Code in an interpretation whereby it would not allow the Order of French- and German-speaking Bars (hereinafter, the "OBFG") to lodge a petition before a court seeking to defend the interests of persons subject to the jurisdiction of courts.

The OBFG had lodged proceedings before those courts seeking to hold the Belgian State liable under civil law for overcrowding in prisons.

The questions to be dealt with by preliminary rulings relate to the compatibility of Article 495 of the Judicial Code with the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution) in that it does not allow the OBFG to bring an action aimed at protecting fundamental freedoms as recognised by the Constitution and the international treaties to which Belgium is party, whereas certain laws allow proceedings to be brought before courts and judicial tribunals by legal persons on the basis of a collective interest linked to the protection of those freedoms.

II. Article 495 of the Judicial Code provides *inter alia* for the OBFG and the Flemish Order to take initiatives and measures necessary for defending the interests of lawyers and persons subject to the jurisdiction of courts. In its interpretation by the Court of cassation, this provision does not allow the Order to lodge a petition intended to defend the interests of persons subject to the jurisdiction of courts because it does not give exemption from Article 17 of the Judicial Code, which stipulates that the action is not admissible if the applicant lacks the requisite capacity or interest to lodge it.

The Court pointed out in its judgment that the legislator has adopted several laws granting the right to bring proceedings to certain associations claiming a collective interest, notably for economic matters or

ensuring the conformity of Belgian legislation with the provisions of international law binding on Belgium. Furthermore, some laws have allowed proceedings to be lodged in courts and judicial tribunals by associations claiming a collective interest linked to the protection of fundamental freedoms as recognised by the Constitution and the international treaties binding on Belgium. Examples are the Law of 30 July 1981 criminalising certain acts motivated by racism or xenophobia (Article 32 of the Law of 23 March 1995) making it illegal to deny, minimise, justify or approve of the genocide committed by the German National Socialist regime during the Second World War (Article 4 of the Law of 10 May 2007) combating certain forms of discrimination (Article 30) and the Law of 10 May 2007 combating gender discrimination (Article 35).

The Court then observed that when the OBFG seeks to bring proceedings that correspond to the specific nature of the mission assigned to it by the challenged provision, the purpose of which is distinct from the public interest and relates to the collective interest of persons subject to the jurisdiction of courts it has a duty to defend, it may have a direct interest in taking action to defend the collective interest of persons subject to the jurisdiction of courts as persons subject to judicial decisions affecting fundamental freedoms. That interest is not necessarily the same as the individual interest of a person before the court whom a lawyer is required to defend, and this is something that the judge must check.

The Court concluded, therefore, that in the interpretation given by the court appealed against, the OBFG was discriminated against in relation to the aforementioned associations since, like those associations, it too has a collective interest linked to the protection of persons subject to the jurisdiction of courts as persons subject to judicial decisions affecting fundamental freedoms.

In this interpretation, the challenged provision is not compatible with the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution).

The Court does point out, however, that the challenged provision may be interpreted as allowing the OBFG to bring proceedings aimed at defending the collective interests of persons subject to the jurisdiction of courts as persons subject to judicial decisions affecting fundamental freedoms as recognised by the Constitution and the international treaties binding on Belgium. In that interpretation, the challenged provision is compatible with the provisions of the Constitution.

The two interpretations are set out in the judgment with findings of violation and non-violation respectively.

Cross-references:

Constitutional Court:

- no. 133/2013, 10.10.2013, *Bulletin* 2013/3 [BEL-2013-3-011].

Languages:

French, Dutch, German.



Identification: BEL-2017-2-007

a) Belgium / **b)** Constitutional Court / **c)** / **d)** 26.07.2017 / **e)** 101/2017 / **f)** / **g)** *Moniteur belge* (Official Gazette), 26.09.2017 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

- 1.2.2.5 Constitutional Justice – Types of claim – Claim by a private body or individual – **Trade unions**.
- 2.1.1.4.6 Sources – Categories – Written rules – International instruments – **European Social Charter of 1961**.
- 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.
- 5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.
- 5.4.10 Fundamental Rights – Economic, social and cultural rights – **Right to strike**.
- 5.4.11 Fundamental Rights – Economic, social and cultural rights – **Freedom of trade unions**.

Keywords of the alphabetical index:

Capacity to bring legal proceedings, trade union organisation / Freedom of association, trade union, freedom / Trade union, freedom / Right to strike / Right to participate in trade union elections / Collective bargaining, right, right to carry out collective action / Trade union, representativeness / Trade union, recognition / Trade union, negotiation / Trade union, pluralism / Public transport, strike, restriction.

Headnotes:

Trade union organisations which are *de facto* associations do not, in principle, have the capacity required to lodge an appeal for annulment with the Court. The situation is different, however, when they act in matters for which they are legally recognised as forming distinct entities and when, though they are involved by law as such in the functioning of public services, the very conditions of that involvement are called into question. When a legislative provision favours certain categories of trade union organisations, the others have a sufficiently direct interest in challenging that provision.

By reserving strike notice and consultation procedures in the framework of industrial disputes with the Belgian Railways for representative and recognised trade unions, the legislator introduced a restriction which was not compatible with freedom of association and the right to collective bargaining, including the right to take collective action. By reserving the possibility of participating in union elections for those trade unions, the legislator violated the right to participate in a democratic process enabling the workers concerned to elect their representatives in conformity with trade union pluralism.

Summary:

I. Under the challenged provision, only the unions that are representative and recognised within the Belgian Railways may participate in strike notice and consultation procedures connected to labour disputes and union elections. The Independent rail workers union (*Syndicat indépendant pour cheminots* – SIC), which has the status of “authorised trade union organisation” but is not a representative or recognised trade union organisation, requested the suspension and annulment of the aforementioned provision. It pointed out that the provision violated trade union freedom by reserving certain essential prerogatives, including the right to strike, solely for representative and recognised trade union organisations.

II. With regard to admissibility, the Court recalled its case-law stating that trade union organisations which were *de facto* associations did not in principle have the capacity required to lodge a petition for annulment before the Court. The situation was different, however, when they acted in matters for which they were legally recognised as forming distinct entities and when, though they were involved by law as such in the functioning of public services, the very conditions of that involvement were called into question. The Court added that when a legislative

provision favoured certain categories of trade union organisations, the others had a sufficiently direct interest in challenging that provision. The challenged provision, which, unlike the previous regulations, reserved certain trade union prerogatives solely for representative and recognised trade union organisations, was likely to have a direct and unfavourable impact on an authorised trade union organisation, such as the applicant, which did not fulfil the requirements of recognition and representative status as defined in the challenged provision and, consequently, was deprived by that provision of certain trade union prerogatives.

On the merits, the Court considered that trade union freedom and the right to collective bargaining derived from freedom of association (Article 27 of the Constitution). Trade union freedom included the right to form a trade union and the right to join one to defend one's interests, as well as the right of that association to regulate its own organisation, its representation, its functioning and its management. However, there was no provision guaranteeing that an organisation would be accepted in the category of representative unions, irrespective of its *de facto* representative status, or enjoy an intangible right to the maintaining of representative status requirements that would be favourable to it. The Court also recognised that restrictions on the exercise of the right to carry out collective action could be justified by public interest where public transport was concerned and the fact that collective actions such as strikes could violate the rights of public transport users.

The fact that strike notice and consultation procedures connected to labour disputes within the Belgian Railways were reserved solely for representative and recognised trade union organisations constituted, in the eyes of the Court, a restriction that was not compatible with freedom of association and the right to collective bargaining, including the right to carry out collective action as guaranteed by constitutional and conventional provisions, notably Article 6.4 of the revised European Social Charter. While the legislator could grant certain prerogatives, particularly as regards union representation, to representative and recognised trade union organisations, that distinction may nevertheless not have the effect of excluding authorised trade union organisations from a prerogative that goes to the very core of trade union freedom by depriving them of an indispensable means of ensuring the effective exercise of the right to carry out collective bargaining and of being able to usefully defend their members' interests.

By reserving the possibility of participating in union elections solely for representative and recognised trade union organisations of the Belgian Railways, the challenged provision furthermore violates the right to participate in a democratic process enabling the workers concerned to elect their representatives in compliance with trade union pluralism.

Accordingly, the Court annulled the challenged provision.

Supplementary information:

In Judgment no. 64/2017 of 18 May 2017 (www.const-court.be), the Court had already provisionally suspended the provision for the same reasons.

Cross-references:

Constitutional Court:

- no. 56/93, 08.07.1993, *Bulletin* 1993/2 [BEL-1993-2-025].

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Important decisions

Identification: BIH-2017-2-003

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 22.12.2016 / **e)** AP 4326/16 / **f)** / **g)** / **h)** CODICES (Bosnian).

Keywords of the systematic thesaurus:

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

5.3.13.26 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to have adequate time and facilities for the preparation of the case.**

Keywords of the alphabetical index:

Detention order / War crime.

Headnotes:

A violation of Article 5 ECHR occurs when a person deprived of his or her liberty did not have adequate time to prepare his or her defence in order to be able – not only formally but also actually – to respond to the prosecutor's motion for detention.

Summary:

I. The appellant was suspected of having committed a crime against humanity and was detained at the time of lodging an appeal. A motion for detention was delivered to the appellant and his defence counsel a half hour before the hearing at which he was given the opportunity to respond to the circumstances related to that motion. The ordinary court noted that the reason for this was the urgent nature of the cases related to detention. The appellant alleged that his right to liberty and security of person had been violated as he had not been given adequate time and conditions to prepare his defence.

II. The Constitutional Court noted that ordinary court's conduct had deprived the appellant, a person deprived of his liberty, of adequate time to prepare his defence in order to be able – not only formally but

also actually – to respond to the prosecutor's motion for detention, or, in terms of the relevant views of the European Court of Human Rights, the ordinary court had not made it possible for him to initiate proceedings in respect of the procedural and substantive conditions which are essential for the "lawfulness" of his deprivation of liberty. According to the view of the Constitutional Court, the ordinary court's conduct in ruling to impose detention on the appellant deprived the appellant of the procedural guarantees safeguarded by Article 5 ECHR. In the present case, although the documents on the basis of which the Prosecutor's Office filed a motion for detention were submitted to the appellant, he did not have a real possibility of submitting his observations and contesting those documents effectively in terms of the relevant views of the European Court of Human Rights, because of the lack of time given to him for the examination of extensive documentation. Therefore, the Constitutional Court found that the appellant's right set out in Article 5 ECHR had been violated.

Languages:

Bosnian, Croatian, Serbian.



Brazil

Federal Supreme Court

Important decisions

Identification: BRA-2017-2-004

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 12.11.2015 / **e)** Direct Action of Unconstitutionality with request for preliminary injunction 5394 (ADI 5394 MC) / **f)** Secrecy of donors in electoral accountability / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 239, 10.11.2016 / **h)**.

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy.**

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

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

Keywords of the alphabetical index:

Contribution, campaign / Election campaign / Election, campaign, financing, control.

Headnotes:

The lack of identification of donors to electoral campaigns in the accountability of political parties and candidates undermines the transparency of the electoral process, frustrates the proper exercise of the Electoral Court's constitutional role and prevents voters from exercising, with full elucidation, their right to choose political representatives.

Summary:

I. The Supreme Court suspended, up to the final decision in this case, the effectiveness of the expression “without donors’ individualisation” of the challenged rule. The rule established that there was no need for political parties, when presenting accounts before the Electoral Court, to identify the one responsible for donating to the parties in case the resources were transferred to candidates.

II. The Court, unanimously, decided that the rule undermined the transparency of the electoral process, frustrated the proper exercise of the constitutional role of the Electoral Justice, and prevented the voters from exercising, with full elucidation, their right to choose their political representatives. The Court held that such a rule violates the democratic and republican order, both expressly established in the Federal Constitution.

The Full Court acknowledged that the financing of electoral campaigns is necessary for the implementation of the democratic process. However, it cannot create distortions and inequalities in electoral contests. The Full Court argued that, while there was controversy over which model of funding was most appropriate to ward off the predatory influence of economic power on the elections, the need for greater effectiveness and transparency in the funding system both by parties and candidates is undeniable.

The data on campaign donors concerns not only control bodies of the electoral process, but the whole society. Its disclosure is indispensable to enable the voter to make a deeper analysis of the campaign proposals of candidates and parties and, thus, to vote consciously. In addition, voters’ free, equal, and conscious participation in the political process is guaranteed. They shall choose their political representatives by means of free and fair electoral campaigns. The preponderant factor in this process must always be the popular will.

The Court stated that the disclosure of the real campaign funders:

- a. qualifies the exercise of citizenship, allowing a better informed voting decision;
- b. enables civil society, including parties and candidates competing with each other, to cooperate with state bodies in verifying the legitimacy of the electoral process, which strengthens social control over partisan political activity; and
- c. provides the improvement of legislative policy to combat electoral corruption, helping to identify the model's weaknesses, to make investigations feasible, and to inspire future proposals for corrections. In addition, reliable identification of individuals responsible for financial contributions is essential to determine whether donations actually come from lawful sources and to observe the value limits provided for in Article 23 of Law 9.504/1997.

The Full Court also stated that, without the identification, the accountability process loses its ability to document the actual financial movement, expenditure, and resources invested in election campaigns. Furthermore, it hinders the electoral courts from verifying political parties' accounts (Article 17.III of the Federal Constitution) and supervising whether the development of political party activity actually ensures the authenticity of the representative system (Article 1.*caput* of Law 9.096/1995).

Supplementary information:

- Articles 16 and 17.III of the Federal Constitution;
- Articles 23 and 28.12 of Law 9.504/1997, Elections Law;
- Article 1.*caput* of Law 9.096/1995.

Languages:

Portuguese, English (translation by the Court).



Identification: BRA-2017-2-005

a) Brazil / **b)** Federal Supreme Court / **c)** Full Court / **d)** 10.11.2016 / **e)** General Repercussion in Extraordinary Appeal with Interlocutory Motion 964246 (ARE 964246 RG) / **f)** Possibility of provisory execution of conviction rendered in appellate degree / **g)** *Diário da Justiça Eletrônico* (Official Gazette), 251, 25.11.2016 / **h)**.

Keywords of the systematic thesaurus:

1.4.4 Constitutional Justice – Procedure – **Exhaustion of remedies.**
 1.6.6 Constitutional Justice – Effects – **Execution.**
 5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest.**
 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:

Appeal, procedure, extraordinary / Court, decision, execution / Internal remedies, exhaustion / Presumption of innocence / Sentence, criminal case, first instance, appeal.

Headnotes:

The provisional execution of a conviction rendered at appellate instance, even if subject to a special appeal or an extraordinary appeal, does not compromise the constitutional principle of the presumption of innocence, provided for in Article 5.LVII of the Federal Constitution.

Summary:

I. The Supreme Court was requested to decide whether the provisional execution of a conviction rendered at appellate instance, even if subject to a special appeal or an extraordinary appeal, breaches the constitutional principle of the presumption of innocence (Article 5.LVII of the Federal Constitution).

II. The Supreme Court held that such provisional execution does not breach the constitutional principle of the presumption of innocence.

The Court asserted that the constitutional text guarantees that no one shall be found guilty until the judgment of conviction becomes unappealable, but this right does not prevent the beginning of the execution of the sentence. The Full Court stated that the presumption of innocence and other guarantees of defence should enable the intervention of the accused in the criminal procedure. However, it cannot nullify the sense of justice that the criminal procedure must provide to guarantee its ultimate goal of achieving social peace.

The Rapporteur Justice pointed out that, before a judge renders a conviction, doubts about the alleged facts lead to attribution of the presumption of innocence to the accused, protecting the accused against hasty judgments about his or her responsibility. An eventual conviction represents a guilty verdict made by the first degree of jurisdiction, resulting from the evidence produced in the course of the criminal prosecution. This judgment is not final, since it is possible to appeal to the next higher court.

It is in this second degree of jurisdiction, which is responsible for the review of a judicial decision in its entirety, that the examination of the facts and evidence of the case is definitively exhausted. At that moment, further analysis of the matter under judgment is precluded and the criminal responsibility of the accused, if any, is settled. The defendant has the right of access, in freedom, to this appellate court, respecting the provisional detention that may be decreed. The appeals still applicable to extraordinary instances are restricted to the rule of law, they are not for examining the justice or injustice of sentences, the

merits of the conviction, nor questions related to guilt or the sentence itself. Those kind of appeals intend to preserve the integrity of the regulatory system. Thus, attributing only devolutive effect to the special and extraordinary appeals, without suspending the effects of condemnation, is a legitimate mechanism to harmonise the principle of presumption of innocence with the effectiveness of the State jurisdictional function.

The Court affirmed that the concept of *res judicata* in criminal prosecution is not necessarily related to the exhaustion of all remedies and to the preclusion of all the issues debated in the proceeding. Moreover, the assertion that there is a continuous count of the limitation period, even if extraordinary appeals are still pending, reinforces the thesis that it is lawful to anticipate the sentence execution subsequent to the appeal courts' rulings. The Rapporteur Justice also emphasised that in no country in the world, after observing the two-tiered system, is the conviction execution suspended while a Supreme Court decision is pending. In these circumstances, the Supreme Court has restated its previous jurisprudence on the subject and held that the provisional execution of a judgment of conviction is justifiable since there had been a second instance of the accused's conviction, based on facts and evidence that the extraordinary instance judge again. This scenario includes the possibility of restriction of the defendant's freedom, even though judgments in extraordinary appeals are possible or pending.

Eventual misconceptions, injustices or excesses in convictions delivered by the ordinary courts may be remedied by other mechanisms, which are capable of inhibiting damaging consequences for the offender. Preliminary injunctions and *habeas corpus*, for instance, may suspend, if necessary, the provisional execution of the sentence. Therefore, the accused will not be exempt from judicial protection in cases of flagrant violation of rights.

Supplementary information:

This case refers to number 925 of general repercussion (i.e. a Supreme Court holding with *erga omnes* binding effect): possibility of provisory execution of a conviction rendered in appellate degree, even if subjected to a special appeal or an extraordinary appeal, to compromise the constitutional principle of the presumption of innocence, provided for in Article 5.LVII of the Federal Constitution.

- Article 5 of the Federal Constitution.

In the judgment of *Habeas Corpus* 84078, published on 26 February 2010, the Supreme Court modified its jurisprudence and held that the presumption of innocence must last for all procedural stages, including the analysis of special and extraordinary appeals. Thus, imprisonment before the judgment of conviction becomes unappealable could only be ordered as a provisional remedy. In the judgment of *Habeas Corpus* 126292, published on 17 May 2016, the Supreme Court restated its previous understanding and asserted that the provisory execution of a conviction, rendered or reaffirmed in a Court of second degree of jurisdiction, even if subject to a special or extraordinary appeals, does not compromise the principle of the presumption of innocence.

Languages:

Portuguese, English (translation by the Court).



Canada

Supreme Court

Important decisions

Identification: CAN-2017-2-002

a) Canada / **b)** Supreme Court / **c)** / **d)** 01.06.2017 / **e)** 36783 / **f)** R. v. Antic / **g)** *Canada Supreme Court Reports* (Official Digest), 2017 SCC 27, [2017] 1 S.C.R. 509 / **h)** <http://scc-csc.lexum.com/scc-csc/en/nav.do>; 347 *Canadian Criminal Cases* (3d) 231; 37 *Criminal Reports* (7th) 237; 410 *Dominion Law Reports* (4th) 675; [2017] S.C.J. no. 27 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

5.3.5.1.4 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Conditional release.**

Keywords of the alphabetical index:

Constitutional right, Charter of Rights and Freedoms, right not to be denied reasonable bail without just cause / Judicial interim release, conditions of release.

Headnotes:

Under Section 11.e of the Canadian Charter of Rights and Freedoms, “[a]ny person charged with an offence has the right not to be denied reasonable bail without just cause”. The Section 11.e right has two aspects: a person charged with an offence has the right not to be denied bail without just cause and the right to reasonable bail. Under the first aspect, there is just cause to deny bail only if the denial occurs in a narrow set of circumstances, and the denial is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to that system. The second aspect relates to the terms of bail, including the quantum of any monetary component and other restrictions that are imposed on the accused for the release period. It protects accused persons from conditions and forms of release that are unreasonable.

Summary:

I. The accused was charged with several drug and firearms offences. He was denied release at his bail hearing, and sought review of the detention order. The bail review judge declined to vacate the order, indicating that he would have released the accused if he could have imposed both a surety and a cash deposit as release conditions. Section 515.2.e of the Criminal Code permits a justice of the peace or judge to require both a cash deposit and surety supervision, as bail conditions, only if the accused is from out of the province or does not ordinarily reside within 200 km of the place in which he or she is in custody. But as an Ontario resident living within 200 km of the place in which he was detained, the accused did not meet the geographical limitation in Section 515.2.e.

The accused brought a subsequent bail review application, challenging the constitutionality of Section 515.2.e. The bail review judge found that since the geographical limitation prevented him from granting bail on the terms that he deemed appropriate, the provision violated the right not to be denied reasonable bail without just cause under Section 11.e of the Charter. He severed and struck down the geographical limitation in Section 515.2.e and ordered the accused’s release with a surety and a cash deposit.

II. In a unanimous decision, the Supreme Court allowed the appeal and reversed the declaration of unconstitutionality. The Court held that a central part of the Canadian law of bail consists of the ladder principle and the authorised forms of release, which are found in Section 515.1 to 3 of the Criminal Code. Save for exceptions, an unconditional release of the accused on an undertaking is the default position when granting release. Alternative forms of release are to be imposed in accordance with the ladder principle, which must be adhered to strictly: release is favoured at the earliest reasonable opportunity and on the least onerous grounds. If the Crown proposes an alternate form of release, it must show why this form is necessary for a more restrictive form of release to be imposed. Each rung of the ladder must be considered individually and must be rejected before moving to a more restrictive form of release. Where the parties disagree on the form of release, it is an error of law for a judge to order a more restrictive form without justifying the decision to reject the less onerous forms. A recognisance with sureties is one of the most onerous forms of release, and should not be imposed unless all the less onerous forms have been considered and rejected as inappropriate. It is not necessary to impose cash bail on accused persons if they or their sureties have reasonably recoverable assets and are able to pledge

those assets to the satisfaction of the Court. A recognisance is functionally equivalent to cash bail and has the same coercive effect. Cash bail should be relied on only in exceptional circumstances in which release on a recognisance with sureties is unavailable. When cash bail is ordered, the amount must not be set so high that it effectively amounts to a detention order, which means that the amount should be no higher than necessary to satisfy the concern that would otherwise warrant detention and proportionate to the means of the accused and the circumstances of the case. The judge is under a positive obligation to inquire into the ability of the accused to pay.

In this case, the Court held that Section 515.2.e of the Criminal Code did not have the effect of denying the accused bail; it was the bail review judge's application of the bail provisions that did so. The bail review judge committed two errors in fashioning the accused's release order. First, by requiring a cash deposit with a surety, one of the most onerous forms of release, he failed to adhere to the ladder principle. Even though the accused had offered a surety with a monetary pledge, the bail review judge insisted on a cash deposit because he believed the erroneous assumption that cash is more coercive than a pledge. Second, the bail review judge erred in making his decision on the basis of speculation, contrary to any evidence and to Parliament's intent, that requiring cash will be more effective.

Because Section 515.2.e did not have the effect of denying the accused bail, the Court concluded that this provision did not deny him bail without just cause. Thus, the first aspect of the Section 11.e Charter right was not triggered. As to the second aspect of the Section 11.e right, it did not need to be addressed because, had the bail review judge applied the bail provisions properly, the accused could have been granted reasonable bail. Accordingly, the cash-plus-surety release order should be replaced with a cash-only release.

Languages:

English, French (translation by the Court).



Identification: CAN-2017-2-003

a) Canada / **b)** Supreme Court / **c)** / **d)** 16.06.2017 / **e)** 37310 / **f)** R. v. Cody / **g)** *Canada Supreme Court Reports* (Official Digest), 2017 SCC 31, [2017] 1 S.C.R. 659 / **h)** <http://scc-csc.lexum.com/scc-csc/en/nav.do>; 37 *Criminal Reports* (7th) 266; [2017] S.C.J. no. 31 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time.**

Keywords of the alphabetical index:

Charter of Rights and Freedoms, right to be tried within reasonable time, infringement / Trial delay, framework of analysis for stay of proceedings.

Headnotes:

Under Section 11.b of the Canadian Charter of Rights and Freedoms, “[a]ny person charged with an offence has the right to be tried within a reasonable time”. The framework set out in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, for applying Section 11.b now governs the analysis and must be followed. Properly applied, this framework provides sufficient flexibility and accounts for the transitional period of time that is required for the criminal justice system to adapt.

Summary:

I. The accused was charged with drugs and weapons offences in January 2010. Before the commencement of his trial scheduled for January 2015, the accused brought an application under Section 11.b of the Charter, seeking a stay of proceedings due to the delay. Because the application pre-dated the release of *Jordan*, the trial judge applied the former framework set out in *R. v. Morin*, [1992] 1 S.C.R. 771. He granted the application and stayed the proceedings. A majority of the Court of Appeal applied the *Jordan* framework and allowed the appeal, set aside the stay of proceedings and remitted the matter for trial.

II. In a unanimous decision, the Supreme Court allowed the appeal and restored the stay of proceedings. The Court held that the delay in this case was unreasonable and therefore, that the accused's right under Section 11.b of the Charter was infringed. The Crown, the defence and the system each contributed to the delay. Under the

Jordan framework, every actor in the justice system has a responsibility to ensure that criminal proceedings are carried out in a manner that is consistent with an accused person's right to a trial within a reasonable time.

After the total delay from the charge to the actual or anticipated end of trial is calculated under the Jordan framework, delay attributable to the defence must be subtracted. Defence delay is divided into two components: delay waived by the defence and delay caused by defence conduct. The only deductible defence delay under the latter component is that which is solely or directly caused by the accused person and flows from defence action that is illegitimate inasmuch as it is not taken to respond to the charges. The determination by the trial judge of whether defence conduct is legitimate is highly discretionary, and appellate courts must show a correspondingly high level of deference thereto. Defence conduct encompasses both substance and procedure – the decision to take a step, as well as the manner in which it is conducted, may attract scrutiny. To determine whether defence action is legitimately taken to respond to the charges, the circumstances may be considered. The overall number, strength, importance, proximity to the Jordan ceilings, compliance with any notice or filing requirements and timeliness of defence applications may be relevant considerations. Irrespective of its merit, a defence action may be deemed not legitimate if it is designed to delay or if it exhibits marked inefficiency or marked indifference toward delay.

Beyond a retrospective accounting of delay, a proactive approach is required from all participants in the justice system to prevent and minimise delay. Trial judges should suggest ways to improve efficiency, use their case management powers and not hesitate to summarily dismiss applications and requests the moment it becomes apparent they are frivolous.

After defence delay has been deducted, the net delay must be compared to the applicable presumptive ceiling set out in Jordan. If the net delay exceeds the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the Crown must establish the presence of exceptional circumstances, which fall into two categories: discrete events and particularly complex cases. Discrete events, like defence delay, result in quantitative deductions of particular periods of time. However, case complexity requires a qualitative assessment and cannot be used to deduct specific periods of delay. Complexity is an exceptional circumstance only where the case as a whole is

particularly complex. The delay caused by a single isolated step that has features of complexity should not be deducted under this category.

Transitional considerations may be taken into account as a third form of exceptional circumstances where the case was already in the system when Jordan was decided. Like case complexity, the transitional exceptional circumstance assessment involves a qualitative exercise. The exceptionality of the "transitional exceptional circumstance" does not lie in the rarity of its application, but rather in its temporary justification of delay that exceeds the ceiling based on the parties' reasonable reliance on the law as it previously existed. The parties' general level of diligence, the seriousness of the offence and the absence of prejudice are all factors that should be taken into consideration, as appropriate in the circumstances.

In this case, the total delay was approximately 60.5 months. After accounting for deductions for the delay waived by the accused (13 months) and two periods of time as defence delay (3.5 months), the delay is 44 months, which exceeds the 30-month ceiling set out in Jordan and therefore, is presumptively unreasonable. With respect to exceptional circumstances, two delays should be deducted as discrete events (7.5 months). The net delay is therefore 36.5 months. Despite the voluminous disclosure, this does not qualify as a particularly complex case.

In light of the trial judge's findings of real and substantial actual prejudice and that the accused's conduct was not inconsistent with the desire for a timely trial, the Crown cannot show that the net delay was justified based on its reliance on the previous state of the law. To the contrary, the trial judge's findings under the Morin framework strengthen the case for a stay of proceedings. Where a balancing of factors under that framework would have weighed in favour of a stay, the Crown will rarely, if ever, be successful in justifying the delay as a transitional exceptional circumstance under the Jordan framework.

Cross-references:

Supreme Court:

- *R. v. Jordan*, 08.07.2016, *Bulletin* 2016/2 [CAN-2016-2-004].

Languages:

English, French (translation by the Court).



Costa Rica

Supreme Court of Justice

Important decisions

Identification: CRC-2017-2-002

a) Costa Rica / **b)** Supreme Court of Justice / **c)** Constitutional Chamber / **d)** 21.07.2017 / **e)** 2017-011421 / **f)** / **g)** / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

4.7.14 Institutions – Judicial bodies – **Arbitration**.
 5.3.13.3.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – **“Natural judge”/Tribunal established by law**.
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Access to justice, meaning / Arbitration / Constitutional rights, violation / Remedy, effective, denial / Right / Right of parties, scope.

Headnotes:

Article 43 of the Constitution provides that all persons have the right to settle their differences in civil matters by means of arbitrators, even when there is a pending lawsuit. The citizen therefore has a fundamental right to choose an alternative way of conflict resolution and there is no possibility for the authorities to disagree with enabling legislation and to indirectly deny the possibility of choosing such an alternative. Therefore, arbitration must contain at least the following standards: an impartial tribunal; the possibility to question the grant and annulment for violations of the due process of law; and also the guarantee for the winning party to file for execution of the grant.

Summary:

I. The applicant filed a constitutional complaint (*amparo*) claiming that the Supreme Court had violated his right to arbitration contained in Article 43 of the Constitution. A provision in the parties' contract stipulated that the parties would have to go to arbitration first in case of a disagreement. While

choosing the arbitrators, problems arose between the parties which lead to referral of the case to the Supreme Court. The Supreme Court then informed the parties that it did not have a list with arbitrators in contrast to Article 26 of the law of alternative dispute resolution and peace, which, among other things, states that in case of conflict, the General Secretariat of the Court, within a period of eight days, shall appoint the arbitrator, in strict turn of the list to be carried.

The applicant therefore claimed a violation of his right to access to justice. He argued that it is clearly the duty of the court to provide a list of arbitrators in order to make fulfilment of Article 43 of the Constitution possible.

II. The Constitutional Chamber held that there is no possibility for the Supreme Court itself to find an excuse for not creating such a list without harming the right to access to justice at the same time.

The Constitution states in Article 43 that all persons have the right to settle their differences in civil matters by means of arbitrators, even when there is a pending lawsuit. Article 43 is subject to different interpretations, which lead to three conclusions.

First, arbitration can be seen as a fundamental right. According to the mere wording, the article creates an alternative way of conflict resolution in proprietary matters, which allows the parties to choose arbitration voluntarily. The interpretation according to its position within the Constitution under "Individual rights and guarantees" leads to the assumption that arbitration is a fundamental right. The essential content of Article 43 shows the possibility of choosing between different mechanisms of dispute settlement in proprietary matters. Furthermore it contains the counterpart, a freedom not to consent to arbitration. Therefore nobody can be forced to choose or participate in arbitration for dispute settlement. If the parties wish to opt out of the court system it is their fundamental right at any stage throughout the process. Article 43 furthermore contains a procedural right in the sense that statutes not only exist to guarantee the freedom established in them but are at the same time helping to enforce the given content.

Second, as a logical consequence to the procedural content of Article 43 it also leads to the right to an official arbitrator's list as without a list of arbitrators to choose from it would not be possible to conduct the arbitration.

Third, Article 43 leads to the right to access prompt and effective remedies as it offers another way for the complainant to settle his dispute besides the judicial court system.

The Supreme Court's omission in establishing a list of arbitrators constitutes a clear obstacle to the access to justice of those who have decided to exercise their right to resolve their conflict through alternative mechanisms, such as arbitration. Therefore, it is inevitable that the Supreme Court must offer a current list of arbitrators. Otherwise it endangers the fundamental right of the applicant in the sense that he is allowed to choose between alternative judicial paths and especially in the sense of the fundamental right to arbitration.

The Constitutional Chamber ruled that the omission of the list constitutes a violation of the right of access to justice as well as a violation of the fundamental right to arbitration and that it is the task of the Supreme Court to provide such a list according to Article 26 of the law of alternative dispute resolution and peace. In conclusion, the Constitutional Chamber decided that within three months the Supreme Court was required to provide the list of arbitrators that must be in existence under Article 26 of the law of alternative dispute resolution and peace.

III. Justice Ernesto Jinesta Lobo wrote a separate but concurrent opinion reasoning that it does not seem appropriate to have the Constitutional Chamber act upon infra-constitutional laws such as Article 26 of the law of alternative dispute resolution and peace, which are not part of the Constitution. In his opinion Article 43 of the Constitution itself contains a direct mandate enforceable by the Constitutional Chamber.

Cross-references:

Constitutional Chamber:

- no. 2016-002708 citing a previous decision (no. 2005-02999) considers arbitration in a twofold manner to highlight both fundamental and procedural rights. It also assigns the following characteristics to arbitration: it is alternate, optional, it cannot be forcefully imposed over any party, and it is independent from other judicial proceedings. It must be an impartial tribunal, parties must have the possibility to question the grant and annulment for violations to the due process of law and also the guarantee for the winning party to file for execution of the grant;
- no. 2001-007628 holds that the legislature is free to create those proceedings necessary to resolve conflicts of different natures and to assure compliance with the constitutional principle to prompt and effective justice;

- no. 2005-015092 deems that the legislature has discretionary power to determine and establish such proceedings as are necessary to resolve conflicts. These regulations must allow access to justice and due process;
- no. 2004-005208 determines that behind the different procedural structures are policy questions of the legislature that respond to the specialty and particularity of the subject matter, all in accordance with the Constitution.

Languages:

Spanish.



Croatia Constitutional Court

Important decisions

Identification: CRO-2017-2-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 25.05.2017 / **e)** U-III-1673/2015 / **f)** / **g)** *Narodne novine* (Official Gazette), 65/17 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Law, repeal, effects.

Headnotes:

Article 58.5 of the Constitutional Act on the Constitutional Court prescribes that in proceedings in which no final decision was passed before the date of the entry into force of a Constitutional Court decision repealing a law, or annulling or repealing another regulation, or some of its provisions, and this law or other regulation was to be directly applied in the legal matter, the repealed law, or annulled or repealed other regulation, shall not be applied from the date when the Constitutional Court decision enters into force.

This rule applies, *mutatis mutandis*, to cases where a regulation has been repealed by the judgment of the High Administrative Court which is competent to assess the legality of general acts.

Summary:

I. Article 58.5 of the Constitutional Act on the Constitutional Court (hereinafter, “CACC”) prescribes that in proceedings in which no final decision was passed before the date of the entry into force of a Constitutional Court decision repealing a law, or annulling or repealing another regulation, or some of its provisions, and this law or other regulation was to be directly applied in the legal matter, the repealed

law, or annulled or repealed other regulation, shall not be applied from the date when the Constitutional Court decision enters into force.

The applicant (the respondent in civil proceedings and enforcement debtor in enforcement proceedings) lodged a constitutional complaint against the decision of a second-instance court amending a first-instance court decision in such a way that the ruling on enforcement remained in force in the part ordering the applicant to compensate the plaintiff in civil proceedings, or the enforcement creditor in enforcement proceedings, for a sum of money, based on a payment order for daily parking tickets, including default interest, and to cover the costs of civil and enforcement proceedings. The first-instance judgment annulled in full the money order contained in the ruling on enforcement.

The impugned second-instance judgment was rendered on the basis of the Decision on the Organisation and Modality of Payment and Control of Parking in the City of Dubrovnik (hereinafter, the "Decision") which had been valid from 24 December 2009 to its repeal by the judgment of the High Administrative Court and its publication on 18 June 2014. The second-instance court held that the repeal of the Decision did not interfere with the legal consequences that this Decision, as a subordinate and a general normative act, had had until the moment of its repeal, i.e. 18 June 2014.

The applicant stated that already in the proceedings before the first-instance court, he had raised his crucial objections stating that from the day of entry into force of the High Administrative Court judgment repealing the Decision, the provisions of the repealed Decision could no longer be applied in the proceedings not brought to an end by a final decision. The applicant argued that the second-instance court proceeded contrary to the rule prescribed in Article 58.5 CACC (by applying the provisions of a subordinate act or Decision that were not in force at the time when the impugned judgment was rendered because they had been repealed by the decision of the High Administrative Court), as well as contrary to the previous legal understanding of the Constitutional Court concerning the application of provisions of a repealed regulation following the entry into force of a decision on its repeal expressed, *inter alia*, in the decision of the Constitutional Court no. U-III-662/2013 of 28 February 2013.

The applicant contended that the impugned judgment was clearly unlawful and arbitrary, and that it violated the constitutional rights guaranteed in Articles 14.2, 26 and 29.1 of the Constitution (the rights to equality before the law and to fair trial).

II. The Constitutional Court considered the constitutional complaint from the aspect of a possible violation of the right to a fair trial guaranteed in Article 29.1 of the Constitution.

The Constitutional Court first recalled the position of the European Court of Human Rights that the imperative of maintaining citizens' legitimate confidence in the State and the law made by it, inherent in the rule of law, required the authorities to eliminate any dysfunctional provisions from the legal system and to rectify extra-legal practices, as expressed in the judgment *Broniowski v. Poland* (§184).

The Court emphasised that in its Article 58, the CACC elaborates the means and the conditions of the legal protection of persons whose rights have been violated by a final individual act adopted on the basis of law or other regulation repealed by a decision of the Constitutional Court and it takes the position that this rule applies, *mutatis mutandis*, to cases where a regulation is repealed by a High Administrative Court judgment. Indeed, since 2012, the High Administrative Court has had jurisdiction to assess the legality of general acts (objective administrative disputes).

Taking into consideration the provision of Article 58.5 CACC (and Article 55.2 CACC, which prescribes that "the repealed ... other regulation ... shall lose legal force on the day of publication of the Constitutional Court decision in the Official Gazette") and that in the current case, it was a contractual relation where one of the parties was a public authority, the Constitutional Court held that its case-law in case no. U-III-662/2013, invoked by the applicant in his constitutional complaint, was applicable in the specific case. In the statement of reasons of its decision, the Constitutional Court held as follows:

"Therefore, it means that in this concrete case, the High Administrative Court applied the legal provisions not valid at the time the impugned judgment was rendered because they had been repealed by a Constitutional Court decision. Consequently, the Constitutional Court finds that the High Administrative Court proceeded contrary to the rule prescribed in Article 58.5 of the Constitutional Act."

The Constitutional Court held that its decision in case no. U-III-5708/2010 was also relevant in the present case. It contains the position that "the repealed law or other regulation ... shall lose legal force on the day of publication of the Constitutional Court decision in the Official Gazette". Hence Constitutional Court decisions are effective only *pro futuro* and in this specific case it means that all the court decisions

rendered after the publication of the High Administrative Court decision repealing the impugned regulation are not valid.

Since the first-instance judgment was rendered on 1 December 2014, and the impugned second-instance judgment on 4 March 2015, it follows that the courts applied the provisions of a subordinate act which, at the time the judgments were rendered, did not have legal force because they had been repealed by the decision of the High Administrative Court. The Constitutional Court thus found that the courts proceeded against the rule prescribed in Article 58.5 CACC. In the Court's assessment, by failing to take into consideration and to refer to the fact that the regulation, on the basis of which the applicant was obliged to make payment based on the payment order for daily parking tickets, had been repealed, the courts had violated his right to a fair trial.

Consequently, the Constitutional Court rendered a decision accepting the constitutional complaint, quashed both first-instance and second-instance judgments and remanded the case to the first-instance court.

Cross-references:

Constitutional Court:

- no. U-I-662/2013, 28.02.2013;
- no. U-I-5708/2010, 20.03.2013.

European Court of Human Rights:

- *Broniowski v. Poland*, no. 31443/96, 22.06.2004, *Reports of Judgments and Decisions* 2004-V.

Languages:

Croatian.



Identification: CRO-2017-2-005

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 25.05.2017 / **e)** U-III-3311/2008 / **f)** / **g)** *Narodne novine* (Official Gazette), 65/17 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

1.6.3 Constitutional Justice – Effects – **Effect erga omnes.**

Keywords of the alphabetical index:

Constitutional Court, decision, binding effect / Constitutional Court, decision, execution / Housing, eviction / Housing, tenant, right.

Headnotes:

As a public law entity, the State and its bodies have the obligation to ensure the protection of the rights and legal interests of citizens, which also includes implementing the acts adopted by public bodies, rather than to act to the contrary and prevent their implementation. Preventing the implementation of such acts results in legal uncertainty and undermines citizens' trust in the functioning of the State and its institutions.

The applicant must be in a position to obtain from the State real and not only apparent implementation of the effect of the Constitutional Court decision no. U-I-892/1994. In such a way, the effects of the abstract review of the constitutionality of laws have a direct impact on particular legal situations because they make it possible, by observing the principle of fairness, in the applicant's case, to achieve a *posteriori* the standard heritage of civilisation which is legal protection inherent in the rule of law.

Summary:

I. The applicant filed a constitutional complaint against the judgment of the Administrative Court of the Republic of Croatia (hereinafter, "Administrative Court") of 15 May 2008 (hereinafter, the "impugned judgment") rejecting the applicant's claim against the ruling of a second-instance administrative body (the competent ministry) of 22 April 2004. This second-instance ruling rejected the applicant's appeal lodged against the conclusion of a first-instance administrative body of 15 July 2002 which dismissed the applicant's request to implement counter-enforcement consisting of her return to a flat in Zagreb of 56m² (hereinafter, "larger flat").

It was established in the proceedings that the larger flat, after the applicant's eviction, was given for use to a third person who bought it based on a sales contract of 26 March 1998. This person still lives in it and the State no longer owns the flat. Therefore, a conclusion was reached that counter-enforcement was realistically and legally no longer possible.

Several years previously, in 1988, the applicant had acquired tenancy right to a flat in Zagreb of a surface area of 33.97m² (hereinafter, "smaller flat"). She voluntarily left it in order to move into the larger flat based on a decision issued by the Garrison Command of the Yugoslav National Army of 1 October 1991 which was not rendered in conformity with the Decree on the Prohibition of All Real Estate Transactions in the Republic of Croatia that was then in force. The competent Ministry issued a request for the larger flat to be returned to the possession of the State because it was occupied by the applicant on the basis of a null and void ruling of 1 October 1991, that is, a ruling without a valid legal basis. By invoking Article 94 of the Housing Act (establishing the competence of administrative and housing bodies in the cases of evicting persons who unlawfully occupy flats), the competent first-instance administrative body, in its ruling of 19 October 1992, accepted the request and ordered the applicant to vacate the flat and return it to the possession of the State. The applicant's appeal against the first-instance ruling was rejected by a ruling of the competent second-instance body of 2 July 1993, and her claim against the second instance ruling was rejected by the judgment of the Administrative Court of 2 March 1994.

The applicant was evicted from the larger flat on the basis of the first-instance administrative ruling of 19 October 1992.

After the Constitutional Court, in decision no. U-I-892/1994 of 20 November 1996, repealed Article 94 of the Housing Act, the applicant filed a proposal for the renewal of proceedings. The competent ministry rendered a ruling on 9 December 1997 annulling the rulings of 2 July 1993 and 19 October 1992 (evicting the applicant from the larger flat) and established that there were no conditions for the institution of proceedings following the request of the competent ministry to evict the applicant from the larger flat.

By the final judgment of the Municipal Court in Zagreb of 9 November 1998, on the basis of Article 99 of the Housing Act (laying down that a tenant's right of tenure will be cancelled if he or she and family members living with the tenant are absent from the flat for a continuous period of more than six months), the applicant's tenancy right to the smaller flat was cancelled.

In the applicant's view, through the Administrative Court's impugned judgment of 15 May 2008, her constitutional rights guaranteed by Articles 14.2, 19.2, 26, 29.1 and 48.1 of the Constitution were violated (concerning equality before the law, judicial review of public acts, access to justice, and the right to property). By explaining the violations, the applicant

reiterated the reasons given during the administrative court proceedings.

II. The Constitutional Court held that the applicant was prevented from implementing the effects of its decision no. U-I-892/1994 and the ruling of the competent ministry of 9 December 1997 annulling the previous rulings (the first-instance ruling of 19 October 1992 and the second-instance ruling of 2 July 1993) by which the applicant was ordered to vacate the flat.

In decision no. U-I-892/1994, rendered in proceedings instituted by the Constitutional Court itself, Article 94 of the Housing Act was repealed. This Article defines the powers of administrative (housing) bodies in cases of the eviction of persons who unlawfully entered and occupied a flat, without any legally valid decision on the allocation of the flat for use or on some other valid legal basis. According to the Constitutional Court's position explained in the statement of reasons of the decision, Article 94 of the Housing Act "fails to guarantee to a sufficient extent lawfulness and veracity in deciding on the rights and obligations of parties, and does not achieve the standard heritage of civilisation which is legal protection inherent in the rule of law".

Based on the above, the Constitutional Court in the present case held that the State and its competent bodies (ministries), by failing to restore the previous situation or enabling in some other way the implementation of the effects of the Constitutional Court decision no. U-I-892/1994, or through acts enabling third parties to acquire ownership of the larger flat, were responsible for the applicant's situation.

The Constitutional Court also held that the State's obligation was "to remedy" the applicant's personal situation, i.e. to make it possible for her to use another suitable flat. Therefore, the situation to which the applicant was brought could only be assessed as contrary to the principle of the rule of law and legal certainty.

The Constitutional Court did not consider it justified to quash the disputed judgment of the Administrative Court and to remand it to the same Court because, taking into consideration the factual and legal situation of the case, counter-enforcement was objectively not possible.

The Constitutional Court stressed that it was not its duty to assess the lawfulness or unlawfulness of the legal basis (validity of legal acts) on which the applicant occupied the smaller flat or the disputed larger flat in Zagreb. However, the Constitutional

Court held that the applicant should not have been brought into a more difficult position than the one in which she would have been had she not exchanged the smaller flat (to which she undoubtedly had tenancy right) for the larger flat in Zagreb.

Therefore, based on Article 31.4-5 of the Constitutional Act on the Constitutional Court, the Constitutional Court ordered the Government to make available, within six months from the publication of this decision in the Official Gazette, another flat which corresponds to the flat in Zagreb (of a surface area of 33.97m²) to which the applicant held the tenancy rights.

III. Justices Miroslav Šumanović, Ingrid Antičević Marinović and Branko Brkić attached dissenting opinions to the majority decision.

Cross-references:

Constitutional Court:

- no. U-I-892/1994, 20.11.1996, *Bulletin* 1996/3 [CRO-1996-3-017].

Languages:

Croatian.



Identification: CRO-2017-2-006

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 11.07.2017 / **e)** U-I-3700/2017 / **f)** / **g)** *Narodne novine* (Official Gazette), 89/17 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
 3.9 General Principles – **Rule of law.**
 3.10 General Principles – **Certainty of the law.**
 5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**
 5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

Keywords of the alphabetical index:

Cemetery / Tax authority, power / Tax, collection, method.

Headnotes:

The legitimacy of the taxation of a specific form of legal transaction, such as a transaction related to gravesite equipment and devices (as well as any other taxable object), does not at the same time legitimise the introduction of a “parallel” system of tax collection supervision.

That the matter concerns an unlawfully established parallel system of tax supervision follows from the fact that the impugned legal provision authorises the cemetery management to set a condition for the entry of the right of use of a gravesite on evidence that tax on gravesite equipment and devices has been paid. Thus, the cemetery management – which is a legal or natural person responsible for carrying out public powers transferred from the unit of local self-government in the field of municipal activities – receives the powers of a tax authority, i.e. bodies of the state executive branch, and within those powers the cemetery management obligates citizens to pay tax, supervises the payment by collecting evidence of the tax paid, and uses coercive means (by denying entry of the right of use of the gravesite) for the purpose of collecting tax. This creates a systemic disruption in relations based on the constitutional principle of the separation of powers, and is of such significance and proportion as to undermine the rule of law and legal certainty in the objective legal order.

Summary:

I. The Constitutional Court, further to a proposal submitted by an attorney, instituted proceedings for the review of conformity with the Constitution of Article 15.5 of the Cemeteries Act (hereinafter, the “CA”) in the part that reads: “so, therefore, where, in addition to the transfer of a gravesite, the ownership of gravesite equipment and devices is also sold or transferred in some other way, the new user of the gravesite shall enclose evidence of payment of real property transfer tax with the transfer contract that is submitted to the cemetery management”. The Constitutional Court repealed the said Article.

According to the impugned provision of the CA, gravesite equipment and devices erected at the gravesite are considered to be real property, so where ownership of gravesite equipment or devices is sold or transferred in some other way along with the

transfer of the gravesite, the new user of the gravesite must enclose evidence of payment of real property transfer tax with the transfer contract submitted to the cemetery management.

The proponent observed that the Constitutional Court, in Decision no. U-I-28/1993 of 17 April 1996, repealed Article 22 of the Act on Real Property Transfer Tax and pointed out that the impugned provision of the CA is an equivalent case of unconstitutional limitation of the same constitutionally guaranteed rights guaranteed in the following articles: Article 48.1 of the Constitution (the right to property), Article 49.1 of the Constitution (the right to free enterprise and market freedom), Article 50 of the Constitution (restriction of free enterprise and the right to property) and Article 51 of the Constitution (the obligation to participate in the defrayment of public expenses).

II. The Constitutional Court was required to address the question of whether the positions referred to in Decision no. U-I-28/1993 are applicable to this specific case.

The repealed Article 22 of the Act on Real Property Transfer Tax related to real property recorded in the land registry, where, in the legal order of the Republic of Croatia, the act of entry has constitutive effects for the acquisition of the right of ownership. At the same time, the legal order included a regulation (the repealed Article 22 of the Act on Real Property Transfer Tax, which stipulated that the transfer of the right of ownership to such real property in the land registry may not be entered without evidence of payment of real property transfer tax), which, despite the meeting of the legally prescribed conditions for the acquisition of the right of ownership, prevented or restricted such entry and, thus, the acquisition of the right of ownership, without any legitimate purpose.

Further to the statements of the proponents, the regulation that in the case unconstitutionally prevents the acquisition of the right of ownership of gravesite equipment and devices is the impugned Article 15.5 CA.

The legislature equated the category “gravesite equipment and devices”, which includes headstones, monuments, markers, rails, etc. (i.e. grave parts above the ground), although they are mobile in nature, with real property within the meaning of Article 2.4 of the Act on Ownership and Other Real Property Rights, and Article 15.5 CA.

Real property that is actually a cemetery (cemetery land) is owned by public law entities. Private law entities may acquire the right of use (the right to use its individual parts – gravesites). Transactions

involving gravesites, which would include the acquisition of the right of ownership by private law entities, is not possible.

The matters to which the impugned Article 15.5 CA relate are found in parcels of grave land (gravesites), and their “permanent connection” to the gravesite is only relative. They can be subject to the right of ownership or transfer (legal transaction), which means the acquisition of the right of ownership by private law entities. Two factual conditions are required for the acquisition of such property – a valid legal transaction and the transfer of independent possession.

The acquisition, change or termination of real rights on gravesite equipment and devices is not entered in the grave registry. All facts that are entered in the grave registry relate exclusively to the grave land and the use of grave land. Such entry has no bearing on the acquisition of the right of ownership to gravesite equipment and devices.

Still, the impugned Article 15.5 CA requires evidence that turnover tax on gravesite equipment and devices has been paid as a condition for the entry of the transfer of the right of use of grave land in the grave registry.

Further, the Constitutional Court found that the impugned Article 15.5 CA does not raise the question of its conformity with the Constitution within the meaning of the guarantees concerning the right of ownership and market freedoms referred to in Articles 48 and 49 of the Constitution, which the proponent indicated in the proposal, so to that extent the legal positions presented in decision no. U-I-28/1993 are not applicable to the present case.

However, the Constitutional Court noted that the legal problem to which the submitted proposal refers in its substance is the fact that the imposition of the disputed conditions affects the transfer or acquisition of the right of use of gravesites.

It is indisputable that the legislature is authorised, pursuant to Article 2.4.1 of the Constitution, in conjunction with Article 51 of the Constitution, to prescribe the obligation of payment of tax (also) on the transfer of gravesite equipment and devices.

The legitimacy of the taxation of a specific form of legal transaction, such as a transaction related to gravesite equipment and devices (as well as any other taxable object), does not at the same time legitimise the introduction of a “parallel” system of tax collection supervision. That the matter concerns an unlawfully established parallel system of tax

supervision follows from the fact that the impugned Article 15.5 CA authorises the cemetery management to set a condition for the entry of the right of use of a gravesite on evidence that tax on gravesite equipment and implements tax has been paid.

Thus, the cemetery management – which is a legal or natural person responsible for carrying out public powers transferred from the unit of local self-government in the field of municipal activities – receives the powers of a tax authority, i.e. bodies of the state executive branch, and within those powers the cemetery management obligates citizens to pay tax, supervises the payment by collecting evidence of the tax paid, and uses coercive means (by denying the entry of the right of use of the gravesite) for the purpose of collecting tax.

The cemetery management, by acting as stipulated in the impugned Article 15.5 CA, does not protect legal interests and objectives for which the public law regime of use, and the cemetery management itself, is established, and which defines the purpose and the remit of the cemetery management as some sort of “branch” of the bodies of the units of local self-government competent for the performance of precisely defined activities in the field of the municipal economy.

Therefore, it is a fact that Article 15.5 CA (in the part that was repealed) causes systemic disruption in relations that are based on the constitutional principle of the separation of powers and is of such significance and proportion as to undermine the rule of law and legal certainty in the objective legal order, which is unacceptable from the point of view of Articles 3 and 5 of the Constitution.

Cross-references:

Constitutional Court:

- no. U-1-28/1993, 17.04.1996, *Bulletin* 1996/1 [CRO-1996-1-008].

Languages:

Croatian.



Identification: CRO-2017-2-007

a) Croatia / b) Constitutional Court / c) / d) 11.07.2017 / e) U-I-4637/2014 / f) / g) *Narodne novine* (Official Gazette), 89/17 / h) CODICES (Croatian).

Keywords of the systematic thesaurus:

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

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

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

4.8.4.1 Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy.**

4.8.7.1 Institutions – Federalism, regionalism and local self-government – Budgetary and financial aspects – **Finance.**

Keywords of the alphabetical index:

Municipality, jurisdiction for prescribing municipality fees / Real property.

Headnotes:

Laws governing the legal field of local and regional self-government, including municipal fees, do not prescribe exemption from payment of municipal fees in the Republic of Croatia. Therefore, the state, as the owner of certain types of real property subject to the payment of municipal fees, is also obligated to pay them and may be exempted only where (and if) a decision is made by the representative body of local self-government as laid down in the relevant legal provisions.

Notwithstanding various other forms of financing units of local self-government by the state, including forms of state aid and assistance that the units receive from the State, when it comes to the fact that the State (as well as other fee payers) are subject to an expressly stipulated obligation to pay municipal fees to units of local self-government for state-owned real property in their area of responsibility, any conflicting actions by the state authorities may be identified as systematic unlawful administrative practice.

Where the practice of state authorities is conducted with reference to a law and legal provisions whose existence in the legal order have no reasonable and objective justification, such legal drafting and practice create legal and factual confusion in a legal field that is highly important for the position of local self-government and all citizens as members of a particular local community. Therefore, the matter concerns normative regulation and a situation of such

significance and proportion to seriously undermine the principle of the rule of law and legal certainty of the objective legal order.

Summary:

I. The Constitutional Court, further to a proposal submitted by five proponents, instituted proceedings for the review of conformity with the Constitution of Articles 19.1 and 26 of the Act on the Management and Use of State Property of the Republic of Croatia (hereinafter, "AMUSP") and rendered a decision repealing the provisions in the part reading: "municipal fees". At the same time, the Court did not accept a proposal for the institution of proceedings for the review of conformity with the Constitution of Article 19.1 AMUSP in the part reading: "real property transfer tax".

Article 19.1 AMUSP exempts the Republic of Croatia and the State Property Management Office from the payment of real property transfer tax, profit tax, and other taxes, municipal fees as well as other public contributions in relation to property and the management and use of state property, unless provided otherwise in special legislation. Article 26 AMUSP provides that the exemption also applies to the Centre for Restructuring and Sale.

The proponents held that it was disputable in terms of constitutional law that the state is exempted from the payment of municipal fees (as laid down in Articles 19.1 and 26 AMUSP) and one proponent also disputed the exemption of the state from paying real property transfer tax (as prescribed in Article 19.1 AMUSP).

All proponents held that Article 19.1 AMUSP was disputable from the point of view of the following articles: Article 3 of the Constitution (the rule of law), Article 4 of the Constitution (the principle of separation of powers), Article 5 of the Constitution (the principle of constitutionality and legality), Article 14 of the Constitution (the prohibition of discrimination and the equality of all before the law), Article 48 of the Constitution (the right to property), Article 51 of the Constitution (the obligation to participate in the defrayment of public expenses), Article 128 of the Constitution (the right to local and regional self-government), Article 129.a of the Constitution (the activities of local and regional self-government), and Article 131 of the Constitution (the right of units of local and regional self-government to their own revenues). They held that the State, as the owner of real property, may not be placed in a position that is different from the position of other natural or legal persons – owners of real property. All owners of real property must pay municipal fees and

may be exempted from the obligation only pursuant to a decision of the representative body of the unit of local self-government.

One of the proponents objected that Article 19.1 AMUSP denies part of the revenues from real property transfer tax to the local units in contravention of the Constitution and that, therefore, the disputed provision is not in conformity with the General Tax Act and the Real Property Transfer Tax Act.

II. The Constitutional Court first observed that municipal fees and taxes are two types of public contributions that are different in terms of their constitutional and legal definition and legal nature.

Regarding municipal fees, the government (including the legislative branch) is limited constitutionally by the right to local and regional self-government (Article 4.1 of the Constitution). Activities within the self-government remit of units of local and regional self-government (hereinafter, "local units") and the method of their financing are defined in Articles 129.a and 131 of the Constitution.

As opposed to municipal fees, the tax system does not essentially belong to the self-government remit of local units. Therefore, the exemption of the State from the payment of municipal fees and from real property transfer tax could not be reviewed in the same way.

The financing of local units and of activities within their remit is regulated in the Public Utilities Act (hereinafter, "PUA") and the Act on the Financing of Units of Local and Regional Self-government (hereinafter, "AFULRSG"). It follows from Articles 19.1, 22 and 23 PUA and Article 29 AFULRSG that municipal fees are own sources of funds, i.e. revenue in the budget of the unit of local self-government by which funds for the performance of certain municipal activities are ensured. The PUA stipulates which persons are obligated to pay municipal fees exclusively in view of their capacity as the owner or user of certain types of real property and stipulates the possibility of full or partial exemption from the payment of municipal fees on the basis of a decision of the representative body of the unit of local self-government.

