

## THE BULLETIN

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*The Venice Commission was requested by the Constitutional Court of Romania, currently holding the presidency of the Conference of European Constitutional Courts (CECC), to produce a working document on the topic chosen by its Circle of Presidents at the preparatory meeting in Bucharest in October 2009 for the XV<sup>th</sup> Congress of the CECC. The topic was the following: "The relations of the Constitutional Court with other state authorities. Sub-topic 1: relations between the Constitutional Court and parliament. Sub-topic 2: conflicts of competence. Sub-topic 3: the execution of judgments." The present working document is a contribution by the Venice Commission to the success of the Congress.*

*Constitutional courts are the independent guarantors of the constitution and their main task is to protect the supremacy of the constitution over ordinary law. Over time, however, these courts have taken on further tasks, such as safeguarding the individual against the excess of the executive or providing a safeguard against judicial errors. Another very important role of these courts is to act as a neutral arbiter in cases of conflict between state bodies. Parties to such a conflict know that they can turn to the Constitutional Court for a decision that will help them in resolving their conflict based on the constitution. The possibility of turning to the court in itself sometimes incites them to settle their disputes before they even reach the court.*

*In order to function correctly as an effective institution that stands above the parties in such a dispute, Constitutional Courts need to be independent and need to be seen as being independent. Although in many countries constitutional judges are elected by Parliament, they do not represent the political party that nominated them and they even have a "duty of ingratitude" towards the latter. Judges act in their own individual capacity and according to their own judgment. It may, however, happen that a Constitutional Court comes under pressure from other state powers, for instance through threats of budget cuts after an unwelcome judgment or when new judges are not nominated to a court to replace those judges that have retired in order to bring the number of judges below the required quorum. Some courts have even been threatened with dissolution while a few have actually been dissolved.*

*Another important component, without which decisions or judgments are meaningless, is their implementation or their execution. A state which considers itself governed by the rule of law must see to it that court decisions are implemented, especially those of the Constitutional Court. However, the court's decisions or judgments will only be useful and respected and therefore implemented if the court is held in high esteem by society. This is the only way the court can fulfil its role usefully. This esteem is derived from its decisions or judgments and for new courts that have not yet rendered any decisions or judgments, their respect will derive from their composition, from the means by which the judges were appointed and by the fact that these judges are widely regarded as independent and as being a balanced representation of society.*

***It is important that Parliament respect the decisions or judgments of the Constitutional Court, even if they are unpleasant. Trust in the fairness of the decisions of the court is crucial, otherwise Parliament could re-enact a law the court struck down.***

*Conflicts of competence or jurisdiction may arise, for instance, between a provincial parliament or regional assembly and national government concerning a law and such disputes can be settled by the Constitutional Court. The constitution may specifically list the areas of exclusive national competence as well as concurrent or shared competence. If disputes nevertheless arise, they will ultimately be dealt with by the Constitutional Court as the final arbiter.*

*In addition, the extent to which decisions or judgments of a Constitutional Court are implemented shows the level of democratic culture in a given country. If their decisions or judgments are not respected, the entire structure of rights and duties contained in a constitution are challenged, which will in turn affect the level of democracy and the protection of human rights in the country, undermine its citizens' confidence in the system and finally affect the way the international community perceives the country concerned.*

*The functions and relationship with other state bodies was the topic of a questionnaire prepared by the CECC, the answers to which can be found on the website of the Constitutional Court of Romania [http://www.ccr.ro/default.aspx?page=congres/rapoarte\\_%20incercari](http://www.ccr.ro/default.aspx?page=congres/rapoarte_%20incercari).*

*The present working document contains judgments that have been published in the regular editions of the Bulletin on Constitutional Case-Law, some of which have been re-edited by the Constitutional Courts' liaison officers for this publication, and judgments that have not yet been published in the Bulletin, but were considered to be relevant by the liaison officers. The Venice Commission is very grateful to the liaison officers for their contributions.*

*The Venice Commission will continue its tradition of publishing the working documents of the CECC in special issues of the Bulletin on Constitutional Case-Law, as was the case with the special Bulletin on freedom of religion and beliefs, requested by the Constitutional Tribunal of Poland for the XI<sup>th</sup> Conference of European Constitutional Courts held in Warsaw on 16-20 May 1999, the Special Bulletin on the relations between Constitutional Courts and other national courts, including the interference in this area of the action of the European courts, requested by the Belgian Court of Arbitration for the XII<sup>th</sup> Conference held in Brussels on 13-16 May 2002, the special Bulletin on the criteria for the limitation of human rights, requested by the Supreme Court of Cyprus for the XIII<sup>th</sup> Conference held in Nicosia on 15-19 May 2005 and the special Bulletin on legislative omissions, requested by the Constitutional Court of Lithuania for the XIV<sup>th</sup> Conference held in Vilnius on 3-6 June 2008.*

*This special issue will be incorporated into the Venice Commission's CODICES database, which contains constitutional case-law with all the regular issues and special editions of the Bulletin on Constitutional Case-Law, full text decisions, constitutions and laws on Constitutional Courts, comprising approximately 7000 précis in English and French and full texts in 43 languages ([www.CODICES.coe.int](http://www.CODICES.coe.int)).*

**T. Markert**

*Secretary of the European Commission for Democracy through Law*

# **THE VENICE COMMISSION**

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**The European Commission for Democracy through Law**, better known as the Venice Commission, is the Council of Europe's advisory body on constitutional matters. Established in 1990, the Commission has played a leading role in the adoption of constitutions that conform to the standards of Europe's constitutional heritage.

Initially conceived as a tool for emergency constitutional engineering, the commission has become an internationally recognised independent legal think-tank.

It contributes to the dissemination of the European constitutional heritage, based on the continent's fundamental legal values while continuing to provide “constitutional first-aid” to individual states. The Venice Commission also plays a unique and unrivalled role in crisis management and conflict prevention through constitution building and advice.

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Established in 1990 as a partial agreement of 18 member states of the Council of Europe, the Commission became an enlarged agreement in February 2002, allowing non-European states to become full members.

The Venice Commission is composed of “independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science” (Article 2 of the revised Statute).

The members are usually senior academics, particularly in the fields of constitutional or international law and supreme or Constitutional Court judges. Acting in the Commission in their individual capacity, the members are appointed for four years by the participating countries.