The Constitutional Court noted that the impugned Article 19.1 AMUSP stipulates that the State is exempted from the payment of municipal fees only where some other (special) legislation does not provide that it is obligated to pay municipal fees.

The laws relevant for the legal field of local and regional self-government and for the issue of municipal fees, PUA and AFULRSG, do not prescribe

exemption from the payment of municipal fees for the State (except under the conditions laid down in Article 23 PUA applicable to all persons obligated to pay municipal fees). Therefore, the State, as the owner of certain types of real property for which municipal fees are paid, is (also) obligated to pay such fees and may be exempted from paying only where (and if) such a decision is made by the representative body of the unit of local self-government, in accordance with the content and meaning of Articles 22 and 23 PUA, and Article 29 AFULRSG, in the light of Article 131 of the Constitution.

Therefore, in the current case, the legislature incorporated the exemption of the State from payment of municipal fees in a law (AMUSP) which is not the relevant law for the legal field of local units or for the legal regulation of the concept of municipal fees. The self-governing remit of the units of local self-government was thus narrowed below the level set in Articles 4.1 and 131.1 of the Constitution, since the constitutional rule related to the limitation of government by the constitutional guarantee of the right to local and regional self-government was breached. This is a constitutional right that guarantees local units the right to their own revenues, which they may dispose of freely in the performance of activities within their remit, which also includes the right to autonomous decision-making concerning all aspects of such revenues, including any exemption of persons obligated to pay municipal fees. Therefore, the State, as the owner of certain types of real property subject to the payment of municipal fees, is obligated to pay such fees and may be exempted from payment only where (and if) such a decision is made by the representative body of the unit of local self-government.

Even if a provision on the exemption of the State from the payment of municipal fees were incorporated into a legislative act which, as opposed to AMUSP, were applicable to the legal field of local and regional self-government, such as PUA, such a legal provision would still not be in conformity with the Constitution for the same reason: the constitutionally envisaged limitation of the legislative branch by the right to local and regional self-government.

Further, the Constitutional Court took the position that the impugned Articles 19.1 and 26 AMUSP do not provide a legal basis for the State to deny payment of municipal fees to units of local self-government.

In relation to the objection regarding the denial of payment of real property transfer tax, the Constitutional Court pointed out that the tax is what is known as a joint tax, namely, a tax from which revenues are

allocated in a prescribed ratio to the unit of local (but not regional) self-government and the State. Considering that revenues from real property transfer tax are neither a constitutionally nor legally guaranteed source of funds for units of local self-government, the normative regulation of the legal field of real property transfer tax is not limited by the constitutional guarantee of the right to local and regional self-government within the meaning of Articles 4 and 131 of the Constitution. Therefore, the legislature is authorised and free to regulate the system of real property transfer tax (also) in a way to exempt the State (or other entities where there are legitimate and reasonable reasons to do so) from paying transfer tax in the case of the transfer of real property that it owns.

Languages:

Croatian.



Czech Republic

Constitutional Court

Statistical data

1 May 2017 – 31 August 2017

- Judgments of the Plenary Court: 11
- Judgments of panels: 78
- Other decisions of the Plenary Court: 3
- Other decisions of panels: 1 267
- Other procedural decisions: 34
- Total: 1 393

Important decisions

Identification: CZE-2017-2-004

a) Czech Republic / **b)** Constitutional Court / **c)** Plenum / **d)** 03.05.2017 / **e)** Pl. ÚS 2/15 / **f)** Public health insurance of foreigners and payment-free health care / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State**.
 3.16 General Principles – **Proportionality**.
 5.1.1.1 Fundamental Rights – General questions – Entitlement to rights – **Nationals**.
 5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.
 5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.
 5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.
 5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

Keywords of the alphabetical index:

Healthcare, cost-free, foreigners / Statutory health insurance / Solidarity, national.

Headnotes:

In terms of the scope of constitutional guarantees, the difference between the right to payment-free health care under the second sentence of Article 31 of the Charter of Fundamental Rights and Freedoms and

the right to protection of health under the first sentence of Article 31 of the Charter cannot be erased. The constitutional right to payment-free health care on the basis of public health insurance applies only to a citizen of the Czech Republic, whereas the right to protection of health applies to everyone.

The first sentence of Article 31 of the Charter should be perceived as a minimum basis for the guarantee of the right to protection of health. This means that the fact that payment-free health care is constitutionally guaranteed only to citizens does not make it impossible for the legislature to provide it also to other groups of persons. The legislature cannot come into conflict with a constitutional norm if it provides a higher standard of protection of rights, exceeding the minimum constitutional guarantees.

Summary:

I. Both applicants filed a petition seeking the annulment of the subject provisions in connection with proceedings being conducted before them. In both cases these were disputes where Ukrainian citizens were parties to the proceedings. In the proceedings before the Municipal Court in Prague, the plaintiff was employed in the Czech Republic from 2008; however, as of 31 January 2013 her employment permit expired and thus her employment ended as well. When she later gave birth, in March of the same year, she was staying in the Czech Republic on the basis of a long-term residence permit. She did not obtain a permanent residence permit until June. The medical facilities required payment of expenses connected with the birth directly from her, because at the decisive time she was no longer a participant in public health insurance, per a decision of the Public Health Insurance Company. The plaintiff appealed that decision in court.

The matter before the District Court for Prague 6 concerned a complaint from the Institute for the Care for Mother and Child which sought to recoup from the defendant foreigner expenses connected with the medical care for and hospitalisation of her newborn son. Although, at the time of the birth, the defendant was a participant in public health insurance through her employment, her son, during the time of his hospitalisation, was not. The defendant had contractually committed directly with the plaintiff to pay the expenses for medical care. The applicants both concluded that the contested provisions of the Act on Public Health Insurance, which they were supposed to apply in the proceedings, were inconsistent with the Charter of Fundamental Rights and Freedoms, led to unjustified discrimination against foreigners, and negated the solidarity of the public health

insurance system. They suspended the proceedings and submitted the matter to the Constitutional Court for assessment.

II. The Constitutional Court concluded that there were no grounds to annul the contested provisions. Participation in the public health insurance system arises directly from the Act, which also determines the circle of persons who participate in it, and the conditions for participation to begin and cease. While a person participates in this system, he or she is entitled to receive payment-free health care. A person who does not meet the statutory conditions can either arrange private contractual insurance with one of the commercial health insurance companies or pay for care directly from their own funds. The content of the contested provisions is the definition of the personal scope of health insurance to persons who have permanent residence in the Czech Republic, as well as to persons who do not have permanent residence, but are employees of an employer that has a registered address or permanent residence in the country.

The Constitutional Court stated that the basic criterion for evaluating the justification of both petitions was Article 31 of the Charter, which provides that:

“Everyone has the right to the protection of his health. Citizens shall have the right, on the basis of public insurance, to free medical care and to medical aids under conditions provided for by law.”

Thus, it is evident that while the right to protection of health is a public subjective right that belongs to everyone in the territory of the Czech Republic (citizens, foreigners or stateless persons), the right to payment-free health care on the basis of public health insurance is provided only to citizens. Thus, in terms of constitutional guarantees, the difference between the right to payment-free health care and the right to protection of health cannot in fact be erased, as the applicants suggest.

The Constitutional Court further stated that distinguishing the state's obligations from social rights *vis-a-vis* various groups of the population based on the criterion of a close connection between a person and a particular state is not unusual or suspicious. Social security systems are of a sovereign territorial nature; they reflect the economic, political, social and cultural conditions of each country. The territorial nature of social protection systems and their diversity are the reason why persons who migrate between countries have no guarantee in principle that the national system of the “host country” will accept them into itself immediately, with no requirements whatsoever. The individual parts of the social protection system have

various degrees of sensitivity to possible abuse through so-called “social tourism”. These issues are resolved by international treaties of the “coordination” type – instruments of international law which guarantees migrating persons equal treatment. This is because social rights are not derived only from the postulate of protecting human dignity, but are also based on solidarity across the population.

Although Article 31 of the Charter distinguishes access to payment-free health care based on the criterion of state citizenship, the implementing legislative framework is considerably more accommodating in relation to foreigners in this regard. The decisive condition for access to public health insurance is not having state citizenship, but having permanent residence on the territory of the Czech Republic, or the registered address or permanent residence of the employer who employs these persons. Thus, it is evident that the fundamental distinguishing criterion is not the issue of state citizenship, but the *de facto* connection of the individual and the state, in the form of residence or performance of work on its territory.

In conclusion, the Constitutional Court acknowledged the difficult situation of both foreigners but noted that these proceedings were for a review of norms, where granting the petitions would have general effects, without more closely distinguishing the specific circumstances of individual cases. It is not the role of the Constitutional Court to initiate or enter into essentially political discussion on the theme of the appropriateness of the existing personal scope of health insurance. It is for the legislature to find an appropriate solution that would eliminate the existing risks arising from the existing legal framework.

III. The judge rapporteur in the case was Vojtěch Šimíček. A dissenting opinion to the verdict and the justification of the judgment was filed by judges Ludvík David, Jaroslav Fenyk, Jan Musil, Pavel Rychetský, Radovan Suchánek, David Uhlíř and Kateřina Šimáčková.

The dissenting judges believed that the petition should have been granted due to inconsistency between the contested framework with the universal right to protection of health and special protection for children and pregnant women. The majority of the plenum, when assessing the review of the violation of fundamental rights, neglected to apply the test of reasonableness. Otherwise it would have concluded that the rights had been violated. In the adjudicated matter, there was no legislative framework that would fulfil the rights in question in a constitutionally conforming manner, by creating a system for financing health care that would ensure the

availability of health care services. In the opinion of the dissenting judges, financial availability of health care for children and pregnant women should fall within the core of the fundamental rights in question. In contrast, the purpose of excluding certain groups from the public health care insurance system is to ensure that financial resources are not drawn from the system for the benefit of those other than the statutorily preferred groups of persons, and thus to ensure the system is protected from potential misuse by persons who do not contribute to the system, have no connection with the Czech Republic, and do not fall within any protected group.

The possibility of concluding a commercial health insurance contract was not, in the dissenting judges' view, a sufficient guarantee of the availability of health care in relation to vulnerable groups of foreigners, such as pregnant women and children. This is because there is a relatively high likelihood that, in view of the level of insurance premiums, these groups will be unable to conclude an insurance contract, or commercial health insurance companies will not conclude a contract with them at all, or will conclude it under conditions that will not ensure the financial availability of health care for these persons.

The dissenting judges noted that the restriction on the right of pregnant foreigners to access to payment-free health care services, which followed from the termination of their participation in public health insurance, was not in a proportional relationship with opposing legitimate interests. Yet the danger of abuse of the system by this group of people was minimal. Moreover, setting a protective period for pregnant employees would not be an excessive burden on the state. Thus, in the opinion of the dissenting judges, the situation where a pregnant foreigner, who resides in the territory of the Czech Republic on the basis of a long-term residence permit, has her participation in the public health insurance system end at the moment when her employment ends, without the state sufficiently ensuring financial availability of health care for her, even for a certain protective period after her employment ends, is unconstitutional. It cannot reasonably be required that the affected person must ensure the financial availability of health care in another manner, outside the possibilities envisioned by Czech law.

Likewise, the specific interest in protection of the state's financial resources cannot be considered sufficiently serious to justify the restriction of financial availability of health care for the children of persons who have health insurance. The dissenting judges emphasised that these are children of parents who contribute to the public health care system. That lowers the weight of the legitimate interest in protection the financial sustainability of the public health care

insurance system. If a parent participates in the public health care insurance, then his or her child should have a realistic chance to participate in the system, or should be ensured another adequate alternative means of participation. Concluding commercial health care insurance cannot be considered an adequate alternative. Therefore, the legislative framework, given the long-term non-existence of other measures that would adequately ensure the financial availability of health care, violates the right to protection of health and the right to special protection of children.

Languages:

Czech.



Identification: CZE-2017-2-005

a) Czech Republic / **b)** Constitutional Court / **c)** Second Panel / **d)** 16.05.2017 / **e)** II. ÚS 3122/16 / **f)** Biological father v. Registered father / **g)** <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors.**
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**
 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**
 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

Keywords of the alphabetical index:

Child, best interest / Paternity, marriage, presumption / Paternity, biological father / Paternity, contested / Paternity, denial / Paternity, dispute, time limit.

Headnotes:

A dismissal by the ordinary courts of an action by a putative biological father to determine paternity where the birth certificate mentions as the father the mother's husband on the basis of the first presumption of paternity does not violate the putative father's right to respect for private and family life.

Summary:

I. The ordinary courts dismissed an action by the applicant to determine the paternity of a minor daughter. The applicant, who was a national of Nigeria, claimed that he had, at the decisive time, sexual intercourse with the intervener and that he was the biological father, which was allegedly evidenced by the dark skin of the child. The birth certificate mentioned as the father of the minor daughter the mother's husband on the basis of the first presumption of paternity (Section 51.1 of Act no. 94/1963 Coll., as then amended, and Section 776 of the new Civil Code). The applicant wished to have access to the child, although he did not want to create a family with the mother. The courts decided in accordance with the application legal regulations that if a child is born during the marriage, paternity will be determined according to the first presumption by the birth during the marriage and the putative biological father may not apply to courts to determine the paternity of the child. Only parents registered on the birth certificate of the child are entitled to deny paternity that does not correspond to the factual situation. In this case, however, the parents failed to do so during the denial period. In his constitutional complaint, the applicant argued that the decisions by the ordinary courts violated his right to respect for private and family life and the right to a fair trial.

II. The Constitutional Court first addressed the admissibility of the constitutional complaint and the legal regulation relating to the presumptions of the determination of paternity according to the Family Act and the Civil Code, and summarised the most important judgments of the European Court of Human Rights relating to the denial and determination of paternity. It noted that the commentary literature criticised the case-law of the European Court of Human Rights which prefers the stability of the child's relationships to the actual biological relationships. The case-law did not imply an obligation to allow the putative father to deny the paternity of registered father, which was established by the first presumption of paternity.

The Constitutional Court concluded that the applicant was not entitled to bring an action to determine paternity under the current legislation. The birth certificate mentioned the mother's husband as the father in accordance with the first presumption of the determination of paternity. Neither of the parents of the minor daughter who did have the right to do so, had brought an action to deny paternity within the period prescribed by law.

The Constitutional Court admitted that this case was exceptional. Many facts, including the dark colour of the skin of the child, suggested that the applicant could actually be the biological father of the minor daughter. Under the current case-law of the European Court of Human Rights, however, the state does not have a positive obligation to ensure that the putative biological father should have the opportunity to claim the denial of the paternity of registered father established by the first presumption of paternity determination and the subsequent paternity determination. The Constitutional Court also noted that it cannot substitute for the will of the legislature. However, by comparison with German and Austrian private law, the circle of persons who may bring an action to deny or determine paternity appears inadequately narrow and the legislature should consider widening this circle, for example by the child concerned, as is the case under Austrian law, or by a man who claims to be the biological father, as is the case under German law. This would better reflect the standard of protection of private and family life under Article 8 ECHR.

The Constitutional Court also stressed that according to the case-law of the European Court of Human Rights, the putative biological father must have the opportunity to have at least access to the child. Under Czech law, such a father may file an application for the determination of the kinship under Section 771 of the Civil Code and, once kinship has been determined, submit the application to court under Section 927 of the Civil Code. The second option would be a direct application filed under Section 927 of the Civil Code, when the issue of kinship would be dealt with directly.

The Constitutional Court concluded that the ordinary courts had not violated by the contested decisions any of the applicant's constitutional rights, especially in terms of the protection of private and family life guaranteed by Article 10.2 of the Charter and Article 8 ECHR. It therefore dismissed the constitutional complaint.

III. The judge-rapporteur in the case was Mr Ludvík David. None of the judges put forward a dissenting opinion.

Cross-references:

European Court of Human Rights:

- *L. v. The Netherlands*, no. 45582/99, 01.06.2004, *Reports of Judgments and Decisions* 2004-IV;
- *Kroon and others v. The Netherlands*, no. 18535/91, 27.10.1994, Series A, no. 297-C;

- *Pini and others v. Romania*, nos. 78028/01 and 78030/01, 22.06.2004, *Reports of Judgments and Decisions 2004-V* (extracts);
- *Nylund v. Finland*, no. 27110/95, 29.06.1999, *Reports of Judgments and Decisions 1999-VI*;
- *Nekvedavicius v. Germany*, no. 46165/99, 19.06.2003;
- *Hülsmann v. Germany*, no. 33375/03, 18.03.2008;
- *Róžański v. Poland*, no. 55339/00, 18.05.2006;
- *Znamenskaya v. Russia*, no. 77785/01, 02.06.2005;
- *Rasmussen v. Denmark*, no. 8777/79, 28.11.1984, Series A, no. 87;
- *Yildirim v. Austria*, no. 34308/96, 19.10.1999;
- *Backlund v. Finland*, no. 36498/05, 06.07.2010;
- *Marckx v. Belgium*, no. 6833/74, 13.06.1979, Series A, no. 31;
- *X and Y v. Netherlands*, no. 8978/80, 26.03.1985, Series A, no. 91;
- *Von Hannover v. Germany*, no. 59320/00, 24.06.2004, *Reports of Judgments and Decisions 2004-VI*;
- *Nunez v. Norway*, no. 55597/09, 28.06.2011;
- *Odievre v. France*, no. 42326/98, 13.02.2003, *Reports of Judgments and Decisions 2003-III*;
- *Ahrens and Kautzor v. Germany*, no. 45071/09, 23338/09, 22.03.2012;
- *Chavdarov v. Bulgaria*, no. 3465/03, 21.12.2010;
- *Görgülü v. Germany*, no. 74969/01, 26.02.2004;
- *Marinis v. Greece*, no. 3004/10, 09.10.2014;
- *Kroon and others v. Netherlands*, no. 18535/91, 27.10.1994, Series A, no. 297-C;
- *Paulík v. Slovakia*, no. 10699/05, 10.10.2006, *Reports of Judgments and Decisions 2006-XI* (extracts).

Languages:

Czech.



Identification: CZE-2017-2-006

a) Czech Republic / **b)** Constitutional Court / **c)** First Panel / **d)** 29.06.2017 / **e)** I. ÚS 3226/16 / **f)** Failure to recognise the foreign legal and factual parenthood of one of the men constituting a same-sex couple is in violation of the right to family life and the best interest of the child / **g)** *Sbírka nálezů a usnesení* (Court's Collection); <http://nalus.usoud.cz> / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

- 3.17 General Principles – **Weighing of interests.**
- 5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners.**
- 5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors.**
- 5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation.**
- 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**
- 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

Keywords of the alphabetical index:

Adoption, child, best interests / Child, paternal rights / Couple, same-sex / Family, family life, definition / Homosexuality, family life / Judgment of foreign country / Marriage / Parentage, interests of the child / Parental rights / Paternity, biological father / Paternity, recognition / Public order / Surrogacy, principle.

Headnotes:

Failure to recognise a foreign decision determining the parenthood of a child of a same-sex couple in a situation when the family life has previously been factually and legally constituted through surrogacy owing to the fact that Czech law does not allow parenthood of a same-sex couple violates the best interest of the child protected by Article 3.1 of the Convention on the Rights of the Child and the right to family life under Article 10.2 of the Charter of Fundamental Rights and Freedoms.

Summary:

I. In 2015, the Supreme Court partially allowed the petition of the applicants seeking the recognition of a judgment of a Californian court determining the parenthood of the first and second applicant, i.e. two men, towards the third applicant (a minor child), originating on the basis of the institute of surrogacy. However, the Supreme Court recognised parenthood only in relation to the first applicant (a Czech national). With reference to this judgment, the competent authority issued a certificate of nationality for the child, after which they issued a birth certificate for the third applicant, mentioning the first applicant as the father whilst leaving the mother's box empty. The applicants accordingly filed another petition seeking the recognition of the relevant Californian judgment in relation to the second applicant as well.

The Supreme Court, however, dismissed their petition, on the basis of a manifest breach of public order, explaining that if it were to allow the petition, this would result in a situation corresponding to the joint adoption of a child by a same-sex couple, a state of affairs not accepted by Czech law. In their constitutional complaint, the applicants stated that the Supreme Court's failure to recognise the parenthood of the second applicant towards the child posed a legal risk for their continuing stay in the Czech Republic. They also alleged the inconsistency of the contested decision both with the best interest of the child and the prohibition of discrimination.

II. The Constitutional Court did not agree that the recognition of a family created legally abroad through the use of surrogacy would be a manifest violation of public order. The first and second applicants are spouses under foreign law and the social parents of the third applicant. In the USA, they are also the child's birth register parents and there is a fifty-per cent probability that the second applicant is also a biological parent of the third applicant. There is no doubt that the child has close links to both applicants. In view of these facts, all three applicants create a family life within the meaning of Article 8 ECHR and Article 10.2 of the Charter. Unlike adoption, it is not a family life created in the future but a legal and factual reality only requiring recognition by the Czech state.

The Constitutional Court stated that the Supreme Court judgment had turned down the applicants' request regarding the parenthood of the child, when family life had already been created between them through the use of surrogacy, due to the fact that Czech law did not allow parenthood by same-sex couples. This is contrary to the best interests of a child protected by Article 3.1 of the Convention on the Rights of the Child. In cases where a legally-based family life already exists between individuals, it is the duty of all public authorities to act in a way that allows this relationship to develop and the legal safeguards protecting the relationship between the child and their parents must be respected. The Supreme Court thus erred when it refused formal recognition of the parental relationship that already existed between the second and third applicants and dismissed the petition seeking recognition of the decision of the second applicant's declaration of paternity. The contested judgment is also contrary to the child's right to recognition of their identity in that it refused to recognise a legal relationship with one of the child's parents. In addition, the Constitutional Court did not find any arguments to suggest that the best interests of the child might be served by a decision other than recognition of the applicants' parenthood. It is in the best interests of the third applicant that their factual

and legal relationship in the country of residence with the second applicant as a parent should also be recognised in the territory of the Czech Republic.

The Constitutional Court acknowledged that the protection of the traditional family is generally a strong and legitimate interest. However, it cannot always prevail. Although there is a family life in the case of the applicants, once they disembark the aircraft at the airport when visiting the Czech Republic, the legal relationship between the second and third applicant ceases to exist as a result of the contested judgment. This is due solely to the fact that the first and second applicants are a homosexual couple, i.e. on the basis of their sexual orientation, which is their personality characteristic which cannot be changed. In the view of the Constitutional Court, it was unacceptable that such stigmatisation of the applicants should occur under the pretext of preserving the values of the traditional family.

Recognising the parenthood of the second applicant would not adversely affect the interests of any third party and would pose no threat to the traditional family unit. The Constitutional Court did not find any potential for negative impact on the interests of the third applicant. The Constitutional Court respects the legitimate interest in the protection of the traditional family, but this would not be compromised by allowing the applicants' petition in a substantial manner, as it would not create any new family ties but would only recognise already existing ties. Thus, the interference in the family life of the second and third applicants and the disparate treatment of the other applicant (albeit justified by the legitimate interest in protecting the traditional family) was not appropriate in this particular situation.

Even Article 15.1.e of the Private International Law Act, applied by the Supreme Court, which precludes a foreign decision being recognised if recognition would manifestly violate public order did not pose an obstacle to the petition being allowed. The fact that Czech law does not envisage the parenthood of same-sex couples does not lead to an inference that the situation in the applicants' case is so contrary to public order that the contradiction is obvious. Czech law already recognises the possibility of a child having two parents of the same sex.

The Constitutional Court did not deal with the objection of the first and second applicant alleging discriminatory treatment. It concluded that there had been no interference with the rights of the first applicant as the Supreme Court had allowed his petition in full.

The Constitutional Court allowed the complaint of the second and third applicants. It found that the Supreme Court, by means of the contested judgment, had violated the duty to take into account, as the first and foremost aspect, the best interests of the child under Article 3.1 of the Convention on the Rights of the Child as well as the rights of the second and third applicants to family life under Article 10.2 of the Charter. For this reason, it set aside the contested decision. However, it dismissed the complaint of the first applicant as being manifestly ill-founded.

III. Kateřina Šimáčková served as the Judge Rapporteur in the instant case. None of the Judges submitted a dissenting opinion.

Cross-references:

European Court of Human Rights:

- *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, 28.06.2007;
- *Menesson v. France*, no. 65192/11, 26.06.2014, *Reports of Judgments and Decisions 2014* (extracts);
- *Schalk and Kopf v. Austria*, no. 30141/04, 24.06.2010, *Reports of Judgments and Decisions 2010*;
- *Oliari and others v. Italy*, no. 18766/11, 21.07.2015;
- *Anayo v. Germany*, no. 20578/07, 21.12.2010;
- *Gözüm v. Turkey*, no. 4789/10, 20.01.2015;
- *Penchevi v. Bulgaria*, no. 77818/12, 10.02.2015;
- *Emonet and others v. Switzerland*, no. 39051/03, 13.12.2007;
- *X. and others v. Austria*, no. 19010/07, 19.02.2013, *Reports of Judgments and Decisions 2013*;
- *Négrépontis-Giannisis v. Greece*, no. 56759/08, 03.05.2011;
- *Paradiso and Campanelli v. Italy*, no. 25358/12, 24.01.2017, *Reports of Judgments and Decisions 2017*.

Languages:

Czech, English.



France

Constitutional Council

Important decisions

Identification: FRA-2017-2-007

a) France / **b)** Constitutional Council / **c)** / **d)** 31.05.2017 / **e)** 2017-651 QPC / **f)** *Association En marche!* [Duration of campaign electoral broadcasts in relation to parliamentary elections] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 01.06.2017, text no. 25 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.9.8.3 Institutions – Elections and instruments of direct democracy – Electoral campaign and campaign material – **Access to media**.
 5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections**.
 5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication**.
 5.3.24 Fundamental Rights – Civil and political rights – **Right to information**.
 5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.

Keywords of the alphabetical index:

Election campaign, access to media, public opinion, information.

Headnotes:

Provisions that may result in the granting of airtime on public service broadcasters that is manifestly disproportionate with the participation in the democratic life of the nation of political parties and groupings that are not represented by a parliamentary group within the National Assembly violate Article 4 of the Constitution (concerning political parties and groups) and encroach in a disproportionate manner upon the principle of electoral equality.

Summary:

I. On 29 May 2017 the Constitutional Council received an application for a priority preliminary ruling on the issue of constitutionality from the *Conseil d'État*, hearing summary proceedings, concerning the compatibility of Article L. 167-1 of the Electoral Code with the rights and freedoms guaranteed by the Constitution.

These provisions lay down the conditions under which political parties and groupings have access to radio and television airtime on public service broadcasting for official campaigns in relation to parliamentary elections.

They differentiate between two situations.

Parties and groupings represented within the National Assembly by a parliamentary group are granted a total of three hours' broadcasting during the first round and one hour and thirty minutes during the second round. These totals are divided into two equal shares between the parties and groupings comprising the majority and those not amongst the majority.

Any parties and groupings that are not represented by a parliamentary group within the National Assembly may for their part be allocated blocks of seven minutes during the first round and five minutes during the second round.

II. The Constitutional Council held that the legislature could take account of the composition of the National Assembly to which elections are to be held and, having regard to the votes received by them, allocate specific airtime to each of the parties represented therein.

However, the legislature must also stipulate rules that grant airtime to other parties that is not manifestly out of proportion with their electoral support.

In this case, the contested provisions give parties with a parliamentary grouping in the National Assembly airtime of three hours and one hour and thirty minutes, irrespective of the number of such groups. The airtime granted to the other parties is much more limited in comparison. In addition, identical airtime has been granted to parties and groupings that are not represented in the National Assembly, without any distinction as to the importance of the ideas or opinions represented by them.

The Constitutional Council inferred that the contested provisions may result in the granting of airtime on

public service broadcasters that is manifestly disproportionate with the participation in the democratic life of the nation of these political parties and groupings. It accordingly held that they violate Article 4 of the Constitution and encroach in a disproportionate manner on the principle of electoral equality.

The Constitutional Council consequently declared unconstitutional the provisions of Article L. 167-1.II and L. 167-1.III of the Electoral Code.

However, the Constitutional Council deferred until 30 June 2018 the date on which these provisions are to be repealed in order to leave time for the legislature to replace them.

Nevertheless, in order to put an end to the unconstitutionality ascertained, and having regard to the parliamentary elections to be held on 11 and 18 June 2017, the Constitutional Council formulated a transitory interpretative reservation.

In the event of a manifest imbalance, having regard to their electoral support, between the airtime granted to parties and groupings represented within the National Assembly and the airtime granted to those that are not represented therein, this transitory reservation requires that the importance of the ideas or opinions represented by the latter be taken into account by two criteria:

- first, the number of candidates standing;
- secondly, the representativeness of these parties or groupings, assessed in particular with reference to the results obtained in the elections held since the previous parliamentary elections.

Consequently, in the event of a manifest imbalance, the airtime granted to parties and groupings that are not represented in the National Assembly may be increased above the seven and five minutes respectively provided for by law. However, the additional time that may be granted to each party and grouping to which an increase may be granted must not exceed a maximum threshold set at five blocks of seven minutes for the first round and five blocks of five minutes for the second round.

Languages:

French.



Identification: FRA-2017-2-008

a) France / **b)** Constitutional Council / **c)** / **d)** 02.06.2017 / **e)** 2017-632 QPC / **f)** National Union of Associations of the Families of Persons who have Suffered Brain Injuries and Brain Damaged Persons [Collegial procedure prior to the decision to limit or withdraw treatment for a person who is unable to express his or her wishes] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 04.06.2017, text no. 78 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

5.3.13.2 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.**

Keywords of the alphabetical index:

Life, end, medical assistance.

Headnotes:

The contested provisions on medical support in end-of-life situations do not violate the principle of safeguarding human dignity.

Summary:

I. On 6 March 2017 the Constitutional Council received an application for a priority preliminary ruling on the issue of constitutionality from the *Conseil d'État* concerning the compatibility with the rights and freedoms guaranteed by the Constitution of Articles L. 1110-5-1, L. 1110-5-2 and L. 1111-4 of the Public Health Code (hereafter, the "PHC"), as in force following the enactment of Law no. 2016-87 of 2 February 2016 establishing new rights for the sick and for persons in end-of-life situations.

The contested provisions concern the medical support provided in end-of-life situations.

The three contested Articles concern first the principle of withdrawing treatment in instances of unreasonable aggressive medical treatment (Article L. 1110-5-1 of the PHC), second situations in which profound and lasting sedation resulting in the loss of

consciousness may be administered at the same time as withdrawal of life-support treatment (Article L. 1110-5-2 of the PHC), and thirdly the consideration given to the patient's wishes concerning the administration of medical treatment, including in situations in which he or she is unable to express his or her wishes (Article L. 1111-4 of the PHC).

Each of these Articles refers to the implementation of a collegial procedure, the arrangements governing which are objected to by the applicant association.

Article L. 1110-5-1 provides for such a procedure solely where the withdrawal of treatment is considered in terms of refusing to administer unreasonable aggressive medical treatment in the case of a patient who is unable to express his or her wishes.

Article L. 1110-5-2 provides that the patient must be incapable of expressing his or her wishes in order for the medical team to examine whether the medical conditions required for achieving profound and lasting sedation, coupled with a withdrawal of treatment, are met.

Article L. 1111-4 reiterates the requirement for a collegial procedure in the circumstances provided for under Article L. 1110-5-1.

The applicant association objects that these provisions violate the principle of safeguarding human dignity.

II. In its decision, the Constitutional Council rejected this line of argument based on the following considerations.

First, the physician must in advance enquire into the presumed wishes of the patient. He or she is required in this regard, pursuant to Article L. 1111-11 of the PHC, to abide by any advance care instructions formulated by the patient, and may depart from them only if they appear to be manifestly inappropriate or not applicable to the patient's medical circumstances. In the absence of such instructions, he or she must consult the person of trust designated by the patient or, in the absence of such a person, the patient's family or close friends.

Second, it does not fall to the Constitutional Council, which has no similar general power of appreciation and decision-making to that of Parliament, to impose its assessment in the place of that of the legislature with regard to the conditions under which, where the patient's wishes are not known, the physician may decide to withdraw or not to continue treatment in

cases in which the provision of aggressive medical treatment would be unreasonable. Where the patient's wishes are uncertain or unknown, the physician may not however base his or her decision on this fact alone, from which he or she cannot infer any presumption when deciding whether to withdraw treatment.

Third, the physician's decision may be taken only after conclusion of a collegial procedure intended to clarify the issue. This procedure enables the health care team in charge of the patient to verify compliance with the legal and medical requirements for withdrawing care and, under these circumstances, the administration of profound and lasting sedation together with an analgesic.

Finally, the physician's decision and his or her assessment of the patient's wishes are subject, as the case may be, to review by the courts.

The Constitutional Council also made the following additional comments when ruling on the basis of the right to an effective judicial remedy:

- first, a decision to withdraw or limit life-support that results in the death of a person who is unable to express his or her wishes must be notified to the persons with whom the physician has made enquiries concerning the patient's wishes under conditions that allow them sufficient time to file an appeal;
- second, it must be possible to appeal against such a decision in order to obtain its suspension, which must be examined as quickly as possible by the competent court.

Having made these clarifications, the Constitutional Council consequently upheld as constitutional the phrase "and, if the latter is unable to express his or her wishes, upon completion of a collegial procedure specified by regulations" featuring in the first subparagraph of Article L. 1110-5-1 of the Public Health Code, the fifth subparagraph of Article L. 1110-5-2 of the Code and the phrase "the collegial procedure referred to in Article L. 1110-5-1 and" featuring in the sixth subparagraph of Article L. 1111-4 of the Code.

Languages:

French.



Identification: FRA-2017-2-009

a) France / **b)** Constitutional Council / **c)** / **d)** 09.06.2017 / **e)** 2017-635 QPC / **f)** Mr Emile L. [Residence ban within the context of a state of emergency] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 11.06.2017, text no. 28 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.18 Institutions – **State of emergency and emergency powers.**
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**
 5.3.6 Fundamental Rights – Civil and political rights – **Freedom of movement.**
 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**

Keywords of the alphabetical index:

State of emergency, residence, prohibition.

Headnotes:

The provisions granting the *Préfet* (the State's representative in a *département* or region) the power, where a state of emergency has been declared and exclusively in relation to the locations situated within the area covered, "To impose a prohibition on residence within all or part of the *département* on any person who seeks to obstruct in any manner whatsoever the actions of the public authorities" do not strike a reasonable balance between, on the one hand, the constitutional objective of safeguarding public order and, on the other, freedom of movement and the right to lead a normal family life.

Summary:

I. On 29 March 2017, the Constitutional Council received an application for a priority preliminary ruling on the issue of constitutionality raised by Mr Émile L. concerning the compatibility with the rights and freedoms guaranteed by the Constitution of Article 5.3° of Law no. 55-385 of 3 April 1955 on the state of emergency.

These provisions grant the *Préfet* the power, where a state of emergency has been declared and exclusively in relation to the locations situated within the area covered, "To impose a prohibition on residence within all or part of the *département* on any person who seeks to obstruct in any manner whatsoever the actions of the public authorities".

II. The Constitutional Council held that these provisions do not strike a reasonable balance between, on the one hand, the constitutional objective of safeguarding public order and, on the other, freedom of movement and the right to lead a normal family life.

First, a residence ban may be imposed on any person “who seeks to obstruct ... the actions of the public authorities”. The law therefore does not restrict its scope solely to public order concerns that have consequences for the maintenance of order and security where a state of emergency has been declared.

Second, the discretion granted to the *Préfet* is not subject to any legislative framework: the residence ban may therefore also include the home and the place of work of the individual in question, and may even apply to the entire *département*, potentially on an open-ended basis. The Constitutional Council held that the Law should provide for more guarantees.

For these reasons, the Constitutional Council accordingly declared unconstitutional Article 5.3° of Law no. 55-385 of 3 April 1955. However, it deferred the repeal date for these provisions until 15 July 2017.

Languages:

French.



Identification: FRA-2017-2-010

a) France / **b)** Constitutional Council / **c)** / **d)** 31.07.2017 / **e)** 2017-749 DC / **f)** Comprehensive Economic and Trade Agreement between Canada, on the one part, and the European Union and its member states, on the other part / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 11.08.2017, text no. 1 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.1 General Principles – **Sovereignty**.
4.17 Institutions – **European Union**.
4.17.2 Institutions – European Union – **Distribution of powers between the EU and member states**.

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

Keywords of the alphabetical index:

Trade treaty / Precaution, principle / Constitutional identity / Arbitration, court.

Headnotes:

A joint agreement concluded by the European Union and its member states is subject to a different standard of constitutional review depending upon whether the stipulations examined fall under the exclusive competence of the European Union or whether competence over such matters is shared between the European Union and the member states.

Summary:

I. The Constitutional Council was apprised on the basis of Article 54 of the Constitution by more than 60 members of the National Assembly of the Comprehensive Economic and Trade Agreement (“CETA”) between Canada, on the one part, and the European Union and its member states, of the other part, which was signed on 30 October 2016. This Agreement was approved by the European Parliament on 15 February 2017.

The Constitutional Council was asked whether this Agreement contained any clause that violated the Constitution.

The general objective of the agreement submitted to the Constitutional Council for examination is to “create an expanded and secure market” for the goods and services of the parties and to establish rules “to govern their trade and investment”.

II. The decision by the Constitutional Council, which received sixteen external submissions, the list of which was published on the website of the Constitutional Council, and for which ten hearings were held, is comprised of 75 paragraphs. It rules on the various objections that have been brought against the Agreement.

Its main aspects are the following.

- The Agreement submitted to the Constitutional Council for examination has a joint status.

The key areas covered by the Agreement fall under the exclusive competence of the European Union, which results in transfers of competences already provided for under treaties previously signed by

France. However, certain aspects of the Agreement relate to areas over which competence is shared between the European Union and its member states.

The Constitutional Council took account of the special nature of the Agreement presented to it along with the case-law of the Court of Justice of the European Union in this area.

With regard to the areas over which the Union has exclusive competence, the Constitutional Council limited the extent of its review to a verification that the Agreement does not call into question any rule or principle inherent within the constitutional identity of France. In this case, having regard to the subject matter of the Agreement, which has the status of a trade treaty, the Constitutional Council held that no rule or principle of this nature had been called into question.

As regards matters relating to areas over which competence is shared between the European Union and its member states, the Constitutional Council verified whether the terms of the Agreement contained any clause that ran contrary to the Constitution.

The Constitutional Council ruled in particular on two aspects of the Agreement: the dispute resolution mechanism in the area of investment and the precautionary principle.

- The Constitutional Council ruled first on the Tribunal established by the agreement in order to settle disputes between investors and states.

The Tribunal created by the Agreement, subject to examination by the Council, is characterised by the following elements.

- The chapter of the Agreement that creates the Tribunal has the objective of furthering the protection of investments made within the States Parties.

- The scope of the dispute resolution mechanism is delineated by the terms of the Agreement.

- The powers granted to the Tribunal are limited to the payment of pecuniary damages and the restitution of property. The Tribunal cannot interpret or annul any decisions taken by states.

- The Tribunal includes an equal number of members appointed by the European Union and by Canada. The members appointed by the European Union are appointed by a joint committee with equal numbers of European Union and Canadian members, which decides by consensus. In addition, the position of the

European Union in this area must be established by mutual agreement with the member states.

- The members of the Tribunal and of the Appellate Tribunal must comply with the qualification requirements.

- Any difference may be brought, as the case may be, before the national courts and mechanisms have been put in place in order to avoid conflicts or divergences between the Tribunal established by the Agreement and the national courts.

Taking account of these aspects, and since they are not of such a nature as to impede any measures that the states may take in relation to the control of foreign investments, the Constitutional Council held that the establishment of the Tribunal provided for under the Agreement did not violate the essential conditions for the exercise of national sovereignty.

The Agreement also sets forth the "ethical standards" to which the members of the Tribunal are subject and the proper application of which should ensure that the principles of independence and impartiality are not violated.

Finally, the Constitutional Council held that the rules governing the Tribunal do not violate the principle of equality. In particular, if access to the Tribunal established by the Agreement is reserved in France only to Canadian investors, this fulfils a twofold general interest objective. First, the agreement establishes on a reciprocal basis a protective framework for French investors in Canada. Secondly, the rules in question enable Canadian investment to be attracted into France.

- The Constitutional Council also ruled on the precautionary principle, the constitutional status of which it reasserted.

In relation to this matter, the Council first and foremost referred to the commitments made by the parties in Chapter 22 of the Agreement, which is expressly dedicated to trade and sustainable development.

The Constitutional Council then went on to hold first that the absence of any express reference to the precautionary principle in the terms of the Agreement relating to areas over which competence is shared between the European Union and its member states does not entail any violation of this principle. In addition, the decisions of the joint committee must abide by the precautionary principle protected under European Union law, including in particular by Article 191 of the Treaty on the Functioning of the European Union.

Finally, the Constitutional Council based its ruling on paragraph 2 of Article 24.8 of the Agreement, which provides as follows:

“The Parties acknowledge that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.

These stipulations authorise the parties to take cost-effective measures in order to prevent environmental degradation where there are threats of serious or irreversible damage. In addition, the Joint Interpretative Instrument on the Agreement specifies that the parties are required to provide for and encourage high levels of environmental protection.

The Constitutional Council concluded that these stipulations, considered overall, are such as to guarantee compliance with the precautionary principle laid down in Article 5 of the Environmental Charter.

- The Constitutional Council finally ruled on the provisional application of the Agreement and the terms applicable to its abrogation.

Regarding the issue of provisional application, first of all, this relates only to the stipulations falling under the exclusive competence of the European Union. Second, the Agreement provides for the possibility to suspend such provisional application in the event that it is not possible for one of the parties to ratify it.

As regards the terms applicable to abrogation, it is apparent from the terms of the Agreement that it is not irrevocable. In addition, having regard to its objective, the Agreement does not affect any area that is inherent to national sovereignty.

After completing its analysis, and strictly within the framework of its examination of the constitutionality of an agreement which largely falls under the exclusive competence of the European Union, the Constitutional Council held that it did not presuppose any amendment of the Constitution.

Languages:

French.



Identification: FRA-2017-2-011

a) France / **b)** Constitutional Council / **c)** / **d)** 04.08.2017 / **e)** 2017-648 QPC / **f)** Squaring of the Net and others [Real time administrative access to connection data] / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 08.08.2017, text no. 59 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.18 Institutions – **State of emergency and emergency powers.**
5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**
5.3.36 Fundamental Rights – Civil and political rights – **Inviolability of communications.**

Keywords of the alphabetical index:

Connection, data, access / Terrorism, restrictive measure.

Headnotes:

The legislature has not struck a reasonable balance between, on the one hand, the prevention of breaches of public order and of crime and, on the other, the right to respect for private life by allowing a large number of persons to be subject to the intelligence gathering technique in question (real time administrative access to connection data), even if they do not necessarily have a close link with the terrorist threat.

Summary:

I. On 23 May 2017, the Constitutional Council received an application for a priority preliminary ruling on the issue of constitutionality from the *Conseil d'État* raised by the associations *La Quadrature du Net*, French Data Network and the *Fédération de fournisseurs d'accès à internet associatifs* [*Federation of Associated Internet Access Providers*]. This question concerned the compatibility with the rights and freedoms guaranteed by the Constitution of certain provisions of Article L. 851-2 of the Internal Security Code, as in force following the enactment of Law no. 2016-987 of 21 July 2016 extending the application of Law no. 55-385 of 3 April 1955 on the state of emergency and laying down measures to reinforce the combating of terrorism.

These provisions authorise the administration, for the purpose of preventing terrorism, to obtain real time connection data in relation to two categories of individual.

The following are covered:

- first, individuals identified in advance who are liable to be related to a threat;
- second, individuals associated with another individual who is covered by an authorisation where there are serious grounds to consider that they are capable of providing information regarding the matter on which the authorisation was based.

Languages:

French.



The part of the contested provisions that provides that the administration may be authorised to collect connection data from the first of these two categories of individual was upheld as constitutional.

II. Regarding this matter, the Constitutional Council based its position on the manner in which the measure is framed under the legislation: the intelligence gathering technique in question can be implemented only for the purpose of preventing terrorism, authorisations are granted for a renewable period of four months and are granted by the Prime Minister after consulting the National Commission for the Control of Intelligence Techniques, this Commission reviews the deployment of the intelligence gathering technique and any individual who wishes to establish whether it has been unlawfully deployed may apply to the *Conseil d'État*.

On the other hand, the Constitutional Council ruled unconstitutional the provisions of Article L. 851-2 of the Internal Security Code, which enables connection data to be collected from the second category of individual covered by it, namely persons associated with an individual covered by an authorisation.

In relation to this matter, the Council held that the legislature had authorised a large number of persons to be subject to the intelligence gathering technique in question even though they do not necessarily have any close link with the terrorist threat. Accordingly, given the absence of any requirement that the number of authorisations in force at any given time must be limited, the Council held that the legislature had not struck a reasonable balance between, on the one hand, the prevention of breaches of public order and of crime and, on the other, the right to respect for private life.

The Constitutional Council consequently upheld as constitutional the first sentence of Article L. 851-2.I of the Internal Security code. However, the Council objected to the second sentence of paragraph I and deferred the date of its repeal until 1 November 2017.

Germany

Federal Constitutional Court

Important decisions

Identification: GER-2017-2-008

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 13.04.2017 / **e)** 2 BvL 6/13 / **f)** Nuclear fuel tax / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** *Zeitschrift für Zölle und Verbrauchsteuern* 2017, 182; *Neue Zeitschrift für Verwaltungsrecht* 2017, 1037; *Deutsches Verwaltungsblatt* 2017, 891; *Neue Juristische Wochenschrift* 2017, 2249; *Betriebsberater* 2017, 1827; *Höchstrichterliche Finanzrechtsprechung* 2017, 760; *Zeitschrift für neues Energierecht* 2017, 260; *Deutsches Steuerrecht kurzgefasst* 2017, 262; *Juristenzeitung* 2017, 941; CODICES (German).

Keywords of the systematic thesaurus:

3.6.3 General Principles – Structure of the State – **Federal State**.
 4.5.5 Institutions – Legislative bodies – **Finances**.
 4.8.7 Institutions – Federalism, regionalism and local self-government – **Budgetary and financial aspects**.
 4.10.7 Institutions – Public finances – **Taxation**.

Keywords of the alphabetical index:

Tax law, amendments / Taxation, power.

Headnotes:

1. Regarding those taxes and tax types listed in Articles 105 and 106 of the Basic Law, the Basic Law uses defined tax types.

2. Within the defined tax types, which are set forth in Articles 105 and 106 of the Basic Law and which must be interpreted broadly, the legislator is free to “invent” new taxes.

3. The attribution of legislative competences to the Federation and the *Laender* in Article 105 of the Basic Law in conjunction with Article 106 of the Basic Law is definitive. A general right to invent taxes which exceed the scope of tax types listed in Article 106 of the Basic Law cannot be derived from the Basic Law.

4. Taxing the business consumption of a mere means of production is generally not compatible with a legislative concept of taxes on consumption which are designed to gain access to the private use of income.

5. The nuclear fuel tax is not a tax on consumption within the meaning of Article 106.1 no. 2 of the Basic Law.

Summary:

I. Pursuant to the Act on Nuclear Fuel Tax of 8 December 2010 (hereinafter, the “Act”), nuclear fuel used for the commercial generation of electric power was subject to taxation. The Act imposed taxation on processes in which the self-sustaining nuclear chain reaction was triggered before 1 January 2017. According to the legislator, the tax constituted “a tax on consumption within the meaning of the Fiscal Code”. The operators of nuclear power plants were the tax debtors. The tax revenues from the nuclear fuel tax for the federal budget amounted to a total of EUR 6,285 billion between 2011 and 2016.

In 2011, the plaintiff of the initial proceedings inserted new fuel elements into a nuclear power plant it operated, triggered a self-sustaining chain reaction and paid, after a respective tax return, a tax amount of about EUR 96 million. Afterwards, it took legal action against the tax return. The Hamburg Finance Court suspended the proceedings and referred the question of whether the Act was incompatible with the Basic Law to the Federal Constitutional Court.

II. The Federal Constitutional Court decided that the Act was incompatible with Article 105.2 in conjunction with Article 106.1 no. 2 of the Basic Law, and void. The federal legislator lacked the legislative competence to enact this Law.

The decision is based on the following considerations:

The constitutional provisions of the Basic Law governing public finances (*Finanzverfassung*) are cornerstones of the federal order. They constitute a coherent framework and procedural system and are designed with a view to clearly define forms and commit to these forms. Strict compliance with the areas of competence assigned to the Federation and the *Laender* under the Basic Law with regard to public finances has a paramount significance for the stability of the federal system. In addition to their ordering function, the constitutional provisions governing public finances serve the function of protecting and limiting, which prevents the regular legislator from exceeding the limits set for it.

Article 105 of the Basic Law provides the basis for the legislative competences of the Federation and the *Laender* with regard to taxes. Article 106 of the Basic Law attributes the revenues of certain taxes either to the Federation, or the *Laender*, or jointly to both. New taxes must be assessed with regard to whether they are compatible with the characteristics of the tax types defined in Articles 105 and 106 of the Basic Law.

Neither the Federation nor the *Laender* have the right to freely invent taxes; only such taxes may be introduced that generate revenues which are allocated to the Federation, the *Laender* or both of them jointly in Article 106 of the Basic Law. Otherwise, the allocation of the new tax type's revenues would be unclear. The regular legislator may not "force" the constitution-amending legislator to pass a law by first introducing a new tax type, which then requires an amendment to Article 106 of the Basic Law.

Any uncertainty regarding the allocation of revenues can lead to distortions within the fiscal system and thus be contrary to its function of establishing peace and avoiding unnecessary conflicts between the Federation and the *Laender*. The coherence and the systemising function of the constitutional provisions governing public finances safeguard public trust in only being burdened according to the constitutional framework. Protecting individuals from an incalculable variety of taxes is an important purpose of the provisions governing the legislative competences regarding tax law. A right to invent taxes would not be in accordance with these standards.

With regard to the question of whether the nuclear fuel tax can be considered a tax on consumption, the necessary overall assessment led to the result that the central criterion of a tax on consumption, i.e. the taxation of the private use of income, is lacking. The taxation of a mere means of production is contrary to this tax type. The explanatory materials to the draft of the Act also do not support the argument that the legislator intended to link the taxation to the private use of income.

As the Act violates Article 105.2 in conjunction with Article 106.1 no. 2 of the Basic Law it had to be declared void. An exception to the retroactive effect of the decision is not warranted in the present case.

III. Justices Huber and Müller gave a separate opinion. They agree with the result of the Panel majority's decision, but not with the reasons on which the decision is based.

Their opinion is based on the following considerations:

Article 105 of the Basic Law contains a provision on the attribution of legislative competences in the area of tax law, with Article 105.2 of the Basic Law subjecting "other taxes" to the concurrent legislation of the Federation. It cannot be inferred from the wording of the provisions that only the taxes listed in Article 106 of the Basic Law were meant. Legislative structure, purpose and history of the constitutional provisions governing public finances also suggest recognition of the concurrent competence of the Federation pursuant to Article 105.2 of the Basic Law.

While Article 105 of the Basic Law attributes legislative competences in the area of tax law, Article 106 of the Basic Law serves to allocate the tax revenues to the Federation, the *Laender* or both jointly. There are no apparent reasons for inferring limitations to the legislative competences based on the allocation of tax revenues in Article 106 of the Basic Law.

It is not comprehensible that the competence of the legislator deciding on tax matters should not include the allocation of tax revenues. When introducing a new tax which is not listed in Article 106 of the Basic Law, the regular legislator can also decide on the allocation of the revenues. In addition, the requirement of the *Bundesrat's* consent to tax legislation can serve to prevent the Federation from one-sidedly accessing tax revenues and as well as a "competition of tax inventions".

The requirement of the *Bundesrat's* consent pursuant to Article 105.3 of the Basic Law must be extended, beyond its wording, to cases in which the Federation creates tax revenues for the first time, by virtue of its concurrent legislative competence, and thereby excludes the *Laender*.

According to these standards, the Federation did have a concurrent legislative competence for the nuclear fuel tax. However, the Act is formally unconstitutional and void as it was enacted without the *Bundesrat's* consent.

Cross-references:

Federal Constitutional Court:

- 2 BvL 2/14, 17.01.2017, to be published in Official Digest (*Entscheidungen des Bundesverfassungsgerichts – BVerfGE*);
- 1 BvR 905/00, 20.04.2004, *BVerfGE* 110, 274 <297 et seq.>.

Languages:

German.

*Identification:* GER-2017-2-009

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 08.05.2017 / **e)** 2 BvR 157/17 / **f)** / **g)** / **h)** *Neue Zeitschrift für Verwaltungsrecht* 2017, 1196; *Asylmagazin* 2017, 292; *Europäische Grundrechte Zeitschrift* 2017, 441; *Informationsbrief Ausländerrecht* 2017, 299; *Verwaltungsrundschau* 2017, 357; CODICES (German).

Keywords of the systematic thesaurus:

5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status.**

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

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

5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum.**

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

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

5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living.**

Keywords of the alphabetical index:

Asylum law, reasoning, adequacy / Asylum, request, examination, determination of the Member State responsible / Asylum, request, refusal / Asylum proceedings, duty to investigate / Asylum proceedings, effective legal protection, preliminary injunction / Common European Asylum System / Deportation, receiving state, assurances / Deportation, reception conditions, third country / Effective remedy, suspensive effect / European Union,

Member States, mutual confidence / International protection, beneficiary / Most vulnerable groups, protection / Refugee, integration / Refugee, rights, adequate accommodation / Refugee, rights, national treatment / Refugee, rights, social benefits / Refugee, rights, standard of living.

Headnotes:

1. Where there are indications suggesting that the conditions under which beneficiaries of international protection are received in a third country could amount to inhuman and degrading treatment within the meaning of Article 3 ECHR, thus calling into question the principle of mutual confidence between Member States of the European Union, the regular courts must investigate the relevant facts in a manner that is sufficiently reliable and satisfactory in scope.

2. If these relevant facts, pertaining to reception conditions in a third country, are neither available nor to be obtained in the course of proceedings for preliminary legal protection sought against a notice of deportation, the principle of effective legal protection requires that a preliminary injunction be granted.

Summary:

I. The applicant is a Syrian national who entered the territory of the Federal Republic of Germany in July 2015. His subsequent application for asylum in Germany was rejected by the Federal Office for Migration and Refugees (hereinafter, the “Office”) due to the fact that he had already been granted international protection in Greece. During the German asylum proceedings, the applicant submitted that he had not received any form of support from the Greek authorities and, as a result, had been forced to live on the streets. His application for a preliminary injunction before the German administrative courts, directed against the rejection of his asylum request and against the deportation notice regarding his imminent transfer back to Greece, was unsuccessful. The administrative court held that, based on the information available during the expedited proceedings, there was no reason to believe that beneficiaries of protection in Greece were systematically subjected to less favourable treatment than Greek citizens. Furthermore, the administrative court assumed that the situation of recognised refugees in Greece had considerably improved in recent months.

With his constitutional complaint, the applicant primarily claims a violation of his right to effective legal protection (first sentence of Article 19.4 of the Basic Law).

II. The First Chamber of the Second Panel of the Federal Constitutional Court held that the constitutional complaint is manifestly well-founded and granted the relief sought.

The decision is based on the following considerations:

The procedural guarantee laid down in the first sentence of Article 19.4 of the Basic Law confers a right to effective judicial review. In cases involving a review of whether the reception conditions of beneficiaries of international protection in a third country constitute inhuman and degrading treatment, the procedural duty to sufficiently investigate the facts of the case has a constitutional dimension. At least in the event that there are indications of a risk of inhuman and degrading treatment, the review conducted by the regular courts must be based on facts that have been established in a sufficiently reliable manner and are satisfactory in scope. Before a deportation to a third country is permissible, the competent authorities and courts may be required to investigate the situation on the ground and, if appropriate, obtain relevant assurances from the competent authorities abroad.

If the relevant information or assurances, respectively, cannot be obtained in the course of expedited proceedings, an order of suspensive effect must be granted in relation to the asylum and deportation proceedings in order to ensure effective legal protection.

The challenged decisions do not satisfy these requirements. The administrative court's conclusions are essentially based on the assumption that the conditions under which the applicant, as a recognised beneficiary of protection, will be received differ from how refugees are received in Greece. In the view of the administrative court, the applicable requirements under EU law were met, given that recognised beneficiaries of international protection hosted in Greece are entitled to national treatment under the Convention Relating to the Status of Refugees.

However, the Federal Constitutional Court held that the administrative court failed to consider that any social benefits available in Greece are subject, in practice, to legal residency requirements of up to 20 years, thus essentially excluding beneficiaries of international protection from eligibility. Moreover, it would have been necessary to take into account the assessment that, in accordance with the view of the European Court of Human Rights, both recognised beneficiaries of protection as well as asylum-seekers are to be considered most vulnerable groups, which are dependent on state support facilitating integration

in the receiving state; such support is required for a transitional period at least.

Therefore, in the applicant's case, the administrative court should have assessed if, and to what extent, the applicant is guaranteed access to accommodation, food and sanitation, at least for a minimum period following arrival. In the proceedings in question, Greek authorities did not offer any assurances as regards securing accommodation for the applicant during a minimum transitional period, nor does it appear that the Office or the Federal Government had requested any such assurance. Rather, the Office based the reasoning for its decision refusing asylum solely on the assumption that Greece would comply with the applicable provisions of EU law.

The Federal Constitutional Court remanded the matter to the administrative court for a new decision. In this respect, the administrative court must assess to what extent the general social benefits in Greece, as recently introduced effective 1 January 2017, are in fact available to beneficiaries of international protection.

Cross-references:

Federal Constitutional Court:

- 2 BvR 2015/09, 25.01.2011, Official Digest (*Entscheidungen des Bundesverfassungsgerichts – BVerfGE*) 128, 224 <224 et seq.>, ECLI:DE:BVerfG:2011:rs20110125.2bvr201509;
- 2 BvQ 56/09, 08.09.2009, First Chamber of the Second Panel of the Federal Constitutional Court of Germany, ECLI:DE:BVerfG:2009:qk20090908.2bvq005609;
- 2 BvR 1506/03, 05.11.2003, *BVerfGE* 109, 38 <61 et seq.>, ECLI:DE:BVerfG:2003:rs20031105.2bvr150603;
- 2 BvR 1938/93, 2 BvR 2315/93, 14.05.1996, *BVerfGE* 94, 49 <85 et seq.>, ECLI:DE:BVerfG:1996:rs19960514.2bvr193893;
- 1 BvR 1019/82, 23.02.1983, *BVerfGE* 63, 215 <223 et seq.>.

European Court of Human Rights:

- *M.S.S. v. Belgium and Greece*, no. 30696/09, 21.01.2011, ECLI:CE:ECHR:2011:0121JUD003069609; *Reports of Judgments and Decisions* 2011;
- *Tarakhel v. Switzerland*, no. 29217/12, 04.11.2014, ECLI:CE:ECHR:2014:1104JUD002921712; *Reports of Judgments and Decisions* 2014 (extracts).

Court of Justice of the European Union:

- C-411/10 and C-493/10, 21.12.2011, *N.S. v. Secretary of State for the Home Department, M.E. v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, ECLI:EU:C:2011:865.

Languages:

German.



Identification: GER-2017-2-010

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 23.05.2017 / **e)** 2 BvR 883/14, 2 BvR 905/14 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** *Zeitschrift für Tarif-, Arbeits- und Sozialrecht des Öffentlichen Dienstes* 2017, 561; *Deutsche Richterzeitung* 2017, 326; *Zeitschrift für Beamtenrecht* 2017, 340; CODICES (German).

Keywords of the systematic thesaurus:

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

5.2 Fundamental Rights – **Equality**.

5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law**.

Keywords of the alphabetical index:

Civil servant, remuneration.

Headnotes:

1. The requirement of fixed intervals between remuneration grades (*Abstandsgebot*) constitutes an independent traditional principle of the professional civil service system (*hergebrachter Grundsatz des Berufsbeamtentums*) which is closely linked to the principle of alimentation (*Alimentationsprinzip*) and to the principle of performance (*Leistungsprinzip*).

2. Regardless of the legislator's broad leeway to design, the requirement of fixed intervals bars the legislator deciding on remuneration matters (*Besoldungsgesetzgeber*) from permanently levelling

the intervals between different remuneration grades as far as the legislator does not use, in a documented way, its authority to re-evaluate the significance of professional positions and to restructure the whole remuneration framework.

Summary:

I. Civil servants in the Eastern German *Laender* received lower amounts of remuneration than those in the Federation and the Western German *Laender*. The *Land* Saxony adjusted the remuneration for civil servants in remuneration grades up to grade A 9 to the level of the respective Western German remuneration amounts taking effect on 1 January 2008. The remuneration grades A 10 and above were kept at the lower level of the Eastern German remuneration amounts until 31 December 2009. In order to rule out the situation that a civil servant in grade A 10 received smaller amounts of remuneration and benefits than a comparable civil servant in grade A 9, the differential between the remuneration according to grade A 9 (West) and grade A 10 (East) was paid, and an additional EUR 10 was granted. If a civil servant in grade A 10 received the same or an insignificantly higher amount as a comparable civil servant in grade A 9, the additional EUR 10 was not granted. Beyond the later adjustment to the higher Western German remuneration level, the rise in remuneration of 2.9% in 2008 was also delayed by four months.

One applicant is, the other one was, a police officer in remuneration grade A 10 in Saxony. Both received the lower amounts of the Eastern German remuneration scheme. In addition, both were affected by the delayed rise in remuneration in 2008. Legal action against the delayed adjustment as well as the delayed rise remained unsuccessful.

The applicants claimed violations of their rights pursuant to Articles 3.1 and 33.5 of the Basic Law.

II. The Federal Constitutional Court decided that the delayed adjustment to the Western German level of remuneration and benefits for the remuneration grades A 10 and above as well as the delayed rise in remuneration in 2008 are incompatible with Articles 33.5 and 3.1 of the Basic Law.

The decision is based on the following considerations:

Among the most important principles of the civil service system are the principle of alimentation, the principle of performance, the career principle (*Laufbahnprinzip*), and the requirement of fixed intervals between remuneration grades, which is closely linked to these principles.

The principle of alimentation imposes the obligation on the state (*Dienstherr*) to appropriately support civil servants and their families as well as to grant them an appropriate maintenance according to the development of the economic and financial situation as well as the general standard of living. The level of this maintenance is dependent on their rank, the responsibilities related to their office, and the relevance of professional civil service for the general public. The financial situation of public budgets or the objective of consolidating the budget alone cannot justify limitations of the principle of alimentation, which has to be appropriate to the office.

The principle of performance essentially refers to a merit-based approach, which not only relates to access to the professional civil service, but also to promotions. Civil servants are therefore subject to assessments of aptitude, qualifications and professional achievements.

According to the career principle, access to the civil service and professional success are dependent on standardised minimum requirements. The organisation of the public administration reflects the fact that offices for which higher remuneration is provided are the ones which perform more important tasks for the state. Therefore, considering the principle of performance and the career principle, the graded structure of the offices must be accompanied by grading the remuneration.

Provisions regarding remuneration and benefits are subject to the general guarantee of the right to equality. As a consequence, civil servants with equal or equivalent offices must, in general, receive the same amount of remuneration. This does not apply without limitations, but differentiations are only permissible if they are, according to the standard of Article 3.1 of the Basic Law, sufficiently justified. Due to the legislator's wide leeway to design, the Federal Constitutional Court's review is restricted to differentiations which are evidently objectionable under the Basic Law.

There are no apparent factual reasons which would be sufficient to justify the delayed rise in remuneration of 2.9% and the resulting disadvantaging of civil servants in remuneration grades A 10 and above compared to those in remuneration grades A 9 and below. The delay violates the applicants' rights set forth in Article 33.5 in conjunction with Article 3.1 of the Basic Law.

The unequal adjustment to the Western German remuneration level for civil servants in remuneration grades A 10 and above compared to those in remuneration grades A 9 and below is also incompatible with the Basic Law.

The adjustment to the Western German remuneration level can be understood as a system change, because it can be seen as a definite departure from a differentiation which resulted from taking account of the consequences of German unification. However, the two-phased adjustment of remuneration grades to the Western German level reflects a decision on how the system change was implemented and only amounts to a singular measure which is merely based on reasons of the state budget.

The challenged measure levels the interval between remuneration grades A 9 and A 10 (East) and therefore violates the requirement of fixed intervals between remuneration grades.

There are no apparent factual reasons for justifying this violation.

Cross-references:

Federal Constitutional Court:

- 2 BvL 19/09, 17.11.2015, Official Digest (*Entscheidungen des Bundesverfassungsgerichts – BVerfGE*) 140, 240;
- 2 BvL 17/09, 05.05.2015, *BVerfGE* 139, 64, *Bulletin* 2015/2 [GER-2015-2-008];
- 2 BvL 4/10, 14.02.2012, *BVerfGE* 130, 263;
- 2 BvL 11/07, 28.05.2008, *BVerfGE* 121, 205 <226>;
- 2 BvL 11/04, 20.03.2007, *BVerfGE* 117, 372;
- 2 BvL 16/02, 06.05.2004, *BVerfGE* 110, 353;
- 2 BvL 3/00, 12.02.2003, *BVerfGE* 107, 218.

Languages:

German.



Identification: GER-2017-2-011

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 13.06.2017 / **e)** 2 BvE 1/15 / **f)** Oktoberfest / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** *Europäische Grundrechte Zeitschrift* 2017, 455; *Neue Zeitschrift für Verwaltungsrecht* 2017, 1364; CODICES (German).

Keywords of the systematic thesaurus:

1.3.4.2 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between State authorities.**

4.5.2.2 Institutions – Legislative bodies – Powers – **Powers of enquiry.**

4.5.7 Institutions – Legislative bodies – **Relations with the executive bodies.**

Keywords of the alphabetical index:

Confidential information, protection / Informant / Informant, anonymity / Informant, identity, disclosure / Intelligence service / Intelligence, gathering / Parliament, controlling function / Parliament, group, rights / Police, undercover operation / Security, external and internal / Security, national.

Headnotes:

1. It follows from the second sentence of Article 38.1 of the Basic Law and the second sentence of Article 20.2 of the Basic Law that the German *Bundestag*, parliamentary groups as well as individual members of the *Bundestag* have the right to ask questions and to receive information from the Federal Government; this right generally corresponds to a duty of the Federal Government to give answers. This also applies to questions relating to activities of intelligence services.

2. Given the importance of the use of covert sources to intelligence services for the purpose of gathering information, the Federal Government may generally refuse – based on threats to national security interests or to the fundamental rights of persons acting covertly – to provide information on such persons, even though Parliament has a significant interest in receiving information in this regard; the Federal Government may refuse to provide the information sought if this disclosure would expose the informants in question or if their identification appears likely.

3. Protection of sources and of informants in particular does not only serve the interests of the persons concerned. In fact, it is also of great significance for the modes of operation and the functioning of intelligence services. It impairs confidence in the effectiveness of a commitment to maintain confidentiality if information relating to informants and other covert sources is released.

4. As far as questions relating to the employment of specific persons as informants are concerned, it is conceivable that there are strictly limited exceptional

cases in which the parliamentary interest in information will prevail. This applies, in particular, if, due to the particular circumstances of the case, a threat to constitutionally protected interests is ruled out or if it is unreasonable to assume that the functioning of the intelligence services might be impaired.

Summary:

In an order published on 13 June 2017, the Second Panel of the Federal Constitutional Court decided that the Federal Government in part violated the rights of the parliamentary groups *BÜNDNIS 90/DIE GRÜNEN* and *DIE LINKE* as well as the rights of the German *Bundestag* by refusing, based on national security interests and the fundamental rights of the covertly acting persons, to provide exhaustive answers to enquiries concerning intelligence obtained in relation to the 1980 *Oktoberfest* bombing.

On 26 September 1980, an explosive device detonated at the main entrance of the Munich *Oktoberfest*. After investigations by the Federal Prosecutor General (*Generalbundesanwalt*) into the bombing were concluded in 1982, the role of both Karl-Heinz Hoffmann, founder of the so-called “*Wehrsportgruppe Hoffmann*”, and Heinz Lembke, a militia fighter and member of the “*Wehrsportgruppe*” who committed suicide by hanging himself in 1981 while in remand detention (*Untersuchungshaft*), remained unresolved. In December 2014, the Federal Prosecutor General reopened investigations in relation to the 1980 *Oktoberfest* bombing after a previously unknown witness had come forward.

The parliamentary groups *BÜNDNIS 90/DIE GRÜNEN* and *DIE LINKE* challenge the incomplete answers provided in response to two minor interpellations (*Kleine Anfragen*) [pursuant to Rule 104 of the Rules of Procedures of the German *Bundestag*] regarding the findings of the intelligence services on the Munich *Oktoberfest* bombing, and the possible involvement in this regard of informants working for the intelligence services. The minor interpellation of the parliamentary group *BÜNDNIS 90/DIE GRÜNEN* submitted in 2014 comprised, in particular, questions relating to a possible recruitment of Heinz Lembke as informant of a security agency of the Federation or a *Land* (federal state). The minor interpellation of the parliamentary group *DIE LINKE* submitted in 2015 comprised, in particular, questions relating to the volume and organisation of the files on the *Oktoberfest* bombing, as well as to sources of the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*). Another submitted question asked whether and, if so, how many members of the “*Wehrsportgruppe Hoffmann*” had

acted as confidential informants for the Federal Office for Protection of the Constitution or, respectively, for the corresponding agencies of the *Laender*. The Federal Government refused to answer some of the questions, arguing that the relevant information was confidential and that disclosure could result in threats to security interests of the Federation or a *Land*.

The Court decided as follows.

Under the second sentence of Article 38.1 of the Basic Law and the second sentence of Article 20.2 of the Basic Law, the German *Bundestag* has the right to ask questions and to receive information from the Federal Government; this right extends to the individual members of the *Bundestag*, as well as to parliamentary groups in their capacity as an association of members of the *Bundestag*, and the right generally corresponds with a duty of the Federal Government to give answers.

The Federal Government is, in principle, obliged to respond to parliamentary queries concerning activities of the intelligence services. Given the importance of the use of covert sources to intelligence services for the purpose of gathering information, however, the Federal Government may generally refuse – based on threats to national security interests or to the fundamental rights of persons acting covertly – to provide information on such persons, even though Parliament has a significant interest in receiving information in this regard. The Federal Government may refuse to provide such information if sharing the requested information were to result in exposure of the informants in question. However, the parliamentary right to information may prevail, in strictly limited exceptional cases in which it would be unreasonable to expect, due to the particular circumstances of the case, that this will result in a threat to constitutionally protected interests or an impairment of the functioning of the intelligence services.

When refusing, in part or in full, to provide the requested information, the Federal Government is obliged to sufficiently substantiate its reasons for doing so, thereby allowing the *Bundestag* to assess and determine whether to accept this refusal to provide answers or to take further steps for the purpose of enforcing its parliamentary request for information.

Languages:

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



Identification: GER-2017-2-012

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 20.06.2017 / **e)** 1 BvR 1978/13 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** *Europäische Grundrechte Zeitschrift* 2017, 475; *Zeitschrift für Datenschutz* 2017, 476; CODICES (German).

Keywords of the systematic thesaurus:

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

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

5.3.25.1 Fundamental Rights – Civil and political rights – Right to administrative transparency – **Right of access to administrative documents.**

Keywords of the alphabetical index:

Archive, document, access / Document, access, held by third party / Document, right of access, scope, exceptions / Freedom of information / Information, access, denied / Information, access, limit / Interpretation in accordance with the Constitution / Remedy, exhaustion / Subsidiarity, principle, constitutional proceedings.

Headnotes:

On the requirements for a constitutional complaint based on the first alternative of the first sentence of Article 5.1 of the Basic Law, in which the applicant asserts a right of access to information with regard to official documents which are in the possession of private third parties.

Summary:

I. The applicant is a journalist and historian. She has been conducting research into claims that in the 1960s, the German Federal Government under former Federal Chancellor Konrad Adenauer had made covert payments to the State of Israel, funding the Israeli nuclear weapons programme. During the course of her research, the applicant arrived at the conclusion that certain official documents exist, drawn up by the Federal Chancellery for the Federal Government. These documents, some of which were

classified, had been transferred to the archives of two private foundations. The applicant requested access to these documents, but was refused by the foundations. Thereupon, the applicant requested the Federal Archives to provide access to these official documents. The Federal Archives refused on the grounds that they could only provide access to documents in their possession and the documents in question were not held at the Archives. The applicant then pursued the matter before the administrative courts, but her claims were rejected and the right to appeal was denied. In her constitutional complaint challenging the decisions of the administrative courts, the applicant claims a violation of the freedom of information on the basis of the first alternative of the first sentence of Article 5.1 of the Basic Law.

II. The Court held the constitutional complaint to be inadmissible; at the same time, it recognised that many of the legal issues raised by the case with regard to the applicable statutory law on access to information have not yet been resolved by the regular courts.

The decision is based on the following considerations:

The Court held the complaint to be inadmissible because it does not fulfil the requirement of subsidiarity (first sentence of § 90.2 of the Federal Constitutional Court Act). According to the principle of subsidiarity, a constitutional complaint is generally only admissible if – in addition to the legal remedies before the regular courts – all other available possibilities to correct or prevent the challenged violation of the Constitution have been used. Since the Federal Archives never were in possession of the requested documents, the applicant should have applied to the Federal Chancellery, which originally drafted the documents, in order to exhaust all other available options.

Pursuant to the second sentence of § 90.2 of the Federal Constitutional Court Act, the Court may decide constitutional complaints even if remedies or other available options have not been exhausted in cases where questions of general relevance are raised. However, in the case at hand, important legal issues relating to the Federal Freedom of Information Act (hereinafter, the “Act”) have not been resolved by the regular courts, thus barring a constitutional complaint.

One such issue is the scope of the right to access to information. The freedom of information (second alternative of the first sentence of Article 5.1 of the Basic Law) provides a right to access to information, directed against the state, at least in cases where a source of information for which the state is

responsible is designated as publicly accessible by legal provisions. In principle, the first sentence of § 1.1 of the Act generates a right to access official information from generally accessible sources; however, exceptions to the rule are recognised. The Act does not expressly state whether access must be provided to files that are not held by a public authority, but rather by a private foundation. While it does result from the Act that there is no right to access to files that were never held by public authorities, it is unclear whether this also applies to cases involving the potential reacquisition of files that were once held by a public authority, but then changed into private hands. This is a matter which must be clarified by the regular courts.

The state’s potential discretion for deciding whether to demand the handing over of documents held by private parties in effect gives the state the power to determine who shall be granted access to sources and who shall be denied. These decisions by the state are subject to the equality clauses under Article 3 of the Basic Law. This must be taken into account when interpreting § 1.1 of the Act. The interpretation of the rules on access to information must neither result in the unequal treatment of the various parties seeking access, nor in inequality between those parties and the private party holding the information.

In case the regular courts were to find § 1.1 of the Act to provide the applicant with a right to access the information requested, this access would be protected under the freedom to information. The provisions in the Act governing this access would have to be interpreted in light of this constitutionally guaranteed freedom. In doing so, the significance of the general accessibility of sources for the freedom of the individual and for communication in a democratic and constitutional state must be taken into account and reasonably balanced with opposing interests.

Languages:

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



Identification: GER-2017-2-013

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 28.06.2017 / **e)** 1 BvR 1387/17 / **f)** / **g)** *Neue Zeitschrift für Verwaltungsrecht* 2017, 1374 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**
5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly.**

Keywords of the alphabetical index:

Freedom of assembly, possible, restrictions / G20 Summit / Injunction, preliminary / Protest action, public, prohibition / Weighing of the consequences.

Headnotes:

1. There is no constitutional case-law on the matter of whether and to what extent Article 8.1 of the Basic Law (freedom of assembly) affords protection for the construction of a protest camp on public grounds.

2. The administrative authority deciding on the authorisation of the protest camp must, as a precaution, apply the law of assembly. However, the authority must be given an appropriate scope for decision-making with regard to the dimensions of the camp and restrictions upon it.

Summary:

I. The applicant registered an event planned to take place from 30 June to 9 July 2017 in the form of a political protest camp on the fairgrounds of one of Hamburg's city parks. For its duration, the camp was to represent a place of ongoing, noticeable protest against the G20 Summit being held in Hamburg at that time. About 10,000 people from around the globe were expected to attend the camp, where they would live and sleep in 3,000 tents.

The Free and Hanseatic City of Hamburg (hereinafter, the "City") did not consider the scheduled protest camp to constitute an assembly and therefore banned the event citing a park-law prohibition on camping in public park and recreation areas. The applicant sought injunctive relief from the ban before the Administrative Court. The Administrative Court ordered the City to allow the protest camp to be set up, pending a (new) review and

decision by the City in accordance with the law of assembly. Following the City's complaint, the Higher Administrative Court rejected the applicant's request for a preliminary injunction on the grounds that the protest camp lacked the necessary characteristics of an "assembly" protected under Article 8.1 of the Basic Law. In filing the application for a preliminary injunction at the Federal Constitutional Court, the applicant continues to pursue his objective that the City be ordered to allow the protest camp to be planned, built and operated.

II. The Third Chamber of the First Panel of the Federal Constitutional Court, by way of preliminary injunction, assigned the City the task of deciding, under the law of assembly, on whether to allow the planned protest camp in the city park. The decision of the Chamber is based on a weighing of consequences.

Not at issue in this decision was the question of whether and to what extent a protest camp may be restricted or even banned for public safety reasons.

The decision is based on the following considerations:

The Court may provisionally decide a matter by way of preliminary injunction if this is urgently required in order to avert severe disadvantage, prevent imminent violence, or for other important reasons in the interest of the common good (§ 32.1 of the Federal Constitutional Court Act). The prospects of success in the principal proceedings must not be taken into consideration unless the application filed in the principal proceedings is inadmissible from the outset or manifestly unfounded. If the outcome of the principal proceedings remains open, the Court must undertake a weighing of consequences.

The constitutional complaint in question is neither inadmissible from the outset nor manifestly unfounded. It raises difficult questions which have not yet been clarified in the Court's case-law, and which cannot be conclusively assessed in the course of preliminary proceedings. Accordingly, it is yet unclear whether and to what extent the protest camp is a protected assembly pursuant to Article 8.1 of the Basic Law.

Consequently, a decision must be made based on the weighing of consequences, the outcome of which is partly in favour of the applicant.

If the preliminary injunction were not to be issued and it was found in the principal proceedings that at least parts of the protest camp were protected by the freedom of assembly and were, therefore, at least permissible in principle, then the applicant would be, as things stand now, barred from making use of his

fundamental freedom of assembly in the form of realising the protest camp. Thereby, his freedom of assembly would be lastingly devaluated with regard to a major political event that is particularly prominent.



If, in contrast, the preliminary injunction were issued and the City were ordered to allow the construction, operation and dismantling of the protest camp between 28 June and 11 July 2017 and it was found, in the principal proceedings, that the planned protest camp was not protected by the freedom of assembly, then not only would the public have been unjustifiably deprived of a recreation area for the duration of about three weeks, but public authorities and resources would also, without reason, have been burdened with the risk of permanent damage to the park.

Weighing these respective disadvantages against one another, a compromise settlement is required within the framework of injunctive protection that enables the applicant to realise the protest camp on the occasion of the G20 Summit to the largest possible extent while preventing permanent damage to the city park and minimising the related risks for public authorities. Consequently, it must be ordered that, as a precaution, in deciding on the protest camp, the City must apply the law of assembly to the matter. In doing so, the City is to be provided with an appropriate scope for decision-making which entitles it – where possible, in cooperation with the applicant – to limit the dimensions of the camp and also to impose restrictions in such a way that severe damage to the city park can be sufficiently ruled out. If this is not possible in a way that corresponds to the applicant's objective, the City may instead assign a different place for realising the planned protest camp, which comes as close as possible to achieving the impact envisaged by the applicant. In this respect, too, the City may impose restrictions that prevent as much damage as possible to the area of the substitute location, even limiting the dimensions of the scheduled protest camp, if necessary. In doing so, the City may also consider to what extent the camp provides the necessary infrastructure for an autonomous political assembly and to what extent it exceeds this. In particular, the City is entitled to prohibit the construction of such tents and facilities which are, without relation to the expression of opinions, intended only as accommodation for persons who wish to participate in assemblies elsewhere.

Languages:

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

Identification: GER-2017-2-014

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 11.07.2017 / **e)** 1 BvR 1571/15 / **f)** Act on Uniformity of Collective Agreements / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** *Neue Zeitschrift für Arbeitsrecht* 2017, 915; *Betriebsberater* 2017, 1789; *Zeitschrift für Tarif-, Arbeits- und Sozialrecht des öffentlichen Dienstes*, 467; *Deutsches Verwaltungsblatt* 2017, 1093; *Europäische Grundrechte Zeitschrift* 2017, 415; *Entscheidungssammlung zum Arbeitsrecht § 4a TVG Nr 1; Arztrecht* 2017, 285; CODICES (German).

Keywords of the systematic thesaurus:

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

5.4.11 Fundamental Rights – Economic, social and cultural rights – **Freedom of trade unions.**

Keywords of the alphabetical index:

Trade union, collective bargaining / Trade union, representation.

Headnotes:

1. The fundamental freedom under Article 9.3 of the Basic Law protects all activities which are typical for associations, in particular the conclusion of collective agreements, their continued existence and application as well as measures taken in labour disputes (*Arbeitskampfmassnahmen*). The fundamental right does not, however, grant an absolute right to exploit, for one's own benefit, key positions in a company and related power to obstruct a business for tariff-related purposes.
2. Article 9.3 of the Basic Law protects the right to freedom of associations but does not guarantee protection of the *status quo* of individual associations. State measures seeking to drive particular trade unions out of the collective bargaining process or to deprive particular trade unions of their basis of existence are incompatible with Article 9.3 of the Basic Law, and so are requirements demanding that trade unions have a particular profile.

3. Legal provisions that are covered by the scope of protection of Article 9.3 of the Basic Law and are intended to establish and ensure the functioning of the system of autonomy of collective bargaining (*Tarifautonomie*) pursue a legitimate objective. To achieve this, the legislator can establish parity between the opposing parties of collective agreements; however, it can also adopt rules governing the relationship between parties of collective agreements that are on the same side in order to create the structural preconditions for a fair balance in collective negotiations also in that respect, and in order to ensure that collective agreements, which are presumed to be inherently correct, generate reasonable economic and working conditions.
4. With regard to the structural preconditions of autonomy of collective bargaining the legislator has a prerogative of assessment and wide latitude. Difficulties arising only due to the fact that several parties to a collective agreement operate on one side do not generally justify a limitation of the right to freedom of association.

Summary:

I. The Act on Uniformity of Collective Agreements (hereinafter, the "Act") regulates conflicts that arise if several collective agreements are applicable in one company (*Betrieb*). The Act prescribes that, in case of a conflict, the collective agreement of the trade union, which has fewer members in a company is supplanted by the one of the trade union that has a greater number of members, and the Act provides for court proceedings to determine which union organises the majority. Also, if the employer engages in collective bargaining, the employer has to inform the other trade unions with collective bargaining competence in the company and all unions have the right to present their tariff-related demands to the employer. The union, the collective agreement of which is supplanted by another, which has a greater number of members in the company also has the right to adopt the collective agreement of the majority union (*Nachzeichnung*).

With their constitutional complaints, several trade unions have directly challenged the Act. The applicants mainly claim that their right to freedom of association (*Koalitionsfreiheit*), pursuant to Article 9.3 of the Basic Law, has been violated.

II. The Federal Constitutional Court decided that the Act is, for the most part, compatible with the Basic Law. As for the unconstitutional part, the legislator is obliged to remedy the situation.

The decision is based on the following considerations:

The provision in the Act regulating which collective agreement supplants another in case of a conflict in a company, interferes with the right to freedom of association. Moreover, it can unfold advance effects because the threat that a trade union's own collective agreement may be supplanted as well as the determination by a court that a union is the minority in a company can weaken the trade union with regard to its membership recruitment or with regard to its ability to mobilise so as to take measures in labour disputes. The scope of protection of this fundamental right covers the trade union's decision as to whether and to what extent it wants to cooperate with other trade unions as well as the choice of its own profile.

It would be incompatible with Article 9.3 of the Basic Law for the provisions dealing with clashes to also lead to a loss of claims from a collective agreement, which are long-term and affect the life planning of individual employees.

The challenged provisions appear to be suitable and necessary to achieve the legitimate purpose of the Act to offer incentives for a cooperative approach on the side of employees when negotiating collective agreements, and to thus avoid conflicts between such agreements.

Overall, the burdens arising in the context of the Act are, for the most part, reasonable, provided that the Act is restrictively interpreted in light of the Basic Law, the supporting procedural provisions are observed, and the right to adopt the supplanting provisions of the collective agreement is interpreted extensively.

The uncertainty of the employer regarding a trade union's actual clout due to its number of members is particularly significant with respect to the parity between trade unions and the employer, which is protected under Article 9.3 of the Basic Law. The newly introduced proceedings involve the risk of resulting in a disclosure of the number of members of trade unions. The regular courts must use all available means of procedural law to prevent this from happening to the largest possible extent.

The impairments that are linked to the supplanting of a collective agreement are disproportionate to the objective sought by the legislator to the extent that there are no precautions to ensure that the interests of members of smaller groups of professions in a company the collective agreement of which is supplanted by another one, are sufficiently taken into account. Thus, it cannot be ruled out that their working conditions and interests are disregarded because they are not effectively represented by the majority trade union.

III. Justices Baer and Paulus did not endorse the judgment with respect to its evaluation of the means by which the legislator wants to strengthen this freedom, the majority decision that the Act remains applicable, and the decision to delegate the regulation of fundamental rights issues to the regular courts.

The separate opinion is based on the following considerations:

The Act is not only unreasonable in terms of the protection of the fundamental rights of specific professions in an applicable collective agreement. The interpretation of the provision as supplanting a collective agreement without a previous decision of a labour court is also unreasonable. The interpretation according to which the conflict is assessed and determined in the labour court proceedings to identify the union that organises the majority of employees in a company must be mandatory under constitutional law. To supplant a collective agreement in constitutive court proceedings alone is the only way to create legal certainty and avoid unpredictability that additionally burdens the system of collective agreements.

The Panel majority's assumption that adopting the supplanting provisions of the collective agreement of a different trade union limits the loss of one's own collective agreement is based on the dangerous tendency to consider the interests of employees to be uniform. The idea that a specifically negotiated agreement does not matter as long as there are ties to any collective agreement at all also substantively favours large sectoral trade unions. This contradicts Article 9.3 of the Basic Law, which relies on the self-determined commitment of members of all professions with regard to collective bargaining.

Cross-references:

Federal Constitutional Court:

- 1 BvL 4/00, 11.07.2006, Official Digest (*Entscheidungen des Bundesverfassungsgerichts – BVerfGE*) 116, 202, *Bulletin* 2006/3 [GER-2006-3-015];
- 1 BvR 2203/93, 05.05.2015, *BVerfGE* 100, 271 <282 and 283>, *Bulletin* 2015/2 [GER-2015-2-008];
- 1 BvR 712/86, 24.04.1996, *BVerfGE* 94, 268, *Bulletin* 1996/2 [GER-1996-2-011];
- 1 BvF 2/86, 04.07.1995, *BVerfGE* 92, 365, *Bulletin* 1995/2 [GER-1995-2-024].

European Court of Human Rights:

- *Swedish Engine Drivers' Union v. Sweden*, no. 5614/72, 06.02.1976, Series A, no. 20.

Languages:

German; English translation is being prepared for the Court's website; press release in English on the Court's website.



Identification: GER-2017-2-015

a) Germany / b) Federal Constitutional Court / c) First Panel / d) 12.07.2017 / e) 1 BvR 2222/12, 1 BvR 1106/13 / f) / g) to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / h) *Wertpapiermitteilungen* 2017, 1625; *Neue Zeitschrift für Verwaltungsrecht* 2017, 1282; *Briefe zum Agrarrecht* 2017, 417; *Neue Juristische Wochenschrift* 2017, 2744; *Gewerbearchiv* 2017, 375; *Neue Zeitschrift für Gesellschaftsrecht* 2017, 1237; CODICES (German).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy**.
 5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.
 5.4.11 Fundamental Rights – Economic, social and cultural rights – **Freedom of trade unions**.

Keywords of the alphabetical index:

Chamber of Commerce, function, official / Chamber of Commerce, membership, compulsory / Chamber, professional.

Headnotes:

1. The right not to be held liable by “unnecessary” corporations follows from Article 2.1 of the Basic Law (general right to self-determination) and not from Article 9.1 of the Basic Law (fundamental right to freedom of association). The fundamental right set out in Article 2.1 of the Basic Law also provides protection against having to pay a contribution for membership in a chamber if that contribution is not provided for in the constitutional order.

2. The organisation of a corporate body of functional self-administration must reflect the internal plurality of interests which the body aims to serve.

Summary:

The compulsory contribution linked to compulsory membership in Chambers of Commerce and Industry is not objectionable under constitutional law. The First Panel of the Federal Constitutional Court affirmed this in its order of 12 July 2017 and thus rejected the constitutional complaints of two members of such Chambers.

The Chambers of Commerce and Industry are organised as corporate bodies under public law. Any person who runs a business within the district of the regionally responsible Chamber is subject to compulsory membership, based on a federal statute which also requires members to pay contributions. The two applicants claim that this compulsory membership violates their right to freedom of association under Article 9.1 of the Basic Law or, at the very least, their general right to self-determination under Article 2.1 of the Basic Law.

The Court decided as follows.

The standard of review for protection from compulsory membership in “unnecessary” corporations follows from the general right to self-determination (Article 2.1 of the Basic Law) and not from the fundamental right to freedom of association (Article 9.1 of the Basic Law). While Article 9.1 of the Basic Law governs voluntary formations of associations for the purpose of pursuing freely chosen aims, a statutory integration into a corporate body under public law draws on private actors to pursue public aims.

Involving private actors in Chambers of Commerce and Industry by way of compulsory membership is justified under constitutional law. The duties standardised in § 1 of the Act on the Chamber of Commerce and Industry (hereinafter, the “Act”) reflect a combination of representation of interests, and of the promotion and administrative tasks, which are characteristic of economic self-administration; and Federal Constitutional Court has repeatedly recognised that this constitutes a legitimate purpose of compulsory membership.

The statutory provisions governing compulsory membership are suitable to reach these goals and thus form a sufficient basis for levying contributions. The contributions help to enable the Chambers to fulfil their tasks, provided that the amount of the contributions is adequate and that they are appropriately used.

In consideration of the legislator's wide margin of appreciation, the interference with the applicants general right to self-determination (Article 2.1 of the Basic Law) appears to be necessary. Compulsory membership is also a reasonable means to reach the legislator's legitimate goals and justifies the liability to contribution. The burden for business enterprises caused by the contribution to be paid according to their respective earnings and based on compulsory membership in a regional Chamber of Commerce and Industry is not particularly significant. Overall, the amount of such contributions has decreased rather than increased over the last years. Apart from that, compulsory membership gives members rights of participation and cooperation with regard to the Chamber's tasks. This advantage resulting from the membership rights alone already entitles the Chamber to levy a contribution. In particular, compulsory membership does not force members to accept a situation in which the association and its organs exceed the tasks legally assigned; in fact, each member can take action against such conduct in an administrative court.

However, the overall interest can only be safeguarded if deviating interests of individual members or fundamental conflicts of interest that are of considerable importance for individual members are taken into account in the Chambers of Commerce and Industry. § 1.1 of the Act sets out the requirement to balance interests, rather than only represent such interests. This requirement also entails a duty to protect minorities. Deviating interests or fundamental conflicts of interest may not be left aside. In that respect it may be necessary to highlight different positions in the presentation of facts to be balanced, to specifically address them in detail, or to allow for a minority vote.

The liability to contribution on the basis of a compulsory membership in the Chambers is also compatible with the requirements of the principle of democracy (Article 20.1 and 20.2 of the Basic Law). Performance of the Chambers' of Commerce and Industry tasks enjoys sufficient democratic legitimation. The Chambers independently perform public duties in a clearly defined area by representing a pool of private interests. However, they do not aim to interfere with third party rights nor do they aim to exercise powers of interference at the expense of their members, except for the levying of contributions. The competencies of the Chambers have been sufficiently defined in the interpretation of the statutory provisions by the administrative courts. Combined with the legal supervision by the state over the rules on membership contributions, this also applies with regard to the compulsory contribution.

Furthermore, and also regarding the principle of democracy, there are no serious constitutional concerns as to the internal statutes of the Chambers of Commerce and Industry. Pursuant to the rules in the federal statute concerning the elections to the plenary assembly of the Chambers, the affected interests are appropriately taken into account by sufficient institutional arrangements. In light of the tasks incumbent upon the Chambers, the requirement to establish electoral groups to reflect the economic structure of a Chamber district is covered by the political leeway to design the legislator enjoys. Although such a rule modifies the counting value of one vote, it serves legitimate aims. It seeks to prevent that individual interests are given preference and aims to take businesses into account according to their economic strength within the district. Furthermore, with the rule on the allocation of seats (in the plenary assembly) stipulated in the second sentence of § 5.3 of the Act, the legislator itself sufficiently regulates those issues that are essential in this context to safeguard fundamental rights. This is supplemented by the provision for legal supervision by the state (§ 11 of the Act). Other than that, and considering the principle of democracy, the Chambers of Commerce and Industry are required to ensure that legitimate interests of association members are not neglected arbitrarily.

Languages:

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



Identification: GER-2017-2-016

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 18.07.2017 / **e)** 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 / **f)** EAPP / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** *Wertpapiermitteilungen* 2017, 1694; *Neue Juristische Wochenschrift* 2017, 2894; *Recht der internationalen Wirtschaft* 2017, 671; *Europäisches Wirtschafts- & Steuerrecht* 2017, 269; CODICES (German).

Keywords of the systematic thesaurus:

- 2.1.1.3 Sources – Categories – Written rules – **Law of the European Union/EU Law.**
- 2.2.1.6 Sources – Hierarchy – Hierarchy as between national and non-national Sources – **Law of the European Union/EU Law and domestic law.**
- 3.1 General Principles – **Sovereignty.**
- 3.3.1 General Principles – Democracy – **Representative democracy.**
- 3.26 General Principles – **Fundamental principles of the Internal Market.**
- 4.10 Institutions – **Public finances.**
- 4.17.1.5 Institutions – European Union – Institutional structure – **Court of Justice of the European Union.**
- 4.17.1.6 Institutions – European Union – Institutional structure – **European Central Bank.**
- 4.17.2.1 Institutions – European Union – Distribution of powers between the EU and member states – **Sincere co-operation between EU Institutions and member States.**
- 4.17.3 Institutions – European Union – **Distribution of powers between Institutions of the EU.**

Keywords of the alphabetical index:

Assets, financial, purchase / Constitution, identity / European Central Bank, mandate / European Union act, *ultra vires*, review / Identity review / Integration, responsibility (*Integrationsverantwortung*) / Government bonds, purchase / Manifest exceeding of competences / Monetary financing, prohibition / Monetary policy / Preliminary ruling, Court of Justice, jurisdiction / Risk sharing, Eurosystem / Securities, sovereign debt.

Headnotes:

The compatibility of the Public Sector Purchase Programme (PSPP) with the Basic Law is contingent on whether the programme for the purchase of debt securities issues by member state governments and other public entities violates the prohibition of monetary financing or exceeds the European Central Bank's monetary policy mandate.

Summary:

I. The constitutional complaint proceedings concern the question whether the Public Sector Purchase Programme (hereinafter, "PSPP") of the European Central Bank (hereinafter, "ECB") for the purchase of public sector securities is compatible with the Basic Law. The PSPP is part of the Expanded Asset Purchase Programme (hereinafter, "EAPP"), an ECB framework programme for the purchase of financial assets.

With their constitutional complaints, the applicants claim that the PSPP violates the prohibition of monetary financing (Article 123 TFEU) and the principle of conferral (Article 5 TEU, in conjunction with Articles 119, 127 *et seq.* TFEU).

II. The Second Panel of the Federal Constitutional Court stayed the proceedings and referred several questions to the Court of Justice of the European Union for a preliminary ruling. In the view of the Panel, significant reasons indicate that the asset purchase programme violates the prohibition of monetary financing and exceeds the monetary policy mandate of the ECB, thus encroaching upon the competences of the Member States.

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

The first sentence of Article 38.1 of the Basic Law guarantees, to the extent protected by Article 79.3 of the Basic Law, German citizens a right to democratic self-determination; this right can be enforced by way of a constitutional complaint. Due to their responsibility with respect to European integration (*Integrationsverantwortung*), the constitutional organs are obliged to use the means at their disposal to ensure, within the scope of their competences, that the European integration agenda (*Integrationsprogramm*) is respected. Insofar, it is the task of the Federal Constitutional Court to review whether acts adopted by institutions, bodies, offices, and agencies of the European Union evidently exceed competences, or whether they touch upon the inalienable part of the constitutional identity; as a consequence, German state organs would neither be allowed to participate in the development nor in the implementation of such acts.

It is doubtful that the PSPP decision is compatible with the provision on the prohibition of monetary financing.

Article 123.1 TFEU bars the ECB and the central banks of the Member States from purchasing bonds directly from institutions of the European Union or the Member States. It is also not permissible to resort to purchases on the secondary market in order to circumvent the objective pursued by Article 123 TFEU. Therefore, any programme relating to the purchase of government bonds on the secondary market must provide sufficient guarantees to effectively ensure observance of the prohibition of monetary financing. The Panel presumes that the Court of Justice of the European Union deems the conditions which it developed, and which limit the scope of the ECB policy decision on the Outright Monetary Transactions (OMT) programme of

6 September 2012, to be legally binding criteria. Against that background, the Panel further presumes that contempt of these criteria would amount to a violation of competences also with regard to other programmes relating to the purchases of government bonds.

The PSPP concerns government bonds issued by Member States, state-owned enterprises and other state institutions as well as debt securities issued by European institutions. Even though these bonds are purchased exclusively on the secondary market, several factors indicate that the PSPP decision nevertheless violates Article 123 TFEU, namely the fact that details of the purchases are announced in a manner that could create a *de facto* certainty on the markets that issued government bonds will, indeed, be purchased by the Eurosystem; that it is not possible to verify compliance with certain minimum periods between the issuing of debt securities on the primary market and the purchase of the relevant securities on the secondary market; that to date all purchased bonds were – without exception – held until maturity; and furthermore that the purchases include bonds that carry a negative yield from the outset.

Moreover, it appears that the PSPP decision may not be covered by the ECB's mandate.

The wording and systematic concept as well as the spirit and purpose of the Treaties suggest that it is necessary to delineate matters of a monetary policy nature from economic policy matters, the latter being primarily the responsibility of the Member States.

In the view of the Federal Constitutional Court, based on an overall assessment of the relevant criteria, the PSPP decision can no longer be qualified as a monetary policy measure, but instead must be deemed to constitute a measure that is primarily of an economic policy nature. It is true that the PSPP officially pursues a monetary policy objective and that monetary policy instruments are used to achieve this objective; however, the economic policy impacts stemming from the volume of the PSPP and the resulting foreseeability of purchases of government bonds are integral features of the programme, which are already inherent in its design. As far as the underlying monetary policy objective is concerned, the PSPP could thus prove to be disproportionate.

Currently, it is not possible to determine with certainty whether, based on the risk sharing between the ECB and the *Bundesbank* (Federal Central Bank), the *Bundestag's* right to decide on the budget protected under Article 20.1 and 20.2 of the Basic Law in conjunction with Article 79.3 of the Basic Law, as well

as its overall budgetary responsibility, could be affected by the PSPP decision and its implementation in terms of potential losses to be borne by the *Bundesbank*.

An unlimited risk sharing within the Eurosystem and the resulting risks for the profit and loss account of the national central banks would amount to a violation of the constitutional identity within the meaning of Article 79.3 of the Basic Law if it became necessary to provide recapitalisation for the national central banks through budgetary resources to such extent that approval by the *Bundestag* would be required in accordance with the case-law of the Federal Constitutional Court. Therefore, the success of the constitutional complaint at hand is contingent upon whether this form of risk sharing can be ruled out under primary law.

The primary law of the Union provides little guidance on the decision-making of the ECB Governing Council concerning the manner and scope of risk sharing between the members of the European System of Central Banks. Consequently, the ECB Governing Council may be able to modify the rules on risk sharing within the Eurosystem in a way that would result in risks for the profit and loss accounts of the national central banks and also threaten the overall budgetary responsibility of national parliaments. Against that background, the question arises whether an unlimited distribution of risks between the national central banks of the Eurosystem regarding bonds in default would violate Articles 123 and 125 TFEU as well as Article 4.2 TEU (in conjunction with Article 79.3 of the Basic Law).

Cross-references:

Federal Constitutional Court (Selection):

- 2 BvR 2728, 2729, 2730, 2731, 2 BvE 13/13, 21.06.2016, Official Digest (*Entscheidungen des Bundesverfassungsgerichts – BVerfGE*) 142, 123 <245 et seq.>, ECLI:DE:BVerfG:2016:rs20160621.2bvr272813, *Bulletin* 2016/3 [GER 2016-3-020];
- 2 BvR 2728, 2729, 2730, 2731/13, 2 BvE 13/13, 14.01.2014, *BVerfGE* 134, 366 <372 et seq.>, ECLI:DE:BVerfG:2014:rs20140114.2bvr272813, *Bulletin* 2014/1 [GER-2014-1-005];
- 2 BvR 987/10, 07.09.2011, *BVerfGE* 129, 124 <166 et seq.>, ECLI:DE:BVerfG:2011:rs20110907.2bvr098710, *Bulletin* 2011/3 [GER-2011-3-017];
- 2 BvR 2661/09, 06.07.2010, *BVerfGE* 126, 286 <298 et seq.>, ECLI:DE:BVerfG:2010:rs20100706.2bvr266106, *Bulletin* 2010/2 [GER-2010-2-010].

Court of Justice of the European Union (Selection):

- C-62/14, 16.06.2015, *Gauweiler and Others v. Deutscher Bundestag*, ECLI:EU:C:2015:400.

Languages:

German; English translation is being prepared for the Court's website; English press release on the Court's website.



Identification: GER-2017-2-017

a) Germany / b) Federal Constitutional Court / c) First Chamber of the Second Panel / d) 24.07.2017 / e) 2 BvR 1487/17 / f) / g) *Asylmagazin* 2017, 361; *Neue Zeitschrift für Verwaltungsrecht* 2017, 1530 / h) CODICES (German).

Keywords of the systematic thesaurus:

2.3.1 Sources – Techniques of review – **Concept of manifest error in assessing evidence or exercising discretion.**

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

3.16 General Principles – **Proportionality.**

4.5.4.4 Institutions – Legislative bodies – Organisation – **Committees.**

4.5.6.1 Institutions – Legislative bodies – Law-making procedure – **Right to initiate legislation.**

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

5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status.**

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

5.3.11 Fundamental Rights – Civil and political rights – **Right of asylum.**

Keywords of the alphabetical index:

Asylum law / Asylum, request, refusal / Deportation, receiving state, assurances / Deportation, reception conditions / Deportation, risk, torture / Deportation, terror suspect / Discretion, exercise, immigration authorities / National security, threats / Terrorist threats.

Headnotes:

1. The competence of the Mediation Committee to submit amendment proposals to a draft law is limited to such regulatory matters that have already been introduced into the legislative process, at the very latest before the final reading in Parliament.
2. The use of the term “terrorism” as a legal term to define the constituent elements of a statutory provision does not violate the principle of legal specificity, as long as the remaining definitional difficulties and differing legal views concerning the interpretation and application in practice can be addressed by means of recognised legal methodology, most notably in the case-law of the regular courts.
3. In principle, it is permissible to rule out concerns that a foreign citizen would be at risk of inhuman and degrading treatment in violation of Article 1.1 of the Basic Law and Article 3 ECHR in the event of deportation by way of obtaining adequate assurances from the authorities of the receiving state. This also applies to cases concerning the deportation of “dangerous suspects”.
4. A mere general assurance, according to which the person affected by the deportation order “would not be at risk of torture or inhuman or degrading treatment or punishment”, does not suffice to satisfy the requirements arising under Article 1.1 of the Basic Law and Article 3 ECHR. In this respect, assurances obtained from the receiving state must include specific guarantees that take into account the circumstances of the individual case.

Summary:

I. The applicant is an Algerian national who entered the territory of the Federal Republic of Germany for the first time in early 2003. On March 2017, the competent authority of the Free Hanseatic City of Bremen ordered his deportation to Algeria pursuant to § 58a of the Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory of 2004 (Residence Act; hereinafter, the “Act”) and issued a permanent ban on entry and residence against the applicant pursuant to § 11.5 of the Act. The reasoning of the deportation notice stated that the applicant posed a terrorist threat.

The action brought by the applicant against the deportation order was dismissed by the Federal Administrative Court, subject to the reservation that a

deportation would only be permissible upon obtaining an assurance from Algerian government authorities that the applicant would not be at risk of suffering human rights violations in Algeria.

With his constitutional complaint, the applicant primarily challenges the formal and substantive constitutionality of § 58a of the Act. The challenged provisions govern so-called foreign “dangerous suspects” (*Gefährder*) residing in Germany, i.e. persons who constitute a particular risk to the security of the Federal Republic of Germany or a terrorist threat, and allows for their deportation in order to avert such threats. The applicant contends that the provision was inserted in the relevant draft by the Mediation Committee (*Vermittlungsausschuss*) without first having been tabled for parliamentary debate; for this reason, the applicant claims that the enactment of the challenged provision does not meet formal constitutional requirements.

II. The First Chamber of the Second Panel of the Federal Constitutional Court did not admit the constitutional complaint for decision, on the basis that it was unfounded. The Chamber also held that § 58a of the Act is formally and substantively compatible with the Basic Law.

The decision is based on the following considerations:

There are no objections to the formal constitutionality of the challenged provision, as the Mediation Committee did not exceed its competences. The Committee’s competences are limited to mediation proposals aimed at reconciling such regulatory options that have already been the subject of parliamentary debate or, at the very least, have already been ascertainably introduced in the relevant legislative process. In contrast, the Mediation Committee does not have the right to initiate legislation (Article 76.1 of the Basic Law); amendments of draft legislation proposed by the Committee may neither curtail the legislative process nor undermine the visibility of regulatory matters in terms of public attention.

These constitutional requirements are satisfied with regard to the challenged provision. In the course of the legislative process in question, demands for the effective protection against terrorist threats resulted in proposals that included, *inter alia*, suggestions to introduce lifetime entry bans, expand grounds for deportation, and reduce statutory prohibitions on deportation. All these amendment proposals had in common that the relevant measures were to be applicable to cases of suspected terrorism. The fact that the relevant amendment proposals were initially rejected before the Parliamentary Committee of the

Interior and subsequently not reflected in the first draft submitted to Parliament, does not merit a different conclusion. Specifically, this does not change the fact that the basic elements of the compromise put forward by the Mediation Committee are sufficiently rooted in the legislative process. Moreover, the proposed amendments to the draft law were adequately introduced to parliamentary debate in terms of both scope and content.

Moreover, § 58a of the Act satisfies the substantive constitutional requirements of legal clarity and specificity. In this regard, the Basic Law requires that any legal authorisation of the executive branch to issue administrative decisions be sufficiently specific and limited in terms of content, purpose and scope. Persons affected by the relevant law must be able to assess the legal situation and to align their conduct accordingly. It must be possible for them to ascertain, with reasonable efforts, whether the necessary factual elements of the law are fulfilled with regard to the legal consequences set out under the provision in question.

Based on these standards, § 58a of the Act does not raise constitutional objections. The provision requires a particular risk to the security of the Federal Republic of Germany or a terrorist threat, and thus relies on constituent elements that are sufficiently determinable. In addition, the Federal Administrative Court has specified these constituent elements in its case-law and has also clarified relevant distinctions between § 58a of the Act and other general grounds for deportation. In particular, the Federal Administrative Court referred to the specific threats stemming from terrorist offences which could be realised any time and do not require significant preparation.

The challenged provision also satisfies the principle of proportionality. The Basic Law guarantees that public authorities may only interfere with fundamental rights if such interference is proportionate to the legitimate aim pursued. § 58a of the Act grants the administrative authorities discretion regarding decisions on the deportations of “dangerous suspects”. However, the principle of proportionality limits this discretion, and the exercise of such discretion by the authorities is subject to full judicial review by the regular courts. In this respect, the standards developed by the Federal Administrative Court for the application of § 58a of the Act reflect the relevant requirements arising from fundamental rights and remain within the regular courts’ margin of appreciation.

The application of the challenged provision in the applicant’s case also does not violate his fundamental rights. In particular, the Federal Administrative Court did not base its assessment – that the applicant

poses a terrorist threat – solely on the applicant’s ideological conviction. Rather, the Federal Administrative Court considered the applicant’s conviction merely as one of several elements contributing to the applicant’s potential dangerousness. Moreover, there are no constitutional objections to the Federal Administrative Court’s evaluation of the comprehensive evidence submitted in the initial proceedings, leading to the conclusion that the applicant shows signs of a significantly increased willingness to resort to violence and terrorist methods in order to achieve his religiously motivated aims.

Finally, the decision of the Federal Administrative Court is not objectionable under constitutional law insofar as it made the deportation of the applicant contingent upon obtaining an assurance from the Algerian authorities prior to the applicant’s transfer. The specific requirements arising under constitutional law with regard to such assurances largely depend on the prevailing conditions in the country of destination as well as the circumstances of the individual case. In the applicant’s case, it is required under constitutional law that the relevant assurances include specific guarantees that allow for a (potential) review of the conditions of detention in the event that the applicant is incarcerated and ensure, in particular, that the applicant will have unobstructed access to his lawyer. In addition, the applicant must be given the opportunity to submit a statement concerning the assurances obtained and, if appropriate, seek legal protection prior to his deportation.

Cross-references:

Federal Constitutional Court (Selection):

- 2 BvR 758/07, 08.12.2009, Official Digest (*Entscheidungen des Bundesverfassungsgerichts – BVerfGE*) 125, 104 <121 et seq.>, ECLI:DE:BVerfG:2009:rs20091208.2bvr075807;
- 2 BvL 12/01, 15.01.2008, *BVerfGE* 120, 56 <73 et seq.>, ECLI:DE:BVerfG:2008:ls20080115.2bvl001201;
- 1 BvF 3/92, 03.03.2004, *BVerfGE* 110, 33 <56 and 57>, ECLI:DE:BVerfG:2004:fs20040303.1bvff000392;
- 2 BvR 1506/03, 05.11.2003, *BVerfGE* 109, 38 <61 et seq.>, ECLI:DE:BVerfG:2003:rs20031105.2bvr150603;
- 2 BvR 1938/93, 2 BvR 2315/93, 14.05.1996, *BVerfGE* 94, 49 <85 et seq.>, ECLI:DE:BVerfG:1996:rs19960514.2bvr193893;
- 1 BvR 1019/82, 23.02.1983, *BVerfGE* 63, 215 <223 et seq.>.

European Court of Human Rights:

- *Othman v. United Kingdom*, no. 8139/09, 17.01.2012, *Reports of Judgments and Decisions 2012* (extracts) ECLI:CE:ECHR:2012:0117JUD000813909.

Languages:

German.



Greece

Council of State

Important decisions

Identification: GRE-2017-2-001

a) Greece / **b)** Council of State / **c)** Plenary Session / **d)** 04.02.2013 / **e)** 460/2013 / **f)** The constitutionality of Law 3838/2010 / **g)** / **h)** CODICES (Greek).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Citizenship, criteria / Citizenship, genuine bond / Citizenship, abroad / Citizenship, *jus sanguinis*.

Headnotes:

The provisions of Law 3838/2010 according to which Greek citizenship is awarded to aliens with purely typical criteria (5-year legal stay of the parents of the alien in the country, 6-year attendance at Greek schools, non-required continuous stay after graduation until the submission of the application), contravene the Constitution. This is because from Article 1.2 and 1.3 of the Constitution (principle of people sovereignty), Article 4.3 of the Constitution (withdrawal of Greek citizenship), Article 16.2 and 16.3 of the Constitution (right to education), Article 25.4 of the Constitution (duty of social and national solidarity) and Article 29.1 of the Constitution (right to vote) follows that the existence of a genuine bond between the alien and the Greek state and society based on elements passed from generation to generation with the assistance of smaller social groups (family) and organised state units (education), constitutes the minimum condition and limit for the award of Greek citizenship.

Furthermore, Law 3838/2010 which provides that aliens who have not acquired Greek citizenship have a limited right to vote and be elected at the elections for the 1st Degree local authorities, does not comply with Article 4.4 of the Constitution (principle of equality), Article 51.3 of the Constitution (the right to

vote), Article 52 of the Constitution (free expression of the popular will) and Article 102.1, 102.2 and 102.4 of the Constitution (local government agencies), given that by "People", legitimising the exercise of public authority coming either from the State or the local government, is meant the one composed of Greek citizens, namely the persons who have already acquired Greek citizenship.

Summary:

I. The case, which began by an application for judicial review before the Council of State asking for the annulment of the ministerial decision which defined the supporting documents that should be attached to the application for the registration in the Municipal Roll, dealt with the constitutionality of the legislative provisions for the award of Greek citizenship. More specifically, the Council of State ruled on Law 3838/2010, which amended the existing legal regime for the acquisition of Greek citizenship, which is mainly based on *jus sanguinis*, and added cases of citizenship acquisition on grounds of *jus soli*.

These cases were:

- a. acquisition of Greek citizenship by minor children born in Greece whose parents are foreign nationals and reside lawfully in the country for five years,
- b. acquisition of Greek citizenship by children of aliens, who studied for six years in Greek schools; and
- c. acquisition of Greek citizenship by adult foreigners who have attended Greek schools for at least six years on the basis of a statement and an application for the registration in the Municipal Roll submitted between the ages of 18 and 21. Furthermore, the law also provided that aliens have the right to vote and stand as candidates in municipal elections, under certain circumstances.

II.1. The Council of State, sitting *in plenum*, ruled first that the above-mentioned provisions for the award of Greek citizenship are contrary to the Constitution. To do so, the majority pointed out, at first, that the determination of the persons who constitute the People comes under the sovereign competence of the national legislator, who is not limited by international law to determine the acquisition of Greek citizenship conditions and proceedings, given that there is no individual right which gives rise to a claim to acquire nationality, since on this issue the Member State rules through its competent bodies (see Judgment of the International Court of Justice of the Hague on the case *Nottebohm-Liechtenstein v. Guatemala*, 4 June 1955). According to the majority's

opinion, the fact that, according to the Constitution, the determination of the qualifications for the acquisition of Greek citizenship is conferred by the law, does not mean that the common legislator is uncontrollable in terms of constitutional boundaries. On the contrary, the constitutional provisions and the principles deriving from its provisions, set limits within which the national legislator should move in order to determine the preconditions and qualifications for the acquisition of Greek citizenship. This further means that the legislator has the possibility to assess each specific condition (political, economic, social) for the acquisition of citizenship, in a looser or tighter manner, but the legislator cannot, in any case, be unaware of the fact that the State was established and exists as a national state with a specific history, a character that is guaranteed at least by the definitions of Article 1.3 of the Constitution (principle of people sovereignty), as well as that this state is a part of a community of national states with similar constitutional and cultural traditions (European Union). Therefore, the existence of a genuine bond between the alien and the Greek state and society is the minimum condition and limit for the award of Greek citizenship. Otherwise, if the condition of this substantial link could be overlooked and the legislator could ignore the above mentioned bond, minimising the acquisition of citizenship qualifications, then the legislator would be able to determine arbitrarily the composition of the People with the addition of an undetermined number of persons of various origin with loose or no integration. This would have indeterminate consequences on the constitutional order and the peaceful development of social life, given the fact that the status of citizenship is irrevocable. Having in mind the assumptions set out in the headnotes, the majority stressed that, in determining the acquisition of the preconditions for the Greek citizenship, the legislator is able to deviate from the basic principle of *jus sanguinis* as an automatic way of acquiring Greek citizenship and adopt ways of awarding citizenship on the ground of *jus soli*, as long as the legislator sets for these cases both formal and typical conditions, such as the legal stay of the alien in the country and its duration, combined with substantial criteria, which document the genuine bond of the alien with Greek society.

2. On the basis of all the above-mentioned assumptions, the majority of the Council of State ruled, finally, that the disputed provisions of Law 3838/2010, with which the legislator uses purely typical and precarious criteria for the award of Greek citizenship, do not comply with the above-mentioned constitutional provisions and principles. In doing so, the majority pointed out that the condition of the parents' stay for five years in Greece does not document the substantive integration of aliens into Greek society as

long as it is not combined with other elements which would give to the stay substantial characteristics of accession. Moreover, this criterion is also unsafe, given that the legal stay of aliens, as formulated in the various legislations of the 1991-2008 period, refers not only to foreigners who comply with the criteria of the fixed provisions, namely the aliens who entered Greece legally and obtain a stay permit, but also to those who entered the country illegally and stayed illegally for various unspecified time periods, acquiring a stay permit *ex post* on the basis of legalisations that took place occasionally until the Law in question entered into force. Regarding attendance at Greek schools, the majority ruled that this also constitutes a criterion which is unable to confirm the needed integration of underage children of aliens into Greek society, since the status at stake does not require a substantial link of the parents with the state. Moreover, the required studying in a Greek school for only six years, that is to say for a time period less than the minimum duration of school attendance that the Constitution requires for children of Greek citizens, does not guarantee the intended integration. Finally, the majority stressed the inadequacy of the use of the third case criterion, given that as long as the continuous stay of the alien in the country during the period from graduation until the submission of the statement for citizenship acquisition is not required, this has as a result the subordination to this case of aliens who have left the country in the meantime.

III.1. A strong minority supported the view that the provisions of the Law at stake comply with the Greek Constitution, given that the conditions used for the award of Greek citizenship are not manifestly inadequate for the achievement of the pursued purpose nor unsafe for the assurance of the smooth integration of aliens into Greek society. In order to reach the above conclusion, the minority pointed out at first that the Greek Constitution, which contains special provisions for the acquisition of Greek citizenship, that is to say the legal bond of a certain person with the Greek state and not with the Greek nation, confers upon the common legislator the delegation to define the prerequisites for the award of the Greek citizenship, without providing for any kind of restrictions in the relevant power of the legislature. This is because, according to the minority, the constitutional legislator acknowledges that this regulation constitutes a political choice as to whether or not public interest has been met, which may differ according to the internal or international circumstances or to political views. For this reason, the Constitution provides the common legislator with a wide margin of political appreciation. The minority further noted that, in view of the wide power that the Constitution confers upon Parliament and the mainly political considerations, on the basis of which the

legislature makes the appropriate, according to its substantial discretion, legislative choices, the Court, in order to rule on the unconstitutionality of the provisions at stake, reviews only if the substantial assessments of the legislator on the pursued purpose of public interest and on the adequacy of the adopted criteria for the award of Greek citizenship, are objectively and logically incorrect and therefore unreasonable. This is because, according to the minority, the Court, would otherwise use judicial review to substitute Parliament in the exercise of its legislative work. With these thoughts, the minority expressed the opinion that the provisions of the Law at stake are not unconstitutional, as long as the criteria set by the above-mentioned legal provisions for the award of Greek citizenship constitute the product of the legislator's substantive assessment.

2. The Court then proceeded to examine the conformity of the provisions of the impugned Law (which gives to aliens who have not acquired Greek citizenship, the right to vote and to be elected at elections for the local government organisations) with the constitutional provisions which enshrine the right to vote and to be elected and the principle of popular sovereignty. The Court concluded that these legislative provisions are unconstitutional because, by recognising these rights to aliens who do not even have the status of expatriates, violate the basic constitutional principle that these political rights belong exclusively to Greek citizens, regardless of the fact that the impugned Law provided with the same provisions certain positive and negative preconditions which must also be satisfied for the exercise of these rights by aliens.

The Court ruled so by taking into account Article 1.2 and 1.3 of the Constitution, which stipulate that:

- a. only Greek citizens, namely persons having acquired Greek citizenship, comprise the Greek People, who is the carrier of sovereignty, namely the legitimising factor of the exercise of public power, coming either directly from the State, or from the local authorities (the Local Government Organisations of any degree);
- b. this assumption is not in contradiction with the fact that those who fall under the notion of "the People" tend to decrease when "the People" is fulfilling its role as an instrument of democracy, namely, when those belonging to "the People" exercise the right to vote and to be elected.

3. According to the dissenting opinion formulated in this judgment, the relevant provisions of Law 3838/2010, which permit a limited participation of foreigners (expatriates or not) in local elections, are in congruence with the Constitution. More specifically,

according to the minority, after the constitutional revision of 2001, the common legislator is not thereby precluded to widen the electorate for local elections, permitting the participation of foreigners from third countries, who are part of the local community and have, therefore, according to the justified assessment of the legislator, an interest in the management of local affairs. This differentiation between the electoral body for the election of the Hellenic Parliament and the one for the election of the authorities of local government, is fully justified by the different constitutional nature and mission of these institutions, given that the main mission of the local government agencies is, according to Article 102 of the Constitution, the administration of local affairs under the supervision of the State. In view of the above, according to the minority, the impugned regulations are not unconstitutional as long as the purpose pursued by their adoption obviously constitutes a legitimate aim of general interest.

Cross-references:

International Court of Justice of the Hague:

- *Nottebohm-Liechtenstein v. Guatemala*, 04.06.1955.

German Federal Constitutional Court:

- no. 83, page 37 *et seq*, 31.10.1990, *BVerfGE*.

Austrian Constitutional Court:

- G 218 / 03-16, 30.06.2004, *Bulletin* 2004/2 [AUT-2004-2-001].

Languages:

Greek.



Identification: GRE-2017-2-002

a) Greece / **b)** Council of State / **c)** Plenary Session / **d)** 27.09.2013 / **e)** 3354/2013 / **f)** / **g)** / **h)** CODICES (Greek).

Keywords of the systematic thesaurus:

3.21 General Principles – **Equality**.

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

Keywords of the alphabetical index:

Administration, public, organisation, rational, principle / Administration, public, functional needs / Civil servant, dismissal, automatic / Civil servant, status, non-active / Public administration, effectiveness, principle.

Headnotes:

The legislator's freedom to reduce the public sector in its effort to cut expenses is limited by the constitutional requirement of a prior study of the functional needs of the Administration as a whole. Article 33 of Statute 4024/2011, which provided for the automatic dismissal of civil servants or their placement in a non-active status, was contrary to the Greek Constitution and especially to the principle of the effectiveness and the rational organisation of public administration, because it was decided without prior examination of the rationality of the measure in question and its effect on the workings of the Administration as whole and without any consideration of the qualifications, the capabilities and in general the efficiency of the civil servants.

Summary:

I.1. Article 33 of Statute 4024/2011 provided for the automatic dismissal of civil servants who had a 35 – year – service and were at least 55 years old. Moreover, a month after the Statute's enforcement, the permanent positions held by those servants would be automatically abolished. The civil servants who did not meet the requirements of the Law for the automatic dismissal by the time of its entry into force would be placed in a non-active status. According to the national legislator, this provision aimed at restricting the State and reducing public expenditure and more specifically, it aimed at the rationalisation and the restriction of the huge public sector, which should be reduced, given the severe financial crisis.

2. In the light of its settled case-law on civil servants' status and the functioning of the public administration, the majority of the Court held that Article 33 of Law 4024/2011 on the automatic dismissal of employees immediately or after their entry into the status of the so-called "pre-retirement availability" was contrary to the constitutional framework established by Article 103 of the Constitution and the constitutional

principle of equality, because this change in the official status of civil servants, which affected the organisation and functioning of public services, was not based on a previous redefinition of State functions and administrative reorganisation after taking into account the service needs and so the abolition of statutory permanent positions did not occur as a result of the restructuring the Administration, as it should. The Court concluded that the pursued reduction of the public sector was not based on prior redefinition of the State's functioning and restructure of the Administration in a rational way, according to the above constitutional framework and therefore the organisation of some services as a result of the automatic dismissal of civil servants infringed the principle of equality.

II. According to the established case-law of the Highest Administrative Court (*Council of State*), the legislator may abolish statutory positions or modify their competences, provided that the rule of the organisation and the staffing of the Administration with permanent civil servants, set out in Article 103.4 of the Constitution, is not infringed. Moreover, when regulating the abolition of statutory positions, the legislator must act according to the principle of equality, as enshrined in Article 4.1 of the Constitution, in order to ensure equal treatment of civil servants and to enact laws based on objective criteria. Budgetary concerns may justify the legislator's choices regarding the redefinition of the State's workings and its administrative reorganisation. Nevertheless, the relevant provisions must on the one hand be introduced with respect to the constitutional principles, according to which the rational, effective and continuous function of the Administration and the provision of services to all citizens in the framework of a social state based on the rule of law must be ensured and on the other hand they must be in compatibility with the aforementioned constitutional guarantees concerning the status of civil servants. In the light of the above principles, the legitimate purpose of the reorganisation of the public services and of the rational management of the respective public expenses cannot be realised through the obligatory dismissal of civil servants based on criteria that have no reference to the needs of the Administration and the qualifications, the capabilities and the efficiency of the civil servants. Nor can the abolition of the permanent positions occupied by the dismissed civil servants take place as an immediate consequence of their dismissal. In addition, a legal provision stipulating that the obligatory dismissal of civil servants taking effect without a prior decision of the civil servants' service organs but solely on the basis of their time in the service, even if it is long enough, is contrary to the Constitution, unless it is combined with their coming close to pensionable age.

Cross-references:

Council of State:

- no. 2151/2015, 01.01.2015, *Bulletin* 2017/2, [GRE-2017-2-005].

Languages:

Greek.



Identification: GRE-2017-2-003

a) Greece / **b)** Council of State / **c)** Plenary Session / **d)** 21.03.2014 / **e)** 1116/2014 / **f)** / **g)** / **h)** CODICES (Greek).

Keywords of the systematic thesaurus:

4.10.1 Institutions – Public finances – **Principles**.
 4.10.2 Institutions – Public finances – **Budget**.
 4.10.8 Institutions – Public finances – **Public assets**.
 5.2 Fundamental Rights – **Equality**.
 5.3.39.1 Fundamental Rights – Civil and political rights – Right to property – **Expropriation**.

Keywords of the alphabetical index:

Bonds, State, guaranteed / Securities, State, guaranteed / Bonds, default risks.

Headnotes:

Investing in bonds and other securities issued or guaranteed by states, which creates between citizens and the state a legal relationship of providing financial credit, is not free from the risk of lawful pecuniary loss, even if the law governing the securities does not provide for the possibility of re-negotiation of their terms prior to maturity. This is because usually there is a considerable period of time between the issue of the security and its maturity, during which unforeseeable events are likely to happen that substantially reduce, even to the point of annihilation, the economic potential of the state as issuer or guarantor of the securities. When such events occur, the state lawfully seeks a re-negotiation on the basis of the "*rebus sic standibus*" clause, which delimits the

general principle "*pacta sunt servanda*". Any version to the opposite is grounded on the impossible admission that the state enjoys absolute solvency, i.e. the potential to secure at all times the necessary funds to satisfy its creditors, due to its permanent existence, unlimited resources and firm creditworthiness.

Bonds and other securities, tangible or intangible, do not themselves have any asset value as property. Title annulment does not constitute expropriation within the meaning of Article 17.2 of the Constitution, i.e. expropriation of an asset which itself has a value, in which case the legality of expropriation depends on the payment of total compensation following a relevant decision by the competent court determining the amount of such compensation.

The principle of equality does not oblige the State to reserve special favourable treatment to certain creditors on the basis of their personal data and relevant subjective elements and in particular to individuals having limited economic opportunities and life expectancy, who perceive their trading behaviour as depositors rather than investors. On the contrary, the principle of equality, as it is applied to relationships between numerous creditors and the same debtor according to international business conduct, known as the "*pari passu*" principle, imposes the development of these legal relationships until their end on an equal footing, so that, in case of failure to satisfy the sum of the creditors' claims, every creditor should be satisfied on a *pro rata* basis.

Summary:

1. Jurisdiction of the Council of State

The acts challenged before the Council of State were issued within the process of replacement of bonds issued or guaranteed by the State with new ones, according to Law 4050/2012. Such replacement was carried out following the acceptance by the majority of individual creditors of a relevant proposal made by the Cabinet, while such acceptance was binding on creditors who did not take part in the process, as well as on those who, being minority, did not accept the said replacement. Moreover, the possibility of replacement had not been established or agreed upon when the bonds were issued, but it was dominantly established by Law 4050/2012 on public interest grounds. This being the case, the contestation of the relevant acts creates judicial review (annulment) disputes, thus falling under the jurisdiction of the Council of State.

2. Enforceability of the challenged Cabinet Act

The Cabinet decision on the process for the replacement of the eligible bonds with a view to reducing sovereign debt, does not constitute an act of political power management that escapes judicial review (thus, it is not deemed as a governmental act).

3. Legitimate interest of the applicants to contest the relevant acts

The applicants were investors in intangible securities, which were issued by the State in 2010 and were about to expire in 2015. Their bonds were replaced with new ones on the basis of the process established by the challenged Cabinet act.

4. Constitutionality of the Private Sector Involvement (PSI) Plan

The specification of the eligible securities is assigned to the Cabinet by virtue of Law 4052/2012. The Cabinet acts with broad discretion in view of addressing the need for reducing sovereign debt. There is no requirement for the relevant Cabinet act to contain any reasoning as to the eligibility of the securities.

However, such admission is overtaken by reality. Under the given change in economic conditions, which surprised the Hellenic Republic and rendered it too weak to fulfil in a timely manner and in full all obligations of a financial nature, i.e. in view of the risk of bankruptcy and collapse of national economy, the pursuit of a re-negotiation (by virtue of Law 4050/2012) of the part of the sovereign debt that was owed to the private sector, which re-negotiation was expected to have a positive outcome, does not contravene Articles 5 and 25.1 of the Constitution, the constitutional principles nor European Union Law and the European Convention on Human Rights.

The provisions of Article 1 of Law 4050/2012 were deemed not to affect the procedural rights of the applicants as investors in intangible assets (securities), given that the issuer of these securities is not associated with the investors, but with the persons appointed by the Governor of the Bank of Greece as operators of the transaction monitoring system. Taking into consideration this special legal relationship between the State and the investors-customers of the operators, it is noted that no claim was made by the applicants on the basis of Article 5 of the Constitution, to be invited to participate in the negotiation provided for by Law 4052/2012. The provisions of Law 4050/2012 in relation to the re-negotiation procedure derive in fact from international practice: Re-negotiation constitutes a legal relationship which is restricted, from a

procedural point of view, to communications between the issuer of the intangible securities and the holders of bonds (“holders in relation to a bond”). The provisions of Article 1 of Law 4050/2012 were not enacted in an arbitrary way, but according to international business conduct. In addition, the activation and payment of Credit Default Swap following the expiration of the process and due to it (as a credit event) refers to the implementation of those derivative agreements and concerns only those who draw rights or undertake obligations on the basis of these derivative agreements – this is a matter which the national legislator is not obliged to weigh since the State does not participate in concluding derivative agreements in relation to bonds issued by it. In the light of the above, the relevant provisions of Law 4050/2012, which were enacted under exceptional circumstances, i.e. in view of the risk of bankruptcy and collapse of the national economy are not incompatible, as a whole, with Articles 5 and 25.1 of the Constitution, with European Union Law or the European Convention on Human Rights.

The provisions of Laws 4046/2012 and 4050/2012 were enacted following consultation amongst the Greek Government, the Leaders of States and Governments of other member-states of the Eurozone, Eurogroup, European Commission, as well as the European Central Bank and other instruments. Consultations were carried out at a political or technocratic level, during which no European Union acts were issued to implement European Union Law. Nor is the European Financial Stability Facility (EFSF) an institution of the European Union competent for the implementation of EU Law. Besides, at the crucial time, EU law included no rules for sovereign debt restructuring, nor rules for the sovereign debt market which individual investors are interested for, which constitutes a part of the market governed by national legislation. In the light of the above, the Court held that it was not necessary to refer a question to the European Court of Justice for a preliminary ruling on the issues raised by Laws 4046/2012 and 4050/2012.

Besides, according to Articles 5.1, 17.1 and 25.1 of the Constitution, for reasons of weighty public interest it is permissible to restrict any kind of contractual rights, if this is deemed necessary and appropriate to pursue the said public interest under those circumstances and if it is compatible with the principle of proportionality. The Court also held that provided that a fair balance is struck between the general interest of the community and the requirements for protection of an individual's fundamental rights, the loss suffered in property does not contravene Article 1 Protocol 1 ECHR.

The Court noted that the annulment of the applicants' securities, as well as their replacement by new ones issued by the State and the EFSF actually results in loss of capital per 53.5 % or even higher, due to alteration of the maturity provided for the securities annulled. Such property loss, being a restriction of a contractual right, was rather serious. However, as the Court held, such loss was not inappropriate or unnecessary or excessive so as to infringe Articles 17.1 and 25.1 of the Constitution and Article 1 Protocol 1 ECHR. This is because, under the exceptional circumstances which were assessed by the Hellenic Parliament and the Cabinet, as well as by the Private Sector, the Court held that the measure adopted does not exceed the limits of proportionality in order to achieve the financial goal of reducing sovereign debt to avoid bankruptcy and the collapse of the national economy, which would bear unforeseeable social and economic consequences and would definitely endanger, to a serious extent, the enjoyment of rights of all individuals and legal entities that invested in sovereign debt.

The fact that the applicants and other individuals fell under the provisions of Article 1 of Law 4050/2012 does not contravene Article 4.1 of the Constitution given that, in the present case of unforeseeable development of all credit relationships deriving from Law 2198/1994, individuals are not entitled to any favourable treatment in comparison with other creditors of the State, whose rights derive from the same provisions, even if their securities are of low nominal value if they are considered as size and percentage of the total capital unpaid.

As held by Decisions 668, 1283 – 6/2012 (*in plenum*) of the Council of State, extraordinary measures taken to address unforeseeable circumstances, which are prolonged and extremely unfavourable for the national economy, are not permissible, according to Articles 2.1 and 4.5 of the Constitution, to be indiscriminately thrown upon community and especially upon citizens, who are consistent in fulfilling their tax and other obligations. The community has been overcharged with a series of legislative measures regarding the imposition of new taxes and contributions, the increase of the existing taxation (taxation on income, real estate, consumption and other), as well as the serious cut in pensions and in the salaries of civil servants (see Laws 3833/2010, 3845/2010, 3986/2011, 4021/2011 and 4024/2011). In addition, other legislative measures, which have been adopted to address economic circumstances through the restructuring of the national economy, have also affected labour relationships in the private sector. In the case at hand, the restriction of claims against the State by virtue of Law 4050/2012 affected investors, whether

individuals or legal entities, nationals or aliens, who enjoyed rights deriving from legal relationships that provided financial credit to the State, but were not riskless. The regulation of those relationships by Law 4050/2012 and the challenged Cabinet Act, i.e. by restricting, following relevant negotiation, the claims of creditors against the State at a particular rate and by satisfying each creditor on a *pro rata* basis depending on the amount of capital which corresponds to sovereign debt towards Private Sector, is part of the aforementioned legislative interventions, which are broader and aggravating for the community and aim at addressing the given extraordinary economic downturn. Therefore, such regulation does not contravene Article 4.5 of the Constitution.

The Administration has no discretion whether or not to implement the provisions of Article 1 of Law 4050/2012. On the contrary, the decision of the holders in relation to a bond as majority capital has an *erga omnes* effect, it is binding on all holders in relation to a bond and investors of eligible securities and it prevails over any other contrary, general or special, provision of law or normative act or agreement. Law 4050/2012 was dominantly enacted by the Hellenic Parliament and its validity does not depend on former or subsequent statements made by the Eurogroup and/or its Chairman.

The petition for judicial review was dismissed.

Cross-references:

Council of State:

- no. 1117/2014, 01.01.2014, *Bulletin* 2017/2, [GRE-2017-2-004].

Languages:

Greek.



Identification: GRE-2017-2-004

a) Greece / **b)** Council of State / **c)** Plenary Session / **d)** 21.03.2014 / **e)** 1117/2014 / **f)** On the constitutionality of the Private Sector Involvement (PSI) plan / **g)** / **h)** CODICES (Greek).

Keywords of the systematic thesaurus:

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**
4.10 Institutions – **Public finances.**

Keywords of the alphabetical index:

Contract, legislative intervention.

Headnotes:

Articles 5.1, 5.3 and 106.2 of the Constitution do not exclude, as extraordinary measure justified by serious reasons of public interest, the legislative intervention in existing contractual relationships, in the case that special circumstances are met (provision on the basis of general, objective and appropriate criteria, observance of the principle of proportionality, intervention within a reasonable time from the conclusion of the contract). In those cases where the legislator subjects said contractual relationships to the sphere of state intervention for public interest reasons, the relevant acts issued are governed by administrative law and are subject to challenge before the Council of State.

Summary:

The constitutionality of the Private Sector Involvement (PSI) plan (Law 4050/2012) was challenged in this case. The first applicant was a German association and its purpose was to protect the interests of its shareholders and other investors, private property and strengthening the so-called “democracy of shares”. It was also holder of a bond issued by the State, which was subject to the challenged alteration process. The other four applicants were holders of bonds issued by the State, which were also subject to the same process. Therefore, all applicants had a legitimate interest to contest the relevant acts through the petition for judicial review (annulment) in question.

The confirmed legal ability of the applicants to file a petition for judicial review (an application of annulment) of the acts issued under Law 4050/2012 and to contest the constitutionality of this Law renders their claim for infringement of Article 20.1 of the Constitution and Article 6.1 ECHR ill-founded.

The Court also ruled that the applicants' bonds do not fall within the provisions of the international agreement dated 27 March 1961 between Greece and Germany on the promotion and mutual protection of capitals under investment. The applicants' claim for infringement of their right for compensation previously determined by the court, was held ill-founded given

that no evidence was submitted, nor did the applicants allege that their investment in the bonds in question relates to the import of capitals, which was approved by a decision of the competent Ministers in common.

The petition for judicial review was dismissed.

Cross-references:

Council of State:

- no. 1116/2014, 01.01.2014, *Bulletin* 2017/2, [GRE-2017-2-003].

Languages:

Greek.



Identification: GRE-2017-2-005

a) Greece / **b)** Council of State / **c)** Plenary Session / **d)** 05.06.2015 / **e)** 2151/2015 / **f)** **g)** / **h)** CODICES (Greek).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Administration, public, organisation, rational, principle / Administration, public, continuous, principle / Transparency, principle / Impartiality, principle.

Headnotes:

The legislator's freedom to decide on how to organise the Administration presupposes the prior study of the services' needs so that the principle of the rational, effective and continuous function of the Administration is guaranteed.

Summary:

1. By reviewing the constitutionality of Article 90.1 of Statute 4172/2013, which was enacted as a

measure of adjustment of the provisions of Statute's 4046/2012, that ratified the so-called 2nd Memorandum, the Court ruled that the legislator's freedom to decide on how to organise the Administration presupposes the prior study of the services' needs so that the principle of the rational, effective and continuous function of the Administration is guaranteed.

2. The Court then proceeded to control the legislator's intent and held that Article 90.1 of Statute 4172/2013 did not impose the abolition of permanent positions of civil servants so that numerically predetermined objectives are achieved. On the contrary, it is provided for that the abolition of such positions is possible on the condition that, on the one hand, the functional and organisational needs of the public services are taken into account and that, on the other hand, it is well-documented by the relevant evaluation reports on the structuring of the Administration and the staffing plans that the rational, effective and continuous function of the Administration is guaranteed, even after the abolition of the above-mentioned positions. Besides, Article 90.1 of Statute 4172/2013, apart from the abolition, provides for the possibility of the formation of positions in public services via ministerial decrees. In other words, Article 90.1 of Statute 4172/2013 aims to achieve legitimate purposes within the framework of the legislator's organisational power and only secondarily that provision was enacted for budgetary reasons. Accordingly, Article 90.1 of the reviewed Statute does not contravene Article 26 of the Constitution (separation of powers), Article 81 of the Constitution (composition of the government), Article 101 of the Constitution (organisation of the Administration) and Article 103 of the Constitution (civil servants' status). Nor is it against the institutional guarantee of civil servants' permanent status.

3. In addition, the legislator is not precluded by Article 22.1 of the Constitution (right to work) from abolishing – for organisational reasons – the positions occupied by civil servants working in the public sector under a private-law employment relationship.

4. Finally, the Court found not only that the selection criteria laid down by Statute 4172/2013 are general and objective, but also that the legitimate aim pursued by the provisions in question, namely the purpose of ensuring that the selection of officials placed in a non-active status ("availability") will be done under conditions of meritocracy, justifies the different treatment of employees on the basis of their appointment procedure. Further, the procedure prescribed by Statute 4172/2013 was held to be consistent with the principles of impartiality and transparency.

Cross-references:

Council of State:

- no. 3354/2013, 01.01.2013, *Bulletin* 2017/2, [GRE-2017-2-002].

Languages:

Greek.



Hungary

Constitutional Court

Important decisions

Identification: HUN-2017-2-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 19.06.2017 / **e)** 12/2017 / **f)** Annuling certain provisions of Act CXXV of 1995, on national security services / **g)** *Magyar Közlöny* (Official Gazette), 2017/93 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
 3.17 General Principles – **Weighing of interests**.
 4.7.4.1.6.3 Institutions – Judicial bodies – Organisation – Members – Status – **Irremovability**.
 5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence**.

Keywords of the alphabetical index:

Judiciary, independence / Judge, independent / National security / National security, control.

Headnotes:

The general obligation on judges to undergo a national security verification affected their right to private life and the independence of the Judiciary, especially the principle of irremovability.

Summary:

I. Having been authorised by Article 24.2.e of the Fundamental Law and by Article 24.1 of Act CLI of 2011 on the Constitutional Court, the President of the *Curia* initiated a posterior norm control procedure at the Constitutional Court.

The petitioner requested the annulment of certain textual parts of Sections 69.2.b; 70.2; 71.2.e; 71.4; 72/B.2.e; 72/B.8; 74.g of Act CXXV of 1995 on the National Security Services (hereinafter, the “NSSA”) that concern ordinary judges. The regulations were added to the NSSA by Act CIX of 2014.

Before 2013, the NSSA required national security verification only for judges who authorised covert information-gathering, and in cases that were specified in other Acts. The national security examination was to be initiated by the President of the Budapest-Capital Regional Court. The President of the *Curia* stated that the first amendment (Act LXXII of 2013) to the NSSA altered the whole concept of the very Act and it converted the need of the verification into a general obligation for judges. The Constitutional Court, in its Decision 9/2014, found several elements of the new legislation contrary to Article VI of the Fundamental Law (right to private life, protection of personal data) and annulled them.

Firstly, the President of the *Curia* stated that, submitting the judicial profession, by its very nature, to such an obligation violated Article B.1 (legal certainty); Article C.1 (separation of powers); Article XXVIII.1 (right to fair trial, right to an independent and impartial court established by an Act); Article 26.1 (independence of the Judiciary). By doing so, the NSSA defines the judicial profession as one that falls under its general scope. The petitioner claimed that applying the same rules to the judiciary and to the executive branch was contrary to the principle of the separation of powers. The rule was also contrary to the right to an independent and impartial court established by law, since the denial of the verification would result in the removal of the judge, even if the procedure was on-going.

Secondly, the new regulations were against the principle of clarity and legal certainty, which would lead to arbitrariness. Thus, the petitioner requested the Constitutional Court to declare that an omission was made on the side of the law-maker, violating Articles C.1, XXVIII.1 and 26.1 of the Fundamental Law, since the NSSA did not contain judges as exceptions from its general applicability. The President also initiated the constitutional review of the regulations of the NSSA that had not been annulled in Decision 9/2014 of the Constitutional Court.

Thirdly, the petitioner found contrary to the right to an independent and impartial court established by law and to the independence of the Judiciary the regulations of the NSSA, which provided that no judicial office could have been filled or the judge was to be moved out if a national security risk was found during the verification process.

Fourthly, the amendment to the NSSA practically re-regulated what the Constitutional Court had annulled in Decision 9/2014, since it allowed supervising procedures. The national security verification was to be valid and to be reviewed every five years, but the NSSA allowed the supervising procedure within this

period with no limits (before Decision 9/2014 was delivered, it had been called continuous national security control). Such regulations were in violation of the separation of powers; right to an independent and impartial court established by law and with the independence of the Judiciary. The President of the *Curia* stated that these rules were also in violation of Article VI of the Fundamental Law (right to private life, protection of personal data).

II. The Constitutional Court found that all judicial professions and namely certain parts of it fell under the scope of the NSSA. Thus, the requirement of the national security verification was to be applied concerning all judges who were about to enter into – or who had been already in office. The only exceptions were the President of the *Curia* and the President of the National Office for the Judiciary. Judges were also excluded, who were entitled to obtain confidential information by another Act.

According to the NSSA, the verification proceedings could have been initiated by the President of the *Curia*, the presidents of the courts of appeal, the presidents of the regional courts and by the Director of the National Security Authority.

Firstly, the Constitutional Court acknowledged that the protection of national security interests were not only legitimate aims, but they also implied an obligation on the State. The main goals of the national security examinations were investigation and prevention. In abstract, such an aim was not contrary to the Fundamental Law. The proceeding was to be done by filling out a form of various questions on private and sensitive data; moreover it could have included observation and recording of intimate details.

The independence of the Judiciary was an achievement of the Hungarian historical Constitution. In the light of its case-law, the Constitutional Court also emphasised that the very principle bore a special constitutional significance. The protection of the employment of judges was the essence, enshrined in Article 26.1 of the Fundamental Law. Judges could not be instructed in their adjudicating activities. Their independence was to be secured also by guarantees respecting their legal status, organisation and finances. To sum up, the verification procedure affected the right to private life and the independence of the Judiciary, especially the principle of irremovability.

The Constitutional Court concluded that no justification for such a broad obligation could be derived from Article 46.1 of the Fundamental Law (on the national secret services). The NSSA should have struck a fair balance between the interest of national

security and the right to private life. The scope of the application should have also been formulated clearly.

Thus, the general obligation was not necessary and it violated the independence of the Judiciary.

Secondly, the affect of the verification on the status of a judge was examined. If the verification was denied, the judge could not have entered into office or he or she was to be discharged. According to Articles 9.3.k and 26.2 of the Fundamental Law, judges shall be appointed by the President of the Republic in line with the provisions of a cardinal Act. Only such a cardinal Act could formulate the terms of removing a judge. The NSSA stipulated that employment could be prolonged if the person exercising the employers' rights allowed it to do so. However, such a rule could lead to arbitrariness that is contrary to the independence of the Judiciary.

Thirdly, the supervising procedure could have been initiated by authorised officials without any legitimate – clear – aim or reason. Any sort of suspicion could have been the basis of such an investigation. The Constitutional Court ruled out that the NSSA granted too broad a possibility to investigate, not just the judge who was concerned, but also his or her connections. However, such an intrusion could have only been accepted in line with strict regulations and sufficient guarantees. The Constitutional Court added that the NSSA would still infringe the constitutional requirements having been formulated in Decision 9/2014. Thus, it violated the right to private life and the protection of personal data, moreover, the independence of the Judiciary.

III. Justice Ágnes Czine attached a concurring reasoning and Justice Mária Szívós a dissenting opinion to the decision.

Cross-references:

Constitutional Court:

- no. 9/2014, 21.03.2014, *Bulletin* 2014/1 [HUN-2014-1-003].

Languages:

Hungarian.



Ireland Supreme Court

Important decisions

Identification: IRL-2017-2-001

a) Ireland / **b)** Supreme Court / **c)** / **d)** 30.05.2017 / **e)** SC 31 and 56/15 / **f)** N.H.V v. Minister for Justice and Equality and others / **g)** [2016] IESC 51 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status**.

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

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

5.4.5 Fundamental Rights – Economic, social and cultural rights – **Freedom to work for remuneration**.

Keywords of the alphabetical index:

Asylum, process, delay / Asylum, seeker, employment, gainful, right to engage in, foreigner / Equality before the law / Equality, categories of person, comparison / Fundamental right, application / Fundamental right, entitlement / Fundamental rights, nature / Right to work, freedom to work for remuneration / Non-citizen, rights and guarantees / Unconstitutionality, Act.

Headnotes:

As there is no temporal limit on the asylum process, the absolute prohibition in Section 9.4 of the Refugee Act 1996 (now in Section 26.3 of the International Protection Act 2015) on the seeking of employment by a person waiting for a final determination of his or her application for refugee status is, in principle, contrary to the constitutional right to seek employment.

Summary:

I. 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) and in certain exceptional instances directly from the High Court. The decision of the Supreme Court summarised here is an appeal from a decision of the Court of Appeal.

The applicant was a Burmese national who arrived in Ireland in July 2008. He made two claims for refugee status, which were rejected by the Office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal. An application for judicial review in respect of the first decision was successful, and the second decision was discharged by consent. The applicant was in Direct Provision accommodation in Ireland, which is a system of accommodating asylum seekers in residential institutions while their applications are being processed. While there, the applicant was offered employment as a chef in May 2013, which he could not take up as he had no temporary permission to work in the State. The Minister for Justice and Equality refused his application for permission to take up the work on the grounds that he was precluded from doing so under Section 9.4 of the Refugee Act 1996, which prohibits an applicant for asylum from seeking or entering employment before the final determination of his or her application. The applicant brought proceedings in the High Court challenging the interpretation of the Minister of Section 9.4 of the 1996 Act and/or seeking a declaration of incompatibility of the Section with the Charter of the European Union, the European Convention on Human Rights and the Constitution. The primary issue for consideration was whether the applicant, as an asylum seeker, is entitled to the right to work or earn a livelihood under Article 40.3 of the Constitution, in which “[t]he State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen”. The Irish Courts have found that Article 40.3 of the Constitution guarantees a number of personal rights, which are not explicitly referred to in the Constitution, including the right to work or earn a livelihood.

The High Court dismissed the applicant’s claim. The Court of Appeal upheld the decision of the High Court, finding that a right to work or earn a livelihood within the State is inextricably linked to the person’s status within the State. It held that the applicant, as a person who had been given leave to enter the State and remain while his application for a declaration of refugee status, did not have a constitutionally protected personal right to work or earn a livelihood in the State.

II. The Supreme Court granted the applicant leave to appeal to the Court on the basis that the case concerned a matter of public importance. O’ Donnell J., giving the judgment of the Court, considered that the arguments in the case raised:

“some important and difficult questions of constitutional law: may a non-citizen, and in particular an asylum seeker without any other connection to the State, rely on any right guaranteed by the Constitution of Ireland, and is so the unenumerated constitutional right to work? If so what is the nature and extent of the right which must be accorded to a non-citizen and in particular asylum seeker with no other connection to, or claim to remain in the State?”

As to the question of the right of non-citizens to rely on the provisions of the Constitution, the Court referred to Article 40.1 of the Constitution, which provides that “[a]ll citizens shall, as human persons, be held equal before the law” but that “[t]his shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function”. The Supreme Court found that the obligation to hold persons equal before the law “as human persons” in Article 40.1 of the Constitution means that non-citizens may rely on constitutional rights, where those rights and questions relate to their status as human persons, but that a distinction may be made in accordance with Article 40.1 of the Constitution having regard to the difference between citizens and non-citizens if such distinction is justified by that difference in status. Thus, the Court found that, in principle, a non-citizen, including an asylum seeker, may be entitled to invoke the unenumerated personal right to work if it could be established that to do otherwise would fail to hold such a person equal as a human person.

The Court considered what previous case-law had described as the unenumerated ‘right to work’ under Article 40.3 of the Constitution, and found that any such constitutionally protected interest is better envisaged as a “freedom to seek work which however implies a negative obligation not to prevent the person from seeking or obtaining employment, at least without substantial justification”, noting that the interest is protected in this way in, for example, the EU Charter of Fundamental Rights.

In assessing the nature of the freedom to work as an unenumerated right, the Court stated that “it must be recognised that work is connected to the dignity and freedom of the individual which the Preamble tells us the Constitution seeks to promote”. It concluded that “a right to work at least in the sense of a freedom to work or seek employment is part of the human

personality and accordingly the Article 40.1 of the Constitution requirement that individuals as human persons are required to be held equal before the law, means that those aspects of the right which are part of human personality cannot be withheld absolutely from non-citizens". Nonetheless, the Court took the view that the differences between citizens and non-citizen applicants justify significant differentiation in the field of employment, for reasons of the connection of the labour market to the economy of the State.

The Court therefore had to consider whether the extent of such differences justifies the statutory distinction made under Section 9.4 of the 1996 Act in this case. It found that this Section does not only limit the right severely, it removes it altogether. As there is no limitation on the time by which an application for asylum must be processed, Section 9.4 could constitute an absolute ban on employment. The applicant in this case had been in the asylum application system for more than eight years, during which he was prohibited from seeking employment. The Court held that, in principle, in circumstances where there was no temporal limit on the asylum process, the absolute prohibition on the seeking of employment in Section 9.4 of the 1996 Act is contrary to the constitutional right to seek employment.

However, as the situation arose due to the connection between a number of legislative provisions, and "could arguably be met by alteration of someone or other of them", which is a matter for the executive and legislative organs of government, the Court adjourned consideration of its order for six months, and invited the parties to make submissions on the form of the order in light of the circumstances on that date.

Cross-references:

Supreme Court:

- *H.A.H. v. S.A.A. and others*, 15.06.2017, [2017] IESC 40, *Bulletin* 2017/2 [IRL-2017-2-002].

Languages:

English.



Identification: IRL-2017-2-002

a) Ireland / **b)** Supreme Court / **c)** / **d)** 15.06.2017 / **e)** [SC 128, 130 and 135/2011] / **f)** *H.A.H. v. S.A.A. and others* / **g)** [2017] IESC 40 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.4.12 Constitutional Justice – Jurisdiction – Types of litigation – **Conflict of laws.**

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

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

3.18 General Principles – **General interest.**

5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion.**

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

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

Keywords of the alphabetical index:

Marriage, polygamous / Asylum, seeker / Private international law, Public Policy / Constitution, interpretation / Family reunification / Spouse, definition.

Headnotes:

A marriage that is potentially polygamous is capable of being recognised as legally valid in the State in accordance with the rules of private international law, under which recognition of a marriage entered into in compliance with a foreign legal system should be refused only if a refusal is required for the protection of the values and principles represented in public policy of Ireland. Recognition afforded to a potentially polygamous marriage should not be withdrawn if the husband contracts into a further marriage. However, recognition of actually polygamous marriages would be contrary to the definition of marriage in the Constitution of Ireland as a union between two people, and the constitutional principle of equality of all persons before the law, and therefore contrary to public policy. However, this does not mean that a second or subsequent marriage cannot have legal consequences.

Summary:

I. The Supreme Court of Ireland considered the legal consequences in the State of a polygamous marriage entered into in another country. The applicant (husband), who was originally from the Lebanon, was a recognised refugee and naturalised Irish citizen. While in the Lebanon, he had contracted into a

marriage with two women, the first woman in 1975 and the second in 1988. The parties were Lebanese Muslims and the marriage ceremonies were valid under Lebanese law. The husband entered Ireland as an asylum seeker in 1998 and was recognised as a refugee in 2000, which entitled him, under the Refugee Act 1996, to apply to the Minister for Justice, Equality and Law Reform (hereinafter, the “Minister”) to be joined by members of his family, including his “spouse”. The second notice party, SAH, was the second wife of the applicant from the 1988 marriage, and was admitted in 2001 with a number of minor children. She became an Irish citizen, and supported the contention of the first wife that the first marriage was recognisable, whilst also maintaining that she herself was validly married to the husband. The husband was granted Irish citizenship in 2002 and applied to have the first wife from the 1975 marriage admitted to the State. The Minister refused the application to admit the first wife.

The husband brought judicial review proceedings to quash the refusal of the Minister. The first wife entered Ireland in 2006 and unsuccessfully applied for asylum, although she was granted permission to remain, and the Attorney General indicated to the Court that it was unlikely that any steps would be taken to remove her, regardless of the outcome of the proceedings. As a result of a compromise between the parties during the judicial review proceedings, the applicant brought an application to the High Court for a declaration under Section 29 of the Family Law Act 1995, which provides for the making of a range of declarations pertaining to marriage, including that a marriage was valid at the date of its inception. The application was refused in the High Court and was appealed to the Supreme Court.

II. In the Supreme Court, it was submitted on behalf of the applicant that the Constitution of Ireland does not require that recognition of the marriage be refused and, further, that it was not sufficient for refusal that the form of marriage at issue is not a form permitted in Ireland. It was submitted on behalf of the first wife that since a marriage need not, in the context of private international law, be recognised for all purposes of the national law, it is not necessary for her to come within the constitutional definition of marriage, and she need only establish that she is a wife for the purpose of family reunification.

Irish law recognises a marriage contracted into in a foreign country which complies with the laws of that country, the *lex loci celebrationis*, unless it conflicts with the fundamental requirements relating to validity based on the domicile of the parties or public policy in Irish law, in particular capacity to marry. O’Malley J., delivering the primary judgment of the Supreme Court, considered the definition of marriage under the

Constitution, which in this era “entails the voluntary entry into mutual personal and legal commitments on the basis of an equal partnership between two persons, both of whom possess capacity to enter into such commitments, in accordance with the requirements laid down by law”. The Court was of the view that there was no harm or threat in the case of a couple living in the State in a monogamous relationship arising purely out of the fact that they married under a system of law that permits polygamy. The Court found that a marriage that is potentially polygamous only is capable of being recognised as legally valid in the State and should be recognised at the date of inception.

The Court held that the recognition of a potentially polygamous marriage should not be withdrawn if the husband contracts into a further marriage, and that withdrawal of recognition would interfere unnecessarily with the rights of some of the individuals involved and would go further than necessary to protect the institution of marriage. The Court granted a declaration pursuant to Section 29 of the Family Law Act 1995 that the marriage of the applicant and the first wife was valid at the date of inception.

Expressing a view in relation to the second marriage, the Court considered that the model of marriage provided for under Article 41.4 of the Constitution, which provides that “[m]arriage may be contracted in accordance with law by two persons without distinction as to their sex”, does not contemplate the institution of polygamy. Article 41 of the Constitution, read together with the guarantee of equality of all persons in Article 40.1 of the Constitution means that there is no room for a version of marriage which, by its structure, allows the husband to have more than one spouse, as such a structure would give effect to discrimination and subordination. Recognition of actually polygamous marriages would therefore be contrary to a fundamental constitutional principle and therefore public policy. However, the Court found that there is no reason why a second or subsequent marriage should never have legal consequences.

III. Clarke J. also delivered a judgment of the Supreme Court. He agreed with the judgment of O’Malley J and made some observations on the role of public policy as an exception to the application of the ordinary rules of recognition in private international law, including that public policy should only be deployed to the extent necessary to protect the values inherent in the Irish national legal order. He also expressed the view that “urgent attention be given to the question of whether legislation should be enacted for the purposes of bringing certainty to the question of whether, and if so, to what extent, the fact that a marriage may be valid in accordance with the laws of another jurisdiction might legitimately affect

some rights and obligations of parties in Ireland even though Irish law would not afford recognition to the marriage in question”.

Cross-references:

Supreme Court:

- *N.H.V v. Minister for Justice and Equality and others*, 30.05.2017, *Bulletin* 2017/2 [IRL-2017-2-001].

Languages:

English.



Identification: IRL-2017-2-003

a) Ireland / **b)** Supreme Court / **c)** / **d)** 27.07.2017 / **e)** SC 89/16 / **f)** P.C. v. Minister for Social Protection and others / **g)** [2017] IESC 63 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 3.4 General Principles – **Separation of powers**.
- 3.16 General Principles – **Proportionality**.
- 5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees**.
- 5.2 Fundamental Rights – **Equality**.
- 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.
- 5.3.13.3.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – **“Natural judge”/Tribunal established by law**.
- 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.
- 5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension**.

Keywords of the alphabetical index:

Pension, entitlement / Prisoner, rights / Separation of powers, checks and balances / Sanction, Criminal Law / Administration of justice / Property rights / Trial, criminal, due process of law, constitutional right / Unconstitutionality / Act, unconstitutional.

Headnotes:

The operation by the State of a disqualification regime in respect of the payment of the State Contributory Pension, which applies only to convicted prisoners, constitutes an additional punishment not imposed by a court, which contravenes the principle in Article 34 of the Constitution that justice be administered in courts established by law by judges appointed under the Constitution, and the requirement under Article 38 of the Constitution that no person be tried on any criminal charge, save in due course of law.

Summary:

I. Section 249.1 of the Social Welfare (Consolidation) Act 2005 (hereinafter, the “2005 Act”) provides:

“Except where regulations otherwise provide, a person shall be disqualified for receiving any benefit under Part 2 (including any increase of benefit) for any period during which that person:

- a. is absent from the State, or
- b. is undergoing penal servitude, imprisonment or detention in legal custody.”

Part 2 of the 2005 Act defines benefits as including: disability benefit, unemployment benefit, adoptive benefit, unemployment benefit, occupational injuries benefit, carer’s benefit, old age (contributory) pension, retirement pension, invalidity pension, widow(er) (contributory) pension, orphans (contributory) allowance, bereavement grants and widowed parent grant. The applicant was born in 1940 and spent most of his life working in Ireland. He made sufficient contributions to make him eligible for what was then known as the contributory old age pension, now referred to as the State Contributory Pension (hereinafter, “SPC”). In 2006, at age 66, he began to receive the SPC. In 2011, the applicant was convicted of serious offences committed against a family member, and sentenced to a lengthy term of imprisonment, with an expected release date in 2020. By reason of Section 249.1 of the 2005 Act, the Minister for Social Protection (hereinafter, the “Minister”) ceased payment of the SPC to the applicant upon his detention in prison.

The applicant challenged the constitutionality of Section 249.1 of the 2005 Act in the High Court. He sought a declaration that Section 249.1 of the 2005 Act was incompatible with Article 34 of the Constitution, which provides that “justice shall be administered in courts established by law by judges...” and Article 38 of the Constitution, which provides that “[n]o person shall be tried on any

criminal charge save in due course of law". He contended that disqualification from receipt of SPC during his term of imprisonment constituted an extra penalty, additional to the punishment imposed by a Court, and that in accordance with case-law of the Irish courts, it is for the courts to determine the appropriate penalty following conviction. The applicant further submitted that Section 249.1 of the 2005 Act discriminated against him contrary to the equality guarantee in Article 40.1 of the Constitution, as it operated to deprive persons such as him of their right to receive the SPC, whereas others who are in receipt of pensions continue to receive their pensions while serving a term of imprisonment. In addition, he submitted that once a person has met the requirements for payment of SPC, they acquire a property right, which is protected by Article 43 of the Constitution and the European Convention on Human Rights, and that the property rights of vulnerable people, such as the applicant, who have no other source of income or family support, benefit from particular or constitutional protection. The applicant alleged that Section 249.1 of the 2005 Act is in breach of the following Articles 3, 5, 6, 8, 13 and 14 ECHR and Article 1 Protocol 1 ECHR. The High Court dismissed the applicant's claim. The Supreme Court was satisfied that the case raised an issue of general public importance and granted the applicant's application for leave to appeal. The Court was satisfied that, in accordance with Article 35.5.4 of the Constitution, there were exceptional circumstances justifying an appeal directly from the High Court to the Supreme Court (rather than to the Court of Appeal).

II. MacMenamin J delivering the judgment of the Supreme Court, first considered two main constitutional issues which, the Court decided, were sufficient to determine the appeal. The first issue related to the extent of the entitlement of the applicant to the SPC, which the Court described as "a qualified entitlement derived from statute". The Court considered that the decisions of *Cox v. Ireland* [1992] 2. I.R. 503 and *Lovett v. Minister for Education, Ireland and the Attorney General* [1997] 1 I.L.R.M. 89 were relevant to the present case. MacMenamin J. considered that the statutory provisions, at least give rise to a justiciable, if conditional, legal entitlement. It was unnecessary to go so far as to hold that it constitutes a form of property right. The Court found that the sanction was not as a consequence of a judicial order, and that there was no judicial finding or determination which triggered the section. There was no judicial discretion in respect of the extent or impact of the disqualification. Rather, it was triggered by the fact of imprisonment. The sanction came into effect without any court order at all, and was in that sense also arbitrary and discriminatory, operating without any proportionality consideration.

As to whether the effect of Section 249 of the 2005 Act and the associated regulations constituted a penalty, which was not imposed by a court, the Supreme Court held that "the prohibition on the payment of SPC to sentenced persons can only constitute an additional punishment". It therefore contravened Articles 34 and 38 of the Constitution. The Court stated that the "imposition of penalties, in the context of sentencing a person convicted of crimes, is a function exclusively reserved by Article 34 of the Constitution to the courts". Further, "[s]entencing is an integral part of trial in due course of law, guaranteed by Article 38 of the Constitution", and therefore Section 249.1 of the 2005 Act offended against those principles. The Court found that the "effect of Section 249.1 of the 2005 Act is to result in an impermissible legislative incursion into the judicial function by making provision for the imposition of an extra penalty upon an individual in receipt of SPC, without permitting the fact of this to be taken into account by a sentencing court in exercising discretion as to the appropriate penalty to be imposed upon a person convicted of an offence that attracts a sentence of imprisonment". The Supreme Court found that the provision "contravenes the principles of the separation of powers, and administration of justice, fundamental to the Constitution". The Supreme Court held that the provision was invalid, and concluded that the State may not operate a disqualification regime that applies only to convicted prisoners and, thereby constitutes an additional punishment not imposed by a court. In light of this finding, it was unnecessary for the Supreme Court to consider the rights of the applicant under the Convention. The Court adjourned the matter to allow the parties to make representations in relation to the question of remedy.

Cross-references:

Supreme Court:

- *P.C. v. Minister for Social Protection and others* [2017] IESC 63, 27.07.2017;
- *Cox v. Ireland* [1992] 2. I.R. 503, 11.07.1991;
- *Lovett v. Minister for Education, Ireland and the Attorney General* [1997] 1 I.L.R.M. 89, 10.08.2017.

Languages:

English.



Italy

Constitutional Court

Important decisions

Identification: ITA-2017-2-006

a) Italy / **b)** Constitutional Court / **c)** / **d)** 08.02.2017 / **e)** 122/2017 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 22, 31.05.2017 / **h)** CODICES (Italian, English).

Keywords of the systematic thesaurus:

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

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

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

5.3.36.1 Fundamental Rights – Civil and political rights – Inviolability of communications – **Correspondence.**

Keywords of the alphabetical index:

Prison law, prisoners subject to special rules / Prison administration, special rules, prohibition on receiving from or sending to the outside books or print publications.

Headnotes:

Prisoners are not prevented from having access to their preferred reading material and its contents, but are obliged to make use of the prison institution to acquire them. An aim of this is to avoid the transformation of a book or magazine into a vehicle for hidden communications with the outside, which are difficult for the authorised personnel to identify. Restricting the channels by which printed material may be received and banning its transmission to the outside not only do not impinge in any way on the secrecy of prisoners' correspondence (unlike inspection and stamping), but also do not compromise the freedom of correspondence by mail already recognised by national law, consistent with the condition of legitimate restriction of personal freedom in which the prisoner lives. The freedom of correspondence via mail is still able to be expressed, in full, through ordinary written correspondence.

Summary:

In this case, the Court heard a referral order from a supervisory judge (the functions of whom in part coincide with those of a parole board in the United Kingdom's and the United States' criminal justice systems) questioning the constitutionality of a legislative provision that allowed prison administrations to prohibit prisoners from exchanging books and other print publications (such as magazines, newspapers and journals) with persons outside the prison. The provision allowed prison administrations to adopt this measure as one of many measures that could apply to prisoners subject to special, more stringent prison rules intended to sever ties between them and criminal organisations. It was intended specifically to prevent prisoners subject to the special rules from exchanging secret messages with people on the outside by hiding the messages in the printed texts. The referring judge alleged that this was unconstitutional for three reasons: first, it bypassed the power reserved to the judiciary to order restrictions on prisoner correspondence; second, it compromised prisoners' rights to information and study; and, third, it violated international rules forbidding inhuman or degrading treatment and safeguarding the right to respect for family life and correspondence.

The Court accepted the question, holding that the formation of a "living law" had taken place through rulings on this topic by the Supreme Court of Cassation, according to which prison administrations were legally authorised to forbid prisoners subject to the special rules to send and receive print publications, and that the referring judge was, therefore, not bound to form a different interpretation that was more closely aligned with constitutional principles, but was free to refer the constitutional question.

The Constitutional Court then ruled that the questions were unfounded. The Court held that the transmission of books and other printed materials could not be classified as "correspondence" and that the right to correspondence was adequately protected by the methods allowed for corresponding, understandably limited according to the reasonable limits associated with incarceration. It also rejected the argument that the prisoners' rights to information and study were compromised, holding that the Constitution guarantees prisoners a right to choose and acquire texts by which to inform and educate themselves, but the means of acquiring such texts are not dictated by constitutional rights. The challenged rule did not restrict the rights of prisoners to receive the publications of their choice, but obliged them to obtain such material through the prison system rather than from friends and relatives.

The Court rejected the referring judge's allegations based on international law, holding that the absolute ban on inhuman or degrading treatment could not be circumvented even by judicial order, and, consequently, such an allegation was clearly incongruous with the referring judge's conclusion that the measure would be valid if ordered by a judge. The Court also observed that even more restrictive measures had been ruled allowable and reasonable by international courts interpreting the European Convention on Human Rights provisions on inhuman and degrading treatment. With regard to the international rule guaranteeing respect for private and family life, home, and correspondence, the Court ruled that the three conditions required by international law for restricting these rights were met in the case of the challenged measure.

Cross-references:

European Court of Human Rights:

- *Gagiu v. Romania*, no. 63258/00, 24.02.2009;
- *Cotlet v. Romania*, no. 38565/97, 03.06.2003;
- *Olsson v. Sweden (no. 1)*, no. 10465/83, 24.03.1988, Series A, no. 130;
- *Natoli v. Italy*, no. 26161/95, 09.01.2001;
- *Domenichini v. Italy*, no. 15943/90, 15.11.1996, Reports 1996-V;
- *Paolello v. Italy*, no. 37648/02, 01.09.2015;
- *Enea v. Italy*, no. 74912/01, 17.09.2009, Reports of Judgments and Decisions 2009;
- *Annunziata v. Italy*, no. 24423/03, 07.07.2009;
- *Montani v. Italy*, no. 24950/06, 19.01.2010.

Languages:

Italian, English text available on the Court's website.



Identification: ITA-2017-2-007

a) Italy / b) Constitutional Court / c) / d) 07.03.2017 / e) 123/2017 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 22, 31.05.2017 / h) CODICES (Italian, English).

Keywords of the systematic thesaurus:

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

4.7.3 Institutions – Judicial bodies – **Decisions**.

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

Keywords of the alphabetical index:

Decision, final judgment, administrative matters, revision / Trial, reopening / European Court of Human Rights, judgment, execution / European Court of Human Rights, Convention proceedings, third parties.

Headnotes:

In areas other than criminal law, it is not at present apparent from the European Court of Human Rights case-law that there is a general obligation to adopt the restorative measure of reopening a trial. The decision to provide for this is left to the States Parties, which are moreover encouraged to make provision to this effect, albeit with due consideration to the various countervailing interests in play.

Summary:

In this case, the Council of State questioned the lack of any provision under Italian law allowing for the annulment of a final judgment in administrative matters following a ruling against the Italian State by the European Court of Human Rights.

The Court dismissed the questions, noting – firstly – that, in the relevant rulings against the Italian State, the European Court of Human Rights did not set out any obligation to reopen the trial as a required form of *restitutio in integrum*. Moreover, the Court pointed out that – as a matter of principle – it does not fall to the European Court of Human Rights to state which measures are suitable to put an end to a breach of the European Convention on Human Rights, as the States are free to choose the manner in which that obligation is complied with, provided that this is compatible with the conclusions set out in its judgments. The European Court of Human Rights has considered it appropriate to indicate the type of measure to be adopted only in a few exceptional cases.

The types of measures of redress were also addressed in Recommendation R(2000)2 of 19 January 2000 which, although not binding, is particularly important, *inter alia*, because it affects the practical implementation that is relevant for the

interpretation of the European Convention on Human Rights pursuant to Article 31.3 of the Vienna Convention on the Law of Treaties. It is apparent from the case-law of the European Court of Human Rights and the Recommendation that:

- i. the obligation to comply with the Court's judgments is variable in content;
- ii. the individual measures of redress other than compensation are only contingent and must be adopted where they are "necessary" in order to implement judgments; and
- iii. the review of the case or the reopening of the trial is however to be regarded as the most appropriate measure in cases involving the violation of the Convention rules on the right to a fair trial. The specific case-law of the European Court of Human Rights on civil and administrative trials essentially reflects these principles.

On the one hand, the Constitutional Court noted that the assertion that the trial must be reopened as a measure capable of guaranteeing *restitutio in integrum* is only found in European Court of Human Rights judgments given against States whose internal legal systems already provide for the review of judgments that have become final in the event that the European Convention on Human Rights has been violated. On the other hand, the Constitutional Court noted some level of reticence on the part of the European Court of Human Rights to require the reversal of *res iudicata* in non-criminal matters, as this may also affect the legitimate expectations and reliance on legal certainty of other non-state actors who are not at fault for the breach. The more cautious stance adopted by the European Court of Human Rights in relation to non-criminal trials may be explained by the need to protect those actors, along with the respect for legal certainty in relation to those actors guaranteed by *res iudicata* (in addition to the fact that civil and administrative proceedings have no potential implications for individual freedom). The creation of rules in this area is a delicate matter that falls to the legislature and not the judiciary. The Court also noted that the task of national legislators would be facilitated if Convention proceedings were to be made accessible to a wider class of persons than at present.

Cross-references:

European Court of Human Rights:

- *Mottola and Others v. Italy*, no. 29932/07, 04.02.2014;
- *Stabano and Others v. Italy*, no. 29907/07, 04.02.2014;

- *Centre for Legal Resources on behalf of Valentin Campeanu v. Romania*, no. 47848/08, 17.07.2014, *Reports of Judgments and Decisions* 2014;
- *Karelin v. Russia*, no. 926/08; 20.09.2016;
- *Ignatov v. Ukraine*, no. 40583/15, 15.12.2016;
- *S.K. v. Russia*, no. 52722/15, 14.02.2017;
- *Scozzari and Giunta v. Italy*, nos. 39221/98 and 41963/98, 13.07.2000, *Reports of Judgments and Decisions* 2000-VIII;
- *Scoppola v. Italy (no. 2)*, no. 10249/03, 17.09.2009;
- *Kuric and others v. Slovenia*, no. 26828/06, 12.03.2014, *Reports of Judgments and Decisions* 2014;
- *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)*, no. 32772/02, 30.06.2009, *Reports of Judgments and Decisions* 2009;
- *Bochan v. Ukraine (no. 2)*, no. 22251/08, 05.02.2015, *Reports of Judgments and Decisions* 2015;
- *Davydov v. Russia*, no. 18967/07, 30.10.2014;
- *Oleksandr Volkov v. Ukraine*, no. 21722/11, 09.01.2013, *Reports of Judgments and Decisions* 2013;
- *Artemenko v. Russia*, no. 24948/05, 22.11.2016;
- *Kardoš v. Croatia*, no. 25782/11, 26.04.2016;
- *T.Ç. and H.Ç. v. Turkey*, no. 34805/06, 26.07.2011;
- *Iosif and others v. Romania*, no. 10443/03, 20.12.2007;
- *Paykar Yev Haghtanak Ltd v. Armenia*, no. 21638/03, 20.12.2007;
- *Yanakiiev v. Bulgaria*, no. 40476/98, 10.08.2006;
- *Gurov v. Moldova*, no. 36455/02, 11.07.2006.

Languages:

Italian, English text available on the Court's website.



Identification: ITA-2017-2-008

a) Italy / **b)** Constitutional Court / **c)** / **d)** 22.03.2017 / **e)** 124/2017 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 22, 31.05.2017 / **h)** CODICES (Italian, English).

Keywords of the systematic thesaurus:

- 3.17 General Principles – **Weighing of interests.**
- 3.18 General Principles – **General interest.**
- 3.20 General Principles – **Reasonableness.**
- 4.6.9.3 Institutions – Executive bodies – The civil service – **Remuneration.**
- 4.10.2 Institutions – Public finances – **Budget.**
- 5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work.**
- 5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension.**

Keywords of the alphabetical index:

Remuneration, public sector, maximum limit / Remuneration, cumulation of pension and remuneration, maximum limit / Public funds, cost-containment measure.

Headnotes:

In the public sector, the legislator is not precluded from stipulating a maximum limit for remuneration and for the cumulative total of remuneration and pensions, provided that such a choice, the aim of which is to balance out the various values in play, is not manifestly unreasonable.

Summary:

In this case, the Constitutional Court heard referral orders concerning legislation which imposed a maximum limit on the amounts disbursed as remuneration and pensions out of public funds to any individual working for the state (in this particular case, certain senior judges), stipulating that the individual's remuneration must be reduced so as to ensure that the total amount of all funds received does not exceed the salary of the First President of the Court of Cassation.

The Court dismissed the questions, holding that the rule was not directed specifically at the judiciary and applied universally across the public sector and was, moreover, based on a reasonable balancing of the constitutional interests in play. More particularly, the Court stated that the limit of available resources, which is inherent within the public sector, requires the legislator to make consistent choices that seek to strike a balance between various constitutional values, such as equal treatment (Article 3 of the Constitution), the right to remuneration that is commensurate with the quantity and quality of the work performed and in all cases capable of guaranteeing a free and dignified existence (Article 36.1 of the Constitution), the right to adequate

pension provision (Article 38.2 of the Constitution) and the proper conduct of the public administration (Article 97 of the Constitution). The legislator is not precluded from stipulating a maximum limit for remuneration and for the cumulative total of remuneration and pensions. In this connection, it is necessary to respect stringent prerequisites, capable of safeguarding the suitability of the limit to guarantee an adequate and proportionate balancing of the countervailing interests. However, the precise imposition of a maximum limit on public-sector remuneration does not conflict with the principles referred to above.

The legislation under review pursues cost-containment goals and the overall rationalisation of spending, with an approach that guarantees the other general interests involved, within a context of limited resources. The choices made by the legislator were also not unreasonable, as the limit on remuneration, which is set out as a measure of rationalisation, applies generally throughout all administrative bodies. The limit is also not inadequate, as it is linked to service in an appointment of undisputed importance and prestige (i.e., the First President of the Court of Cassation). By virtue of these characteristics it does not violate the right to work and does not demean the professional contribution of the most qualified individuals, but ensures that the link between remuneration and the quantity and quality of the work performed is safeguarded also in relation to the most high-level jobs.

It is apparent that the choices made by the legislator are not unreasonable also in relation to the provision applicable to the cumulative payment of remuneration and pensions out of public funds. The provision, in fact, is consistent with other measures aimed at containing public-sector pay and is distinguished by its particularly wide scope. It is also directed at the vast category of the administrations included in the Italian National Institute for Statistics list and mentions constitutional bodies, which are required to implement it in accordance with their own system of rules. Having been framed in these broader terms and having taken as its point of reference a specific figure, corresponding to the remuneration of the First President of the Court of Cassation, the contested provision strikes a balance that is not unreasonable between the constitutional principles and does not unduly sacrifice the right to remuneration that is commensurate with the quantity and quality of the work performed.

Languages:

Italian, English text available on the Court's website.



Identification: ITA-2017-2-009

a) Italy / **b)** Constitutional Court / **c)** / **d)** 05.04.2017 / **e)** 111/2017 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 20, 17.05.2017 / **h)** CODICES (Italian, English).

Keywords of the systematic thesaurus:

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

2.2.1.6.5 Sources – Hierarchy – Hierarchy as between national and non-national Sources – Law of the European Union/EU Law and domestic law – **Direct effect, primacy and the uniform application of EU Law.**

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

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

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

Keywords of the alphabetical index:

Employment, treatment, female workers, equal pay / Employment, public, retirement, age, gender, discrimination / European Union, law, primacy / European Union, law, interpretation, preliminary ruling, Court of Justice of the European Union.

Headnotes:

Since the EU-law principle of equal pay for men and women undoubtedly has direct effect, a court should disapply the provisions of domestic law that conflict with the principle of equal treatment. If that court considers it necessary, it should make a reference for a preliminary ruling to the Court of Justice of the European Union regarding the correct interpretation of the relevant provisions of European Union law.

Summary:

In this case, the Constitutional Court heard a reference made in the context of employment proceedings in which a female worker objected to a rule that required her to retire earlier than the date on which a male worker in her position would be obliged to retire.

The Court ruled the question inadmissible on the grounds that the referring court could simply have disapplied the discriminatory provision on the grounds that it directly breached applicable EU law. In particular, the principle of equal pay for men and women – which has been enshrined in the Treaty of Rome since the establishment of the European Economic Community as a core principle of the common market and as one of the “social objectives of the Community, which is not merely an economic union” (Court of Justice, judgment of 8 April 1976 in Case C-43/75, *Gabrielle Defrenne v. Sabena* [1976], *European Court Reports* 455, paragraphs 7 to 15) – has been held by the Court of Justice to be binding on public and private persons, as it is intended to prevent discriminatory practices that are harmful to free competition and breach workers’ fundamental rights. The Court of Justice of the European Union has also clarified that the direct effect of the principle of equal pay cannot be undermined by any implementing legislation, whether on national or Community level. This principle has subsequently been consolidated through the evolution of the normative framework: the Union “shall promote ... equality between women and men” (Article 3.3 TEU (Treaty on European Union)) and shall do so in all its “activities” (Article 8 TFEU (Treaty on the Functioning of the European Union)). Also Article 21 of the Charter of Fundamental Rights of the European Union prohibits “any discrimination based on any ground such as sex”, whilst Article 23 of the Charter provides that “[e]quality between men and women must be ensured in all areas, including employment, work and pay”.

The disapplication of provisions of national law conflicting with EU law principles would have rendered superfluous the invocation of the breach of constitutional law through interlocutory constitutionality proceedings. Article 157 TFEU, which is directly applicable by the national court, requires it to comply with EU law, with the result that the contested legislation is inapplicable within the main proceedings and all of the questions raised are irrelevant. The disapplication, which is in no sense equivalent to repeal, derogation, lapse or annulment on the grounds of invalidity (see Judgment no. 389 of 1989), is in effect one of the obligations incumbent upon the national courts, which are bound to comply with EU law and to guarantee the rights arising under it, subject to the sole limit of compliance with the fundamental principles of the constitutional order and of inalienable human rights.

Alternatively, had the referring court considered that a question regarding the interpretation of European Union law arose, it should have made a reference for a preliminary ruling to the Court of Justice of the

European Union. The fact that the termination of the employment relationship occurs at different pensionable ages for men and women could imply discrimination against the latter and a potential breach of EU law. Secondary European law, including in particular Directive no. 2006/54/EC specifies moreover that provisions that violate the principle of equal treatment must include those based on sex for “fixing different retirement ages” (Article 9.1.f, included within Chapter 2 on “Equal treatment in occupational social security schemes”) and that any discrimination on grounds of sex in relation to “employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty” is prohibited (Article 14.1.c).

Cross-references:

Court of Justice of the European Union:

- C-43/75, 08.04.1976, *Gabrielle Defrenne v. Sabena*, [1976] *European Court Reports*, 455;
- C-129/79, 27.03.1980, *Macarthys Ltd v. Wendy Smith*, [1980] *European Court Reports*, 1275;
- C-96/80, 31.03.1981, *J.P. Jenkins v. Kingsgate Ltd*, [1981] *European Court Reports*, 911;
- C-184/89, 07.02.1991, *Helga Ninz v. Freie und Hansestadt Hamburg*, [1991] *European Court Reports*, I-297;
- C-262/84, 26.02.1986, *Vera Mia Beets-Proper v. F. Van Lanschot Bankiers NV*, [1986] *European Court Reports*, 773;
- C-356/09, 18.11.2010, *Pensionversicherungsanstalt v. Christine Kleist*, [2010] *European Court Reports*, I-11939.

Languages:

Italian, English text available on the Court's website.



Identification: ITA-2017-2-010

a) Italy / **b)** Constitutional Court / **c)** / **d)** 20.06.2017 / **e)** 180/2017 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 29, 19.07.2017 / **h)** CODICES (Italian, English).

Keywords of the systematic thesaurus:

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

5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status**.

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

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

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

Keywords of the alphabetical index:

Identity, personal, right / Gender, identity / Gender attribution, public record, amendment, judicial evaluation.

Headnotes:

The possibility that there is an interpretation of Article 1.1 of Law no. 164 of 1982 (Provisions on amendment of gender attribution) that is compatible with constitutional values leads the Constitutional Court to reject the question of constitutionality of the challenged provision, in the part in which it makes amendment of gender attribution contingent upon prior modification of sexual characteristics. Nevertheless, this in no way implies that there is no need for a rigorous assessment not only of the person's intent, but also of a prior, objective transition in gender identity.

Summary:

In this case, the Constitutional Court considered two referral orders challenging a law requiring the existence of a prior modification of a person's primary sexual characteristics in order for that person to have the gender attribution on his or her birth certificate amended. The referring tribunal alleged that this made the exercise of a right (the right to one's own gender identity) contingent upon submission to invasive and health-threatening procedures.

After ruling that the question was admissible, the Court held that it was unfounded since the possibility that there is an interpretation of the challenged provision that respects the constitutional values of the freedom and dignity of the human person has been identified and validated both by the case-law on legitimacy and by constitutional case-law. Indeed, while the referring tribunal interpreted prior modification to entail physical deconstruction and reconstruction of a person's genitalia, the Court cited a Court of Cassation decision, consistent with the

case-law of the European Court of Human Rights, which concluded that acquiring a new gender identity may come as the result of a personal process that does not entail invasive procedures.

The Constitutional Court had also ruled, in a judgment handed down after the submission of the referral orders, that surgical intervention was not required in order for the amendment to be made. The Court reiterated that the constitutionally correct interpretation allowed for the requirement of a prior surgical procedure to be rejected. The Court also reiterated that the judicial authority must carry out a rigorous assessment to conclude that a gender transition is both serious and unambiguous, and corroborated by objective indicia, in order for the amendment to be made to the public record. The reasonable balancing point between the various needs for guarantees was identified in entrusting to the judge, in the judicial evaluation of the irreducible uniqueness of every individual, the task of ascertaining the nature and importance of the prior modifications to a person's sexual characteristics, which combine to determine one's personal and gender identity.

Languages:

Italian, English text available on the Court's website.



Identification: ITA-2017-2-011

a) Italy / **b)** Constitutional Court / **c)** / **d)** 07.07.2017 / **e)** 179/2017 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 29, 19.07.2017 / **h)** CODICES (Italian, English).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
3.16 General Principles – **Proportionality**.

Keywords of the alphabetical index:

Drug offences, punishment, legislative discretion / Constitutional Court, competence, principle of proportionality of punishment.

Headnotes:

Questions in referral orders regarding the difference in punishment between serious drug offences relating to “heavy” drugs and minor offences involving illicit drugs of a non-specified nature are inadmissible because the two criminal scenarios are two distinct offences. Nevertheless, the difference is so great as to result in an anomaly in the punishment scheme, which may be redressed though a variety of legislative options.

Summary:

In this case, the Constitutional Court considered two referral orders questioning a sentencing law for serious drug offences involving drugs known as “heavy” drugs, which placed the minimum sentence at eight years of incarceration plus a fine. The referring judges questioned the significant gap between this minimum sentence and the maximum sentence provided for in a separate provision of the same law for minor offences involving illicit drugs of a non-specified nature (four years of incarceration plus a fine). The referring judges alleged that the two types of offences were similar, and that the difference in the negative social values of the two offences was minimal, making the difference in the two punishments disproportionate and undermining the rehabilitative aim of criminal punishment. They also alleged that there were violations of European law concerning drug sentencing and that the punishment was inhumane on account of its long duration and contribution to prison overcrowding. In particular, they held that the difference in those punishments contradicted the principles of reasonableness and proportionality guaranteed by Articles 3 and 27 of the Constitution, as well as Article 49.3 of the Charter of Fundamental Rights of the European Union and Article 3 ECHR.

The Constitutional Court first reviewed its own authority to review criminal sentencing laws, over which the Parliament has broad discretion. The Court stated that it has oversight, and may enforce constitutional boundaries, in cases where legislative decisions are patently arbitrary or manifestly unreasonable or arbitrary. The principle of proportionality of punishment, and the constitutional mandate that the aim of punishment be the rehabilitation of the convicted person, also allow for the Court to intervene to ensure that the quality and quantity of the punishment, on the one hand, and the offence, on the other hand, are proportional. Nevertheless, the Court cannot intervene by imposing a punishment chosen at its own discretion, but must rather resolve the constitutional defect with a punishment drawn from pre-existing laws.

After reviewing its own role, the Constitutional Court retraced the legislative and judicial history of the provisions in question, which involved various iterations that eventually resulted in dropping the distinction between “heavy” and “light” drugs in the offence for minor incidents, while maintaining the “heavy” drugs prerequisite in the provision involving serious incidents. After reviewing this history, the Court ruled the questions inadmissible. Contrary to the allegations, the Court found that the offences differed significantly and that, although the difference was not so great as to justify the four-year gap between the maximum sentence for the lesser offence and the minimum sentence for the greater offence, a variety of constitutionally acceptable legislative solutions were available, and eliminating the gap by judicial decision was not the only acceptable one. The Court concluded by rejecting the questions and calling upon the Parliament to rapidly proceed to remedy the gap through legislative intervention.

Languages:

Italian, English text available on the Court’s website.



Korea Constitutional Court

Important decisions

Identification: KOR-2017-2-001

a) Korea / **b)** Constitutional Court / **c)** / **d)** 31.03.2016 / **e)** 2013Hun-Ka2 / **f)** Act on the Punishment of Commercial Sex Act / **g)** 28-1(1), *Korean Constitutional Court Report* (Official Digest), 259 / **h)**.

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality.**

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

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

Keywords of the alphabetical index:

Prostitution, customer, unspecified / Sex trafficking, prohibition / Sexual self-determination / Sexual culture / Sexual morality / Sex, selling decriminalisation.

Headnotes:

Article 21.1 of the ‘Act on the Punishment of Arrangement of Commercial Sex Acts, etc.’ (hereinafter, the “Instant Provision”) which prescribes that any person who has engaged in sex traffic shall be punished by imprisonment with labour for not more than one year, by a fine not exceeding three million won, by misdemeanour imprisonment, or by a minor fine, does not violate the right to sexual self-determination, the right to privacy, the freedom of sex workers to choose their occupation, nor the right to equality.

Summary:

I. Petitioner was prosecuted for engaging in sex trafficking. While the case was pending at the trial court, the petitioner filed a motion to request a constitutional review of the Instant Provision that punishes sex trafficking. The court granted the motion and requested a constitutional review of this case.

II.1. The Instant Provision imposes criminal punishment on sex trafficking, restricting the right to sexual self-determination and the right to privacy of the parties engaging in sex trafficking (sex workers and sex buyers), and the freedom of sex workers to choose their occupation.

While individuals' sexual conduct belongs to the intimate realm of privacy and is subject to the protection of the right to sexual self-determination, they must be regulated by law when they are expressed in the public domain and undermine the sound sexual culture of the society. Sex trafficking is of an abusive and exploitative nature, and takes the form of domination over the body and personality of a sex worker that is economically vulnerable. Sex trafficking also creates an environment more vulnerable to sexual commercialisation and sex crimes, and undermines sound sexual culture and sexual morality. Therefore, the Instant Provision is justified in its legislative purpose, as it seeks to establish a sound sexual culture and sexual morality by punishing sex trafficking.

The criminal punishment of sex trafficking is also acknowledged as an appropriate means of reducing it, considering that it has led to the reduction of sex trafficking business establishments and female sex workers.

As the demand for sex trafficking is the major cause behind sustaining and expanding the sex trafficking market, it is of utmost importance to suppress the demand of sex buyers. It is difficult to conclude that recidivism prevention programs or sex trafficking prevention education is as effective as criminal punishment. Thus, criminal punishment on sex buyers cannot be considered an excessive exercise of the authority to impose criminal punishment.

It is necessary to impose criminal punishment on not only the sex buyer, but also the sex worker, in order to eradicate sex trafficking. The decriminalisation of selling sex may lead to a rise in the supply of sex trafficking for economic gain, entail the risk of opening the way for persons willing to engage in sex trafficking to acquire easier access to sex workers. Therefore, this fully justifies the necessity to impose criminal punishment on, not only sex buyers, but also sex workers.

The Act on the Punishment of Commercial Sex Acts contains a broad recognition of the term 'victim of sex trafficking,' and exempts victims of sex trafficking from criminal punishment. In addition, there are many other institutional measures that induce disengagement from sex trafficking without criminal punishment. Thus, it cannot be said that the imposition of criminal punishment on sex workers is excessive.

While different countries implement various policies on sex trafficking, it is not easy to ascertain the efficiency of such policies based on visible and external statistics and performance compiled in the short term. Therefore, it cannot be said that the Instant Provision goes against the principle of least restrictive means merely by superficially comparing other countries to Korea.

The public values of a sound sexual culture and sexual morality in the overall society, which the State aims to defend by actively intervening in sex trafficking, cannot be deemed to be of lesser value than the restriction of fundamental rights such as the right to sexual self-determination. Thus, the Instant Provision does not violate the balance of interests.

2. Sex trafficking targeting unspecified persons and sex trafficking targeting specified persons differ in nature in terms of the impact on a sound sexual culture and sexual morality. Thus, the fact that only sex trafficking targeting unspecified persons is subject to prohibition cannot be said to infringe on the right to equality.

III.1. Dissenting opinion of two Justices (partially unconstitutional)

The criminal punishment of the sex worker violates the principle against excessive restriction.

Sex trafficking is an act that infringes on the personality and dignity of the sex worker. Therefore, sex workers are persons that require protection and guidance, rather than being subject to criminal punishment. Since imposing criminal punishment on these persons will aggravate the oppression and exploitation of sexuality, foster the underground sex trafficking market and hinder the eradication of the sex trade, the appropriateness of means is not justified.

There are measures that are less restrictive on fundamental rights in the form of protection or guidance, which indicates that criminal punishment on sex workers also goes against the principle of least restrictive means.

This also violates the balance of interests as, while the public interest of establishing a sound sexual culture or sexual morality is abstract and vague, the disadvantage to sex workers is serious and dire.

2. Dissenting opinion of one Justice (unconstitutional)

The Instant Provision violates the Constitution for violating the principle against excessive restriction, thus infringing on the right to sexual self-

determination and the right to privacy of the parties who engage in sex trafficking (sex buyers and sex workers).

Voluntary sex trafficking between consenting adults fundamentally belongs to the highly intimate realm of individual privacy, and can hardly be considered to be harmful to others or to pose evil to a sound sexual culture and sexual morality. The legislative purpose of the provision cannot be justified, since the criminal punishment of voluntary female sex workers engaged in the trade for subsistence, imposed by a State that has failed to fulfill its minimum obligation to protect its people, is another form of social violence. More than ten years have passed since the Act entered into force, but the Instant Provision has made absolutely no contribution to the eradication of sex trafficking, and thus the appropriateness of means cannot be justified.

The Instant Provision fails to meet the element of minimum restriction, as it is possible to use less restrictive means, such as conducting sex trafficking prevention education; suppressing the sex trafficking industry itself; or permitting sex trafficking within certain zones.

While the establishment of a sound sexual culture and sexual morality is abstract and vague, and thus cannot be considered to conform to constitutional values, the personal harm caused by criminal punishment is substantial and concrete, and of an extensive degree, thus leading to a loss of balance of interests.

Regardless of whether sex trafficking targets specified or unspecified persons, it is, in essence, of the same nature. As there is no logical reason to punish only sex trafficking targeting unspecified persons, the Instant Provision violates the principle of the right to equality.

3. Concurring opinion to majority opinion of two Justices

Sexual self-determination, which derives from the right to pursue happiness, stems from liberation from sexual violence, sexual exploitation and sexual oppression. Therefore, it is highly questionable whether sex trafficking, which commercialises sex and treats it as an object to be traded, and harms the sound sexual culture and sexual morality of society, should be protected within the constitutional framework of 'sexual self-determination.'

There are concerns that the full decriminalisation of sex trafficking will further expand the sex industry and undermine the sexual culture and sexual morality. Further, given that countries that allow sex trafficking have social issues in common, such as the expansion of the sex trafficking industry and the influx of females from underdeveloped countries into sex trafficking, the opinion on full unconstitutionality is inappropriate.

Provided, the term 'victim of sex trafficking' in the Act should be interpreted flexibly with consideration given to specific facts, the protective disposition under the Act should be actively utilised in efforts to guide and protect sex workers, and any regulatory activities that do not coincide with the legislative purpose should be rejected.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2017-2-002

a) Korea / **b)** Constitutional Court / **c)** / **d)** 31.03.2016 / **e)** 2013Hun-Ma585,786, 2013Hun-Ba394, 2015Hun-Ma199,1034,1107 (consolidated) / **f)** Restriction on Employment of Medical Personnel that Have Committed a Sex Offence against an Adult / **g)** 28-1(1), *Korean Constitutional Court Report* (Official Digest), 453 / **h)**.

Keywords of the systematic thesaurus:

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

3.16 General Principles – **Proportionality.**

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

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

Keywords of the alphabetical index:

Sexual assault, adult / Child, protection / Restriction on employment / Restriction on establishment, medical institution / Reliability, medical institution / Recidivism.

Headnotes:

The provision concerning “person sentenced to a penalty for committing a sex offense against an adult and for whom such sentence is made final and conclusive” in Article 44.1.3 of the former ‘Act on the Protection of Children and Juveniles against Sexual Abuse,’ (hereinafter, the “Instant Provision of the Former Act”) which restricts persons sentenced to a penalty for committing a sex offense and for whom such sentence is made final and conclusive from establishing or working for medical institutions for ten years from the date on which the execution of the penalty is terminated, and the provision concerning “one sentenced to a penalty for committing a sex offense against an adult and for whom such sentence is made final and conclusive” in Article 56.1.12 of the ‘Act on the Protection of Children and Juveniles against Sexual Abuse’ (hereinafter, the “Instant Provision of the Current Act”) infringe on the freedom to choose one’s occupation. However, Article 3 of the Addenda to the former Act (hereinafter, the “Instant Addendum”), which prescribes that the above restrictions on employment are applied from the first person in whose case a sentence of punishment becomes final and conclusive after the aforesaid provision of the same Act enters into force, does not violate the Constitution.

Summary:

I.1. Background regarding the former Act

Complainant was notified of a summary order for a fine of three million won on a charge of quasi-indecent act by compulsion, and the sentence was finalised on 23 October 2012. Around April 2013, when the complainant was appointed as a public health doctor and working at Hospital in Incheon, the Superintendent of district Police Station notified the complainant of being subject to restriction on employment by a medical institution under Article 44 of the former Act, after which, the Mayor of Incheon ordered that the complainant be transferred to a non-medical institution. Thereupon, the above complainant filed a constitutional complaint.

2. Background regarding the current Act

Complainant, a hospital director that had established and was operating an internal medicine clinic, was sentenced to a fine of five million won on a charge of indecent act by compulsion, and this sentence was made final and conclusive. Subsequently, the above complainant reported business closure in adherence to the guidelines on the voluntary reporting of business closure provided by the Mayor of

Seongnam, and closed his medical. The complainant then filed a constitutional complaint.

II.1. Judging by its wording, the phrase “sex offense against an adult” can be interpreted as a sex-related crime against an adult victim, in the form of a crime that infringes on another person’s right to sexual self-determination, or a crime that involves an adult and infringes on the sound sexual culture of a society; and judging by the legislative purposes of the Instant Provisions, a crime which also requires restriction on employment by medical institutions. In addition, by examining the content related to “sex offense against a child or juvenile” stipulated in the Acts, it can be presupposed that a “sex offense against an adult” will be subject to regulation similar to the regulation for a “sex offense against a child or juvenile,” and the content of the Act on Special Cases concerning the Punishment, etc. of Sexual Crimes, which has a close legal connection with the Acts in that it prevents sex offenses and protects victims, is also helpful in understanding what constitutes a “sex offense against an adult”. The above shows that the phrase “sex offense against an adult” cannot be considered unclear, and therefore does not violate the rule of clarity under the Constitution.

2. The Instant Provisions have the legislative purposes of protecting children and juveniles from potential sex offenses, and enhancing the ethics and credibility of medical institutions to allow for children and juveniles and their guardians to trust, use and rely on these institutions, by guaranteeing the quality of the operator or employee of a medical institution to a certain extent, and the legislative purposes are therefore found to be legitimate, and the restriction on the employment of former sex offenders by medical institutions for a certain period can be considered an appropriate means. However, the Instant Provisions take it for granted that a person with a sex offense record will commit the same type of crime in the future, deem that the risk of recidivism will not be eliminated until ten years from the date the execution of the penalty is terminated, and overlook the necessity for different penalties based upon the nature of the crime, thus violating the principle of the least restrictive means by imposing a uniform ten-year employment restriction on persons with a sex offense record but who do not hold the risk of recidivism; persons who have a sex offense record but for whom the risk of recidivism is likely to be resolved within the ten-year period; and persons whose offense is trivial and whose risk of recidivism is not comparatively high. Further, such restrictions violate the balance of interests for they extend beyond the level of endurance that our society should demand of the complainants. Therefore, the Instant Provisions infringe on the freedom of occupation of the complainants.

3. The Instant Addendum prescribes that the restriction on employment by medical institutions shall apply from the first person in whose case a sentence of punishment becomes final and conclusive after the Act on the Protection of Children and Juveniles against Sexual Abuse (amended by Act. no. 11287, 1 February 2012) enters into force, but since the restriction on employment is not a punishment, the principle against retroactivity prescribed in the former part of Article 13.1 of the Constitution does not apply.

To the end of effectively handling the risk of recidivism of a sex offender, it is deemed necessary, given the potential risks, to impose restrictions on the employment of persons whose sentencing to punishment became final and conclusive after this Act entered into force, even if the relevant crime was committed before this Act entered into force, and the Instant Addendum impose the employment restriction to those whose sentencing to punishment has been made final and conclusive after the Act entered into force. Moreover, the determination as to whether a person is subject to restriction on employment should be made on the basis of when the restriction on employment would begin, to ensure the effectiveness of the employment restriction measure. Thus, it is difficult to say that the Instant Addendum excessively restricts basic rights.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2017-2-003

a) Korea / **b)** Constitutional Court / **c)** / **d)** 31.03.2016 / **e)** 2015Hun-Ma688 / **f)** Registration of Personal Information for the Crime of Obscene Conduct Using Means of Communication / **g)** 28-1(1), *Korean Constitutional Court Report* (Official Digest), 540 / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Informational self-determination / Obscenity, using means of communication / Personal information, registration / Recidivism, suppression.

Headnotes:

The relevant provision of Article 42.1 of the ‘Act on Special Cases concerning the Punishment, etc. of Sexual Crimes’, (hereinafter, the “Instant Provision”) which prescribes that any person finally declared guilty of a crime of obscene conduct using means of communication shall be subject to registration of personal information, infringes on the right to informational self-determination, and thus violates the Constitution.

Summary:

I. On 17 April 2015, the complainant was fined one million won and ordered to undergo 40 hours of a sex offender treatment program on the charge of sending the victim (female, 14 years of age), words that cause a sense of sexual shame using a smart phone as a means of communication, with intent to satisfy his own sexual urges. On 25 April 2015, this judgment became final and conclusive.

On 30 June 2015, the complainant filed a constitutional complaint on the ground that rendering a person subject to registration of personal information under Article 42.1 of the Act for the crime of obscene conduct using means of communication, a comparatively minor crime, violates the principle against excessive restriction and thus violates the Constitution.

II. Receiving personal information from a person who has committed a certain sexual crime to preserve and manage that information, is an appropriate means for a justifiable purpose, to the end of suppressing recidivism and raising the efficiency of investigation when recidivism occurs. However, the registration of the personal information of sex offenders should be limited to the extent necessary for the legislative purpose of the personal information registration system, instead of targeting all sex offenders. The types of activities that constitute the elements of a crime of obscene conduct using means of communication are extremely diverse in pattern, depending on the criminal intent, criminal motive, the victim targeted, and the frequency and method of the activity; and the risk of recidivism and necessity for the registration of personal information differ greatly according to the individual type of activity. However, the Instant Provision prescribes that any person

finally declared guilty of a crime of obscene conduct using means of communication shall be subject to compulsory registration of personal information without the involvement of separate procedures such as review by judges, and has no means to contest the outcome once registration takes place. Thus, the Instant Provision is unconstitutional in that it violates the principle of least restrictive means, as it does not opt for other means that can lessen the infringement of fundamental rights, for instance, by reducing the number of persons subject to registration depending on the nature of the crime and the risk of recidivism, or by establishing a decision-making procedure by a judge, separately from the conviction procedure. It is also hard to acknowledge the balance of interests, as the Instant Provision can cause an imbalance between the public interest that will be accomplished and the private right that will be infringed on in the exceptional case of persons that have committed the crime of obscene conduct using means of communication, which is of minor illegality, and who have not been recognised as having any risk of recidivism.

III.1. Dissenting opinion of three Justices

Unlike the personal information disclosure and notification system, which discloses the personal information of sex offenders to the general public, in the case of the personal information registration system a state agency internally preserves and manages that information for the purpose of managing sex offenders, and thus the infringement of the legal interests of persons subject to registration is limited. The crime of obscene conduct using means of communication is of no lesser degree than sexual crimes in physical spaces in terms of severity and harm, as it can infringe on the sexual freedom of victims and intensify a distorted sexual culture as do sexual crimes in physical spaces, despite involving no physical contact. Moreover, the crime of obscene conduct using means of communication is a crime with specific intent that can only be constituted with “intent to arouse or satisfy his or her own or the other person’s sexual urges,” and thus has a limited scope for constituting a crime. While the private right infringed upon by this Instant Provision is not significant, as it does not undermine the social rehabilitation of the persons subject to registration or label them in society as a former convict, the public interest of preventing sex offender recidivism and defending society through the Instant Provision is extremely important, and thus the balance of interests is acknowledged.

2. Concurring opinion of two Justices

Despite the fact that the main legislative purpose of the Instant Provision is to prevent the recidivism of sexual crimes, it does not, in the least, require the ‘risk of recidivism’ when selecting persons subject to registration. The Instant Provision, which prescribes that any person declared guilty of the crime of obscene conduct using means of communication is subject to registration of personal information, when it has not been proved that the recidivism rate is high for crimes of obscene conduct using means of communication, imposes unnecessary restrictions on persons subject to registration who have not been recognised as having a risk of recidivism. Therefore, the Instant Provision infringes on the complainant’s right to informational self-determination.

Languages:

Korean, English (translation by the Court).



Identification: KOR-2017-2-004

a) Korea / **b)** Constitutional Court / **c)** / **d)** 28.04.2016 / **e)** 2015Hun-Ma98 / **f)** Restriction on Employment of Persons that Have Committed a Sex Offense against a Child or Juvenile / **g)** 28-1(2), *Korean Constitutional Court Report* (Official Digest), 109 / **h)**.

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one’s profession**.

Keywords of the alphabetical index:

Sexual abuse, child / Child or juvenile, sexual abuse, protection / Employment, restriction in child or juvenile-related institution / Medical treatment and custody / Reliability, child or juvenile-related institution / Recidivism.

Headnotes:

The provision “one sentenced to a penalty or medical treatment and custody for committing a sex offense against a child or juvenile and for whom such sentence is made final and conclusive” in Article 56.1 of the ‘Act on the Protection of Children and Juveniles against Sexual Abuse’ (hereinafter, the “Restriction on Employment Provision”), which prescribes that no one sentenced to a penalty or medical treatment and custody for committing a sex offense against a child or juvenile and for whom such sentence is made final and conclusive shall work for or provide actual labour to a child or juvenile-related institution, etc. for ten years from the date on which the execution of such penalty or medical treatment and custody is terminated, suspended or exempted, infringes on the freedom to choose one’s occupation, and thus violates the Constitution.

Summary:

I. On 17 July 2014, the complainant was sentenced by Incheon District Court to imprisonment with labour for one year and six months and medical treatment and custody, etc. (hereinafter, the “Judgment”), for violating the Act on the Protection of Children and Juveniles against Sexual Abuse (indecent act by compulsion).

On 30 January 2015, while being held prisoner at the Institute of Forensic Psychiatry under the Ministry of Justice following the Judgment, the complainant filed a constitutional complaint on the grounds that the Restriction on Employment Provision infringes on the basic rights of the complainant.

II. The Restriction on Employment Provision prevents persons who have committed a sex offense against a child or juvenile from coming into contact with children or juveniles by restricting their operation of or employment at child or juvenile-related institutions, etc. for a certain period, with the legislative purpose of protecting children and juveniles against sexual abuse and enhancing the ethics and credibility of child or juvenile-related institutions, etc. so that children and juveniles and their guardians can trust, use and rely on these institutions, and the legislative purpose is therefore found to be legitimate, and restricting the employment of persons who have a record of committing a sex offense against a child or juvenile at child or juvenile-related institutions, etc. for a certain period can be deemed an appropriate means.

However, the Restriction on Employment Provision violates the principle of the least restrictive means, in

that it imposes a blanket prohibition of ten years on employment by child or juvenile-related institutions, etc. on persons with a record of committing a sex offense against a child or juvenile, deeming that they are, without any exception, likely to recommit a sex crime, that this Restriction on Employment Provision in particular is contrary to the intent of the medical treatment and custody system, as it presupposes that persons under medical treatment and custody are still likely to recommit a sex crime even in cases where the Medical Treatment and Custody Deliberation Committee has determined that the medical treatment and custody of the persons under medical treatment and custody should be terminated on the premise that the psychosexual disorder that shows a propensity for sexual activity, such as paedophilia, sexual sadism, etc. that was the cause of the sex offense against the child or juvenile was cured, and that the Restriction on Employment Provision imposes a blanket restriction of ten years on employment on persons whose offense is trivial and whose risk of recidivism is comparatively low, without reflecting the type or specific fact pattern of the crime. Further, while the public interest that the Restriction on Employment Provision seeks to achieve is an important social public interest, the Restriction on Employment Provision excessively restricts the complainant’s freedom of occupation, and thus violates the balance of interests.

Therefore, the Restriction on Employment Provision infringes on the complainant’s freedom of occupation.

Languages:

Korean, English (translation by the Court).



Kosovo

Constitutional Court

Important decisions

Identification: KOS-2017-2-002

a) Kosovo / **b)** Constitutional Court / **c)** / **d)** 12.06.2017 / **e)** KI 34/17 / **f)** Valdete Daka – Constitutional review of Decision KGJK no. 50/2017 of the Kosovo Judicial Council, concerning election for the President of the Supreme Court / **g)** *Gazeta Zyrtare* (Official Gazette), 14.06.2017 / **h)** CODICES (Albanian, English).

Keywords of the systematic thesaurus:

1.4.4.1 Constitutional Justice – Procedure – Exhaustion of remedies – **Obligation to raise constitutional issues before ordinary courts.**

4.7.4.2 Institutions – Judicial bodies – Organisation – **Officers of the court.**

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

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

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

Keywords of the alphabetical index:

Election, President of the Supreme Court, voting procedure / Kosovo Judicial Council / Transparency, administrative.

Headnotes:

The mechanism of voting applied by the Kosovo Judicial Council for candidates to nominate a candidate for the position of President of the Supreme Court did not provide for the necessary safeguards to guarantee sufficient implementation of the principles of equality, merit, transparency and openness during the voting process. This meant that all the candidates for President of the Supreme Court, including the applicant, were placed in a position of legal uncertainty, inequality and unmeritorious selection.

Summary:

I. The applicant submitted a referral pursuant to Article 113.7 of the Constitution, contesting the voting process for election of the candidate for the position of the President of the Supreme Court, on the basis that process conducted and organised by the Kosovo Judicial Council was in contravention of the principles of transparency, openness and meritocracy, and thus breached her rights as guaranteed by Articles 24, 31, 45 and 108 of the Constitution.

The Court invited the Judicial Council to submit its comments on the applicant's referral. They stated that the process for election of the President of the Supreme Court was done in accordance with the Constitution; all candidates running for that position were chosen from amongst the judges of the Supreme Court, their work experience and managerial skills were taken into account and opinions were given by their peers on each candidate. The Judicial Council added that the applicant could not have direct access to the Constitutional Court to submit a referral; she ought first to have exhausted all legal remedies before the ordinary courts as required by Article 113.7 of the Constitution.

II. The Court, by a majority, held that the referral was admissible because the applicable law in Kosovo did not envisage legal remedies against the decision challenged by the applicant. The Court further held that the applicant was only obliged to exhaust legal remedies that were accessible, capable of providing redress in respect of her complaints and which offered reasonable prospects of success.

The Court, again by a majority, concluded that the voting process for the position of the President of the Supreme Court of Kosovo organised and conducted by the Kosovo Judicial Council was in breach of Article 24 of the Constitution (equality before the Law), Article 31 of the Constitution (right to a fair and impartial hearing), Article 45 of the Constitution (freedom of election and participation) and Article 108.1 and 108.4 of the Constitution (Kosovo Judicial Council). The rationale behind the Court's finding of a breach of the constitutional provisions was that the inequality was not based on any particular quality of the candidates, but the fundamentally unfair voting procedure that allowed voting members of the Judicial Council to vote multiple times and to abstain selectively per candidate. The Court ordered the Judicial Council to conduct a new voting process for the selection of a nominee for the position of President of the Supreme Court in accordance with the findings in this judgment.

Languages:

Albanian, Serbian, English (translation by the Court).



Lithuania Constitutional Court

Important decisions

Identification: LTU-2017-2-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 26.06.2017 / **e)** KT8-N6/2017 / **f)** On the consideration of criminal cases under the appeal procedure upon the coming to light of essentially different factual circumstances / **g)** TAR (Register of Legal Acts), 10749, 26.06.2017, www.tar.lt / **h)** www.lrkt.lt; CODICES (Lithuanian).

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.**

5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time.**

5.3.13.16 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Prohibition of *reformatio in peius*.**

Keywords of the alphabetical index:

Decision, fair / Appeal, procedure / Factual, mistake / Assessment, legally significant facts.

Headnotes:

The Constitution prohibits a situation where a court considering a criminal case on appeal cannot remedy the errors of fact (i.e. the mistakes in the establishment and assessment of legally significant facts) made by the first-instance court and, thus, cannot adopt a fair decision in the case.

Summary:

I. The Constitutional Court declared constitutional the provision of the Code of Criminal Procedure (hereinafter, “CCP”) setting out that a court considering an appeal brought by a convicted person is prohibited from putting in a worse position another convicted or acquitted person, or a person against whom the case was dismissed, where no appeal has

been filed by a prosecutor, private prosecutor, victim, or party claiming damages in criminal proceedings on this matter.

However, the Constitutional Court declared unconstitutional another provision of the CCP, in that the provision does not provide for the powers of the appellate court to refer a case back to the first-instance court for reconsideration if, upon the examination of the evidence, factual circumstances come to light that are essentially different from those established by the first-instance court and that could lead to putting the convicted or acquitted person, or the person against whom the case has been dismissed, in an essentially worse position.

II. The Constitutional Court found that the criminal procedure established by the legislature could lead to the following situation. Where an appellate court considering a criminal case examines and assesses new evidence or the evidence already examined by the first-instance court and concludes from such evidence that the factual circumstances essentially differ from those established by the first-instance court and could result in putting the convicted or acquitted person, or the person against whom the case has been dismissed, in an essentially worse position, that appellate court cannot remedy the errors of fact (i.e. the mistakes in the establishment and assessment of legally significant facts) made by the first-instance court and, thus, cannot adopt a fair decision in the case. The reason for this is that, under the CCP, a prosecutor, private prosecutor, victim, or party claiming damages in criminal proceedings cannot file or supplement the appeal, while the appellate court itself is limited by the principles of criminal procedural law reflected in the CCP, that is to say, the principle *non reformatio in peius* and the principle *tantum devolutum quantum appellatum*.

The Constitutional Court noted that, under the CCP, in such a case, it is not possible for a prosecutor, private prosecutor, victim, or party claiming damages in criminal proceedings to apply to the court of cassation instance seeking to place in a worse position a person against whom no appeal has been filed (or a person against whom the appeal has been filed to an extent greater than has been requested in the said appeal). At the same time, the appellate court is not allowed to quash the final decision or ruling, and to reopen the criminal case on the basis of the factual circumstances known to it or those that could have been known to the first-instance court that are different from those established by the first-instance court.

In such situations, where the court considering a criminal case on appeal is limited by the above-mentioned principles of criminal procedural law and cannot itself remedy the mistakes in the establishment and/or assessment of legally significant facts made by the first-instance court, the Constitutional Court noted that it is implicit in the powers of a court to administer justice, which stem from Article 109.1 of the Constitution, that the law must provide for the powers of the appellate court to refer the case back to the first-instance court for reconsideration.

The Constitutional Court found that the impugned legal regulation of criminal procedure does not provide the preconditions for the court to adopt a fair decision in such cases (to impose a fair punishment on the person having committed a criminal act and to award just compensation for the damage inflicted by that criminal act) and to properly administer justice; therefore, the legal regulation does not ensure the effective protection of every person and the society as a whole from criminal acts and amounts to a denial of the powers of a court to administer justice, which stem from Article 109.1 of the Constitution. Moreover, the legal regulation derogates from the constitutional concept of a court as an institution administering justice in the name of the Republic of Lithuania, as well as from the constitutional principles of the rule of law and justice.

The Constitutional Court emphasised that, under the Constitution, a court has the duty not only to investigate all the circumstances of a case that would allow the court to adopt a fair and reasonable decision, but also to deliver this decision within the shortest possible time. Thus, having examined the evidence leading to the conclusion that the factual circumstances essentially differ from those established by the first-instance court, an appellate court considering a criminal case should quash the decision of the first-instance court and refer the case back to it for reconsideration only in cases where the convicted or acquitted person, or the person against whom the case has been dismissed, could be put in a worse position.

Cross-references:

European Court of Human Rights:

- *Boddaert v. Belgium*, no. 12919/87, 12.10.1992, Series A, no. 235-D;
- *Pedersen and Baadsgaard v. Denmark*, no. 49017/99, 17.12.2004, *Reports of Judgments and Decisions* 2004-XI;
- *Sorvisto v. Finland*, no. 19348/04, 13.01.2009;
- *Delcourt v. Belgium*, no. 2689/65, 17.01.1970, Series A, no. 11;

- *Monnel and Morris v. United Kingdom*, no. 9562/81, 9818/82, 02.03.1987, Series A, no. 115;
- *Ekbatani v. Sweden*, no. 10563/83, 26.05.1988, Series A, no. 134;
- *Muttillainen v. Finland*, no. 18358/02, 22.05.2007;
- *Tatishvili v. Russia*, no. 1509/02, 22.02.2007, *Reports of Judgments and Decisions 2007-I*;
- *Hirvisaari v. Finland*, no. 49684/99, 27.09.2001;
- *I.H. and others v. Austria*, no. 42780/98, 20.04.2006;
- *Mattei v. France*, no. 34043/02, 19.12.2006;
- *Sipavičius v. Lithuania*, no. 49093/99, 21.02.2002;
- *Balette v. Belgium*, no. 48193/99, 24.06.2004;
- *Virolainen v. Finland*, no. 29172/02, 07.02.2006.

Languages:

Lithuanian.



Identification: LTU-2017-2-004

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 04.07.2017 / **e)** KT9-N7/2017 / **f)** On exempting priests from mandatory military service / **g)** TAR (Register of Legal Acts), 11471, 04.07.2017, www.tar.lt / **h)** www.lrkt.lt; CODICES (Lithuanian).

Keywords of the systematic thesaurus:

5.2.2.6 Fundamental Rights – Equality – Criteria of distinction – **Religion**.

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

Keywords of the alphabetical index:

Military service, compulsory / State, duty, defence / Alternative, national, defence, service / Organisations, religious, traditional / Military service, exemption.

Headnotes:

No one may refuse to fulfil the constitutionally established duties – including the duty of a citizen to perform military or alternative national defence

service – or to demand the exemption from these duties on the grounds of his or her convictions, practised religion, or belief.

Summary:

I. The Constitutional Court declared the provision of the Law on National Conscription – to the extent that the provision sets out that priests of the religious communities and associations considered traditional in Lithuania and recognised by the state are exempt from mandatory military service – to be incompatible with the Constitution.

II. Under the Constitution, every citizen of the Republic of Lithuania has the right and duty to defend the State of Lithuania against a foreign armed attack and must perform military or alternative national defence service according to the procedure established by law. These duties are the only duties of a citizen to the state that are *expressis verbis* consolidated in the Constitution and arise from the citizenship of the Republic of Lithuania as a special legal interrelationship between the state and its citizens.

According to the Constitution, alternative national defence service may be performed instead of military service. The establishment of the constitutional institution of alternative national defence service is connected with the constitutionally guaranteed freedom of thought, religion, and conscience. In this ruling, the Constitutional Court noted that persons who are not able to perform military service because of their religious or other convictions have the right to perform alternative national defence service instead of military service in accordance with the procedure established by law.

The Constitutional Court noted that a law may establish no conditions for exemption from the constitutional duty of citizens to perform military service or alternative national defence service that are unrelated to objective circumstances due to which the citizens cannot perform this duty. Failure to comply with this requirement could be a denial of the said constitutional duty of citizens and, at the same time, would prevent the establishment of preconditions for the proper fulfilment of the constitutional right and duty of each citizen to defend the state against a foreign armed attack.

The legislature may provide for the possibility of deferring the fulfilment of the constitutional duty of citizens to perform military or alternative national defence service in cases where the citizen is temporarily unable to perform this service because of the important reasons specified in the law or because

of possible injury to important interests of the person, family, or society if such service were not deferred at a given time.

The Constitutional Court emphasised that a different constitutional status between the churches and religious organisations that are traditional in Lithuania and other churches and religious organisations as collective legal entities is not a denial of the prohibition, enshrined in Article 29 of the Constitution, on discriminating against individuals and on granting them privileges on the grounds of, among other things, religion. Thus, under the Constitution, the fact that certain churches and religious organisations are considered traditional does not provide a basis for treating their members, including priests, differently from other citizens in terms of the fulfilment of their constitutional duties.

The Constitutional Court noted that the neutrality and secularity of the state also mean that, under the Constitution, a religion professed by a person does not constitute a basis for exempting the person from the constitutional duties of a citizen to the state, including the duty to perform military or alternative national defence service.

Assessing the impugned legal regulation, under which exemption from the constitutional duty of a citizen to perform military or alternative national defence service is granted by virtue of a certain social status of the person – being a priest of a religious community or association that is considered traditional in Lithuania and is recognised by the state, the Constitutional Court noted that the fact that a person is a priest of a church or religious organisation (i.e. holds a certain social status relating to the professed religion) is not related to any of the circumstances due to which citizens would be objectively unable to perform the duty in question and which could constitutionally justify their exemption from this duty.

The Constitutional Court noted that a different constitutional status between the churches and religious organisations that are traditional in Lithuania and other churches and religious organisations as collective legal entities may not serve as a basis for constitutionally justifying the exemption of priests of the churches and religious organisations that are traditional in Lithuania from the constitutional duty held by them as citizens to perform military or alternative national defence service.

Cross-references:

European Court of Human Rights:

- *Bayatyan v. Armenia*, no. 23459/03, 07.07.2011, *Reports of Judgments and Decisions* 2011.

Languages:

Lithuanian.



Luxembourg Constitutional Court

Important decisions

Identification: LUX-2017-2-001

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 07.07.2017 / **e)** 00129 / **f)** / **g)** *Mémorial* (Official Gazette), A, no. 638, 14.07.2017 / **h)**.

Keywords of the systematic thesaurus:

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

5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age**.

Keywords of the alphabetical index:

Pension, survivor, partnership, length of registered partnership.

Headnotes:

The Luxembourg pension insurance scheme provides as follows on the subject of survivor's benefits for spouses or partners (Article 196 of the Social Security Code):

“Survivor's benefit for spouses or partners ... shall not be payable:

- if the marriage or partnership was contracted less than one year before the death or the retirement of the insured person on grounds of invalidity or old age;
- if the marriage or partnership was contracted with someone entitled to an old-age or invalidity pension.

However, sub-paragraph 1 shall not be applicable if one or more of the following conditions has been fulfilled:

(...)

- c. the deceased beneficiary of the pension was not 15 years older or more than his or her spouse or partner and the marriage or partnership was at least one year old at the time of death;

- d. the marriage or partnership was at least ten years old at the beneficiary's time of death.”

The establishment by this provision of an upper limit on the age difference between spouses or partners, combined with a length of marriage or partnership requirement, is not incompatible with the constitutional principle of equality before the law.

Summary:

In the context of an appeal against a judgment by the Social Security Arbitration Council dismissing an appeal by AB against the decisions of the relevant bodies of the National Pension Insurance Fund rejecting her application for a survivor's pension following the death on 16 February 2014 of CD, the recipient of an early retirement pension since 9 May 1999, and with whom AB had contracted a registered partnership on 14 March 2011, the Higher Social Security Council referred the following preliminary question to the Constitutional Court:

“In that it prohibits persons from receiving survivor's pension on the death of partners entitled to old age or invalidity pension who are more than fifteen years older than them, whereas this restriction does not apply if the beneficiary is less than fifteen years older than them, is Article 196.2.c of the Social Security in compliance with Article 10bis.1 of the Constitution?”

According to the Constitutional Court, the preliminary question, although centring on the age difference between partners applied as a condition by Article 196.2 of the Social Security Code for the award of a survivor's pension by the surviving partner in the event of the death of a partner entitled to an invalidity or old-age pension when the partnership was contracted, must be considered to call in addition for the examination by the Constitutional Court of the length of partnership requirement also laid down by Article 196.2 of the Social Security Code insofar as the age difference requirement is combined by this legal provision with a length of partnership requirement, the two conditions being cumulative.

The Constitutional Court considered that by setting an upper limit on the age difference between pre-deceased spouses or partners and surviving spouses or partners, the legislator's intention had been to limit situations in which the insured person's right to a pension, which derives from his or her personal contributions, is added to reversion benefits paid in respect of the surviving spouse or partner without these benefits having been directly or indirectly subject to contributions.

The risk of disruption to the bases of the pension scheme is all the more pronounced the greater the difference in age between spouses or partners when their marriage or partnership is contracted.

Setting an upper limit of 15 years on the age difference does not therefore seem manifestly unreasonable or inappropriate.

Bearing in mind that it is for the legislator alone to determine exceptions to the rule on non-entitlement to survivor's pension established by Article 196.1 of the Social Security Code, setting an upper limit on the age difference between spouses or partners combined with a length of marriage or partnership requirement is also a measure which is reasonably proportionate to the aim being pursued.

The fact that the length of marriage or partnership requirement varies according to whether the age difference between spouses or partners is more or less than 15 years does not affect this proportionality as the legislator has some discretion in this respect vis-à-vis the length of marriage or partnership that may be considered sufficient to offset the age difference between the spouses or partners.

Consequently, Article 196.2.c of the Social Security Code is not incompatible with the principle of equality before the law (Article 10bis.1 of the Constitution).

Languages:

French.



Moldova Constitutional Court

Important decisions

Identification: MDA-2017-2-003

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 06.06.2017 / **e)** 19 / **f)** On the exception of unconstitutionality of Article 67.f of the Family Code referring to the words “drug addiction” / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 22.09.2017, 341-351 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

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

5.1.1.4.2 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Incapacitated**.

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:

Parental rights, suspension / Child, best interest / Child, minor, parent, drug, use.

Headnotes:

Legal provisions stipulating that persons who develop chronic alcoholism or drug addiction will be deprived of their parental rights do not infringe constitutional provisions on the respect for private and family life provided this restriction is needed to protect the rights and the best interests of the child.

Any such measure must not be applied automatically; an examination must be conducted in each individual case by a court of law to ensure a fair balance between the protection of family rights and the superior interest of a child.

Summary:

I. The applicant challenged the provisions of Article 67.f of the Family Code, which allow for the termination of parental rights of persons who have developed chronic alcoholic or drug addiction, arguing in particular that failure to examine each individual case of this type of deprivation, if this affects the best interest of the child, amounts to unjustified interference in family life and is not proportional to the goal pursued.

II. The Court noted that respect for family life, enshrined in Article 28 of the Constitution, encompasses the relationship between a parent and his or her child. Although the right to respect and protect family life is not absolute in nature, any interference must be prescribed by law. It must also be in pursuit of a legitimate aim and proportional to the situation that determined it so that it does not encroach on the existence of the right itself.

The Court observed that the measure depriving persons addicted to drugs of their parental rights, introduced by Article 67.f, was in pursuit of a legitimate goal (the protection of the rights and best interests of the child).

The Court recalled European Court of Human Rights case-law to the effect that a measure involving the termination of parental rights should only be applied in exceptional circumstances and could only be justified if it was motivated by an overriding requirement relating to the child's best interest. The interest of the child comprises two "limbs"; firstly, the ties of a child with its family must be maintained, unless the family has proved particularly unfit; secondly, it is in the best interest of the child to ensure his or her development in a safe environment.

In this regard, the Court underlined that the measure of terminating parental rights may not be applied arbitrarily; a fair balance must be struck between concurring rights (the right to family life and the best interest of the child).

The Court held that the provisions of Article 67.f may not be applied automatically; an examination by a court of law must take place, to discern whether serious irregularities have been committed by the parent against the child and whether the application of this measure is in the child's best interests.

The Court also mentioned that this measure should be applied as a last resort, when other means of protecting the best interest of the child are insufficient or ineffective.

The Court accordingly held that the challenged provision did not infringe Article 28 in conjunction with Article 54 of the Constitution, insofar as the termination of parental rights was applied in the best interest of the child.

Supplementary information:

Legal norms referred to:

- Articles 28 and 54 of the Constitution;
- Article 67.f of the Family Code;
- Article 8 ECHR.

European Court of Human Rights:

- *M.D. and Others v. Malta*, no. 64791/10, 17.10.2012;
- *Neulinger and Shuruk v. Switzerland*, no. 41615/07, 06.07.2010, *Reports of Judgments and Decisions* 2010.

Languages:

Romanian, Russian (translation by the Court).

*Identification: MDA-2017-2-004*

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 27.06.2017 / **e)** 22 / **f)** On the exception of unconstitutionality of certain provisions of Article 328.1 of the Criminal Code / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 29.09.2017, 352-355 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
 3.18 General Principles – **General interest**.
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.

Keywords of the alphabetical index:

Abuse of power / Abuse of official authority.

Headnotes:

Incrimination by the Criminal Code of the commission by public officials of actions of “excess of power” and “excess of official authority” which have caused considerable damage to the public interest, in the absence of legal provisions permitting assessment of the impact of the harm caused to the public interest, infringes the constitutional principles of the rule of law and the legality of criminal offences and penalties.

Summary:

I. Article 328.1 of the Criminal Code sanctions the commission by an official of actions of excess of power or excess of official authority, when these actions have clearly been taken in clear excess of the limits of the rights and powers granted to him or her by law and have caused considerable damage to the legally protected rights and interests of individuals or legal entities or the interests of society as a whole. The applicants in this matter contended that the consequences of the criminal offence provided by Article 328.1 (excess of power or excess of official authority) are not determined by the criminal law.

II. The Court noted that under the Constitution, legislators are under a duty to ensure that acts which are subject to criminal sanction are clearly defined, rather than being identified by an extensive interpretation on the part of those applying criminal law. This type of application could lead to abusive interpretation. The requirement of a narrow interpretation of the criminal law, together with the prohibition on making use of analogy in applying criminal law, pursue the goal of protecting individuals against arbitrariness.

In the Report on the relationship between political and the criminal ministerial responsibility, adopted by the Venice Commission at its 94th plenary session, the Venice Commission noted that criminal provisions banning “the abuse of office,” “misuse of powers” and “abuse of power” are deeply problematic, both in relation to the qualitative requirements of Article 7 ECHR, and to other basic requirements under the principle of the rule of law, such as foreseeability and legal certainty, and that they are particularly vulnerable to political misuse. The Venice Commission was of the view that such criminal provisions should be construed narrowly and applied with a high threshold, so that they could only be invoked in cases where the offence was of a serious nature.

The Court noted that the criminal offence of excess of power or excess of official authority forms part of the category of criminal offences against the smooth performance of activities in the public sphere. It is committed by public figures and is a result-related or material crime (in order for the crime to be complete, it must relate to the resulting damage).

The Court found that a consequence of such a criminal offence is the causing of considerable damage to “public interest”. However, at the same time it found that the provisions of the Criminal Code, which constitute a ground when assessing *in concreto* the damage caused in each case, did not provide *expressis verbis* for “public interest” as a social value that may be assessed.

The Court held that the lack of provision for assessing the nature of damages caused to public interests left a broad scope for arbitrariness, which could give rise to the risk of actions by a public official which exceed the limits of the rights and duties prescribed by law (irrespective of the gravity of the act and the damage caused) falling within the scope of criminal law.

The Court also noted that the use in Article 328.1 of the Criminal Code of the notion “public interest” – a generic notion that cannot be defined – was in breach of Articles 1.3, 22 and 23 of the Constitution.

Supplementary information:

Report on the relationship between political and the criminal ministerial responsibility (Venice, 8-9 March 2013).

Legal norms referred to:

- Articles 1.3, 22 and 23 of the Constitution;
- Article 328.1 of the Criminal Code;
- Article 7 ECHR.

Languages:

Romanian, Russian (translation by the Court).



Identification: MDA-2017-2-005

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 27.07.2017 / **e)** 24 / **f)** On the constitutional review of Decree no. 105-VIII of 28 March 2017 on holding a consultative republican referendum on issues of national interest / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette), 15.09.2017, 335-339 / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

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

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

4.5.3.3 Institutions – Legislative bodies – Composition – **Term of office of the legislative body.**

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

Keywords of the alphabetical index:

President, competences, broadening / President, referendum, right to call / Referendum, constitutional amendment.

Headnotes:

Granting a President elected by popular vote enlarged and discretionary powers, such as the right to dissolve Parliament, fails to ensure the coherence of constitutional matters within a parliamentary system of government, where the President's powers are limited. It could obstruct the work of the legislature and generate constitutional crises.

The questions proposed within a single referendum should not relate to fields of different natures with no intrinsic relationship. This would equate to simultaneously holding different referenda, circumventing the constitutional and legal prohibition in this regard.

Summary:

I. A group of MPs lodged an application with the Court, seeking a constitutional review of the Presidential Decree by which a national consultative referendum had been initiated. The issues which the President proposed should be addressed at the referendum concerned distinct fields, namely the repeal of a law; the granting of extra constitutional powers for the President and the introduction of a course on the “History of Moldova” in the educational curriculum. The Court also examined the question of the number of questions which may be submitted within a single referendum.

II. The Court examined separately the questions included in the Presidential Decree, whether they fell within the competence of the Head of State as a subject entitled to initiate a referendum, and whether they might be mutually correlated based on their content and nature so that overall the rule of law was safeguarded.

The Court noted that the provisions of Article 88.f of the Constitution give the President the right to ask people to express their will on matters of national interest. However, this constitutional right of the President to call for a referendum did not, in the Court's view, confer any law-making competences on him or her. The adoption or repeal of legislation is subject to a legislative referendum, not to a consultative plebiscite initiated by the President.

The Court proceeded to examine whether the President was entitled to subject to a referendum questions over amendments to the Constitution. Article 141.1 sets out an exhaustive list of the subjects with the constitutional right to initiate amendments to the Constitution. Under these provisions, the President does not have the right to initiate an amendment to the Constitution.

The Court referred to its previous case-law where it mentioned that the provision in Article 88.f of the Constitution of the right of the President to request people to express their will on matters of national interest by way of referendum was intended by the legislature to allow the President to address the electorate on major issues which the nation might be facing at a particular moment. It did not refer to the approval or repeal of a law amending the Constitution.

Regarding the President's right to subject to a referendum new grounds for the dissolution of Parliament, the Court emphasised that Article 85 of the Constitution sets out the cases and grounds under which Parliament might be dissolved prior to the expiry of its term, such as the impossibility of forming a Government or a three month deadlock in adopting laws. The Court recalled its case-law where it stressed that the right of the President to dissolve Parliament should be seen as a balancing mechanism, rather than something with the potential to bring about imbalance of State powers and to generate political crises. In this respect, the popular mandate does not alter the constitutional competences of the Head of State or presume to grant the discretionary power to dissolve Parliament.

The Court emphasised that cumulating existing specific cases of dissolution with new ones may be interpreted as granting the President the right to make use of the instrument of dissolving the

Parliament as a tool for promoting party politics, in contradiction with his neutral role within the current parliamentary system.

In this respect the Court referred to the Opinion of the Venice Commission CDL-AD (2017) 014-e on the proposal by the President to expand the President's powers to dissolve Parliament, where it underlined that conferring upon the President a discretionary power to dissolve Parliament renders the other grounds listed in the proposal superfluous. It could even be taken to mean that the general power of dissolution is not linked to times of institutional crisis but gives the President the opportunity to dissolve Parliament for purely political reasons. Such an interpretation of the presidential powers to dissolve Parliament alters the neutral role of the President, making him or her into a political player. This runs counter to the logic of a parliamentary system.

Regarding introducing the course "History of Moldova" into the educational curriculum, the Court noted that this issue pertains to the field of research and involves rules which are specific to scientific methods based only on historiographical analysis. Issues connected with the scientific field cannot be politicised and cannot be subject to a political or popular vote.

On the number of questions within a single referendum, the Court reiterated that within one referendum no questions of different nature may be addressed, even if these questions are written down on different ballot papers. As the questions proposed for this referendum concerned totally different matters, the requirement of validity of the form and content of the issue subjected to the referendum was not met and the correct conditions did not exist for voters to make their decisions.

Supplementary information:

Legal norms referred to:

- Articles 85, 88.f and 141.1 of the Constitution;
- Presidential Decree no. 105-VIII on holding a consultative republican referendum on issues of national interest, 28.03.2017.

Languages:

Romanian, Russian (translation by the Court).



Montenegro Constitutional Court

Important decisions

Identification: MNE-2017-2-002

a) Montenegro / **b)** Constitutional Court / **c)** / **d)** 27.06.2017 / **e)** U-II 13/14 / **f)** *Službeni list Crne Gore (OGM)* (Official Journal), no. 60/17 / **g)** / **h)** CODICES (Montenegrin, English).

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law**.
 3.13 General Principles – **Legality**.
 4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members**.
 4.5.3.2 Institutions – Legislative bodies – Composition – **Appointment of members**.
 4.9.3.1 Institutions – Elections and instruments of direct democracy – Electoral system – **Method of voting**.

Keywords of the alphabetical index:

Election, list / Statute / Councillor / Regulation, law, conformity.

Headnotes:

The principle of legality is one of the highest constitutional values and is directly linked to the principle of the rule of law: the state is governed by the rule of law and powers are limited by the Constitution and the law. Authorities are accordingly bound by the Constitution and the law in relation to both their normative and other powers. Under the Constitution, the general powers for adopting regulations are vested in the Government. Administrative authorities, local self-government or other legal entities have such powers only when authorised by law. The law must therefore be the basis for adopting municipal by-laws, and such acts may encompass only what stems from a legal norm and is not expressly defined by such norm.

A municipal assembly exceeded its powers when it regulated the election of its mayor, in that it laid down in its Statute new conditions for the election of mayor at a time when the relevant law governing the matter had already laid down all conditions for the election of mayors.

Summary:

By Decision U-II no. 13/14 of 30 November 2016, the Constitutional Court initiated proceedings for the review of the constitutionality and the legality of Article 57.3 of the Statute adopted by the Municipal Assembly of Herceg Novi. The relevant part of Article 57.3 provides: “among the candidates in the electoral list which, after election, entered the Municipal Assembly with minimum one seat, by the majority votes of the total number of councillors”.

The Municipal Assembly of Herceg Novi submitted no response to the views set out by the Constitutional Court in the decision initiating the proceedings.

The Statute adopted by the Municipal Assembly of Herceg Novi is a regulation adopted for the purpose of enforcement of a law; therefore, like all such regulations, it must be in compliance with the law based on which it was adopted and thus, with the Constitution. The proceedings for the review of the constitutionality and the legality of the Statute accordingly assessed whether it was adopted by the authorised authority, whether there was a legal power for its adoption (legal grounds for adoption) and whether its content complies with the framework set for it by the law.

The Constitutional Court established that, when adopting the Statute, the Municipal Assembly of Herceg Novi referred to the legal grounds in Article 45.1 of the Law on Local Self-Government. The Constitutional Court found that the provisions of the Law on Local Self-Government and of the Law on Election of Councillors and Members of Parliament were directly relevant for the review of the constitutionality and the legality of the impugned part of Article 57.3 of the Statute.

The Constitutional Court examined the content of the impugned part of Article 57.3 of the Statute, and found it to be incompatible with the Constitution and the law. The Court further found the conditions to be met for the impugned part of Article 57.3 to be struck out.

The Law on Election of Councillors and Members of Parliament governs, *inter alia*, the following:

- i. the method and procedure for the election of councillors of the municipal assemblies, city assemblies, Capital and Old Royal Capital, and the Members of Parliament;
- ii. the determination of voting results and distribution of offices; and
- iii. the manner of exercising and protecting the right to vote and other matters relevant to the organisation and running of the elections.

According to its Article 11.2, a voter who is at least 18 years of age, with full legal capacity, and permanent residence in Montenegro for at least two years and permanent residence in a municipality or a city municipality as an electoral district for at least six months prior to the polling day, is entitled to elect and stand for election as a councillor.

The Law on Local Self-Government provides that the municipal assembly adopts a Statute and appoints and dismisses from duty the President of the Assembly and the Mayor.

Article 56.1.2.4.5 of the Law on Local Self-Government stipulates, *inter alia*, the following:

- i. the Mayor shall be elected for a period of four years by the Assembly by a majority vote of the total number of councillors;
- ii. the provisions of the Law related to the election of councillors and Members of Parliament shall apply to the conditions for the election of the Mayor; and
- iii. the Statute shall regulate the methods and procedure for the election of the Mayor.

According to provisions of the Law on Local Self-Government:

- i. the municipal assembly is authorised to elect, by a majority vote of the total number of councillors, the Mayor for a period of four years; and
- ii. the Law on Election of Councillors and Members of Parliament applies to the conditions for the election of the Mayor.

Moreover, Article 56.5 of the Law on Local Self-Government provides that the municipal assembly has the powers to regulate by the Statute the manner and procedure for the election of the Mayor. In line with the aforementioned authorisations, the Municipal Assembly of Herceg Novi adopted the Statute of the Municipality of Herceg Novi which, among other things, regulates the manner and procedure for the election of the Mayor. The impugned part of Article 57.3 of the Statute stipulates that the Mayor shall be elected by the Assembly from among the candidates in the electoral list which, after election, entered the Municipal Assembly with minimum one seat, by the majority votes of the total number of councillors.

The Constitutional Court held that the Municipal Assembly of Herceg Novi had overstepped its powers in adopting the impugned part of Article 57.3. Article 11.2 of the Law on Election of Councillors and Members of Parliament lays down all the conditions which a voter must meet in order to be elected as

councillor, from which, the Constitutional Court stated, it can be concluded that the Municipal Assembly is not authorised to lay down new conditions for the election of the Mayor.

For that reason, the Constitutional Court held that the Municipal Assembly of Herceg Novi – without being authorised by law and in a manner contrary to law – regulated legal relationships for which it has no powers, which are already stipulated in the law, and which are *material legis* and fall within the powers of the legislator. By so doing, the Municipal Assembly violated the principle of legality under Article 145 of the Constitution. Article 145 lays down the principle of compliance of legal regulations, that is to say, legal regulations must be in conformity with the Constitution and the law.

Therefore, the Constitutional Court struck out the part of Article 57.3 which reads: “among the candidates in the electoral list which, after election, entered the Municipal Assembly with minimum one seat, by the majority votes of the total number of councillors” of the Statute of Municipal Assembly of Herceg Novi.

Lastly, under the provisions of Articles 151.2 and 152.1 of the Constitution and Article 51.1 of the Law on the Constitutional Court, the Constitutional Court declared that the impugned part of Article 57.3 of the Statute of Herceg Novi Municipality would cease to be valid as from the date of publication of this Decision.

Languages:

Montenegrin, English.



Norway Supreme Court

Important decisions

Identification: NOR-2017-2-001

a) Norway / **b)** Supreme Court / **c)** The Appeals Selection Committee / **d)** 08.06.2017 / **e)** HR 2017-1127-U / **f)** / **g)** / **h)** CODICES (English, Norwegian).

Keywords of the systematic thesaurus:

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

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

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

5.3.36.1 Fundamental Rights – Civil and political rights – Inviolability of communications – **Correspondence.**

Keywords of the alphabetical index:

Solitary confinement / Prisoner, rights.

Headnotes:

The Appeals Selection Committee of the Supreme Court refused a prisoner – who claimed that his prison conditions violated Article 3 and/or Article 8 ECHR – leave to appeal on the basis of its finding that his confinement did not violate the prohibition on inhuman or degrading treatment set out in Article 3 ECHR, and that, in addition, in its view, the prisoner's claim that his treatment constituted a breach of Article 8 ECHR had no chance of succeeding.

Summary:

In 2011, the claimant committed a terrorist attack in Norway that killed 77 people and injured 42. He is currently serving a sentence of preventive detention, with a time frame of 21 years and a minimum duration of 10 years.

In 2015, he filed a legal action against the State of Norway, claiming that his prison conditions – and, in particular, the fact that he had no contact with other

prisoners – violated Article 3 ECHR and/or Article 8 ECHR. The Court of first instance found a violation of Article 3 ECHR, but this judgment was overturned by Borgarting Court of Appeal. The Court of Appeal ruled in favour of the State on all accounts.

The claimant appealed the Court of Appeal's judgment to the Supreme Court, but on 8 June 2017 the Appeals Selection Committee refused him leave to appeal. In Norway, a judgment cannot be appealed to the Supreme Court unless the Appeals Selection Committee consents, and leave to appeal will be given only if the appeal concerns a legal issue that has a bearing beyond the scope of the specific case at hand, or if it is especially important for other reasons that the case be tried by the Supreme Court.

In its decision, the Appeals Selection Committee stressed that the suffering and humiliation that necessarily follow from being deprived of one's liberty do not in themselves constitute a violation of Article 3 ECHR. States are, however, required to ensure that every prisoner is detained in conditions that are compatible with respect for his or her human dignity, that the manner and method of the execution of the measure of deprivation of liberty do not subject him or her to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and that his or her health and well-being are adequately secured.

The Committee acknowledged that the conditions of the claimant's confinement have caused him great hardship, and that they may also potentially be harmful. Still, the distress or hardship did not exceed the unavoidable level of suffering inherent in the long period of detention the claimant is serving and in the fact that he, on several levels has represented, and continues to represent, an unusually high risk of very serious events. Upon an overall and comprehensive assessment, the Committee concluded that the threshold for infringement of rights set out in Article 3 ECHR had not been exceeded.

In addition, the prisoner's claim that the monitoring of his correspondence and visits violated his right to respect for his private life and his correspondence under Article 8 ECHR had – in the view of the Committee – no chance of succeeding.

Languages:

Norwegian.



Portugal Constitutional Court

Important decisions

Identification: POR-2017-2-006

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 09.05.2017 / **e)** 237/17 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Contempt of court / Penalty, proportionality / Restriction, rights, freedoms.

Headnotes:

Effectively achieving the purposes for which a legal penalty exists and is imposed is indispensable if one is to actually protect the constitutional-law assets and values to which the legislature has afforded the protection of the criminal law. A norm which allows the courts to issue a declaration of contempt of court in order to ensure the practical execution of a subsidiary arrest warrant, that is itself derived from the conversion of a legal penalty involving a fine that has not been paid without good reason, complies with the principle of proportionality, because it is appropriate and necessary in order to achieve the objective which justifies it, which is the need to protect criminal-law assets and values. The norm also fulfils the same principle defined in the strict sense, in that the restriction it imposes is balanced and does not exceed the measure that is fair in the light of the relative weight of each of the concrete opposing constitutional-law assets in question: the right to civil capacity on the one hand, and the asset/value which justifies the restrictive law – i.e. the efficacy of criminal sanctions – on the other.

Summary:

I. The Porto Sentence Execution Court (hereinafter, the “TEP-P”) refused to apply a norm on the grounds that it considered it unconstitutional. As required by law in such cases, the representative of the Public

Prosecutors' Office attached to the Constitutional Court brought this mandatory appeal against the TEP-P's decision.

The norm, contained in the Code governing the Execution of Freedom-Depriving Penalties and Measures (CEPMPL), allows the courts to issue a declaration of contempt of court in order to ensure the practical execution of a subsidiary arrest warrant.

The norm provides that the judge who is responsible for the proceedings in question must issue a declaration of contempt of court in relation to:

- a. accused persons who have not formally provided proof of their identity and place of residence and whom it has been impossible to notify of a court order setting the date of a trial hearing, or whom it has not been possible to detain or place on remand in order to ensure their appearance at such a hearing;
- b. convicted persons who have culpably avoided execution of a legal penalty involving imprisonment, or of a detention or institutionalisation measure.

This declaration of contempt of court has the following consequences:

- i. the immediate issue of a warrant for the detention of the person in contempt;
- ii. asset-related legal dealings into which the person enters after the declaration is issued are subject to annulment;
- iii. public authorities are prohibited from issuing certain documents, certificates or registrations to or regarding the person;
- iv. the possibility that all or part of the person's assets may be seized and held;
- v. there is an official register of contempt orders, access to which is restricted;
- vi. in the present case, the Court *a quo* took the view that it was not constitutionally permissible for a contempt order to be issued when the primary legal penalty at stake in the case before it was a fine, which had subsequently been converted into a penalty of subsidiary imprisonment because the fine was not paid. The Court considered that such a declaration of contempt would constitute an illegitimate restriction of the convicted person's constitutional rights, freedoms and guarantees – namely the right to civil capacity.

II. The Constitutional Court found that this norm complies with the principle of proportionality, because it is appropriate and necessary in order to achieve the objective which justifies it, which is the need to

protect criminal-law assets and values. The norm also fulfils the same principle defined in the strict sense, in that the restriction it imposes is balanced and does not exceed the measure that is fair in the light of the relative weight of each of the concrete opposing constitutional-law assets in question: the right to civil capacity on the one hand, and the asset/value which justifies the restrictive law – i.e. the efficacy of criminal sanctions – on the other. As such, the Court found no unconstitutionality in the norm.

The Constitutional Court naturally agreed that the Constitution enshrines personality rights – in this case, the right to civil capacity, which consists of the right to be a legal person and thus a subject in and of legal relations. However, the Court went on to say that the Constitution also permits restrictions on civil capacity in the cases and under the terms provided for by the ordinary law (the only exception being when those restrictions might be politically motivated, when they are indeed prohibited).

Under the constitutional regime governing restrictions on rights, freedoms and guarantees, such restrictions must respect the principle of proportionality by limiting themselves to that which is necessary in order to safeguard other constitutionally protected rights and/or interests.

For any restriction on a right that falls into the category 'constitutional rights, freedoms and guarantees' to be constitutionally legitimate – and the right to civil capacity is such a right – the following material preconditions must all be met:

- a. the restriction must seek to safeguard another right or interest that is protected by the Constitution;
- b. the restriction must be required in order for that safeguard to be effective, must be fit for that purpose, and must be limited to the extent needed to achieve that goal; and
- c. the restriction cannot damage the essential content of the right in question.

In the present case, the problematic core of the question of constitutionality posed by the norm before the Court is linked to the debate on whether the compression of the right to civil capacity that is inherent in a declaration of contempt of court – a declaration used here as a means of ensuring implementation of the subsidiary imprisonment into which the original legal penalty of a fine was converted because the fine was not paid and there were no valid reasons for the failure to pay – respects the principle of proportionality.

The Court emphasised both the fact that the declaration of contempt of court is designed to ensure that the purposes of legal penalties are effectively achieved, and that those purposes include the protection of constitutional-law assets and values which are themselves protected by the criminal law.

The Constitution says that respect for the fundamental rights and freedoms and the guarantee that they can effectively be enjoyed together form one of the pillars underpinning a democratic state based on the rule of law, and that ensuring them is one of the state's fundamental tasks.

The ordinary legislature is responsible for the concrete implementation of the guarantee. In the case of forms of conduct that are especially damaging to the sphere of protection surrounding these assets and values, the legislature fulfils this responsibility by criminalising the conduct concerned. It is also necessary to create adjective mechanisms (i.e. mechanisms aimed at implementing the substantive law) that are especially effective, namely from the point of view of prevention and dissuasion, in such a way as to make the state's *ius puniendi* executable in practical terms. This is the context within which one must view the declaration of contempt of court.

The Court considered that from a constitutional perspective, and given that the nature of a fine is that of a true legal penalty, the circumstance that the penalty of imprisonment whose execution the declaration of contempt of court is intended to bring about results from the conversion of an improperly unpaid fine does nothing to change the elements which constitute the problem.

In the case before it, the Court was not asked to consider whether it is constitutionally acceptable to convert a fine into imprisonment, but rather to determine the constitutionality of a norm that allows the declaration of contempt of court mechanism to be used to prevent convicted persons from avoiding the penalty of subsidiary imprisonment. The fact that the legal mechanism is necessary in order to ensure that the penalty is effectively executed means that it is a fit means of achieving that purpose. Nor did the Court consider it to be an instrument that excessively compresses the right to civil capacity, all the more so in that it is intended to ensure the effective implementation of a criminal-law measure designed to deprive the convicted person of his or her liberty.

The Court recalled that the law does not limit use of the declaration of contempt of court to cases involving the implementation of a penalty. It is also applicable in situations in which, regardless of the

seriousness of the possible crime, it is not possible to notify an accused person of a court order setting the date of a trial hearing, or to detain or remand him or her in custody – in other words, in situations that occur entirely within the domain of the principle of the presumption of innocence.

As such, the Court found no unconstitutionality in the norm before it, when interpreted to mean that the declaration of contempt of court mechanism is applicable in cases involving a penalty of subsidiary imprisonment derived from the conversion of a penalty of a fine that has not been paid.

Languages:

Portuguese.



Identification: POR-2017-2-007

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 17.05.2017 / **e)** 246/17 / **f)** / **g)** *Diário da República* (Official Gazette), 142 (Series II), 25.07.2017, 15409 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Criminal prosecution / Double jeopardy / *Ne bis in idem*, conditions.

Headnotes:

A norm deduced from the conjugation of various Code of Criminal Procedure articles is not unconstitutional when interpreted to mean that if an accused person has been formally indicted for committing a crime and those charges have been summarily rejected by a court because the indictment failed to adequately describe an element that typifies the legal type of crime in question, new charges in which the original oversight is remedied can be brought against the same person for commission of the same crime at the same time and in the same place. The protection which the procedural dimension of the principle of *ne bis in idem* gives to the accused's position does not

demand that the state's desire to punish a criminal necessarily be exhausted the first time a court rejects criminal charges, particularly when the grounds for that rejection only entail a formal inadequacy on the part of the indictment.

A solution whereby any error (in this case, an insufficient description of one of the elements that typify the crime) makes criminal charges 'unfit' to define the object of the trial would make it impossible to seek to bring a criminal perpetrator to justice, thereby frustrating the objectives of the whole criminal procedural system. Criminal justice could be rendered unachievable by mere imprecisions and mistakes that are capable of being remedied, and this is an outcome the ordinary legislator would not want and the Constitution does not impose.

In other words, such an interpretation could lead to a failure to implement criminal justice, merely because of remediable imprecisions and errors, and this is not something the Constitution requires.

Summary:

I. The normative interpretation before the Court in this concrete review case was derived from a number of articles in the Code of Criminal Procedure. It states that when an accused person has been formally indicted for the alleged commission of a crime, and the charges are summarily rejected because they failed to adequately describe one of the elements which typify that crime, the same person can be validly indicted for a second time for commission of the same crime at the same time and in the same place, whereupon (and assuming, naturally, that the original omission has been rectified) the accused can be brought to trial, and if appropriate, convicted on the basis of the facts and the legal qualification thereof set out in the new indictment.

The Constitutional Court was called on to determine whether this interpretation was in breach of the constitutional principle of *ne bis in idem*, which is one of the guarantees that protect citizens from the possibility of arbitrariness in the state's '*jus puniendi*'.

II. The Court observed that the essential core of the protection afforded by this principle is the requirement that the merit of a criminal case can only be evaluated once. This is one of the two dimensions that comprise the principle: this substantive dimension precludes multiple impositions of legal sanctions for the same offence; the procedural dimension of *ne bis in idem* means that the same subject cannot be the object of a new trial or new proceedings in relation to a criminal offence for which

he or she has already been acquitted or convicted in a decision that has already been consolidated.

The immediate grounds for the procedural aspect of *ne bis in idem* lie in the need to safeguard the certainty inherent in the principle of the state based on the rule of law whereby, even if material justice may be sacrificed in the process, an individual who has already been convicted or acquitted cannot permanently live under the threat of new criminal proceedings and the possibility of being subjected to a new criminal-law penalty.

The substantive side of the same principle is founded on the idea that there cannot be more than one punishment for the same crime and within the scope of the same case. This is because penal sanctions are generally those which sacrifice people's fundamental rights to the greatest extent, and this means firstly that they should be avoided altogether whenever the need for them is not demonstrated, and secondly, that when they are indeed imposed, their measure should be limited to that which is shown to be necessary. The mere existence of a double punishment for the same crime suffices to prove the existence of this disproportionateness or lack of need.

The Constitutional Court had already held in the past that when no court has thus far issued any sentence (be it a conviction or an acquittal) ruling on the facts that are attributed to an accused person, one cannot consider that a simple court order returning the case file to the prosecution – for example, on the grounds that the evidence submitted to the Court has revealed that additional investigative steps are needed in order to discover the truth – constitutes a situation in which the accused is being tried twice for the same crime in the sense that is prohibited by the Constitution.

The Court's case-law is that when combined with those included in the original indictment, the new facts presented as a result of this process form a 'unity of meaning' such that the latter cannot be considered autonomous in relation to the former. In situations in which a court has not yet issued any decision on the merit of the case (be it to acquit or convict), let alone a definitive one (in the sense of the decision's transit *in rem judicatam*), a 'new trial' involving either 'new facts' presented at the trial hearing, or facts that were in the original charges, does not violate the principle of *ne bis in idem*. It is also settled that repeating a trial when a previous one has been annulled, even if the latter ended in a decision on the merit of the case, does not breach the same constitutional principle.

In the present case, the Court of first instance had never given a definitive decision on the ‘new facts’. It did refer to “facts that have been judged and found proven”, but the context in which this statement was made shows that this was merely a provisional and conditional finding. The act of communicating facts to an accused in this way is designed solely to allow him or her to present evidence to refute them, and if he or she is able to raise justified doubt as to their actual existence, they may in the end still be declared unproven.

One key fundamental element in any attempt to determine the significance of a judicial decision is the concrete act in which the Court has interpreted the law. Decision-related statements contained in a judicial decision count within the legal framework that led to them, and only to the extent that they take on significance and are capable of being rationally reconstructed within that framework. This is why objective elements are especially important.

In the present case, the decision to reject an indictment for the crime of driving a vehicle under the influence of alcohol was based on the circumstance that the facts for which it was alleged the accused was responsible did not substantiate the commission of the crime of which he was charged. This was because his blood alcohol rate at the time of the alleged offence (equal to or greater than 1.20g/l) was not included in the indictment. When the Court rejected the indictment, it said that it did so because the description of the offence was incomplete.

There is nothing in the Constitution to say that such an observation must preclude the possibility of a new indictment which, while it concerns the same “piece of life” that underlay the first one, completes the description of the facts by adding the missing elements. Accused persons do not possess a right under which errors must always work in their favour.

If the prosecution seeks an additional punishment, any change made during the trial phase of proceedings must always be exceptional. However, when what is at stake is the mere addition of new material facts linked to some of the accusations that were already made in the original indictment, the defect can be overcome by modifying the charges, or by merely proving that the facts had already been communicated to the accused during the course of the proceedings and that he or she had already had the opportunity to defend himself or herself with regard to them.

The ability to renew an indictment must be subject to limits, the first of which is the need for protection against unending pursuit by the criminal authorities.

They particularly include: the object derived from the reformulated indictment must be respected; the reformulation must be made within a reasonable period of time; the accused must be provided with the same means of defence as those available to him or her when presented with the original indictment (e.g. the option to request an investigation); and the grounds on which the Court rejected the original indictment must permit correction of the error or omission.

None of these limits were relevant in the present case, and the Constitutional Court therefore found no unconstitutionality in the normative interpretation before it.

Cross-references:

Constitutional Court:

- nos. 452/02, 30.10.2002; 494/03, 22.10.2003; 303/05, 08.06.2005; 387/05, 13.07.2005; 522/06, 26.09.2006; 237/07, 30.03.2007.

US Supreme Court:

- *Illinois v. Somerville*, 410 U.S. 458 (1973) <https://supreme.justia.com/cases/federal/us/410/458/>.

Languages:

Portuguese.



Identification: POR-2017-2-008

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 31.05.2017 / **e)** 271/17 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

5.3.35 Fundamental Rights – Civil and political rights
– **Inviolability of the home.**

Keywords of the alphabetical index:

Government / Home, inviolability / Legislative competence, limits / Warrant, judicial.

Headnotes:

A norm holding that for certain purposes, municipal building inspectors are entitled inspect anyone's residence with or without the householder's consent (albeit solely when sanctioned by a court order) is not unconstitutional. The court order in such cases is a special type of warrant – a procedural guarantee embodied in a court order permitting entry to the domicile of a person who has not given his or her consent to that entry. A central factor is that only a judge can issue such warrants. Therefore, despite the multiplicity of types of urban-planning intervention that local authorities are empowered to conduct, this requirement for a court order guarantees the inviolability of the home, as configured by the Constitution.

Summary:

I. The Public Prosecutors' Office requested concrete review of a decision in which the Leiria Administrative and Fiscal Court refused to apply a norm, inferred from the Legal Regime governing Urban Development and Building (hereinafter, the "RJUE"), because it followed jurisprudential guidelines issued by the Constitutional Court itself.

II. In previous rulings issued in 2016, 2012 and 2009, the Constitutional Court had found norms identical to the one before it in the present case to be organically unconstitutional. The Constitution situates the matter of rights, freedoms and guarantees among the areas in which the competence to legislate is partially reserved to the Assembly of the Republic (Parliament). This means the government can only issue legislation on this matter when Parliament has authorised it to do so, and this applies to legislation which affects the right to the inviolability of people's homes. In other words, for the government to legislate on this matter, Parliament must have specifically authorised it to do so in a law. In this case, the old authorising law was not couched in terms that would have allowed the government to issue a norm enabling a district judge to grant a warrant empowering the authorities to enter the domicile of a person who did not consent to that entry, despite knowing that there were activities there which were subject to inspection by municipal officials.

It is accepted constitutional jurisprudence that for a norm to be deemed organically unconstitutional because Parliament has not authorised the government to legislate on the matter in question, the norm must innovate in relation to legislation that was so authorised in the past.

A 1999 RJUE article was *amended* by a 2015 Executive Law (DL – a type of law that is issued by the government). Unlike the version which preceded this amendment and which the Court found unconstitutional in the earlier rulings, the new text of the norm is duly covered by an earlier authorising law, which expressly provides that the purpose of the warrant in question is to 'legitimate entry into the domicile of a person who does not consent thereto and in which activities that are subject to inspection by municipal officials are taking place'.

The question of the competence to issue legislation on the organisation and competence of the courts, which is also reserved to the Assembly of the Republic unless it authorises the government to legislate, is a separate one. The Constitutional Court has repeatedly taken the position that this restriction encompasses 'all' matters concerning judicial competence, including 'defining which matters can only be heard by the ordinary courts of law and which ones pertain to the administrative and fiscal courts'.

In the present case, the Court held that the authorising law applicable to the original version of the RJUE did authorise the government to 'legislate on matters concerning the competence of the courts', but that the 'content and extent' of the authorisation were insufficient to allow the government to issue norms granting district judges the competence to issue warrants to enter the domicile of householders who do not consent to that entry and where there are activities that are subject to inspection by municipal officials. This is why the Court had reached findings of unconstitutionality in the earlier rulings.

However, the authorising Law applicable to the new version of the RJUE norm – i.e. the one under whose authority the government amended the original version – does make provision for this. In organic/formal terms, the government thus now possesses the credentials to make such an amendment.

When it issues legislation under the terms of a parliamentary authorisation, the government is exercising a competence that now pertains to it, and not one that belongs to another entity – i.e. Parliament. In other words, it is not exercising someone else's competence on its own behalf.

This is a particularly complex normative field, and in reaching its decision the Court considered both the types of municipal intervention that would justify local authority staff entering people's domiciles, and the articulation of this norm with others that address the same area.

The Court also considered the possibility that the norm before it violated other constitutional parameters. The Organic Law governing the Constitutional Court only allows it to issue findings of unconstitutionality in relation to norms which the Court *a quo* has either actually applied or refused to apply, but does permit those findings to be based on breaches of constitutional or ordinary-law norms or principles other than those on which the lower court relied in its decision.

In this case, the Court *a quo* refused to apply the norm for strictly organic/formal reasons. The Constitutional Court held that if it were to instead evaluate the norm against material constitutional principles, it would thus itself have to directly establish the meaning of the norm in the first place, in a situation analogous to that in which the Court acts in abstract review cases (as opposed to the present concrete review procedure). The Court deemed that this would be neither desirable nor appropriate here, and thus concluded that it was unable to find any sign of material unconstitutionality in the norm.

III. Two Justices dissented from the Ruling. One was of the opinion that the new authorising law has not eliminated the organic unconstitutionality to which the Court objected in its 2016 ruling, in that it does not say anything about the admissibility of restrictions on the right to the inviolability of the home in the shape of inspections designed to verify the legal conformity of building work and the prevention of dangers to public health and safety.

The other dissenter (the President of the Court) also considered that the new authorising law has not remedied the issue of organic unconstitutionality in relation to the right to the inviolability of the home, because it does not specifically authorise the government to legislate on the matter in question. He based his position on the view that the central argument underlying the majority position was that when Parliament authorised the government to determine which courts are competent to issue the warrant needed to enter a person's domicile, it thereby simultaneously authorised it to legislate on the question of actually entering a home without consent. The majority found that there is a "teleological and material-law unity" between the two moments in time – the issue of the warrant, and the forcible entry. The dissenting Justice disagreed with this, preferring the position the Court took in the 2016 ruling – that these are two distinct moments on both the 'normological' and the normative levels. He said that it is one thing to legitimate forcible entry into a home as a territorial space in which the householders' privacy and intimacy are protected; it is another altogether to decide which courts should

be competent to issue warrants that are a procedural precondition for that form of invasiveness and breach of privacy.

Cross-references:

Constitutional Court:

- nos. 195/16, 13.04.2016; 160/12, 28.03.2012; 145/09, 24.03.2009 and 211/07, 21.03.2007.

Languages:

Portuguese.



Identification: POR-2017-2-009

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 22.06.2017 / **e)** 324/17 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Compensation / Dismissal / Dismissal, different criteria / Labour law / Right to be heard / Worker, protection.

Headnotes:

It is unconstitutional for any type of sanction – be it of an administrative-offence, administrative, fiscal, labour-related, disciplinary or any other kind – to be imposed without first giving the accused the opportunity to be heard and defend himself or herself against the accusations. Having said this, if a dismissal is unlawful because the proceedings that led to it are invalid, but the substantial grounds for the dismissal remain, the dismissed worker is only entitled to compensation and not the other remedies for unlawful dismissal. In adopting this balance, the legislature has attached autonomous value to the accused's right to a defence in disciplinary

proceedings, without thereby denying that in the absence of irregularities which would be serious enough to invalidate the dismissal and given the continued existence of the facts and grounds which justified the decision to dismiss in the first place, that decision should not itself be declared illicit.

Summary:

I. The present case involved a concrete review of the constitutionality of a norm in the context of dismissal of an employee.

The Labour Code (CT) gives workers a time period in which to consult the case file regarding any disciplinary proceedings that are brought against them by their employer and to respond to the written accusation of misconduct that must be addressed to them in such cases. The worker is entitled to submit any items he or she considers relevant in order to clarify the facts and his or her participation in them, to attach documents to the case file, and to request the taking of any steps that prove pertinent to clarification of the truth.

At first instance, a worker challenged both the lawfulness of his dismissal by the Portuguese Equestrian Federation (hereinafter, "FEP") and the latter's proper conduct of the dismissal process. His suit was denied and he appealed to the Lisbon Court of Appeal (TR-L), which found that there had been an irregularity in the disciplinary proceedings leading to the dismissal, in that the employer had not taken probative steps requested by the employee in his response to the formal accusation of misconduct.

The Court of Appeal had ordered FEP to pay its former employee compensation equal to half that which he would have received under the regime governing payment at the worker's request of compensation in lieu of reinstatement, which is one of the possible consequences if a dismissal is illicit.

FEP appealed this decision to the Constitutional Court, arguing that the norm applied by the Court of Appeal was unconstitutional because it violated the constitutional principle of proportionality and its subprinciples (appropriateness, necessity, and fair measure).

II. The Constitutional Court held that where the disciplinary proceedings that precede dismissal with just cause are concerned, it is important to distinguish between different types of procedural irregularity. Very serious ones, which are typified, invalidate the dismissal by invalidating the procedure and thus rendering the dismissal itself unlawful. Serious irregularities impede or impair the worker's

right to defend him or herself, and this is the category that includes the unjustified failure to conduct probatory steps requested by the worker in the response to the accusation of misconduct. Although such a failure is an administrative offence, it does not in its own right prevent the dismissal from being unlawful, but does oblige the employer to compensate the former employee. Some constitute administrative offences. Finally, some irregularities are just that – mere irregularities. *In casu*, the Court said it was necessary to analyse the regime governing the second category – serious irregularities which, albeit they are harmful to the worker's right to a defence, do not invalidate the disciplinary proceedings and therefore do not make the dismissal unlawful.

Only a court of law can determine whether a dismissal was properly conducted and lawful. Workers who consider that they have been unjustly dismissed must take the initiative of contesting or challenging that dismissal before a court. The Court must in turn always say both whether the alleged grounds for the dismissal really existed, and whether they provided sufficient cause to dismiss.

If an employer dismisses an employee and violates his or her rights in the process, it commits a serious administrative offence. Just because the employer has valid grounds for its decision to dismiss the worker, and even if it communicates those grounds to the latter in both its formal accusation of misconduct and its decision, it cannot ignore the latter's right to defend himself or herself in the way and at the moment in time he or she chooses to exercise it.

It is unconstitutional for any type of sanction – be it of an administrative-offence, administrative, fiscal, labour-related, disciplinary or any other kind – to be imposed without first giving the accused the opportunity to be heard and defend himself or herself against the accusations.

Having said this, if a dismissal is unlawful because the proceedings that led to it are invalid, but the substantial grounds for the dismissal remain, the dismissed worker is only entitled to compensation and not the other remedies for unlawful dismissal.

This is a Solomonic solution that seeks to reconcile the different values at stake in such situations. It takes account of the fact that the dismissal is substantially justified, which is why the worker cannot opt for reinstatement and the amount of his or her compensation is also reduced; but it also penalises the employer for behaving in a manner that was illicit, even if only in procedural terms.

In adopting this balance, the legislator has attached autonomous value to the accused's right to a defence in disciplinary proceedings, without thereby denying that in the absence of irregularities which would be serious enough to invalidate the dismissal and given the continued existence of the facts and grounds which justified the decision to dismiss in the first place, that decision should not itself be declared illicit.

The reason for awarding compensation to a worker who has been dismissed, even when that dismissal is deemed lawful despite the fact that his or her rights to a hearing and to a defence were limited by formal irregularities in the disciplinary proceedings prior to the dismissal, is to make up for the violation of his or her right to an adversarial process, which is one of the key structural elements of the procedure leading to the imposition of a disciplinary sanction.

In creating this measure, the legislature sought two things: to dissuade employers from engaging in procedural actions that are improperly hostile to the accused worker's defence; and to compensate the latter for having to resort to the courts in order to definitively clarify the justification for his or her dismissal, because his or her procedural defence rights were violated.

Employers must evaluate the probatory steps requested by workers in such situations; if they conclude that those steps are useless, they must explain why in writing; what they cannot do is to do nothing, just because they consider the worker's request impertinent.

With regard to the appellant employer's argument that the norm under which it was required to pay the reduced compensation was in breach of the principle of equality, the Court recalled that in disciplinary labour proceedings, the employer and the accused worker are not in parallel situations: the former takes the initiative, directs the proceedings and is responsible for complying with the applicable law; the latter simply contests the accusations made against him or her. Only the employer is in a position to violate the other party's procedural rights to a defence. The worker can only choose whether to exercise those rights or not. These are not comparable situations, which is why, where the norm in question is concerned, the employer and the employee are not part of any form of *genus proximum*. The essential condition for there to be a breach of the principle of equality is thus not met.

The Court also rejected the argument the appellant derived from the "idea of the equality of arms". In dismissal proceedings, the worker is defending his or her labour bond, which is why any procedural

irregularities he or she commits necessarily prejudice his or her own labour situation. As such, in addition to the fact that any irregular procedural actions taken by the worker do not count towards the final decision (as far as and under the terms in which the law permits this), no additional sanctions within the framework of such proceedings are warranted.

The Court said that this legal solution is one in which the legislator exercised its freedom to shape legislation in pursuit of a legitimate goal, and is neither disproportionate, nor in breach of the principle of equality.

In the light of all of the above, the Constitutional Court declined to find any unconstitutionality in the Labour Code norm whereby a mere irregularity on the part of the employer in the shape of a defect in the dismissal procedure must be sanctioned by payment of half the compensation that would have been owed to the dismissed worker if the dismissal had itself been illicit. As such, the Court denied the employer's appeal.

Supplementary information:

The Ruling was unanimous.

Cross-references:

Constitutional Court:

- no. 306-03, 25.06.2003.

Languages:

Portuguese.



Identification: POR-2017-2-010

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 12.07.2017 / **e)** 382/17 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living.**

Keywords of the alphabetical index:

Equality / Family, stable family environment / Minors, protection / Minors, social rights / Minors, maintenance, obligation, parents / Proportionality / State, obligation to ensure the protection of human rights and fundamental freedoms.

Headnotes:

Civil legislation providing for economic support for young adults who want to conclude their vocational training or academic studies, derived from the legal protection the Constitution affords to the full development of young persons, does not have to be restricted to persons under the age of twenty-one. A norm in the Law governing the Protection of Endangered Children and Young Persons (LPCJP) was interpreted to mean that an ongoing measure which is designed to support the beneficiary's life autonomy in such a way as to enable him or her to conclude his or her vocational training or academic studies (the measure and the education/training must have begun before he or she came of age on his or her eighteenth birthday) must necessarily end on his or her twenty-first birthday. This limits the direct economic support given to young people, after they come of age, who have been deprived of a normal family environment, compared to that available to young persons who are not in that family situation. This is sufficient to declare the unconstitutionality of the norm in question, because it is in breach of the prohibition on negative forms of discrimination regarding the protection of the right to the full development of young persons deprived of a normal family environment.

Summary:

I. The Public Prosecutors' Office was legally required to bring this concrete review case because the Cascais Family and Juvenile Court (TFM-C) refused to apply a norm of the Law governing the Protection of Endangered Children and Young Persons (hereinafter, the "LPCJP") which it considered unconstitutional. The norm provided that measures designed to protect endangered children and young persons and promote their rights must end when the young person comes of age, or on his or her twenty-first birthday when he or she has asked for the measure to continue beyond his or her eighteenth

birthday.

II. The court *a quo* held that as such, the norm set an age limit which negatively discriminated against young persons who do not enjoy a healthy home, inasmuch as since 1 October 2015 the Civil Code has provided that, as a general rule, parents are generally under a duty to provide for the upkeep of their children until the latter reach twenty-five years of age. It took the view that this was discriminatory and thus unconstitutional, because the same benefit is not available to many young persons covered by the LPCJP.

The Constitutional Court stated that although it considered the lower court had somewhat oversimplified the matter, the purpose of the LPCJP is precisely to fulfil the duty of society and the state to ensure the protection of endangered children and young persons and to promote their rights. It concretely does this by providing for protection and promotion measures, and especially targets at-risk situations that endanger a child or young person's safety, health, training, education or development. In this context, "child" and "young person" are defined as persons below the age of eighteen in general, as well as persons between the age of eighteen and their twenty-first birthday who have requested the continuation of a protection/promotion intervention that began before they were eighteen.

The norm before the Court in the present case referred to a measure that is intended to support an autonomous life and is implemented in a natural life environment (as opposed to measures involving institutionalisation). The measure consists of directly providing young persons aged fifteen and over with economic support and psycho-pedagogical and social counselling, and must take the individual's competencies and potentials into account. Given that both before and after a person comes of age, his or her personal growth and increasing capacity to autonomously take decisions about his or her own interests and freely develop his or her personality pose some specific issues, there is nothing to prevent the concept of 'young person', when used for the purposes of the special protection the Constitution recognises such persons must enjoy, from applying not only to minor teenagers, but also to young adults who require special protection.

The concept of a welfare state based on the rule of law requires that citizens' rights are respected and that the state is under a general duty to promote individual access to the assets and values that are protected by the Constitution.

The Portuguese Constitution attaches special importance to whether a child or young person is incorporated into a normal family environment or is deprived of one.

Among other things, a normal family environment is concretely embodied in the fact that while a young person is a minor, his or her parents or whoever is placed in a similar legal position must fully exercise their responsibilities, particularly with regard to the minor's upkeep and education.

The need to protect a child or young person's full development, namely in cases in which parents do not fulfil their fundamental duties to their offspring, can lead to disqualification from or limitation of the exercise of the parental responsibilities. The constitutional importance of the family environment is derived from a combination of the view that the family is a fundamental element of society and the recognition of the rights and/or duties of mothers and fathers in relation to their children.

The fact that children who are deprived of a normal family environment – especially orphans and abandoned children – are more vulnerable means that they require added protection.

In situations in which it is not possible to create conditions in which parents actually exercise their parental responsibilities, the Constitution's concern with providing children and young persons with a normal family environment postulates a constitutional-law rather than just an ordinary-law preference for measures that are implemented in a natural life environment.

In its decision, the lower court held that the necessary termination of an autonomous living support measure because the beneficiary has turned twenty-one as required by the LPCJP norm in question was constitutionally illegitimate, because it discriminated against young persons who did not even have a healthy home, compared to young persons with a father and a mother who are present in their lives. Since 1 October 2015 and subject to certain conditions, the state has placed parents under a duty to support their adult offspring for as long as the latter are engaged in vocational training or academic studies, up until they reach the age of twenty-five.

The Constitutional Court stated that the core structure of the principle of equality means that the right to support provided for in the law that modified the Civil Code in this way and the right to support for an autonomous life attributed in order to permit the conclusion of training or education can be said to

refer to the same reality, seen within a constitutional framework. When it comes to this right to economic support for the purpose of concluding during adulthood the vocational training or academic education that was begun while they were minors, young adults up to their twenty-fifth birthdays must be considered equal, regardless of whether, when they began that training or education, they were supported by their parents or benefited from an autonomous living support measure.

In the present case, the fact that, subject to certain conditions, the law places parents under a duty to economically support their adult offspring with a view to the conclusion of education or training that began while the latter were minors, with the corresponding right on the part of the offspring to continue to receive economic support from their parents, is not dependent on whether or not the aforesaid parents spent time with their children while the latter were minors.

The autonomous living support measure is also naturally intended to ensure the creation of conditions that will permit the education and/or training of young persons who are deprived of a normal family environment. In this case, in the absence of parents or equivalents in a position to fully shoulder their parental responsibilities, it is the state which, while the protectee is still a minor, undertakes the protection of the young person's right to full development. This is especially true with regard to his or her academic education and vocational training, and the norm before the Court said that, with the young person's agreement and subject to other requisites, that protection can be extended after he or she comes of age, but only up to an absolute limit of his or her twenty-first birthday. The legislature's view that the continuation of economic support granted in order to ensure a young adult's upkeep and sustenance by either his or her parents, or the state in the case of an autonomous living support measure, is a means of protecting his or her full development justifies the comparability of the two situations. The fact that provision is made for the existence of such support does not mean that its award should not be adjusted to each young person's concrete circumstances. However, such differences, which are derived from the need to take the singularity of each case into account, do not mean that when it comes to the promotion of the legal value in question, young persons incorporated into a normal family environment and those deprived of one should not, once they have come of age, both benefit from a form of support intended to enable them to conclude the training or education process they began while they were still minors, all in such a way as to avoid interrupting that process and thus losing the efforts and energies that have already been invested in it.

The Court held that the two groups of young people are in an equal situation with regard to the ability to benefit from a form of economic protection of their right to full development. As such, the different legal treatment afforded to them was constitutionally unacceptable and the Court therefore found the norm in question unconstitutional.

Cross-references:

Constitutional Court:

- nos. 191/88, 20.09.1988; 349/91, 03.07.1991; 231/94, 09.03.1994; 609/94, 22.11.1994; 713/96, 22.05.1996; 412/02, 10.10.2002; 509/02, 19.12.2002; 232/03, 13.05.2003; 306/05, 08.06.2005; 651/09, 15.12.2009; 546/11, 16.11.2011; 187/13, 05.04.2013 and 296/15, 25.05.2015.

Languages:

Portuguese.



Identification: POR-2017-2-011

a) Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 12.07.2017 / **e)** 396/17 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

5.1.1.4.2 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Incapacitated.**

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

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

5.3.13.7 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:

Capacity, legal proceedings / Criminal proceedings / Evidence, value / Legal capacity, restricted.

Headnotes:

A provision of the Code of Criminal Procedure whereby the fact that a person is deprived of his or her legal capacity due to a mental abnormality meant that he or she was absolutely incapable of testifying in proceedings in which he or she was the victim of, or had been harmed by, a crime is unconstitutional. The existence of a mental abnormality is only cause for deprivation of legal capacity if it results in an inability to provide for one's personal interests. This judgement is a legal, not a medical one and reflects the sometimes tense balance between protection and liberty. The degree of incapacity of a person who may be declared legally incapable due to a mental abnormality must be gauged in individual terms, with reference to the nature and quality of his or her interests and the need to provide for them.

Summary:

I. The Public Prosecutors' Office brought this mandatory concrete review case before the Constitutional Court because the court *a quo* refused to apply a provision of the Code of Criminal Procedure (hereinafter, the "CPP") concerning the capacity and duty to testify on the grounds that it was unconstitutional. The disputed dimension of the norm stated that persons who were deprived of their legal capacity due to a mental abnormality were absolutely incapable of testifying in criminal proceedings.

II. In a past case and in a slightly different context, the Constitutional Court had already found the same norm deduced from the CPP to be unconstitutional, in particular because it violated the principle of equality by laying down that a person who had been harmed by a crime, was a civil party to the ensuing criminal proceedings and was deprived of his or her legal capacity was absolutely incapable of testifying during the trial hearing.

Although the object of the present appeal was not exactly the same as that in the earlier decision, inasmuch as what was at stake here was the capacity to bear witness of a person who, although harmed by the crime, was not a civil party to the proceedings, the parallels between the two questions were evident.

The legislative option to consider persons who are deprived of legal capacity incapable of giving testimony is a long-standing one in Portuguese Law. This is true of both criminal procedural law and civil procedural law, with the latter having originally imported it from the former.

At first this choice was not criticised. Quite apart from the widespread belief that the type or level of the subjects' medical condition could indeed make them unfit to give evidence, deprivation of capacity was seen as a legal 'institute' designed to protect 'madmen', while preventing them from testifying in court was designed to protect both the parties to proceedings and the administration of justice. Having said this, some authors did express a preference for a regime under which it would be up to the judge to freely assess the probatory value of witness testimony.

The option to take advantage of legal capacity-depriving sentences as a measuring gauge with which to determine a person's (in)capacity to testify sought to lend greater certainty to the universe of people who were deemed unable to make statements in legal proceedings. The legal solution before the Court in the present case was essentially designed to prevent judicial errors when considering both the fitness to testify of persons suffering from mental abnormalities, and the credibility of their testimony in cases in which they are allowed to give it.

The Court stated that on the other hand, making persons who have been deemed legally incapable due to a mental abnormality absolutely unable to testify is a compression of the right to evidence, itself also seen in terms of the essentially objective aspect of a value or asset that is safeguarded by the Constitution. This is because doing so excludes the possibility of presenting witness evidence that might prove useful to the discovery of the truth. This restriction is particularly significant in situations like the one in the present case, in which the person who is considered incapable is also the victim of the crime.

At issue here was a measure which was designed to promote a value or asset – the probatory integrity of criminal proceedings, which is required by the right to fair process and the principle of a state based on the rule of law – but which did so by harming that very value or asset. In order to prevent value from being attached to testimonies whose probatory worth is actually negative – a possibility that is inherent in a regime in which the courts are free to consider and evaluate evidence – the law categorically excluded a whole universe of forms of testimony. That universe was composed of every testimony provided by persons who are deprived of legal capacity due to mental abnormality, but included a more or less broad subset of cases in which such testimony does in fact possess a positive probatory value. The benefits and sacrifices derived from the measure are linked to the same value or asset – the probatory integrity of criminal proceedings.

The Court emphasised that it is not commonplace for the problems posed by collisions between different rights or by the need to weigh the values and assets that are relevant to constitutional justice against one another to take this intra-axiological shape. Such problems normally concern the harm that is done to one value or asset in order to promote or protect a different value or asset, which is why they tend to be inter-axiological.

It nonetheless noted that there is no substantial difference between applying the constitutional principle of the prohibition of excess when a conflict is intra-axiological and doing so when it is inter-axiological. This principle is not about weighing up values and assets in the strict sense of the term – i.e. posing the question of whether one value or asset should prevail over another – but about controlling whether and to what extent the valuable goal pursued by a legislative measure is proportionate to the sacrificial means imposed by that measure.

In its jurisprudence, the Court has acknowledged that an analysis of the principle of the prohibition of excess must look at three subprinciples: fitness for purpose, necessity, and proportionality. The fitness subprinciple says that the restrictive means chosen by the legislator cannot be inappropriate in order to achieve the purpose for which it is intended. The subprinciple of necessity or need says that the legislator's choice of means cannot be more restrictive than that which is indispensable in order to achieve that purpose. The subprinciple of proportionality says that the goals achieved by the measure must be such as to justify the use of the restrictive means.

The Court was of the view that in the present case, at first sight the measure's fitness seemed to be assured by the apparent convergence between the precondition for the deprivation of legal capacity – the mental abnormality – and the lack of fitness to testify.

However, that convergence is not real, because both the grounds for the judgment on which the decision to deprive is based (i.e., the subject's inability to govern his or her person and property) and its goals (i.e., the protection of the subject's own interests) are very different from those that underlie the judgement as to whether a person is fit to testify.

Be that as it may, however generously one may define the subprinciple of fitness, even to the point of taking the view that any legislative measure which is not absolutely unfit fulfils it, the legal solution before the Court here was in any case entirely incapable of passing the tests of necessity and proportionality.

The inability to act autonomously must be verified in both the asset-related and the personal fields, so all the multiple aspects of the subject's life that can possess legal expression are of interest. The decision to deprive has fixed effects that are determined by law. The underlying judgement is an overall one, but is influenced to a greater extent by the areas in which the verified existence of an inability can seriously prejudice the subject's interests because the acts in which he or she engages therein have binding effects. One especially important such area is that of legal dealings.

The Constitutional Court emphasised that the existence and nature of an (in)ability to relate to a given reality with which such a subject comes into contact can often only be determined on a case-by-case basis and may depend on many factors.

The judgement that has led to the issue of a deprivation order may not be of use in determining the incapable subject's fitness to provide credible testimony in criminal proceedings. This particular fitness is not important when it comes to evaluating the preconditions for a declaration of loss of legal capacity, and that evaluation therefore says little or nothing about the subject's ability to testify in court.

The Court stated that, although the existence of an order depriving the subject of legal capacity due to a mental abnormality may indicate an inability to give evidence, a finding that a person who is deprived of legal capacity is absolutely and automatically incapable of testifying is not a fit means of preventing probatory value from being attached to testimony that has no such value. It is enough for such a rule not to be essentially fit for its intended purpose for it to be deemed excessive. No harm to an asset or value that warrants protection can be justified by a goal that is only accidentally achieved by that harm. The fact that a measure is shown to be unfit or improper suffices to prove that it is excessive and consequently unconstitutional.

The Court held that the measure was certainly not necessary, given that it was impossible to accept as valid the legislature's assumption that evaluating either the fitness to testify of persons suffering from mental abnormality, or the credibility of their testimony, exceeds the normal abilities of the judicial power within the legal regime governing the free consideration of evidence by the court. The goal of excluding testimony with a negative probatory value sought by the measure can be adequately achieved by a regime that establishes a relative incapacity whereby the fitness to give evidence of a witness who suffers from a mental abnormality is judged on a case-by-case basis, taking account of the nature and

degree of the abnormality and the nature and pertinence of the testimony. The measure also failed the proportionality test, given that the extremely modest efficacy of its exclusion of testimony with a negative probatory value was incapable of justifying the sacrifice of the testimony with a positive probatory value that may be provided by persons who have been deprived of their legal capacity due to mental abnormality, above all when that person is the victim.

As such, the Court found that the norm before it violated the combined principles of fair process and the prohibition of excess and was therefore unconstitutional.

Cross-references:

Constitutional Court:

- nos. 187/2001, 02.05.2001; 359/11, 12.07.2011 and 291/17, 08.06.2017.

Languages:

Portuguese.



Identification: POR-2017-2-012

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 13.07.2017 / **e)** 420/17 / **f)** / **g)** / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication.**
- 5.3.24 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 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:

Communication, interception / International law, status / Metadata, access / Personal data, protection / Personal data, storage.

Headnotes:

Seen as a corollary to the protection afforded to the privacy of people's personal life, the privacy of communications encompasses both a prohibition on real-time interference with telephone calls, and the requirement to make it impossible for third parties to subsequently gain access to elements that reveal the factual conditions under which a communication took place. In a democratic state based on the rule of law, any citizen has the right to make telephone calls when and to whom he or she wants with the same privacy as that applicable to the content of their conversation. When they don't support a concrete communication, base data (i.e. data regarding the connection to a network, i.e. the number and other data via which a user accesses the service) and equipment location data are not objects of the protection of the right to the secrecy of communications. They are, however, subject to the constitutional protection of the right to the privacy of personal life. A legal provision that imposes a duty on providers of publicly available electronic communication services and/or public communications networks to preserve the name and address of the subscriber or registered user to whom the Internet Protocol (IP) address was attributed at the moment of each communication, for one year counting from the end of that communication, is not unconstitutional due to the adequate safeguards provided and fulfilment of the proportionality test.

Summary:

I. The Public Prosecutors' Office (MP) was legally required to bring the present appeal against an order by a criminal investigating judge denying a request to authorise the transmission of data identifying a user to whom a given Internet Protocol (hereinafter, "IP") address was attributed. The user in question was a suspect in proceedings involving the investigation of facts capable of forming part of the commission of a crime of child pornography.

The investigating judge based his refusal on the view that a norm contained in Law no. 32/2008 of 17 July 2008, which transposed Directive no. 2006/24/EC of the European Parliament and the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, was unconstitutional.

The object of the present appeal was linked to the so-called 'metadata', which are usually defined as 'data about data', because they concern the circumstances under which communications occur and not the content of those communications itself.

II. The Court held that for Portuguese legal purposes the term should be 'traffic data', because the latter was already defined in Portuguese Law.

Seen as a corollary to the protection afforded to the privacy of people's personal life, the privacy of communications encompasses both a prohibition on real-time interference with telephone calls, and the requirement to make it impossible for third parties to subsequently gain access to elements that reveal the factual conditions under which a communication took place.

In a democratic state based on the rule of law, any citizen has the right to make telephone calls when and to whom he or she wants with the same privacy as that applicable to the content of their conversation.

In the present case, the Constitutional Court only considered the constitutional conformity of a normative dimension embodied in the duty of "providers of publicly available electronic communications or of a public communications network" to store the data regarding the "name and address of the subscriber or registered user to whom the IP protocol address" was attributed "at the moment of the communication...for a period of one year counting from the date on which the communication was concluded".

The Court recalled that its case-law on this subject means that the protection provided by the Constitution – a prohibition on all forms of interference by the public authorities with correspondence and tele- and other types of communication, save in the cases provided for in the law governing criminal procedure – does not cover base data like those addressed by the norm before it here. 'Base data' are those regarding the connection to a network (the number and other data via which a user accesses the service). Data concerning the mere identification of the user to whom a given IP address is attributed are not included within the scope of the protection afforded to the secrecy of communications enshrined in the applicable constitutional precept, inasmuch as they do not presuppose a specific communicational act.

The same absence of constitutional protection also applies to mobile location data that do not presuppose any actual act of communication – i.e. they exist merely because a mobile phone is switched on and capable of receiving calls.

The Court therefore drew a distinction between: base data (those regarding connection to the network, i.e., the number and other data via which a user accesses the service); traffic data (the functional data needed to establish a connection or communication, and the data generated by using the network, e.g. user location, recipient location, date and time, and frequency); and content data (those regarding the content of the communication or message).

Unlike base data, the so-called traffic data and the so-called content data directly concern a communication itself, both in terms of identifiability and with regard to the actual content of the message or communication.

The Court held that when they don't support a concrete communication, base data and equipment location data are not objects of the protection of the right to the secrecy of communications. They are, however, subject to the constitutional protection of the right to the privacy of personal life. The Court took the view that the duty to preserve such data in case they need to be given to the authorities in compliance with the law, fulfils the requirement that it be fit for its purpose, in that obliging providers to keep base data is a measure that is appropriate to the goal of identifying the registered user to whom an IP address was attributed and who is suspected of having committed one of the serious crimes referred to in the Law; it also meets the requirement of need, inasmuch as it is not possible to configure a less restrictive means for the competent authorities to achieve that identification; and it is not excessive, because the data in question are not very invasive, but can be central to the conduct of criminal investigations of such crimes.

The regime under which these data can be accessed limits the universe of data subjects whose data are subject to transmission to the authorities, and requires prior authorisation of such transmissions in the shape of a duly justified order signed by the investigating judge. As such, it does not violate the principle of proportionality either.

The Court consequently found no unconstitutionality in the norm that imposes the duty on providers of publicly available electronic communication services and/or public communications networks to preserve the name and address of the subscriber or registered user to whom the IP address was attributed at the moment of each communication, for one year counting from the end of that communication.

The grounds for the judicial order denying the Public Prosecutors' Office's request for authorisation of the transmission by the service provider of data

identifying a user to whom a given IP address was attributed lay in an alleged unconstitutionality on the part of the applicable norm. In taking this position, the investigating judge relied on the Judgment of the Court of Justice in the case of *Digital Rights Ireland* (Joined Cases nos. C-293/12 and C-594/12), in which the Court of Justice declared the invalidity of Directive no. 2006/24/EC of the European Parliament and the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.

The Constitutional Court recalled that a declaration of the invalidity of an EU Directive has no automatic consequences for the validity or otherwise of a Portuguese legislative act transposing it. Even though the latter's objective is to fulfil the duty to transpose a Directive, which is derived from EU Law, it possesses its own, autonomous source of validity and legitimacy.

The Court of Justice has no jurisdiction to consider the validity of national-law acts of Member States, and in the aforementioned judgment, limited its analysis to the text of the Directive. The validity of the Portuguese law enacted to transpose the Directive into national law cannot be questioned just because the Union's normative act was declared invalid.

However, the Constitutional Court said that this did not mean that in the present case it was unable to review the validity of the Portuguese Law in the light of the various applicable parameters – namely the international law parameters laid down in the European Convention on Human Rights, the EU law parameters enshrined in the Charter of Fundamental Rights of the European Union, and the Portuguese law parameters derived from the Constitution. Although it was appropriate to take the grounds on which the Court of Justice reached its decision into account, the Constitutional Court's own considerations had to be autonomous from the latter.

When it transposed the Directive into the country's national law, the Portuguese legislature broadened the framework of the regulations governing the data-storage process, going far beyond the requirements established in the Directive. Most of the criticisms aimed at the Directive by the Court of Justice were already covered in Portuguese Law, and the general view since the Court of Justice handed down its judgment has been that the latter does not affect the validity of the Portuguese transposing law. As such, the Constitutional Court rejected the argument that the norm in question was unconstitutional and upheld the appeal.

Cross-references:

Constitutional Court:

All Court of Appeal Rulings available at: www.dgsi.pt/

- nos. 241/02, 29.05.2002; 486/09, 28.09.2009 and 403/15, 27.08.2015.

Lisbon Court of Appeal (TR-L):

- no. 20/06/20137 – JFLSB.P2, given in case no. 1746/05.2TJLSB.L1-8 and of 18.01.2011, given in case no. 3142/09.3PBFUN-A.L1-5.

Coimbra Court of Appeal (TR-C):

- no. 84/11.6JAGRD-A.C1, 03.10.2012.

Opinions of the Consultative Council of the Attorney-General's Office (CCPGR):

- no. 16/94, 24.06.1994;
- no. 16/94 – complementary, 02.05.1996, Pareceres, vol. VI, pp. 535-573; and
- no. 21/2000, 16.06.2000, *Diário da República*, Series II, 28.08.2000.

Court of Justice of the European Union:

- C 293/12 and C 594/12 Joined Cases (Grand Chamber), 08.04.2014;
- C 203/15 and C 698/15 Joined Cases (Grand Chamber), 21.12.2016.

Languages:

Portuguese.



Russia

Constitutional Court

Important decisions

Identification: RUS-2017-2-004

a) Russia / **b)** Constitutional Court / **c)** / **d)** 11.05.2017 / **e)** 13 / **f)** / **g)** *Rossiyskaya Gazeta* (Official gazette), no. 110, 24.05.2017 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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:

Woman, accused / Court, jurisdiction / Non-discrimination.

Headnotes:

Depriving a woman accused of a criminal offence of her right to a trial with a jury is unconstitutional. A woman accused of committing a crime for which the Criminal Code provides for life imprisonment or the death penalty should have her case tried by the same court formed in the same way as that which would have had jurisdiction to try a man.

Summary:

The Constitutional Court assessed the constitutionality of Article 31.3.1 of the Code of Criminal Procedure.

Under Articles 57.2 and 59.2 of the Criminal Code, women may not be sentenced to life imprisonment or the death penalty. The result of this is to rule out the trial of a case involving a woman accused of drug trafficking with aggravating circumstances (an offence punishable by life imprisonment under

Article 229.4.b¹) in a regional court or equivalent formed by a judge of the Supreme Court of the Republic assisted by a twelve-member jury.

The Constitutional Court declared the disputed provision to be incompatible with the Constitution because it ruled out the possibility of a trial of a case involving a woman by a court formed by a judge and a twelve-member jury whereas the same case would have been tried by such a court if it had involved a man.

The Constitutional Court pointed out that a woman accused of having committed an offence punishable under the Criminal Code by life imprisonment or the death penalty should have her case tried by the same court formed in the same way as that which would have had jurisdiction to try a man.

The Constitutional Court subsequently provided details of how its decision would be enforced.

Criminal cases involving women accused of the crimes covered by Articles 210.4, 228.5¹, 229.4¹, 277, 295, 317 and 357 of the Criminal Code were to be examined by the Supreme Court of the Republic, courts of the *krais* (territories), regional (*oblast*) courts or equivalent courts formed, at the request of the accused, by a judge and a twelve-member jury if the hearing dates of these cases had not yet been set when the Constitutional Court's decision on this case became final. In cases in which the dates of the hearing had already been set, the jurisdiction and composition of the relevant court would not be changed, including on appeal, at cassation stage or within the framework of an extraordinary procedure.

Languages:

Russian.



Identification: RUS-2017-2-005

a) Russia / **b)** Constitutional Court / **c)** / **d)** 23.05.2017 / **e)** 14 / **f)** / **g)** *Rossiyskaya Gazeta* (Official gazette), no. 119, 02.06.2017 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Stateless person / Detention, time-limit / Detention, review / Expulsion.

Headnotes:

All restrictions which entail a deprivation of liberty must satisfy standards of legality. The law on administrative penalties must be amended by federal legislation to guarantee reasonable judicial supervision of the time-limits on the detention of stateless persons in special centres.

Summary:

The law on administrative penalties must be amended by federal legislation to guarantee judicial supervision of the time-limits on the detention of stateless persons in special centres. All restrictions which entail a deprivation of liberty must satisfy standards of legality.

M.N. was born in Georgia in 1972 and lives in Saint Petersburg. He has been convicted of crimes and misdemeanours several times over.

In 2014, the Russian authorities decided that his residence in the Russian Federation could not continue and therefore that he should be expelled from the country. For this reason M.N. was placed in a special holding centre for foreigners. Georgia, however, refused M.N. entry, arguing that he was stateless and therefore did not have Georgian citizenship. In August 2015, the applicant was authorised to leave the centre in which he had been held.

In December 2015, M.N. was prosecuted under Article 18.8.3 of the Code on Administrative Penalties. He was ordered to pay an administrative fine and to leave Russian territory. He was subsequently placed in a holding centre for foreigners run by the Federal Migration Service in Saint Petersburg, where he is still detained because neither Georgia nor any other state has expressed its willingness to admit him.

All the requests from the applicant and the representatives of the Federal Bailiffs' Service for the expulsion order concerning M.N. to be suspended and for him to be released from the special centre in which he is being held have been dismissed by the courts. In their decisions, the courts have emphasised that the provisions of the disputed law, which establish a time-limit of two years for the enforcement of administrative penalties, make no provision for the revision of an expulsion order or the suspension of its enforcement because there is no real possibility of expelling the person concerned.

According to the applicant, the disputed provisions do not allow the courts to rule on the merits where expulsion proves impossible. In this context, the applicant considers that these provisions are incompatible with Articles 15.4, 17.1, 21, 22, 46.1, 46.2 and 54.2 of the Constitution.

The Constitution guarantees everyone the right to freedom and personal safety. All restrictions which entail a deprivation of liberty must satisfy standards of legality.

The Constitutional Court has already held that a restriction of the right to freedom and personal safety for an indeterminate period infringes the guarantees provided by the Constitution. The European Court of Human Rights also emphasises that any deprivation of liberty must comply with the standards laid down by the Convention to protect individuals from arbitrary measures.

With regard to the expulsion of foreigners and stateless persons, the European Court of Human Rights has held that their provisional detention must not exceed the reasonable duration required to achieve the aim pursued.

The Code on Administrative Penalties does not impose a specific length of detention of stateless persons in special centres on courts in cases of expulsion. Nor does the law provide for any judicial review of measures extending detention times if there are major difficulties with the expulsion procedure. Nonetheless, the Code of Administrative Procedures does require courts to set a time-limit for detention when they place persons (whether stateless or not) in special centres. This shows that persons whose expulsion poses major problems (especially stateless persons) are particularly likely to be placed in conditions of uncertainty and deprived of all possibility of effective judicial protection. Consequently, the Constitutional Court found the disputed provisions to be incompatible with the Constitution.

The Code on Administrative Penalties must be amended by federal legislation to guarantee reasonable judicial supervision of the time for which stateless persons are detained in special centres.

The legislation may introduce a requirement into the Code on Administrative Penalties for courts to set a time-limit for the application of the detention measure (by analogy with the current legislation on immigration). It may also lay down special rules for stateless persons released from special centres with a view to setting up supervision over them before the time-limit for enforcement of the expulsion order expires.

Before these amendments are made to the legislation, there is a need for the right for persons placed in special centres when there is no real prospect of their being expelled to take their case to a court to contest the legality of the extension of their detention within a period of three months from the date on which the expulsion order became final.

The decisions of the courts dealing with the case concerning the applicant will be reviewed.

Languages:

Russian.



Identification: RUS-2017-2-006

a) Russia / **b)** Constitutional Court / **c)** / **d)** 19.07.2017 / **e)** 22 / **f)** / **g)** *Rossiyskaya Gazeta* (Official gazette), no. 175, 09.08.2017 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.
 5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality**.
 5.3.9 Fundamental Rights – Civil and political rights – **Right of residence**.
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

Keywords of the alphabetical index:

Foreign national / Residence rules / Expulsion.

Headnotes:

The legislator should have anticipated the difficulties in understanding the expression “official place of stay” (which equates to a “temporary” place of registration somewhere other than where one actually lives) or expressed its specific nature more clearly in the legislation. Because of this uncertainty, foreign nationals may be held legally responsible for their conduct although it is impossible for them to understand that it is illegal.

Summary:

The applicants travelled to Russia as volunteers at the invitation of a religious organisation, “The Church of Jesus Christ of the Latter Day Saints”. This organisation communicated the address of its head office in the city of Samara to the aliens’ registration office, whereas the volunteers actually moved into a rented flat in the same city but at another address. The authorities for the supervision and registration of foreign nationals found that there had been a violation of the residence rules in the Russian Federation. The courts also found the foreign nationals guilty of a violation of the country’s residence rules, ordering them to pay a fine and issuing an order for their administrative expulsion from the country. Under the disputed provisions, foreign nationals are required to register their place of stay within seven days of their arrival in the Russian Federation. The expression “place of stay” was interpreted by the courts to mean the place in which a citizen actually lives.

According to the applicants there is some uncertainty as to the rules and conditions for the registration of foreign nationals who reside temporarily on the territory of the Russian Federation, the infringement of which gives rise to the imposition of their administrative responsibility. The applicants consider that the disputed provisions are incompatible with Articles 2, 18, 45.1 and 46.1 of the Constitution.

The Constitutional Court pointed out that foreign citizens and stateless persons were protected by the Constitution on the same footing as Russian citizens. The state could, however, establish legal rules on the residence of foreigners on the territory and impose administrative sanctions in the event of infringements.

The content of the expression “place of stay”, used in the Law on the registration of foreign nationals is broader than that deriving from the Law on the rights

of Russian citizens to freedom of movement because account is taken not only of places of residence but also of other premises, institutions or organisations.

The legislator should have anticipated the difficulties in understanding the expression “official place of stay” (which equates to a “temporary” place of registration somewhere other than where one actually lives) or expressed its specific nature more clearly in the Law on the registration of foreign nationals. Because of this uncertainty, foreign nationals may be held legally responsible for their conduct although it is impossible for them to understand that it is illegal.

Consequently, the impugned provisions do not comply with the Constitution and this uncertainty must be removed from the legislation.

Henceforth, the impugned provisions must not be considered to require foreign nationals and stateless persons registered in the location of the head office of the organisation that has invited them to Russia to register as well in the location of the accommodation that the organisation has provided for them.

In other cases, foreign nationals and stateless persons must be registered in the place of residence corresponding to where they actually live.

Furthermore, when the courts examine whether administrative penalties should be imposed on these persons, they must check that they are aware that their actual place of residence does not correspond to the data which will have been passed on to the bodies responsible for their registration.

Languages:

Russian.



Serbia

Constitutional Court

Important decisions

Identification: SRB-2017-2-002

a) Serbia / **b)** Constitutional Court / **c)** / **d)** 08.06.2017 / **e)** IUŽ-289/2015 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette) no. 70/2017 / **h)** CODICES (English, Serbian).

Keywords of the systematic thesaurus:

5.2 Fundamental Rights – **Equality**.

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

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

Keywords of the alphabetical index:

Disciplinary measures, professional body.

Headnotes:

The disciplinary measure of a public warning has the character and attributes of a sanction in terms of legal consequences.

Excluding the possibility to institute administrative proceedings against final decisions imposing public warnings violates the right to judicial protection, access to courts and the right to effective remedy.

Selectively precluding administrative proceedings against decisions of the Court of honour violates the constitutional principles of equality of all before the law and the prohibition of discrimination.

Summary:

I. The Constitutional Court, on its own initiative, instituted proceedings for a review of the constitutionality of Article 46.1 of the Law on Chambers of Health Workers (hereinafter, the “LCHW”) and of the constitutionality and legality of the Article 248.2 of the Statute of the Serbian Medical Chamber (hereinafter, the “SSMC”) in the

part that reads: “except in case of a final decision imposing the measure of a public warning ...”

Article 46.1 precludes a Chamber member from instigating administrative proceedings against a final decision of the Court of Honour imposing a disciplinary measure under Article 43.1 of this law (a public warning).

Under Article 248.2 of the SSMC, decisions of the Supreme Court of Honour of the Serbian Medical Chamber (hereinafter, the “SMC”) are final. Administrative proceedings may be conducted against them except in the case of a final decision imposing a public warning.

The LCHW regulates the disciplinary liability of Chamber members before the Court of Honour. The disciplinary measures the Court of Honour may impose are specified under Article 43 of the LCHW. One such measure, under Article 43.1, is a public warning which, under Article 44.1 of the LCHW, is to be issued for minor violations.

Article 45.4 of the LCHW envisages two-instance decision-making in proceedings before the Court of Honour; an appeal against a decision of the Court of Honour of the first instance will be decided by the Court of Honour of the second instance.

II. The Constitutional Court noted that a public warning, by its legal nature, represents the mildest disciplinary measure which may be imposed in cases of minor violation of professional duty or the reputation of a Chamber member.

The Court of Honour is the body which assesses whether a member of the Chamber has committed a minor or serious violation. A public warning differs from other disciplinary measures such as pecuniary fines, temporary bans on performing certain healthcare activities or any sort of healthcare activity (which entail a certain level of repression and represent a sanction for a mistake which has been committed.) A public warning represents a warning measure consisting of a reprimand directed at the perpetrator.

As regards legal consequences, a Court of Honour decision imposing a public warning is published in the Chambers Gazette, and, as with any other disciplinary measure, is then entered in the record of imposed disciplinary measures, from which it will be erased upon the expiry of three years from the date the decision became final. It is also filed in the Directory of imposed measures.

The Constitutional Court observed that although a public warning as a disciplinary measure of the least severity has primarily the character of a warning for a violation, issued in order to prevent the person in question from repeating the same mistake in the future, the fact that the Law prescribes "a public warning" resulting in its publication in the Chambers Gazette, represents a specific sanction; it is not limited to an internal warning. Persons who are not chamber members may learn of its issue.

Moreover, Article 135.2.4 of the Law on Healthcare requires the founder of a health institution to relieve the director of their duties prior to the expiry of their term of office if the competent chamber has imposed on them one of the disciplinary measures envisaged by law. This includes the measure of a public warning and represents a concrete sanction.

The Constitutional Court noted that issuing a public warning, in view of its consequences, represents a decision on rights, duties or interests. The exclusion of administrative proceedings against such a decision violates the right to judicial protection and access to court, specified under Article 32.1 of the Constitution, and the right to a legal remedy, specified under Article 36.2 of the Constitution.

For the same reasons, the Constitutional Court concluded that the disputed provisions were not in conformity with Article 198.2 of the Constitution, because of the fact that administrative proceedings cannot be conducted against decisions of the Supreme Court of Honour imposing public warnings. No other judicial protection exists for those subject to them.

The Constitutional Court also found that by selectively envisaging the possibility of conducting administrative proceedings against the decisions of disciplinary bodies of the SMC, its members are treated unequally as regards their right to judicial protection when decisions imposing a public warning are at stake. They are allowed to appeal against all other types of disciplinary measure, regardless of the fact that decisions represent legal acts of the same kind, i.e. final individual acts deciding an individual's right, duty or legally based interest. The Constitutional Court accordingly found that the disputed provisions were not in conformity with Article 21 of the Constitution stipulating the equality of all before the Constitution and law and the guaranteed right to equal legal protection without discrimination (the prohibition of any kind of discrimination, direct or indirect, on any grounds).

As regards the assessment of the legality of the disputed provision under Article 248.2 of the SSMC, the Constitutional Court held that the envisaged exclusion of administrative proceedings against certain decisions of the Supreme Court of Honour, in the absence of other form of judicial protection based on law, did not comply with Article 3.1 of the Law on Administrative Proceedings, which stipulates that the Court shall decide upon administrative proceedings in respect of the legality of final administrative acts, except in the case of those involving other kinds of judicial protection.

Languages:

English, Serbian.



Slovakia

Constitutional Court

Important decisions

Identification: SVK-2017-2-002

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 31.05.2017 / **e)** PL. ÚS 7/2017 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
 3.9 General Principles – **Rule of law.**
 3.10 General Principles – **Certainty of the law.**
 3.22 General Principles – **Prohibition of arbitrariness.**
 4.4 Institutions – **Head of State.**
 5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law.**

Keywords of the alphabetical index:

Amnesty, annulment / Pardon, annulment.

Headnotes:

In exercising the power to issue amnesties and grant pardons, the President of the Republic must respect the principles of democracy and rule of law, otherwise the amnesties and pardons may be annulled, if the violation of those principles is more severe than the violation of the legal certainty of those who benefited from them.

Summary:

I. This case concerns the annulment of three clemency decisions – two amnesty decisions issued in 1998 by the then Prime Minister acting as President of the Republic and one pardon granted by the then President of the Republic in late 1997.

The 1990s in Slovakia were known for fierce political conflicts between the Prime Minister and the President.

In 1994, Interpol issued an international arrest warrant against the President's son, who was suspected of having participated in a large-scale fraud. The criminal proceedings fell within the jurisdiction of the German

authorities. In 1995, the President's son was kidnapped in a small town near Bratislava and found the next morning in front of a police station across the border in Austria, intoxicated and seriously beaten. The subsequent investigation showed possible involvement of the Slovak Information Service, an intelligence agency of the State.

In 1997 there was a referendum on four questions. Three were submitted by the National Council. The fourth was based on a petition filed by citizens. The Government ordered the Minister for the Interior not to deliver referendum ballots containing the fourth question to the electoral precincts. In fact, neither the Minister nor the Government were allowed to do so; the presidential decision announcing the referendum with all four questions was already in force. This resulted in the referendum being thwarted.

In 1997 the President of the Republic granted his son a pardon for the fraud in which he was suspected of having been involved. Under this pardon, any criminal proceedings in the Slovak Republic against him had to be terminated.

When the President's term of office ended, the National Council was unable to elect a new President. Under the Constitution, the presidential powers then had to be exercised by the Government. The Constitution allowed the Government to authorise the Prime Minister to exercise those powers on its behalf. In March 1998, on the first day of his office as acting President, the Prime Minister issued an amnesty in both the case of the kidnapping of the President's son and that of the thwarted referendum.

Many attempts were subsequently made to annul the clemency decisions. They all failed. Opinion was divided as to whether it was possible to annul them at all. When the parliamentary term ended in 1998, a new coalition was formed and the new Prime Minister, now also the acting President, tried to annul the amnesties issued by his predecessor. However, the Constitutional Court declared this move unconstitutional, stating that the President was not authorised by the Constitution to annul clemency decisions already issued.

However, in March 2017 the National Council adopted a constitutional amendment which expressly allowed for the annulment of presidential amnesties and pardons. It even allowed for the three clemency decisions to be annulled retroactively. Under the amendment, the National Council had the authority to annul a decision by a three-fifths majority of all its members, if it was incompatible with the principles of democracy and rule of law. The constitutionality of such resolutions was then subject to scrutiny by the Constitutional Court.

On 5 April 2017 the National Council adopted a resolution annulling all three clemency decisions. The Constitutional Court had 60 days to decide on the constitutionality of this resolution.

II. The Court noted that when democracy and the rule of law are understood in their material sense (which the Court has done for the past few years having abandoned the formal approach to the understanding of democracy and the rule of law) in principle no decision by any of the constitutional bodies is exempt from constitutionality review. Furthermore, the exercise of public power may not be unlimited or arbitrary. Even the presidential power to issue amnesties and grant pardons is limited by the presidential oath (Article 104.1 of the Constitution), Slovakia's obligation to respect and uphold the rules of international law, international treaties by which it is bound along with its other international obligations, and the principles of democracy and the rule of law, which form the "material core" of the Constitution and are key constitutional values, are thus intangible.

The Court acknowledged the constitutional basis of the National Council's resolution, which gave it democratic legitimacy as well as legal authority. The Court noted that the resolution met both the formal and material constitutional requirements. The Court observed that it followed from the case-law of various international courts that among the reasons which could "justify" the annulment of an amnesty are the severity of the crime (in terms of its negative impact on human rights or other values of similar importance) and the identity of the perpetrator (especially if the perpetrator was acting on behalf of the state, in cases of "self-amnesty".) The Court also noted that following the recent constitutional amendment, which expressly allowed for annulling amnesties and pardons, many of the arguments presented in the Court's earlier decisions regarding amnesties along with some of those presented by the European Court of Human Rights in *Lexa v. Slovakia* had been rendered obsolete.

The Court proceeded to assess the compatibility of the three clemency decisions with the principles of democracy and the rule of law and whether it was constitutionally acceptable for them to have been annulled. It examined each decision separately, starting with the question of the compliance of the first amnesty decision about the thwarted referendum with the principles of non-arbitrariness, sovereignty of the people, protection of human rights, separation of powers, democratic legitimacy, transparency and public accountability of government, legal certainty and the protection of public trust in the legal system, and the principle of justice. In the Court's opinion, the Prime Minister's amnesty decision violated all these

principles. The Minister of the Interior had clearly acted without legal basis when he ordered the ballots to be printed with three questions on them instead of four. The thwarting of the referendum constituted a violation of the principle of sovereignty of the people; referendums are the most important tool of direct democracy. This in turn violated the constitutional rights of, at a minimum, the 500,000 citizens who had signed the petition calling for a referendum. All this must have been known to the Prime Minister when he issued the amnesty. Given that the Minister of Interior was both politically and functionally subordinate to the Prime Minister, this "self-amnesty" also constituted a breach of the principle of separation of powers.

The Court conceded that there were arguments against annulling this amnesty, notably the principles of legality and non-retroactivity. In terms of legality, the Court stated that while from a formal perspective, the Prime Minister did issue the amnesty legally (he had the power to grant the amnesty and none of the Constitutional principles contained any material limits on issuing amnesties), the argument lost its persuasiveness when viewed with a material understanding of the rule of law and democracy. Having balanced the two groups of principles, the Court concluded that the severity of violation of the first group of principles was much greater and it decided to uphold the annulment of this amnesty.

Regarding the second amnesty decision about the kidnapping of the President's son, the Court noted that the Prime Minister issued this amnesty at a time when reasonable suspicion existed that the President's son had been kidnapped unlawfully by members of the Slovak Information Service, a state agency whose director was both politically and functionally subordinate to the Prime Minister. The Prime Minister must have known about this suspicion. He must have been aware that only an independent criminal investigation could have rebutted it and that it would have been in the public interest to have the matter thoroughly investigated. The Court also noted that this particular crime met the defining elements of torture and inhuman treatment, which is absolutely prohibited under European Court of Human Rights case-law. The Court emphasised that by issuing this amnesty, the Prime Minister seriously undermined public trust in Slovak democracy, then just developing, and the future functioning of the state and greatly contributed to the discrediting of Slovakia's international reputation. Thus, in the Court's opinion, this amnesty was issued in violation of the principles of non-arbitrariness, legality, protection of human rights and respecting international obligations, separation of powers, transparency and public accountability of government, legal certainty, and protection of public trust in the legal system. As a

result of the annulment of this amnesty the legal certainty of persons who had benefited from it was retroactively violated. However, the Court, referring to the reasoning put forward regarding the first amnesty, concluded that this violation was considerably less severe than that committed by issuing the amnesty in the first place. It therefore resolved that in this part as well the National Council's resolution was in line with the Constitution.

As regards the pardon granted by the President to his son while the former was still in office, the Court acknowledged the existence of clear elements of arbitrariness (the President apparently gave priority to subjective over objective criteria.) Nonetheless, this arbitrariness could not be compared in its severity with that of the amnesties issued by the Prime Minister and could not be considered as a true self-amnesty. The pardon could not be viewed as violation of the principle of equality since the President granted it to all those charged in the fraud case. However, the Court noted that the common factor in all three clemency decisions was the political conflict between the then Prime Minister and the then President and stressed the need to apply the same criteria to them all. It accordingly also upheld the annulment of the pardon.

Cross-references:

European Court of Human Rights:

- *Lexa v. Slovakia*, no. 54334/00, 23.09.2008.

Languages:

Slovak.



Slovenia

Constitutional Court

Statistical data

1 May 2017 – 31 August 2017

During this period, the Constitutional Court held 17 sessions – 9 plenary and 8 in panels: 5 in the civil, 2 in the administrative and 1 in the criminal panel. It received 60 new requests and petitions for the review of constitutionality/legality (U-I cases) and 414 constitutional complaints (Up cases).

During the same period, the Constitutional Court decided 22 cases in the field of the protection of constitutionality and legality, as well as 165 cases in the field of the protection of human rights and fundamental freedoms.

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas orders of the Constitutional Court are not generally published in an official bulletin, but are notified to the participants in the proceedings.

However, the judgments and decisions are published and made available as follows:

- In an official annual collection (Slovenian full text versions, including dissenting and concurring opinions, and English abstracts);
 - In the *Pravna Praksa* (Legal Practice Journal) (Slovenian abstracts of decisions issued in the field of the protection of constitutionality and legality, with full-text version of the dissenting and concurring opinions);
 - On the website of the Constitutional Court (full text in Slovenian, English abstracts and a selection of full texts): <http://www.us-rs.si>;
 - In the IUS-INFO legal information system on the Internet, full text in Slovenian, available at <http://www.ius-software.si>;
 - In the CODICES database of the Venice Commission (a selection of cases in Slovenian and English).
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Important decisions

Identification: SLO-2017-2-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.12.2016 / **e)** Up-407/14 / **f)** / **g)** *Uradni list RS* (Official Gazette), 2/17 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

3.17 General Principles – **Weighing of interests**.

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**.

Keywords of the alphabetical index:

Media, freedom of expression, limits / Politician, honour, protection / Politician, family, honour, protection.

Headnotes:

While – because of the nature of their function – politicians must accept very harsh and provocative criticism, they must nevertheless be ensured legal protection from unjustified interferences that extend to their family members.

Summary:

I. The Constitutional Court decided on two constitutional complaints filed by the company MLADINA, which publishes a weekly magazine of the same name. In 2011, in the satirical section of its magazine, the complainant published an article with the title, in Slovenian, “Not Every Dr G. is Dr Goebbels”. In the article, a photograph of the Slovenian politician Branko Grims (hereinafter, the “plaintiff”) with his family was published alongside a photograph of the German Nazi politician and Minister of Propaganda Joseph Goebbels with his family. In an editorial in the same issue and in three articles in the next issue of the magazine, the complainant compared the political propaganda methods of the two politicians and explained in more detail the reasons for publishing the disputed photographs. The plaintiff filed a civil action against the complainant. He disputed only the simultaneous publication of the photograph of his family alongside the photograph of the family of

Joseph Goebbels, and the consequent visual comparison of the two families. The ordinary courts held that the publication of the disputed comparison of the photographs was inadmissible and imposed a civil sanction on the complainant, namely the duty to publish the judgment and an apology to the plaintiff.

II. The Constitutional Court assessed the challenged court decisions from the viewpoint of the complainant's freedom of expression, which is protected by Article 39.1 of the Constitution, and the plaintiff's right to the protection of his honour and reputation, which is protected by Article 35 of the Constitution. In its assessment, it took into consideration both the criteria adopted in its constitutional case-law and the criteria developed by the European Court of Human Rights.

The Constitutional Court first clarified that the fact that the ordinary courts carried out a separate balancing of the conflicting rights with regard to the admissibility of the publication of the photograph and of the publication of the accompanying article was not inconsistent with the Constitution. Such separate consideration of the admissibility of the publication of the photograph did not entail that the courts disregarded the context in which the photograph was published. This approach proceeded from the ordinary courts' view, which is also shared by the Constitutional Court, that photographs can have a much greater documentary and communication power than written articles and that, because of the open nature of the content that is shared by non-written means of communication, journalists must demonstrate particular care and act in a particularly responsible manner when publishing such material.

The Constitutional Court highlighted that an important factor in the balancing of conflicting rights was the fact that the photograph at issue showed the plaintiff (primarily) in his role as father of a family. Although the plaintiff is a politician, he must be guaranteed and ensured judicial protection against inadmissible interferences with his honour and reputation, in particular, when he is protecting the reputation of his family as a family member. Despite the fact that as a politician the plaintiff must accept very harsh and provocative criticism, he must nevertheless be ensured legal protection from unjustified interferences that extend to his family members, such as in the case at issue. The Constitutional Court acknowledged that a satirical style of expression of opinions and criticism enjoys broader protection; however, in the light of all the circumstances of the case at issue, it held that the fact that the disputed comparison of the photographs was placed in a satirical section of the publication did not suffice to tip the balance towards the complainant's freedom of expression.

The Constitutional Court held that the ordinary courts adequately considered both of the human rights in conflict in the case at issue and appropriately assessed their relative importance. They carried out the balancing between these rights with due consideration of the criteria adopted in the constitutional case-law and the case-law of the European Court of Human Rights, having regard to all the constitutionally relevant circumstances of the case. The ordinary courts thus established that the publication of the family photograph resulted in an inadmissible interference with the plaintiff's right to the protection of his honour and reputation and provided appropriate reasons for this decision. Consequently, the Constitutional Court had no grounds to interfere with the challenged judgments and dismissed both constitutional complaints.

III. The decision was adopted by seven votes against two. Judges Jadek Pensa and Sovdat voted against. Judge Mežnar submitted a concurring opinion, and Judge Jadek Pensa submitted a dissenting opinion that was joined by Judge Sovdat.

Languages:

Slovenian, English (translation by the Court).



Sweden

Supreme Administrative Court

Important decisions

Identification: SWE-2017-2-003

a) Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 20.06.2017 / **e)** 4239-16 / **f)** / **g)** HFD 2017 ref. 39 / **h)**.

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.
5.3.33 Fundamental Rights – Civil and political rights
– **Right to family life**.

Keywords of the alphabetical index:

Child in care, whereabouts.

Headnotes:

A decision to keep the whereabouts of a child secret from its parents must be based on tangible circumstances; a palpable risk must exist that the parents might harm the child.

Summary:

Under the Care of Young Persons Act (1990:52) it is the responsibility of the social welfare committee to ensure that when a child has been committed to care under the act the greatest possible provision is made for the child's need for contact with its parents. However, if necessary in view of the purpose of care under the act, the social welfare committee may decide how the contact is to be exercised. It may also decide that the child's whereabouts must not be revealed to its parents.

The case concerned a child who had been committed to care in a family home. The social welfare committee had decided not to reveal the child's whereabouts to its parents on the grounds that the parents might interfere with the care of the child and thus cause detriment to it. The Supreme Administrative Court stressed that a mere suspicion that parents might interfere with the care of a child is not enough to justify such a decision. The suspicion has to be based on tangible circumstances; the risk of

interference must be palpable. The investigation carried out by the social welfare committee was found wanting in this regard. The decision not to reveal the child's whereabouts was therefore reversed.

Languages:

Swedish.



Identification: SWE-2017-2-004

a) Sweden / **b)** Supreme Administrative Court / **c)** / **d)** 29.06.2017 / **e)** 6337-15 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Nature reserves, designation.

Headnotes:

The decision by the government to propose that the European Commission should appoint certain areas as Natura 2000 sites did not constitute an infringement of the right to a fair trial, despite the fact that the government's decision may affect pending judicial proceedings.

Summary:

The case concerned a judicial review of a decision by the Swedish Government suggesting that the European Commission should appoint certain areas as Natura 2000 sites. The applicants owned property in the areas concerned and had applied for permission to build limestone quarries there. The case regarding the permission was pending before the Land and Environment Court of Appeal at the time of the government's decision about the Natura 2000 sites. The applicants claimed that this decision constituted an infringement of the right to a fair trial and that it was disproportionate.

The Supreme Administrative Court acknowledged that the government's decision affected the pending judicial proceedings insofar as the Land and Environment Court of Appeal in its review also had to apply the provisions of the Swedish Environmental Code (1998:808) concerning protected areas, as regards the natural habitats which were protected through the proposal. The fact that the scope of the review was modified in this sense could be perceived as a disadvantage for the applicants. However, the Supreme Administrative Court stated that the government's decision constituted a part of the state's commitment under Council Directive 92/43/EEC (the Habitats Directive) and concerned public interests of considerable weight. Furthermore, the decision was a general one, aimed at protecting several areas within the county in question. The Supreme Administrative Court found that the government's decision was aimed at satisfying the public interest of protection of certain natural habitats. Therefore, the fact that the decision could affect the pending judicial reviews in the Land and Environment Court of Appeal to the disadvantage of the applicants did not imply that the right to a fair trial had been infringed. Neither was the decision deemed to be disproportionate.

Languages:

Swedish.



Switzerland

Federal Court

Important decisions

Identification: SUI-2017-2-003

a) Switzerland / **b)** Federal Court / **c)** First Court of Public Law / **d)** 18.01.2017 / **e)** 1C_502/2015 / **f)** Juristes Démocrates Lucerne (JDL) v. State Council and Grand Council of the Canton of Lucerne / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 143 I 147 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

- 3.13 General Principles – **Legality**.
- 3.16 General Principles – **Proportionality**.
- 3.22 General Principles – **Prohibition of arbitrariness**.
- 4.10.7.1 Institutions – Public finances – Taxation – **Principles**.
- 5.2 Fundamental Rights – **Equality**.
- 5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion**.
- 5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly**.
- 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

Keywords of the alphabetical index:

Public property, use / Fundamental right, deterring or discouraging the exercise thereof / Tax, principle of covering expenses / Tax, principle of equivalence / Public demonstration, organiser, responsibility / Law and order, protection and preservation / Violence, public demonstration.

Headnotes:

Articles 16.1, 16.2 and 22 of the Federal Constitution; freedom of opinion and assembly in connection with the invoicing of costs incurred during demonstrations on the public highway. Article 32b.3 and 32b.4 of the Lucerne Cantonal Police Law; Articles 5.2 and 9 of the Federal Constitution; costs to be borne by the organiser in the event of violent demonstrations; proportionate invoicing of police operating costs to persons participating in the performance of violent acts up to a maximum amount of CHF 30 000; “chilling effect”; principle of equivalence.

Invoicing of costs as a violation of a fundamental right (recital 3.1). Principles of freedom of opinion and assembly during demonstrations on the public highway (recital 3.2). Chilling effect on the exercise of these ideal fundamental rights (recital 3.3).

Organisers of demonstrations may – insofar as they create the risk of a breach of law and order by third parties – in principle be legally classified as disturbers of the peace without violating Article 22 of the Constitution (confirmation of case-law; recital 5.2). Proportionality of the infringement of freedom of opinion and assembly (recital 5.3). Compatibility of the invoicing of costs to the organiser in the event of violent demonstrations with the principle of equivalence in tax law (recital 6.3).

Chilling effect of a vague regulation (question left undecided; recital 11). Assessment of the obligation to bear costs on the basis of an examination after the event and according to the degree of tangible responsibility of a single disturber of the peace (recital 12.3). Violation of the principle of equivalence (recital 12.4).

Summary:

At the beginning of 2016, new provisions were introduced into the Lucerne Cantonal Police Law; these make it possible, *inter alia*, for the organisers of and participants in demonstrations on the sidelines of which violence is committed against persons or property to be invoiced for the policing costs. Organisers who do not have the requisite authorisation, or who violate or flagrantly overlook the terms imposed by such authorisations, may be charged with the policing costs incurred from the point at which the violence begins up to a maximum amount of CHF 30 000. Policing costs up to an amount not exceeding CHF 30 000 may also be claimed under certain circumstances from each of the participants. Several natural and legal persons, trade unions and various political parties challenged the introduction of these provisions in the Federal Court calling for them to be removed. The Federal Court allowed the appeal in part.

Everyone has the right to form his or her own opinion and express it freely (Article 16.1 and 16.2 of the Constitution and Article 10 ECHR). Freedom of assembly entitles persons to hold meetings and to attend or not to attend them (Article 22 of the Constitution and Article 11 ECHR). Charging of costs incurred in connection with the exercise of freedom of opinion and assembly may constitute a breach of fundamental rights. Infringements of fundamental rights must have a legal basis, be justified by a public interest and be proportionate (Article 36 of the

Constitution). The disputed cantonal law constitutes a sufficient legal basis. The protection of law and order and public safety can be regarded as a public interest. For law and order to be preserved there is no room for demonstrations connected with illegal acts (for example damage to property) or which pursue a violent end. Only peaceful demonstrations fall under the protection of freedom of assembly. It follows from the principle of proportionality that policing measures may only be directed against persons actually disturbing the peace, not against persons who are indirectly responsible.

Freedom of opinion and assembly may be undermined not only by direct infringements such as prohibitions or penalties but also indirectly because the person concerned no longer dares to exercise his or her fundamental right subsequent to a reaction by the authorities. This is what case-law and doctrine refer to as the “chilling effect”. The exercise of fundamental rights must not be limited by adverse side effects to the extent that we must talk of a deterrent or chilling effect.

Charging the organisers of demonstrations for the resulting policing costs presupposes that they acted without authorisation or that they violated the terms of the authorisation intentionally or through serious negligence such that their conduct was totally unjustifiable. The result of this is a direct link between the organiser’s conduct and the disruption of law and order, which justifies a restriction of freedom of opinion and assembly. If the organisers can, of their own accord, ensure that the reimbursement of costs will not be imposed on them by adopting conduct that complies with the law, the chilling effect pursued by the legislation does not seem disproportionate. From the viewpoint of the principle of legality, the category of persons subject to such penalties, the purpose of the contribution and the bases for its calculation are sufficiently well-defined. The maximum amount of CHF 30 000 does not seem disproportionate *per se* and the organisers do have a right of appeal each time a penalty is applied.

However, in terms of the participants in demonstrations, the regulations on the apportionment of costs undermine the principle of equal rights and the principle of equivalence. Contributions are not only required from persons who have committed acts of violence themselves but also from those who have failed to obey police orders to disperse. In this way, participants are charged in an identical manner irrespective of their conduct and this is contrary to the principles of tax law.

Accordingly, the Federal Court partly allowed the appeal and set aside the provision concerning the apportionment of policing costs among the participants in demonstrations (Article 32b.4 of the Lucerne Police Law). On the other hand it upheld the regulations concerning organisers, which can be applied in accordance with the Constitution.

Languages:

German.



“The former Yugoslav Republic of Macedonia” Constitutional Court

Important decisions

Identification: MKD-2017-2-003

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 17.05.2017 / e) U.br. 35/2017 / f) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 57/2017, 17.05.2017 / g) / h) CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

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

3.11 General Principles – **Vested and/or acquired rights.**

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

Keywords of the alphabetical index:

Election campaign, limitation / Electoral process, transparency / Electoral rules, breach / Political party, campaign, financing / Public funds, misappropriation / Subsidy, agriculture.

Headnotes:

Disputed provisions of the Electoral Code and the Law on the Prevention of Corruption are incompatible with the constitutional principle of the rule of law because they do not determine in a clear and precise manner which disposals of budgetary resources during the electoral process are considered as unlawful and are prohibited as such.

Prohibition of payment of subsidies during the electoral process violates the principle of legitimate expectations as an element of the rule of law, as well as the principle of the equality of citizens.

Summary:

I. The Constitutional Court was asked to review the constitutionality of Article 8-a.1.1 and 8-a.2.1 of the Electoral Code (“Official Gazette”, nos. 40/2006, 136/2008, 148/2008, 155/2008, 163/2008, 44/2011,

51/2011, 142/2012, 31/2013, 34/2013, 14/2014, 30/2014, 196/2015, 35/2016, 97/2016, 99/2016, 136/2016 and 142/2016) and Article 11.1 of the Law on the Prevention of Corruption (“Official Gazette”, nos. 28/2002, 46/2004, 126/2006, 10/2008, 161/2008, 145/2010, 97/2015 and 148/2015).

Disputed provisions of both laws were almost identical and they contained certain prohibitions and limitations on the use of budgetary resources in order to prevent the misuse of public resources during the electoral process. Limitations included the prohibition on the disposal of budget funds, prohibition on beginning construction of infrastructure facilities such as roads, water supply systems, power lines, etc.; prohibition of payment of salaries, pensions, social aid and other payments that are not regular monthly payments, a ban on new employment or termination of employment in governmental and other public institutions, prohibition of payment of subsidies, etc.

II. In reviewing the constitutionality of the above limitations, the Constitutional Court first noted that neither the Electoral Code, nor any other piece of legislation, contains a legal definition of the term “disposal with budgetary funds”. Taking into account the purposes for which the disputed provisions were introduced in the legislation, which are to separate the state from political parties and to prevent the misuse of public money during elections, the Court noted that the legislature should have determined, in the disputed articles, the illegal and prohibited forms of disposal of budgetary funds. Such conclusion was based also on Article 165-c of the Criminal Code in which violations of provisions of Article 8-a are defined as criminal offence entitled “Unlawful disposal with budget funds during elections”.

The Court pointed out that in Article 165-c of the Criminal Code the very disposal of budgetary resources as formulated in disputed Article 8-a.1.1 of the Criminal Code is not defined as a crime or special form of crime, but the specifically defined activities which are regarded as illegal or unlawful are prescribed as a crime. The Court concluded that every disposal of budget funds during elections is not illegal disposal and is not a crime, but only those activities that represent abuse of public money and funds and whose forms are defined in Article 165-c of the Criminal Code.

This view of the Court was supported by reference to international standards pertaining to this issue. In its Report on the misuse of administrative resources during electoral processes, Document CDL-AD(2013)033 of 16 December 2013, the Council of Europe Venice Commission noted that the “misuse of

public resources" is widely recognised as the unlawful behaviour of civil servants, incumbent political candidates and parties to use their official positions or connections to government institutions aimed at influencing the outcome of elections. The Court cited item 10 of the Report which states that:

The report clearly distinguishes between the use and abuse of administrative resources. The use of resources should be permitted by law; it implies a legal possibility to use administrative resources during the election process for the proper functioning of the institutions, provided that such use is not for the purposes of the campaign. By contrast, abuse of public resources should be sanctioned by law because of the unlawful use of public resources by those in power and state officials for campaign purposes.

The Court also referred to the Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes, adopted jointly by the Council of Europe Venice Commission and the OSCE Office for Democratic Institutions and Human Rights – ODIHR, which in Section 1.1 provide that:

the legal framework should provide for a general prohibition of abuse of administrative resources during the election process. The ban should be determined in a clear and predictable manner. There should be sanctions for misuse of administrative resources and they should be implemented.

The Court concluded that legal provisions to prevent abuse of public resources during elections should make a clear and precise distinction between permissible and illegal disposal of budget funds. Disputed provisions of both the Electoral Code and the Law on Prevention of Corruption do not establish in a clear and precise manner which disposal of budgetary resources during the election process is considered illegal and as such prohibited. As insufficiently precise and clear challenged provisions create legal uncertainty, the Court found them to be contrary to the constitutional principle of the rule of law.

With regard to the prohibition on payment of subsidies the Court found that it jeopardises the realisation of the legitimate expectations of their beneficiaries, who have already invested in agricultural production and legitimately expect that some of the invested money and capital will be returned via subsidies. Considering that the protection of legitimate expectations of the subjects of law is an integral element of the principle of the rule of law, that disputed provision of Article 8-a.2.1 of the Electoral Code is not in accordance with this

constitutional principle which is a fundamental value of the constitutional order. The Court also found that this provision is not in accordance with the constitutional principle of equality of citizens under Article 9 of the Constitution, since the prohibition applies only to beneficiaries of subsidies and not to other users of state aid.

The Constitutional Court referred to the following international documents relating to the issue of misuse of administrative resources during elections:

- Venice Commission's Report on "The misuse of administrative resources during electoral processes", CDL-AD(2013)033, 16 December 2013;
- Joint Guidelines for preventing and responding to the misuse of administrative resources during electoral processes, CDL-AD(2016)004, 14 March 2016, adopted jointly by the Council of Europe Venice Commission and the OSCE Office for Democratic Institutions and Human Rights – ODIHR;
- Report of the Congress of Local and Regional Authorities of the Council of Europe (CG31(2016)07final), "Abuse of administrative resources during the electoral process: the role of local and regional elected representatives and public officials".

Languages:

Macedonian, English (translation by the Court).



Identification: MKD-2017-2-004

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 05.07.2017 / **e)** U.br.136/2016 / **f)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 90/2017, 19.07.2017 / **g)** / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers**.
 3.9 General Principles – **Rule of law**.
 3.18 General Principles – **General interest**.
 5.5.1 Fundamental Rights – Collective rights – **Right to the environment**.

Keywords of the alphabetical index:

Arbitrariness, prohibition / Building plan / Public interest / Spatial planning / Urban planning, public participation.

Headnotes:

The absence of a legal definition and criteria for what is to be considered a building of special interest and the discretionary power of the Government to decide on such buildings is not in accordance with the principles of the rule of law and separation of state powers as fundamental values of the constitutional order of the Republic.

Summary:

I. The Constitutional Court was asked to review the constitutionality of Article 50 of the Law on Spatial and Urban Planning (“Official Gazette”, nos. 199/2014, 44/2015, 193/2015 and 31/2016) which relates to buildings of special interest and the special planning documentation and procedure that is applied regarding buildings of special interest.

Disputed provisions, *inter alia*, authorised the Government to decide which building shall be considered to be a building of special interest and excluded the obligation for holding a public presentation and public consultation of the urban plan for buildings of special interest.

II. The Court first noted that the rule of law, division of state powers into legislative, executive and judicial powers, as well as the development and humanisation of space and protection and improvement of the environment and nature are fundamental values of the constitutional order of the Republic.

The Court then analysed relevant provisions of the Law on Spatial and Urban Planning, which specifies the types of urban plans and urban planning documentation including the disputed provisions that relate to urban planning documentation for buildings of special interest.

The Court noted that the Law on Spatial and Urban Planning has set out categories of buildings according to their purpose (e.g. housing and residential buildings, buildings for commercial and business purposes, for education, for sports and recreation), but has not defined the criteria and procedure under which a building can be declared as a building of special interest. Instead, the Law has authorised the Government to decide which buildings are to be considered as buildings of special interest.

The Court considered that the absence of a legally set definition and criteria for determination of buildings of special interest makes the Law unclear and vague and creates legal uncertainty in a manner contrary to the principle of constitutionality and legality, which requires the legislature to make precise, unambiguous and clear standards that constitute the sole basis for action by the public authorities. Only clear and precise norms guarantee the legal certainty of citizens, as an integral part of the principle of the rule of law. The rule of law implies consistent application of legal regulations, which should be general, precisely defined and unambiguously formulated rules, which was not the case with the challenged legal provision.

The Court also found that the authorisation of the Government to decide independently, at its own discretion and without legally established criteria what a building of special interest means, constitutes an interference of the executive in the legislative power, contrary to the clear constitutional division between them.

The absence of a public presentation and public polls in the procedure for adoption of urban planning documentation for buildings of special interest and the exclusion of the view of the public when adopting the urban plans for buildings of special interest, leaves room for doubt regarding the possibility of arbitrary decisions on the part of the Government on this issue. This is particularly so, given that the disputed provision does not distinguish whether a building of special interest is a private, state or municipal property, which could lead to violation of the right of ownership.

In addition, the non-application of the rules on the assessment of the impact on the environment and human health in the procedure for adoption the urban plans for buildings of special interest interferes with the constitutionally guaranteed right to a healthy environment as a fundamental value of the constitutional order.

The Court concluded that while the legislature has an indisputable constitutional authority to regulate spatial and urban planning by law, including the urban planning of buildings of special interest, the absence of a legal definition and criteria for what is to be considered as a building of special interest, and the authorisation of the Government at its own discretion to decide on such buildings is not in accordance with the principles of the rule of law and separation of state powers into legislative, executive and judicial branches, as fundamental values of the constitutional order of the Republic. Accordingly, the Court repealed Article 50 of the Law on Spatial and Urban Planning.

Languages:

Macedonian, English (translation by the Court).



United Kingdom Supreme Court

Important decisions

Identification: GBR-2017-2-002

a) United Kingdom / **b)** Supreme Court / **c)** / **d)** 19.12.2017 / **e)** / **f)** R (on the application of Black) v. Secretary of State for Justice / **g)** [2017] UKSC 81 / **h)** [2010] Weekly Law Reports 583; CODICES (English).

Keywords of the systematic thesaurus:

1.3.5.4 Constitutional Justice – Jurisdiction – The subject of review – **Quasi-constitutional legislation**.
 2.1.2.2 Sources – Categories – Unwritten rules – **General Principles of law**.
 3.1 General Principles – **Sovereignty**.
 3.9 General Principles – **Rule of law**.
 4.6.2 Institutions – Executive bodies – **Powers**.

Keywords of the alphabetical index:

Legislation / Intention to bind the Sovereign / Executive, power, competences, scope.

Headnotes:

Legislation does not bind the Crown (the Sovereign) except by express words or by necessary implication. This was a rule of the common law. As it was long-established and numerous statutes had been enacted based upon it, it would not be appropriate for the United Kingdom Supreme Court to abolish or alter the rule. If the rule was to be revised, that was a matter for Parliament.

Summary:

I. The Health Act 2006 prohibited smoking in enclosed public places and workplaces. An individual, Mr Black, serving a sentence of imprisonment was a non-smoker. He had a number of health problems, which were aggravated by the presence of cigarette smoke. In the prison there was no confidential process under which he could report other prison inmates who, arguably, were smoking contrary to the ban. The Secretary of State refused to establish a confidential process. Mr Black applied for a judicial

review of the refusal. One issue in the judicial review before the question of the refusal could be considered, was whether the smoking ban applied to the prison. As prisons are Crown premises, for the smoking ban to apply the 2006 Act would have to apply to the Crown. The claim succeeded in the High Court. An appeal from that decision succeeded in the Court of Appeal. The Supreme Court unanimously upheld the Court of Appeal's decision: the 2006 Act did not apply to the Crown and hence it did not apply to prisons.

The common law presumption that legislation only binds the Crown by express words or necessary implication was well-established. It was, as a common law rule, open to the court to modify it. The appellant argued that the Supreme Court could properly modify the rule for two reasons: first, it had been subject to authoritative academic critique, which had identified the rule as amounting to a 'gap in the rule of law'. Additionally, it had been criticised as unclear and, in any event, based on a misunderstanding of authority; and secondly, it could not be said that legislation was always drafted with the existence of the presumption in mind i.e., if Parliament had realised that the presumption would apply absent express words it would have included express words.

II. Lady Hale PSC gave the sole reasoned judgment, with which Lord Mance DPSC, Lords Kerr, Hughes, Lloyd-Jones agreed.

Lady Hale rejected the appellant's argument. While there was merit in it, the common law presumption, which was a rule of statutory interpretation, was well-established. As such many statutes had been drafted on the assumption it applied. Any modification or variation by the Supreme Court would generally operate only retrospectively to alter an understanding of the law, albeit in some circumstances the Court could alter the law so that the alteration was only prospective in operation. The latter course was wholly exceptional. No case to do so in the present appeal had been made out. As such there was no basis on which the Court could properly vary the common law presumption. If it was to be modified, that was a matter for Parliament through legislation. That being said, the Court could, and did, clarify the test, which it did at paragraph 36 of Lady Hale's judgment. In its essence, however, the test required a court to ascertain 'whether, in the light of the words used, their context and the purpose of the legislation, Parliament must have meant the Crown to be bound'. In answering that question it was not a relevant consideration whether it would be beneficial for the public if the Crown was bound.

In the circumstances the appeal was rejected.

Languages:

English.



Court of Justice of the European Union

Important decisions

Identification: ECJ-2017-2-004

a) European Union / **b)** Court of Justice of the European Union / **c)** Third Chamber / **d)** 13.07.2017 / **e)** C-193/16 / **f)** E v. Subdelegación del Gobierno en Álava / **g)** ECLI:EU:C:2017:542 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

European Union, citizenship / Citizenship, European / European Union, citizen, status, rights / European Union, citizen, expulsion / Expulsion, procedure / Public order, threat / Public safety, danger.

Headnotes:

The right of European Union citizens and their family members to reside in the European Union is not unconditional but may be subject to the limitations and conditions imposed by the Treaty and by the measures adopted to give it effect. In that regard, the limitations on the right of residence derive in particular from Article 27.1 of Directive 2004/38, which provides that Member States may restrict the right of residence of Union citizens and their family members, irrespective of nationality, on grounds, in particular, of public policy or public security. As is apparent from Article 27.2.1 of Directive 2004/38, in order to be justified, measures restricting the right of residence of a Union citizen or a member of his family, including measures taken on grounds of public policy, must comply with the principle of proportionality and be based exclusively on the personal conduct of the individual concerned.

In accordance with Article 83.1 TFEU, the sexual exploitation of children is one of the areas of particularly serious crime with a cross-border dimension in which the European Union legislature may intervene. Therefore, it is open to the Member States to regard criminal offences such as those referred to Article 83.1.2 TFEU as constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus is capable of being covered by the concept of ‘imperative grounds of public security’, capable of justifying an expulsion order under Article 28.3 of Directive 2004/38, as long as the manner in which such offences were committed discloses particularly serious characteristics, which is a matter for the referring court to determine on the basis of an individual examination of the specific case before it.

Summary:

I. On 14 April 2003, E, an Italian national, was registered as a European Union citizen residing in Spain. On 13 November 2013, the Provincial Office of the Spanish Government in Álava adopted, on the basis of Article 15.1.c of Royal Decree no. 240/2007, a decision ordering, for reasons of public security, the expulsion of E from the territory of the Kingdom of Spain, with a 10-year entry ban, on the ground that E had been sentenced by three final judgments to 12 years’ imprisonment for repeated offences of child abuse, which he served in a prison facility.

E appealed against that decision before the High Court of Justice of the Basque Country, Spain. He, in particular, claimed that he had been in prison for six years for child sexual abuse offences. According to him, as a result of those circumstances, he could not be considered to represent a genuine and present threat to a fundamental interest of society at the time the expulsion decision was adopted.

By its question, the referring court asks, in essence, whether Article 27.2.2 of Directive 2004/38 must be interpreted as meaning that the fact that a person is imprisoned at the time the expulsion decision was adopted without the prospect of being released in the near future, excludes that his conduct represents, as the case may be, a present and genuine threat for a fundamental interest of the society of the host Member State.

II. Article 27.2.2 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (hereinafter, “EEC”) no. 1612/68 and

repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, must be interpreted as meaning that the fact that a person is imprisoned at the time the expulsion decision was adopted, without the prospect of being released in the near future, does not exclude that his conduct represents, as the case may be, a present and genuine threat for a fundamental interest of the society of the host Member State.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, Swedish.



Identification: ECJ-2017-2-005

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 26.07.2017 / **e)** C-1/15 P / **f)** Opinion pursuant to Article 218.11 TFEU / **g)** ECLI:EU:C:2017:592 / **h)** CODICES (English, French).

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:

International agreement, validity, assessment / Data, personal, collecting, processing / Data, personal, transfer, limits / Terrorism, combat, data, exchange.

Headnotes:

Having regard to the risk of data being processed contrary to Article 21 of the Charter, a transfer of sensitive data to Canada requires a precise and particularly solid justification, based on grounds other than the protection of public security against terrorism and serious transnational crime.

Summary:

I. On 18 July 2005, the Council adopted Decision 2006/230/EC on the conclusion of an Agreement between the European Community and the Government of Canada on the processing of Advance Passenger Information and Passenger Name Record data, by which it approved that agreement. As stated in the preamble thereto, that agreement was concluded having regard to 'the Government of Canada requirement of air carriers carrying persons to Canada to provide Advance Passenger Information and PNR data to the competent Canadian authorities, to the extent it is collected and contained in carriers' automated reservation systems and departure control systems. This agreement expired in September 2009.

On 2 December 2010, the Council adopted a decision, together with negotiation directives, authorising the Commission to open negotiations, on behalf of the Union, with Canada with a view to an agreement on the transfer and use of PNR data to prevent and combat terrorism and other serious transnational crime. On 5 December 2013, the Council adopted the decision on the signature of the Agreement between Canada and the European Union on the transfer and processing of PNR data.

The envisaged agreement was signed on 25 June 2014. On 25 November 2014, the Parliament adopted the resolution on seeking an opinion from the Court of Justice on the compatibility with the Treaties of the Agreement between Canada and the European Union on the transfer and processing of PNR data.

The request for an opinion, which concerns both the compatibility of the agreement envisaged with primary EU law and the appropriate legal basis for the Council decision concluding the agreement envisaged, is worded as follows:

- a. Is the [agreement envisaged] compatible with the provisions of the Treaties (Article 16 TFEU) and the Charter of Fundamental Rights of the European Union (Articles 7, 8 and 52.1) as regards the right of individuals to protection of personal data?; and
- b. Do Articles 82.1.d and 87.2.a TFEU constitute the appropriate legal basis for the act of the Council concluding the [agreement envisaged] or must that act be based on Article 16 TFEU?

II. The Court established first of all that the Council Decision on the conclusion, on behalf of the Union, of the agreement envisaged must be based jointly on Articles 16.2 TFEU and 87.2.a TFEU.

The choice of the legal basis for a European Union act, including one adopted in order to conclude an international agreement, must rest on objective factors amenable to judicial review, which include the aim and the content of that measure. If an examination of a European Union act reveals that it pursues a twofold purpose or that it comprises two components and if one of these is identifiable as the main one, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component. Exceptionally, if it is established, however, that the act simultaneously pursues a number of objectives, or has several components, which are inextricably linked without one being incidental to the other, such that various provisions of the Treaties are applicable, such a measure will have to be founded on the various corresponding legal base.

The Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data (hereinafter, the “envisaged agreement”) is incompatible with Articles 7, 8 and 21 as well as Article 52.1 of the Charter of Fundamental Rights of the European Union (hereinafter, the “Charter”) in so far as it does not preclude the transfer of sensitive data from the European Union to Canada and the use and retention of that data. In this connection, it must be pointed out that any measure based on the premise that one or more of the characteristics set out in Article 2.e of the envisaged agreement may be relevant, in itself or in themselves and regardless of the individual conduct of the traveller concerned, having regard to the purpose for which Passenger Name Records (hereinafter, “PNR data”) is to be processed, namely combating terrorism and serious transnational crime, would infringe the rights guaranteed in Articles 7 and 8 of the Charter, read in conjunction with Article 21 thereof. In this instance, however, there is no such justification.

The envisaged agreement must, in order to be compatible with Articles 7 and 8 and Article 52.1 of the Charter of Fundamental Rights:

- a. determine in a clear and precise manner the PNR data to be transferred from the European Union to Canada;
- b. provide that the models and criteria used in the context of automated processing of PNR data will be specific and reliable and non-discriminatory; provide that the databases used will be limited to those used by Canada in relation to the fight against terrorism and serious transnational crime;
- c. save in the context of verifications in relation to the pre-established models and criteria on which automated processing of PNR data is based, make the use of that data by the Canadian Competent Authority during the air passengers’ stay in Canada and after their departure from that country, and any disclosure of that data to other authorities, subject to substantive and procedural conditions based on objective criteria; make that use and that disclosure, except in cases of validly established urgency, subject to a prior review carried out either by a court or by an independent administrative body, the decision of that court or body authorising the use being made following a reasoned request by those authorities, *inter alia*, within the framework of procedures for the prevention, detection or prosecution of crime;
- d. limit the retention of PNR data after the air passengers’ departure to that of passengers in respect of whom there is objective evidence from which it may be inferred that they may present a risk in terms of the fight against terrorism and serious transnational crime;
- e. make the disclosure of PNR data by the Canadian Competent Authority to the government authorities of a third country subject to the condition that there be either an agreement between the European Union and that third country equivalent to the Agreement between Canada and the European Union on the transfer and processing of PNR data, or a decision of the European Commission, under Article 25.6 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, covering the authorities to which it is intended that PNR data be disclosed;
- f. provide for a right to individual notification for air passengers in the event of use of PNR data concerning them during their stay in Canada and after their departure from that country, and in the event of disclosure of that data by the Canadian Competent Authority to other authorities or to individuals; and
- g. guarantee that the oversight of the rules laid down in the envisaged agreement relating to the protection of air passengers with regard to the processing of PNR data concerning them will be carried out by an independent supervisory authority.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



Identification: ECJ-2017-2-006

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand Chamber / **d)** 26.07.2017 / **e)** C-490/16 / **f)** A.S. v. Republika Slovenija / **g)** ECLI:EU:C:2017:585 / **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.**

Keywords of the alphabetical index:

Asylum, seeker, illegal, deportation / Border, crossing / Foreigner, residence permit, humanitarian grounds / Residence, authorisation, humanitarian grounds.

Headnotes:

On a proper construction of Article 27.1 of Regulation no. 604/2013 of the European Parliament and of the Council of 26 June 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 (hereinafter, the “Dublin III Regulation”), read in the light of recital 19 of that regulation, an applicant for international protection is entitled, in an appeal against a decision to transfer him, to plead incorrect application of the criterion for determining responsibility relating to the irregular crossing of the border of a Member State, laid down in Article 13.1 of that regulation.

As regards the fact, highlighted by the referring court, that in the case in the main proceedings another Member State had already accepted responsibility for the examination of the application for international protection concerned, it should be stressed that, pursuant to Article 26.1 of the Dublin III Regulation, the person concerned may be notified of the transfer decision only after the requested Member State has agreed to take charge of or to take back that person. In those circumstances, that fact does not mean that judicial review of the transfer decision regarding the

application of the criteria set out in Chapter III of that regulation is excluded, for otherwise Article 27.1 of that regulation would be deprived of most of its practical effect.

On a proper construction of Article 13.1 of Regulation no. 604/2013, a third-country national whose entry has been tolerated by the authorities of a first Member State faced with the arrival of an exceptionally large number of third-country nationals wishing to transit through that Member State in order to lodge an application for international protection in another Member State, without satisfying the entry conditions in principle required in that first Member State, must be regarded as having ‘irregularly crossed’ the border of that first Member State, within the meaning of that provision.

On a proper construction of the second sentence of Article 13.1 of Regulation no. 604/2013, read together with Article 7.2 of that regulation, the lodging of an appeal against a transfer decision has no effect on the running of the period laid down in Article 13.1.

On a proper construction of Article 29.1 and 29.2 of that regulation, the lodging of such an appeal means that the period laid down by those provisions does not start to run until the final decision on that appeal, including when the court hearing the appeal has decided to request a preliminary ruling from the Court of Justice, as long as that appeal had suspensory effect in accordance with Article 27.3 of that regulation.

Summary:

I. A.S. left Syria for Lebanon, before travelling across Turkey, Greece, “the former Yugoslav Republic of Macedonia” and Serbia. He crossed the border between that last State and Croatia in 2016. The Croatian authorities arranged for him to be transported to the Slovenian border. A.S. entered Slovenia on 20 February 2016. The Slovenian authorities then handed him over to the Austrian authorities. The latter, however, refused him entry to Austria.

On 23 February 2016, A.S. lodged an application for international protection in Slovenia. The Slovenian authorities asked the Croatian authorities to take charge of A.S. on the basis of Article 21 of the Dublin III Regulation. The Croatian authorities acceded to that request on 20 May 2016.

On 14 June 2016, the Ministry of the Interior of Slovenia decided not to examine A.S.’s application for international protection, on the grounds that he must be transferred to Croatia, which is the Member State responsible for examining that application in

accordance with the criteria set out in Article 13.1 of the Dublin III Regulation, since A.S. had irregularly crossed the Croatian border coming from a third country.

In those circumstances, the Supreme Court of Slovenia, the referring court, further seeks guidance on the application of certain procedural aspects of the Dublin III Regulation, namely whether Mr A.S.'s right to an effective remedy under Article 27 of that regulation covers the assessment in law of how the terms 'irregular' or 'unlawful entry' into a Member State in Article 13.1 are to be applied. If the answer to that question is affirmative, it then becomes necessary to establish how the time limits in Articles 13.1 and 29.2 of the Dublin III Regulation operate. In essence the referring court wants to know if time continues to run where a challenge is lodged under Article 27.1, in particular where a transfer has been ruled out pursuant to Article 27.3.

II. The Court established first of all that the scope of the remedy available to the applicant for international protection against a decision to transfer him is made clear in recital 19 of that regulation, which states that, in order to ensure compliance with international law, the effective remedy introduced by that regulation in respect of transfer decisions should cover both the examination of the application of that regulation and the examination of the legal and factual situation in the Member State to which the applicant is to be transferred.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, Swedish.



Identification: ECJ-2017-2-007

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand chamber / **d)** 26.07.2017 / **e)** C-646/16 / **f)** Khadija Jafari and Zainab Jafari v. Bundesamt für Fremdenwesen und Asyl / **g)** ECLI:EU:C:2017:586 / **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.**

Keywords of the alphabetical index:

Asylum / Border, control / Border, crossing, massive / Border, crossing, tolerance / Border, crossing, irregular / Residence, authorisation, humanitarian grounds / Visa, definition.

Headnotes:

Article 12 of Regulation (EU) no. 604/2013 of the European Parliament and of the Council of 26 June 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 (hereinafter, the “Dublin III Regulation”), read in conjunction with Article 2.m of that regulation, must be interpreted as meaning that the fact that the authorities of one Member State, faced with the arrival of an unusually large number of third-country nationals seeking transit through that Member State in order to lodge an application for international protection in another Member State, tolerate the entry into its territory of such nationals who do not fulfil the entry conditions generally imposed in the first Member State, is not tantamount to the issuing of a ‘visa’ within the meaning of Article 12 of the Dublin III Regulation.

Article 2.m of the Dublin III Regulation provides a general definition of the term ‘visa’ and stipulates that the nature of the visa is to be determined in accordance with more specific definitions relating to long-stay visas, short-stay visas and airport transit visas, respectively. In that regard, that definition stipulates that a visa is the ‘authorisation or decision of a Member State’ which is ‘required for transit or entry’ into the territory of that Member State or several Member States. It therefore follows from the actual wording which the EU legislature adopted that, first, the term ‘visa’ refers to an act formally adopted by a national authority, not to mere tolerance, and, second, a visa is not to be confused with admission to the territory of a Member State, since a visa is required precisely for the purposes of enabling such admission.

Article 13.1 of the Dublin III Regulation must be interpreted as meaning that a third-country national whose entry was tolerated by the authorities of one Member State faced with the arrival of an unusually large number of third-country nationals seeking transit through that Member State in order to lodge an application for international protection in another Member State, without fulfilling the entry conditions generally imposed in the first Member State, must be regarded as having ‘irregularly crossed’ the border of the first Member State within the meaning of that provision.

Where the border crossed is that of a Member State bound by the Schengen Borders Code, whether the crossing is irregular must be determined by taking into account, *inter alia*, the rules laid down by that code. Regard must therefore be had to the fact that the rules on external border crossing may grant the competent national authorities the power to derogate, on humanitarian grounds, from the entry conditions generally imposed on third-country nationals in order to ensure that their future stay in the Member States is lawful. A power of that nature is provided for, *inter alia*, in Article 5.4.c of the Schengen Borders Code. That said, it should be noted, first of all, that Article 5.4.c of the Schengen Borders Code stipulates, unlike Article 5.4.b of that code, that such authorisation is valid only in respect of the territory of the Member State concerned, not the territory ‘of the Member States’ as a whole. Consequently, the former provision cannot have the effect of regularising the crossing of a border by a third-country national, admitted by the authorities of a Member State for the sole purpose of enabling the transit of that national to another Member State in order to lodge an application for international protection there.

In this respect, the criteria laid down in Articles 12 to 14 of the Dublin III Regulation cannot, without calling into question the overall scheme of that regulation, be interpreted to the effect that a Member State is absolved of its responsibility where it has decided to authorise, on humanitarian grounds, the entry into its territory of a third-country national who does not have a visa and is not entitled to waiver of a visa. Furthermore, the fact that, as in the present case, the third-country national in question entered the territory of the Member States under the watch of the competent authorities without in any way evading border control is not decisive for the application of Article 13.1 of the Dublin III Regulation. The fact that the border crossing occurred in a situation characterised by the arrival of an unusually large number of third-country nationals seeking international protection cannot affect the interpretation or application of Article 13.1 of the Dublin III Regulation.

Summary:

I. The Jafari sisters, Khadija and Zainab, left Afghanistan in December 2015 with their children and then travelled through Iran, Turkey, Greece, “the former Yugoslav Republic of Macedonia” and Serbia. They crossed the border between Serbia and Croatia in 2016. The Croatian authorities organised transport for them by bus to the Slovenian border.

On 15 February 2016, the Slovenian authorities issued them with police documents stating that their travel destination was, for one of them, Germany and, for the other, Austria. On the same day, having entered Austria, the Jafari sisters lodged applications, on their own behalf and on behalf of their children, for international protection in that Member State.

The Federal Office for immigration and asylum, Austria (hereinafter, the “Office”) then sent the Slovenian authorities a request for information, pursuant to Article 34 of the Dublin III Regulation, referring to the police documents issued to the Jafari sisters. On 16 April 2016, the Office requested the Croatian authorities to take charge of the Jafari sisters and their children pursuant to Article 21 of the Dublin III Regulation. The Croatian authorities did not respond to that request. By letter of 18 June 2016, the Office indicated to those authorities that, pursuant to Article 22.7 of that regulation, the responsibility for examining the applications for international protection lodged by the Jafari sisters and their children now lay with the Republic of Croatia.

On 5 September 2016, the Office rejected that the applications for international protection lodged by the Jafari sisters as inadmissible, ordered the sisters’ removal, as well as that of their children, and found that their return to Croatia would be lawful. The Jafari sisters contested those decisions before the Federal Administrative Court, Austria. On 10 October 2016, that court dismissed their applications on the ground, in particular, that, without a visa, their entry into Croatia must be considered irregular in the light of the conditions laid down in the Schengen Borders Code and that no valid argument could be based on the fact they were admitted into Croatia in breach of those conditions. The Jafari sisters brought appeals against that judgment before the referring court on the ground, *inter alia*, that they had been admitted into Croatia, Slovenia and Austria in accordance with Article 5.4.c of the Schengen Borders Code.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, Swedish.

*Identification:* ECJ-2017-2-008

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand chamber / **d)** 06.09.2017 / **e)** C-643/15 and C-647/15 / **f)** Slovak Republic and Hungary v. European Council / **g)** ECLI:EU:C:2017:631 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
 3.16 General Principles – **Proportionality.**
 4.17.4 Institutions – European Union – **Legislative procedure.**
 5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – **Refugees and applicants for refugee status.**

Keywords of the alphabetical index:

Asylum, seeker, relocation / Asylum, seeker, protection, international / Border, control / Provisional measure, nature / Proportionality, measures / Legal certainty.

Headnotes:

Measures which are capable of being adopted on the basis of Article 78.3 TFEU must be classified as ‘non-legislative acts’ because they are not adopted at the end of a legislative procedure.

In fact, it follows from Article 289.2 TFEU a legal act can be classified as a legislative act of the European Union only if it has been adopted on the basis of a provision of the Treaties which expressly refers either to the ordinary legislative procedure or to the special legislative procedure. However, Article 78.3 TFEU does not contain an express reference to any of these procedures.

Although it has to be accepted that the provisional measures adopted on the basis of Article 78.3 TFEU may in principle also derogate from provisions of legislative acts, both the material and temporal scope of such derogations must nonetheless be circumscribed, so that the latter are limited to responding swiftly and effectively, by means of a temporary arrangement, to a specific crisis: that precludes such measures from having either the object or effect of replacing legislative acts or amending them permanently and generally, thereby circumventing the ordinary legislative procedure provided for in Article 78.2 TFEU.

A measure may be classified as ‘provisional’ in the usual sense of that word only if it is not intended to regulate an area on a permanent basis and only if it applies for a limited period. In this context, Article 78.3 TFEU, whilst requiring that the measures referred to therein be temporary, affords the Council discretion to determine their period of application on an individual basis, in the light of the circumstances of the case and, in particular, of the specific features of the emergency situation justifying those measures. If, in assessing whether a relocation measure is provisional within the meaning of Article 78.3 TFEU, it were necessary to take into account the duration of the effects of that measure on the persons relocated, no measures for the relocation of persons in clear need of international protection could be taken under that provision, since such more or less long-term effects are inherent in such relocation.

Summary:

I. On 9 September 2015, the Commission submitted, on the basis of Article 78.3 TFEU, a Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary (COM(2015) 451; ‘the Commission’s initial proposal’).

At the various meetings held within the Council between 17 and 22 September 2015, the Commission’s initial proposal was amended on certain points. In particular, Hungary stated at those meetings that it rejected the notion of being classified as a ‘frontline Member State’ and that it did not wish to be among the Member States benefiting from relocation as were Italy and Greece. Accordingly, in the final version of the proposal, all reference to Hungary as a beneficiary Member State, including in the title of the proposal, was deleted. Likewise, Annex III to the Commission’s initial proposal, concerning the distribution of 54 000 applicants for international protection whom it had initially been planned to relocate from Hungary was deleted. On the other

hand, Hungary was included in Annexes I and II as a Member State of relocation of applicants for international protection from Italy and Greece respectively and allocations were therefore attributed to it in those annexes.

On 22 September 2015, the Commission's initial proposal as thus amended was adopted by the Council by a qualified majority. The Czech Republic, Hungary, Romania and the Slovak Republic voted against the adoption of that proposal. The Republic of Finland abstained.

Accordingly, the Slovak Republic (C-643/15) and Hungary (C-647/15) seek annulment of Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. In support of their actions they put forward pleas seeking to show (i) that the adoption of the decision was vitiated by errors of a procedural nature or arising from the choice of an appropriate legal basis and (ii) that the decision was neither a suitable response to the migrant crisis nor necessary for that purpose.

II. The Court found that the Conclusions of the European Council of 25 and 26 June 2015, which stated that the Member States were to agree 'by consensus' on the distribution of persons in clear need of international protection and were to do so in a manner 'reflecting the specific situations of Member States', could not prevent the adoption of the contested decision. The Court adds that the European Council cannot under any circumstances alter the voting rules laid down by the Treaties.

In addition, the Court states that, although substantial amendments were made to the Commission's initial proposal for a decision, in particular the amendments giving effect to Hungary's request that it be removed from the list of Member States that were beneficiaries of the relocation mechanism and classifying it as a Member State of relocation, the Parliament was duly informed of those amendments before the adoption of its resolution on 17 September 2015, which meant that it was able to take account of this in that resolution.

The Court also holds that the Council was not required to act unanimously when it adopted the contested decision, even though, for the purpose of adopting the above-mentioned amendments, it had to depart from the Commission's initial proposal. The Court finds that the amended proposal was in fact approved on behalf of the Commission by two of its Members, who were authorised by the College of Commissioners for that purpose.

Moreover, the Court considers that the relocation mechanism provided for by the contested decision is not a measure that is manifestly inappropriate for contributing to achieving its objective, namely helping Greece and Italy to cope with the impact of the 2015 migration crisis.

Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, Swedish.



Identification: ECJ-2017-2-009

a) European Union / **b)** Court of Justice of the European Union / **c)** Grand chamber / **d)** 12.09.2017 / **e)** C-589/15 P / **f)** Alexios Anagnostakis v. European Commission / **g)** ECLI:EU:C:2017:663 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy**.
5.1.1.2 Fundamental Rights – General questions – Entitlement to rights – **Citizens of the European Union and non-citizens with similar status**.
5.3.29.1 Fundamental Rights – Civil and political rights – Right to participate in public affairs – **Right to participate in political activity**.

Keywords of the alphabetical index:

Citizenship, active / European Union, citizen, status, rights conferred by / Legislative initiative, popular, annulment.

Headnotes:

The obligation to inform the organisers of the reasons for the refusal to register their proposed European citizens' initiative (hereinafter, the "ECI"), as provided for in the second subparagraph of Article 4.3.2 of Regulation no. 211/2011 on the citizens' initiative, constitutes a specific expression, with regard to the ECI, of the obligation to state reasons for legal acts enshrined in Article 296 TFEU. The requirement to state reasons must be assessed by reference to the circumstances of the case.

In that regard, where that refusal is based on Article 4.2.b of Regulation no. 211/2011, that statement must state the reasons why it considers that that proposal is manifestly outside the scope of the powers under which it may submit a proposal for a legal act of the European Union for the purpose of implementing the Treaties.

As the proposed ECI making a general reference the provisions of the TFEU for the adoption of the Union legal act referred to in that proposal, the Commission was entitled to take a decision solely on the basis of those provisions invoked which appeared to it to be the least obviously relevant, without being required specifically to justify its assessment regarding each of those provisions or, a fortiori, to explain why any other provision of the TFEU was irrelevant. In this respect, even if the Commission's website only allowed a block for a given area, the organisers could, however, have provided more detailed information on the relevance of those articles to the content of the proposed ECI at issue, in accordance with Annex II to Regulation no. 211/2011.

In addition, as stated in recital 10 of that regulation, the decision on the registration of a proposed ECI, within the meaning of Article 4 of that regulation, must be taken in accordance with the principle of good administration, which entails, in particular, the obligation for the competent institution to conduct a diligent and impartial examination which, moreover, takes into account all the relevant features of the case. These requirements, that are inherent in the principle of good administration, apply generally to the actions of the European Union administration in its relations with the public and, therefore, also in the context of the right to submit an ECI as an instrument of citizen participation in the democratic life of the European Union. Moreover, in accordance with the objectives pursued by that instrument, as set out in recitals 1 and 2 of Regulation no. 211/2011 and consisting, *inter alia*, in encouraging citizen participation and making the Union more accessible, the registration condition provided for in Article 4.2.b of that regulation must be interpreted and applied by the Commission, when it receives a proposal for an ECI, in such a way as to ensure easy accessibility to the ECI.

Accordingly, it is only if a proposed ECI, in view of its subject matter and objectives, as reflected in the mandatory and, where appropriate, additional information that has been provided by the organisers pursuant to Annex II to Regulation no. 211/2011, is manifestly outside the scope of the powers under which the Commission may present a proposal for a legal act of the Union for the purposes of the

application of the Treaties, that the Commission is entitled to refuse to register that proposed ECI pursuant to Article 4.2.b of that regulation.

Summary:

I. On 13 July 2012, Mr Anagnostakis submitted to the Commission a proposed European citizens' initiative (hereinafter, the "ECI") entitled 'One million signatures for a Europe of solidarity'. The objective of the proposed initiative was to enshrine in EU law the principle of 'the state of necessity, in accordance with which, when the financial and political existence of a Member State is threatened by the servicing of abhorrent debt, the refusal to repay that debt is necessary and justifiable'. The proposed ECI at issue referred to 'economic and monetary policy (Articles 119 to 144 TFEU)' as the legal basis for its adoption.

By the contested decision, after recalling the wording of Article 4.2 of Regulation no. 211/2011 and stating that it had examined the provisions of the TFEU referred to in the proposed ECI at issue, in particular Article 136.1 TFEU, and 'all other possible legal bases', the Commission refused to register that proposal on the ground that it manifestly fell outside the scope of its powers to submit a proposal for the adoption of a legal act of the Union for the purpose of implementing the Treaties.

By an application lodged at the Registry of the General Court of European Union on 11 October 2012, Mr Anagnostakis brought an action for annulment of the contested decision. In support of his action, he raised a single ground, divided into several parts, alleging that the Commission made errors of law in refusing to register the proposed ECI at issue, on the basis of Article 4.2.b of Regulation no. 211/2011. By the judgment under appeal, the General Court, examining of its own motion the plea alleging a defect or insufficient statement of reasons, held that the Commission had complied with the obligation to state reasons by adopting the contested decision. Furthermore, it held that it had committed no error of law in finding that the proposed ECI in question was manifestly outside the scope of its powers to submit a proposal for a legal act in that regard. Consequently, it dismissed the action as unfounded.

II. The Court found that, taking into account, *inter alia*, the spirit of solidarity between the Member States, which must, in accordance with the wording of Article 122.1 TFEU, inform the adoption of measures appropriate to the economic situation within the meaning of that provision, that provision cannot serve as a basis for adopting a measure or a principle

enabling, in essence, a Member State to decide unilaterally not to repay all or part of its debt. The adoption of such a principle cannot be regarded as a measure of 'assistance referred to in Article 122.2 TFEU, because it would cover not only debts owed by the Member States to the Union, but also debts owed by the Member States to other natural or legal persons, both public and private. Article 122.2 TFEU, solely concerns financial assistance granted by the Union and not that granted by the Member States.

The Court also affirms that adoption of the principle of the state of necessity, as envisaged by the proposed ECI at issue, manifestly falls outside the scope of the measures described in the Article 136.1 TFEU. There was nothing to support the conclusion that the adoption of such a principle would serve the objective of coordinating budgetary discipline or fall within the scope of the economic policy guidelines which the Council is entitled to draw up in order to ensure the proper functioning of economic and monetary union. In this regard, the role of the Union in the area of economic policy is restricted to the adoption of coordinating measures and, secondly, to find that the adoption of a measure such as that envisaged by the proposed ECI at issue, far from constituting 'economic policy guidance' within the meaning of Article 136.1 TFEU, would in fact result in replacing the free will of contracting parties with a legislative mechanism for the unilateral writing-off of sovereign debt, which is something that the provision clearly did not authorise.

Languages:

Bulgarian, 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-2017-2-001

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 12.05.2017 / **e)** 21980/04 / **f)** Simeonovi v. Bulgaria / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.1 Constitutional Justice – **Constitutional jurisdiction.**

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

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

Keywords of the alphabetical index:

Police custody, lawyer, access, restriction / Police detention, right to a lawyer.

Headnotes:

Absence of a lawyer for the first three days of custody had no effect on the overall fairness of proceedings.

Given that the applicant's arrest by the police was based on suspicions that he had committed criminal offences and substantially affected his situation by enabling the authorities to implement investigative measures with his participation, that arrest should be taken as the starting-point for the application of the safeguards set out in Article 6 ECHR. Since he had not been informed promptly after his arrest of his right to legal assistance during his police custody, the lack of an explicit request from the applicant could not be considered as an implicit waiver of that right. However, as no causal link was ever posited between the three-day absence of a lawyer and the applicant's confession two weeks later in the presence of a lawyer of his choosing, the absence of a lawyer during the applicant's time in police custody in no way prejudiced his right not to incriminate himself.

Summary:

I. The applicant was arrested on 3 October 1999 on suspicion of involvement in a serious criminal offence. During his three days in police custody he was not assisted by a lawyer. When he was officially charged on 6 October 1999 in the presence of an officially assigned lawyer, he refused to answer the investigator's questions. On 12 October 1999 he was questioned in the presence of two lawyers of his own choosing, but he remained silent. On 21 October 1999, assisted by his two lawyers, he confessed. A few months later he retracted his confession and put forward a different version of events. He was sentenced to life imprisonment.

II. The Court reiterated that as a general rule, access to a lawyer had to be granted as of the first police questioning of a suspect, unless it can be demonstrated, in the light of the particular circumstances of the case, that there are compelling reasons for restricting that right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 ECHR. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

a. Starting-point for the application of Article 6 ECHR – The starting point for the right to legal assistance in the present case is the date of the applicant's arrest. That arrest was based on suspicions that he had committed criminal offences, and substantially affected his situation by enabling the authorities to implement investigative measures with his participation.

b. Lack of waiver of the right – Even supposing that the applicant did not expressly request the assistance of a lawyer while in police custody, he cannot be deemed to have implicitly waived his right to legal assistance, since the police had not informed him of that right after his arrest.

c. Lack of "compelling reasons" for restricting access to a lawyer – No "compelling reason" which could have justified restricting the applicant's access to a lawyer while he was in police custody was proffered (imminent danger to the lives, physical integrity or security of other persons). Furthermore, domestic legislation on access to a lawyer during detention in police custody did not explicitly lay down any exceptions to the application of that right.

d. Overall fairness of the proceedings – The absence of "compelling reasons" in the present case obliged the Court to carry out a very strict assessment of the fairness of the proceedings. It was incumbent on the Government to demonstrate convincingly that the applicant had nevertheless benefited from a fair criminal trial.

The Court noted that:

- i. the applicant had actively participated at all stages in the criminal proceedings: he had retracted his initial statements, presenting a different version of events, and his defence lawyers had obtained exculpatory evidence and contested the incriminating evidence;
- ii. the applicant's conviction had not been based solely on his confession but on a whole body of consistent evidence; and
- iii. the courts had had due regard to the evidence adduced, ascertained that the applicant's procedural rights had been respected, and had given proper legal and factual reasons for their decisions.

There was no *prima facie* evidence that the applicant had been formally or informally interrogated while in police custody. No evidence capable of being used against the applicant had been obtained and included in the case file during that period. No evidence on file indicated that the applicant had been involved in any other investigative measures over that three-day period (such as an identification parade or biological sampling). In fact, domestic law prohibited the use against a defendant of evidence obtained in the absence of a lawyer. Furthermore, the applicant's version of events changed over time; even his application to the European Court was very vague on that matter, and it was not until he submitted his memorial before the Grand Chamber that he provided a number of more specific details.

The voluntary nature of the applicant's confession could be deduced from the following facts:

- i. the applicant had already been questioned on two occasions, and had remained silent on both those occasions;
- ii. during both these interrogations, and when he confessed, he was assisted by a lawyer and had already been informed of his procedural rights, particularly the right not to incriminate himself;
- iii. the applicant's failure to make any statement would have had no impact on the ensuing stages of the criminal proceedings.

No causal link was ever posited, either before the domestic courts or before the Court, between the absence of a lawyer during the police custody and the applicant's confession two weeks after the end of that period in the presence of a lawyer of his choosing. Consequently, the absence of a lawyer during the applicant's time in police custody in no way prejudiced his right not to incriminate himself. Accordingly, the overall fairness of the criminal proceedings against the applicant had not been irretrievably prejudiced by that absence.

The Court therefore found no violation of Article 6.1 and 6.3.c ECHR.

Cross-references:

European Court of Human Rights:

- *Dayanan v. Turkey*, no. 7377/03, 13.10.2009;
- *Salduz v. Turkey* [GC], no. 36391/02, 27.11.2008, *Reports of Judgments and Decisions* 2008.

Languages:

English, French.



Identification: ECH-2017-2-002

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 27.06.2017 / **e)** 931/13 / **f)** *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

- 3.17 General Principles – **Weighing of interests.**
- 3.18 General Principles – **General interest.**
- 3.19 General Principles – **Margin of appreciation.**
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
- 5.3.25.1 Fundamental Rights – Civil and political rights – Right to administrative transparency – **Right of access to administrative documents.**
- 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

Keywords of the alphabetical index:

Freedom to impart information / Data, public, access / Data, public, dissemination / Tax data, dissemination.

Headnotes:

Order restraining mass publication of tax information.

The fact that information was already in the public domain did not necessarily remove the protection of Article 8 ECHR. The existence of a public interest in providing access to, and allowing the collection of, large amounts of taxation data did not necessarily or automatically mean that there was also a public interest in disseminating en masse such raw data in unaltered form without any analytical input. In attaching particular weight to its finding that the publication of the taxation data in the manner and to the extent described did not contribute to a debate of public interest and was not done solely for a journalistic purpose within the meaning of domestic and European Union law, the Finnish Supreme Administrative Court had given relevant and sufficient reasons to show that the interference with the applicant's freedom to impart information was "necessary in a democratic society" to strike a fair balance between the competing interests at stake (see paragraphs 134, 175 and 198 of the judgment).

Summary:

I. The first applicant company (*Satakunnan Markkinapörssi Oy*) published a newspaper providing information on the taxable income and assets of Finnish taxpayers. The information was, by law, public. The second applicant company (*Satamedia Oy*) offered a service supplying taxation information by SMS text message.

In April 2003 the Data Protection Ombudsman requested the Data Protection Board to restrain the applicant companies from processing taxation data in the manner and to the extent they had in 2002 and from passing such data to an SMS-service. The Data Protection Board dismissed the Ombudsman's request on the grounds that the applicant companies were engaged in journalism and so were entitled to a derogation under Section 2.5 of the Personal Data Act. The case subsequently came before the Supreme Administrative Court, which in February 2007 sought a preliminary ruling from the Court of Justice of the European Union (hereinafter, the "CJEU") on the interpretation of the EU Data Protection Directive. In its judgment of 16 December 2008 the CJEU ruled that activities relating to data from documents which were in the public domain under national legislation could be

classified as “journalistic activities” if their object was to disclose to the public information, opinions or ideas, irrespective of the medium used to transmit them. In September 2009 the Supreme Administrative Court directed the Data Protection Board to forbid the processing of taxation data in the manner and to the extent carried out by the applicant companies in 2002. Noting that the CJEU had found that the decisive factor was to assess whether a publication contributed to a public debate or was solely intended to satisfy the curiosity of readers, the Supreme Administrative Court concluded that the publication of the whole database collected for journalistic purposes and the transmission of the information to the SMS service could not be regarded as journalistic activity.

In the Convention proceedings the applicant companies complained, among other matters, of a violation of Article 10 ECHR.

II. Article 10 ECHR:

a. Preliminary issue – whether the taxpayers had a competing right to privacy under Article 8 ECHR – The fact that information was already in the public domain did not necessarily remove the protection of Article 8 ECHR. Where there had been compilation of data on a particular individual, processing or use of personal data or publication of the material concerned in a manner or degree beyond that normally foreseeable, private-life considerations arose. In the instant case, the data collected, processed and published by the applicant companies in the newspaper had provided details of taxable earned and unearned income and taxable net assets and so clearly concerned the private life of the individuals concerned, notwithstanding the fact that, pursuant to Finnish law, the data could be accessed by the public.

b. Interference, prescribed by law and legitimate aim – The Data Protection Board’s decision to forbid the processing of the taxation data in the manner complained of, as upheld by the national courts, entailed an interference with the applicant companies’ right to impart information as guaranteed by Article 10 ECHR. The interference was prescribed by law – the terms of the relevant data-protection legislation and the nature and scope of the journalistic derogation on which the applicant companies sought to rely were applied in a sufficiently foreseeable manner following the interpretative guidance provided to the Supreme Administrative Court by the CJEU and, as media professionals, the applicant companies should have been aware that the mass collection of data and its wholesale dissemination might not be considered as processing “solely” for journalistic purposes – and the interference pursued the legitimate aim of protecting the reputation or rights of others.

c. Necessity in a democratic society – The Court examined the criteria it had identified in its previous case-law as being relevant when balancing the competing rights to private life under Article 8 ECHR and to freedom of expression under Article 10 ECHR.

- i. Contribution to a debate of public interest: Underpinning the Finnish legislative policy of rendering taxation data publicly accessible was the need to ensure that the public could monitor the activities of government authorities. Nevertheless, public access to taxation data, subject to clear rules and procedures, and the general transparency of the Finnish taxation system did not mean that the impugned publication itself contributed to a debate of public interest. Taking the publication as a whole and in context the Court, like the Supreme Administrative Court, was not persuaded that publication of taxation data in the manner and to the extent done by the applicant companies (the raw data was published as catalogues en masse, almost verbatim) had contributed to such a debate or indeed that its principal purpose was to do so.
- ii. Subject of the publication – Some 1,200,000 natural persons were the subject of the publication. They were all taxpayers but only a very few were individuals with a high net income, public figures or well-known personalities within the meaning of the Court’s case-law. The majority of the persons whose data were listed in the newspaper belonged to low-income groups.
- iii. Manner of obtaining the information and its veracity – The accuracy of the information published was never in dispute and the data were not obtained by illicit means. However, it was clear that the applicant companies, who had cancelled their request for data from the National Board of Taxation and instead hired people to collect taxation data manually at the local tax offices, had a policy of circumventing normal channels and, accordingly, the checks and balances established by the domestic authorities to regulate access and dissemination.
- iv. Content, form and consequences of publication – Although journalists enjoy the freedom to choose, from the news items that come to their attention, which they will deal with and how, that freedom is not devoid of responsibilities. Even though the taxation data in question in the applicant companies’ case were publicly accessible in Finland, they could only be consulted at the local tax offices and consultation was subject to clear conditions.

Journalists could receive taxation data in digital format, but only a certain amount of data could be retrieved. Journalists had to specify that the information was requested for journalistic purposes and that it would not be published in the form of a list. Therefore, while the information relating to individuals was publicly accessible, specific rules and safeguards governed its accessibility. For the Court, the fact that the data in question were accessible to the public under the domestic law did not necessarily mean that they could be published to an unlimited extent. Publishing the data in a newspaper, and further disseminating that data via an SMS service, had rendered them accessible in a manner and to an extent that was not intended by the legislator. The safeguards in national law were built in precisely because of the public accessibility of personal taxation data, the nature and purpose of data-protection legislation and the accompanying journalistic derogation. Under these circumstances, the authorities of the respondent State enjoyed a wide margin of appreciation in deciding how to strike a fair balance between the respective rights under Articles 8 and 10 ECHR.

When weighing those rights, the domestic courts had sought to strike a balance between freedom of expression and the right to privacy embodied in data-protection legislation. Applying the derogation in Section 2.5 of the Personal Data Act and the public-interest test to the impugned interference, they and, in particular, the Supreme Administrative Court, had analysed the relevant Convention and CJEU case-law and carefully applied the case-law of the Court to the facts of the instant case.

- v. Sanction – The applicant companies had not been prohibited from publishing taxation data or from continuing to publish the newspaper provided they did so in a manner consistent with Finnish and EU rules on data protection and access to information. The fact that, in practice, the limitations imposed on the quantity of the information to be published may have rendered some of their business activities less profitable was not, as such, a sanction within the meaning of the Court’s case-law.

In conclusion, the competent domestic authorities and, in particular, the Supreme Administrative Court had given due consideration to the principles and criteria laid down by the Court’s case-law for balancing the right to respect for private life and the right to freedom of expression. The Supreme Administrative Court had attached particular weight to

its finding that the publication of the taxation data in the manner and to the extent described did not contribute to a debate of public interest and that the applicants could not in substance claim that it had been done solely for a journalistic purpose within the meaning of domestic and EU law. The reasons relied upon by the domestic courts were thus both relevant and sufficient to show that the interference complained of had been “necessary in a democratic society” and that the authorities of the respondent State had acted within their margin of appreciation in striking a fair balance between the competing interests at stake.

The Court therefore found no violation of Article 10 ECHR.

Cross-references:

European Court of Human Rights:

- *Amann v. Switzerland* [GC], no. 27798/95, 16.02.2000, *Reports of Judgments and Decisions* 2000-II;
- *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, 22.04.2013, *Reports of Judgments and Decisions* 2013 (extracts);
- *Avotiņš v. Latvia* [GC], no. 17502/07, 23.05.2016, *Reports of Judgments and Decisions* 2016;
- *Axel Springer AG v. Germany* [GC], no. 39954/08, 07.02.2012;
- *Bédat v. Switzerland* [GC], no. 56925/08, 29.03.2016, *Reports of Judgments and Decisions* 2016;
- *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, 30.06.2005, *Reports of Judgments and Decisions* 2005-VI;
- *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, 10.11.2015, *Reports of Judgments and Decisions* 2015 (extracts);
- *Delfi AS v. Estonia* [GC], no. 64569/09, 16.06.2015, *Reports of Judgments and Decisions* 2015;
- *Flinkkilä and Others v. Finland*, no. 25576/04, 06.04.2010;
- *Fressoz and Roire v. France* [GC], no. 29183/95, 21.01.1999, *Reports of Judgments and Decisions* 1999-I;
- *G.S.B. v. Switzerland*, no. 28601/11, 22.12.2015;
- *Huhtamäki v. Finland*, no. 54468/09, 06.03.2012;
- *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, 15.10.2015 *Reports of Judgments and Decisions* 2015;

- *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, 08.11.2016, *Reports of Judgments and Decisions* 2016;
- *MGN Limited v. the United Kingdom*, no. 39401/04, 18.01.2011;
- *Perinçek v. Switzerland* [GC], no. 27510/08, 15.10.2015, *Reports of Judgments and Decisions* 2015 (extracts);
- *Ristamäki and Korvola v. Finland*, no. 66456/09, 29.10.2013;
- *Rotaru v. Romania* [GC], no. 28341/95, 04.05.2000, *Reports of Judgments and Decisions* 2000-V;
- *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, 04.12.2008, *Reports of Judgments and Decisions* 2008;
- *Stoll v. Switzerland* [GC], no. 69698/01, 10.12.2007, *Reports of Judgments and Decisions* 2007-V;
- *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, 08.07.1999, *Reports of Judgments and Decisions* 1999-IV;
- *Uzun v. Germany*, no. 35623/05, 02.09.2010, *Reports of Judgments and Decisions* 2010 (extracts);
- *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, 07.02.2012, *Reports of Judgments and Decisions* 2012.

Court of Justice of the European Union:

- C-524/06, *Heinz Huber v. Germany* [GC], 16.12.2008.

Languages:

English, French.



Identification: ECH-2017-2-003

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 27.06.2017 / **e)** 17224/11 / **f)** Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

- 3.17 General Principles – **Weighing of interests.**
- 3.18 General Principles – **General interest.**
- 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:

NGO, public watchdog, role / Media, journalist, ethics / Media, statement, veracity, verification, obligation / Media, statement, defamatory / Person, criticism, acceptable, limits / NGO, ethics / Statement, responsibility / Statement, purpose / Statement, private, harmful effect.

Headnotes:

NGOs bound by requirement to verify factual statements defamatory of private individuals.

When an NGO drew attention to matters of public interest, it was exercising a public watchdog role of similar importance to that of the press and could be characterised as a social watchdog. NGOs playing the role of a social watchdog warranted similar Convention protection to that afforded to the press. In the context of press freedom, special grounds were required before the media could be dispensed from their ordinary obligation to verify factual statements that were defamatory of private individuals. Similarly to newspapers, NGOs were bound by the requirement to verify the veracity of defamatory allegations (see paragraphs 86 and 108 of the judgment).

Summary:

I. The applicants, a religious community of Muslims and three NGOs of ethnic Bosniacs in the Brčko District, sent a letter to the highest district authorities, voicing their concerns about the procedure for the appointment of director of the multi-ethnic public radio station and alleging that an editor at the station, who had been proposed for the position, had carried out actions which were disrespectful of Muslims and ethnic Bosniacs. Soon afterwards, the letter was published in three different daily newspapers. The editor brought civil defamation proceedings. The applicants were held liable for defamation and ordered to retract the letter, failing which they were to pay non-pecuniary damage. The applicants complained that their punishment violated their right to freedom of expression as guaranteed by Article 10 ECHR.

II. Article 10 ECHR: The decisions of the domestic courts amounted to an interference with the applicants' freedom of expression. The interference had been prescribed by law and pursued a legitimate aim, namely that of the protection of the reputation of others. The central issue before the Court was whether the interference was necessary in a democratic society.

Accusing the editor of being disrespectful in regard to another ethnicity and religion was not only capable of tarnishing her reputation, but also of causing her prejudice in both her professional and social environment. Accordingly, the accusations attained the requisite level of seriousness as could harm her rights under Article 8 ECHR. Therefore the Court had to verify whether the domestic authorities had struck a fair balance between the two values guaranteed by the Convention, namely, on the one hand, the applicant's freedom of expression protected by Article 10 ECHR and, on the other, the editor's right to respect for her reputation under Article 8 ECHR.

The applicants were not in any subordinated work-based relationship with the public radio which would have made them bound by a duty of loyalty, reserve and discretion towards it and as such, there was no need for the Court to enquire into issues central to its case-law on whistle-blowing. The Court shared the opinion of the domestic authorities that the applicants' liability for defamation should be assessed only in relation to their private correspondence with local authorities, rather than the publication of the letter in the media, as it had not been proven that they had been responsible for its publication.

When an NGO drew attention to matters of public interest, it was exercising a public watchdog role of similar importance to that of the press and could be characterised as a social watchdog. In the area of press freedom, by reason of the duties and responsibilities inherent in the exercise of freedom of expression, the safeguard afforded by Article 10 ECHR to journalists in relation to reporting on issues of general interest was subject to the proviso that they were acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism. The same considerations applied to an NGO assuming a social watchdog function.

In balancing the competing interests involved, it was appropriate to take account of the criteria that generally applied to the dissemination of defamatory statements by the media in the exercise of its public watchdog function.

a. How well-known was the person concerned and what was the subject of the allegations – By having

applied for the post of the radio's director and bearing in mind the public interest involved in the information contained in the letter, the editor had to be considered to have inevitably and knowingly entered the public domain and laid herself open to close scrutiny of her acts. In such circumstances, the limits of acceptable criticism were accordingly to be wider than in the case of an ordinary professional.

b. Content, form and consequences of the information passed on to the authorities – An important factor was the wording used by the applicants in the impugned letter. They had not explicitly said that part of the information which they passed on to the authorities had emanated from other sources, such as radio employees. They had introduced their letter with the words "according to our information", but had not clearly indicated that they had acted as messengers. Therefore they implicitly presented themselves as having direct access to that information and in those circumstances they had assumed responsibility for the statements.

Another important factor was whether the thrust of the impugned statements had been primarily to accuse the editor or whether it had been to notify the competent State officials of conduct which to them appeared irregular or unlawful. The applicants maintained that their intention had been to inform the competent authorities about certain irregularities and to prompt them to investigate and verify the allegations made in the letter. However, the impugned letter did not contain any request for investigation and verification of the allegations.

As to the consequences of the above accusations passed on to the authorities, there could be little doubt that when considered cumulatively and against the background of the specific context in which they were made, the conduct attributed to the editor was to be regarded as particularly improper from a moral and social point of view. The allegations cast her in a very negative light and were liable to portray her as a person who was disrespectful and contemptuous in her opinions and sentiments about Muslims and ethnic Bosniacs. The domestic courts had held that the statements in question contained defamatory accusations that damaged her reputation and the Court found no reason to hold otherwise. That the allegations were submitted to a limited number of State officials by way of private correspondence did not eliminate their potential harmful effect on the career prospects of the editor as a civil servant and her professional reputation as a journalist. Irrespective of how the letter reached the media, it was conceivable that its publication opened a possibility for public debate and aggravated the harm to her dignity and professional reputation.

c. The authenticity of the information disclosed – The most important factor relevant for the balancing exercise in the case was the authenticity of the information passed on to the authorities. In the context of press freedom, special grounds were required before the media could be dispensed from their ordinary obligation to verify factual statements that were defamatory of private individuals. Similarly to newspapers, the applicants were bound by the requirement to verify the veracity of the allegations submitted. That requirement was inherent in the Code of Ethics and Conduct for NGOs.

The domestic authorities had held that there had been an evident inconsistency between what the appellants had been told by the radio's employees and what they had reported in the letter. The applicants, as NGOs whose members enjoyed a good reputation in society, were required to present an accurate rendering of the employees' account, as an important element for the development and maintaining of mutual trust and of their image as competent and responsible participants in public life. The domestic courts had established that, contrary to what had been alleged, the editor had not been the author of comments reported in the weekly newspaper. The verification of that fact prior to reporting would not have required any particular effort on the part of the applicants.

The Court found no reason to depart from the findings of the domestic courts that the applicant's had not proved the truthfulness of their statements which they knew or ought to have known were false and accordingly concluded that the applicants did not have a sufficient factual basis for their impugned allegations about the editor in their letter.

d. The severity of the sanction – The domestic authorities had ordered that the applicants inform the authorities that they had retracted their letter, failing which they would have to pay EUR 1,280 jointly in respect of non-pecuniary damages. The amount of damages which the applicants were ordered to pay was not, in itself, disproportionate.

The Court discerned no strong reasons which would require it to substitute its view for that of the domestic courts and to set aside the balancing done by them. It was satisfied that the disputed interference was supported by relevant and sufficient reasons and that the authorities of the respondent State had struck a fair balance between the applicants' interest in free speech, on the one hand, and the editor's interest in protection of her reputation on the other hand, thus acting within their margin of appreciation.

The Court therefore found a no violation of Article 10 ECHR.

Cross-references:

European Court of Human Rights:

- *A. v. Norway*, no. 28070/06, 09.04.2009;
- *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, 22.04.2013, *Reports of Judgments and Decisions* 2013 (extracts);
- *Axel Springer AG v. Germany* [GC], no. 39954/08, 07.02.2012;
- *Bédat v. Switzerland* [GC], no. 56925/08, 29.03.2016, *Reports of Judgments and Decisions* 2016;
- *Bezymyanny v. Russia*, no. 10941/03, 08.04.2010;
- *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, 20.05.1999, *Reports of Judgments and Decisions* 1999-III;
- *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, 10.11.2015, *Reports of Judgments and Decisions* 2015 (extracts);
- *Delfi AS v. Estonia* [GC], no. 64569/09, 16.06.2015, *Reports of Judgments and Decisions* 2015;
- *Fressoz and Roire v. France* [GC], no. 29183/95, 21.01.1999, *Reports of Judgments and Decisions* 1999-I;
- *Guja v. Moldova* [GC], no. 14277/04, 12.02.2008, *Reports of Judgments and Decisions* 2008;
- *Karácsony and Others v. Hungary* [GC], no. 42461/13, 17.05.2016, *Reports of Judgments and Decisions* 2016 (extracts);
- *Kazakov v. Russia*, no. 1758/02, 18.12.2008;
- *Lešník v. Slovakia*, no. 35640/97, 11.03.2003, *Reports of Judgments and Decisions* 2003-IV;
- *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, 08.11.2016, *Reports of Judgments and Decisions* 2016;
- *Morice v. France* [GC], no. 29369/10, 23.04.2015, *Reports of Judgments and Decisions* 2015;
- *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, 14.10.2004, *Reports of Judgments and Decisions* 2004-XI;
- *Perinçek v. Switzerland* [GC], no. 27510/08, 15.10.2015, *Reports of Judgments and Decisions* 2015 (extracts);
- *Rotaru v. Romania* [GC], no. 28341/95, 04.05.2000, *Reports of Judgments and Decisions* 2000-V;
- *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, 27.07.2004, *Reports of Judgments and Decisions* 2004-VIII;
- *Siryk v. Ukraine*, no. 6428/07, 31.03.2011;
- *Sofranschi v. Moldova*, no. 34690/05, 21.12.2010;

- *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, 07.02.2012, *Reports of Judgments and Decisions* 2012;
- *Zakharov v. Russia*, no. 14881/03, 05.10.2006.

Languages:

English, French.



Identification: ECH-2017-2-003

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 11.07.2017 / **e)** 19867/12 / **f)** *Moreira Ferreira v. Portugal* (no. 2) / **g)** *Reports of Judgments and Decisions* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.19 General Principles – **Margin of appreciation**.
 3.22 General Principles – **Prohibition of arbitrariness**.
 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

Keywords of the alphabetical index:

Criminal proceedings, reopening / Denial of justice / European Court of Human rights, judgment, execution, options / European Court of Human rights, judgment, distortion / European Convention on Human Rights, violation, redress / Judgment, national, re-opening / Judgment, revision / Procedural obligation, continuing.

Headnotes:

Dismissal by the Supreme Court of a request for a reopening of a criminal case following a judgment of the European Court finding a violation of Article 6 ECHR.

When the Court indicates under Article 46 ECHR that a retrial or a reopening of procedure at the applicant's request represents "in principle, an appropriate way of redressing the violation", this solution is not a necessary or exclusive one. Moreover, the use of the expression "in principle" narrows the scope of the recommendation, although without detracting from the importance of procedures for reconsidering cases in the light of the Contracting States' undertaking to comply with the Convention and the case-law of the Court. Having regard to the margin of appreciation available to the domestic authorities in the interpretation of the Court's judgments, a refusal by the domestic judges to reopen proceedings is not arbitrary and does not amount to a violation of Article 6.1 ECHR unless there has been a denial of justice or a deformation or distortion by the domestic judges of the judgment delivered by the Court.

Summary:

I. The Supreme Court delivered a judgment on 21 March 2012 dismissing a request for revision of a criminal judgment submitted by the applicant following a judgment delivered by the European Court of Human Rights finding a violation of Article 6.1 ECHR (*Moreira Ferreira v. Portugal*). Under Article 41 ECHR, the Court found that a retrial or the reopening of the case at the applicant's request, in principle, represented an appropriate way of redressing the violation. In that regard, it noted that Article 449 of the Portuguese Code of Criminal Procedure permitted the reopening of proceedings at domestic level where the Court has found a violation of a person's fundamental rights and freedoms.

The Supreme Court held that the judgment of the Court was not incompatible with the applicant's conviction and did not raise any serious doubts as to its merits, as required by Article 449.1.g of the Code of Criminal Procedure.

The applicant complained that the Supreme Court had misinterpreted the Court's judgment, in breach of Articles 6.1 and 46.1 ECHR.

II.a. Admissibility

i. Whether Article 46 ECHR precluded the Court's consideration of the complaint under Article 6 ECHR? – The alleged unfairness of the proceedings conducted in the framework of the request for a retrial, and more specifically the errors which the applicant claimed had vitiated the reasoning of the Supreme Court, were new facts which had emerged since the Court's previous judgment.

Furthermore, the procedure for supervising the execution of the judgment, which was still pending before the Committee of Ministers, did not preclude the Court's examination of a new application, provided that the latter comprised new facts which had not been determined in the initial judgment.

Consequently, Article 46 ECHR did not preclude the Court's examination of the new complaint under Article 6 ECHR.

ii. Whether the applicant's new complaint was compatible *ratione materiae* with Article 6.1 ECHR? – The Supreme Court had to compare the conviction in question with the grounds on which the Court based its finding of a violation of the Convention. Since the Supreme Court's task was to adjudicate on the application for the granting of a review, it carried out a re-examination on the merits of a number of aspects of the disputed issue of the applicant's absence from the hearing on her appeal and the consequences of her absence for the validity of her conviction and sentence. Given the scope of the Supreme Court's scrutiny, that scrutiny should be regarded as an extension of the proceedings concluded by the judgment of 19 December 2007 upholding the applicant's conviction. The Supreme Court once again focused on the determination, within the meaning of Article 6.1 ECHR, of the criminal charge against the applicant. Consequently, the safeguards of Article 6.1 ECHR were applicable to the proceedings before the Supreme Court.

The Government's objection that the Court lacked jurisdiction *ratione materiae* to adjudicate on the merits of the complaint raised by the applicant under Article 6 ECHR consequently had to be rejected.

Conclusion: admissible (majority).

b. Merits – According to the Supreme Court's interpretation of Article 449.1.g of the Code of Criminal Procedure, procedural irregularities of the type found in the instant case did not give rise to any automatic right to the reopening of proceedings. That interpretation, which had the effect of limiting the situations that could give rise to the reopening of criminal proceedings that had been terminated with final effect, or at least making them subject to criteria to be assessed by the domestic courts, did not appear to be arbitrary, and it was further supported by the Court's settled case-law to the effect that the Convention did not guarantee the right to the reopening of proceedings or to any other types of remedy by which final judicial decisions could be quashed or reviewed, and by the lack of a uniform approach among the member States as to the operational procedures of any existing reopening

mechanisms. Moreover, a finding of a violation of Article 6 ECHR did not generally create a continuing situation and did not impose on the respondent State a continuing procedural obligation.

The Chamber had held in its 5 July 2011 judgment that a rehearing or reopening of the proceedings at the appellant's request represented "in principle an appropriate way of redressing the violation". This meant that a retrial or reopening of proceedings was deemed an appropriate means of redress, but not a necessary or the only means. Moreover, the use of the expression "in principle" narrowed the scope of the recommendation, suggesting that in some situations a retrial or the reopening of proceedings might not be an appropriate solution. Thus the Court refrained from giving binding indications on how to execute its judgment, and instead opted to afford the State an extensive margin of manoeuvre in that sphere. Moreover, the Court could not prejudge the outcome of the domestic courts' assessment of whether it would be appropriate, in view of the specific circumstances of the case, to grant a retrial or the reopening of proceedings.

Accordingly, the reopening of proceedings did not appear to be the only way to execute the Court's judgment of 5 July 2011; at best, it represented the most desirable option, the advisability of which was a matter for assessment by the domestic courts, having regard to Portuguese law and to the particular circumstances of the case.

The Supreme Court, in its reasoning in the judgment of 21 March 2012, had analysed the content of the Court's judgment of 5 July 2011 and set out its own interpretation of the latter. In view of the margin of appreciation available to the domestic authorities in the interpretation of the Court's judgments, and in the light of the principles governing the execution of judgments, the Court considered it unnecessary to express a position on the validity of that interpretation. Indeed, it was sufficient for the Court to satisfy itself that the judgment of 21 March 2012 had not been arbitrary, that is to say that the judges of the Supreme Court had not distorted or misrepresented the judgment delivered by the Court.

The Court could not conclude that the Supreme Court's reading of the Court's 2011 judgment had been, viewed as a whole, the result of a manifest factual or legal error leading to a "denial of justice". Having regard to the principle of subsidiarity and to the wording of the Court's 2011 judgment, the Supreme Court's refusal to reopen the proceedings as requested by the applicant had not been arbitrary. The Supreme Court's judgment of 21 March 2012 provided a sufficient indication of the grounds on

which it was based. Those grounds fell within the domestic authorities' margin of appreciation and did not distort the findings of the Court's judgment.

The above considerations were not intended to detract from the importance of ensuring that domestic procedures are in place whereby a case may be re-examined in the light of a finding that Article 6 ECHR has been violated. On the contrary, such procedures could be regarded as an important aspect of the execution of its judgments and their availability demonstrated a Contracting State's commitment to the Convention and to the Court's case-law.

The Court therefore found no violation of Article 6.1 ECHR.

Cross-references:

European Court of Human Rights:

- *Assanidze v. Georgia* [GC], no. 71503/01, 08.04.2004, *Reports of Judgments and Decisions* 2004-II;
- *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, 05.02.2015, *Reports of Judgments and Decisions* 2015;
- *Del Río Prada v. Spain* [GC], no. 42750/09, 21.10.2013, *Reports of Judgments and Decisions* 2013;
- *Egmez v. Cyprus* (dec.), no. 12214/07, 18.09.2012;
- *Emre v. Switzerland (no. 2)*, no. 5056/10, 11.10.2011;
- *García Ruiz v. Spain* [GC], no. 30544/96, 21.01.1999, *García Ruiz c. Espagne* [GC], n° 30544/96, 21.01.1999, *Reports of Judgments and Decisions* 1999-I;
- *Jeronovičs v. Latvia* [GC], no. 44898/10, 05.07.2016, *Reports of Judgments and Decisions* 2016;
- *Lhermitte v. Belgium* [GC], no. 34238/09, 29.11.2016, *Reports of Judgments and Decisions* 2016;
- *Öcalan v. Turkey*, [GC], no. 46221/99, 12.05.2005, *Reports of Judgments and Decisions* 2005-IV;
- *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, 24.01.2017, *Reports of Judgments and Decisions* 2017;
- *Sejdovic v. Italy*, [GC], no. 56581/00, 01.03.2006, *Reports of Judgments and Decisions* 2006-II;
- *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, 30.06.2009, *Reports of Judgments and Decisions* 2009.

Languages:

English, French.



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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.

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¹¹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

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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- 1.4.5.5 Service
- 1.4.6 Grounds
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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.

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³⁷ This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

³⁸ Including its Protocols.

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³⁹ Presumption of constitutionality, double construction rule.

⁴⁰ Including the principle of a multi-party system.

⁴¹ Includes the principle of social justice.

⁴² See also 4.8.

⁴³ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

⁴⁴ Including maintaining confidence and legitimate expectations.

⁴⁵ Principle according to which general sub-statutory acts must be based on and in conformity with the law.

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⁴⁶ Prohibition of punishment without proper legal base.

⁴⁷ Including compelling public interest.

⁴⁸ Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

⁴⁹ Including questions of treason/high crimes.

⁵⁰ Including prohibition on monopolies.

⁵¹ For 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.

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⁵³ For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵⁴ For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵⁵ For example, the granting of pardons.

⁵⁶ For regional and local authorities, see Chapter 4.8.

⁵⁷ Bicameral, monocameral, special competence of each assembly, etc.

⁵⁸ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁹ In particular, commissions of enquiry.

⁶⁰ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁶¹ Obligation on the legislative body to use the full scope of its powers.

⁶² Representative/imperative mandates.

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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.

⁶⁷ For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

⁶⁸ For local authorities, see 4.8.

⁶⁹ Derived directly from the Constitution.

⁷⁰ See also 4.8.

⁷¹ The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

⁷² Civil servants, administrators, etc.

⁷³ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

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⁷⁴ Other than the body delivering the decision summarised here.

⁷⁵ Positive and negative conflicts.

⁷⁶ Notwithstanding the question to which to branch of state power the prosecutor belongs.

⁷⁷ For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

⁷⁸ Comprises the Court of Auditors in so far as it exercises judicial power.

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⁷⁹ See also 3.6.

⁸⁰ And other units of local self-government.

⁸¹ See also keywords 5.3.41 and 5.2.1.4.

⁸² Organs of control and supervision.

⁸³ Including other consultations.

⁸⁴ For questions of jurisdiction, see keyword 1.3.4.6.

⁸⁵ Proportional, majority, preferential, single-member constituencies, etc.

⁸⁶ For example, *Panachage*, voting for whole list or part of list, blank votes.

⁸⁷ For aspects related to fundamental rights, see 5.3.41.2.

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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.

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.

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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.

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.

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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).

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.

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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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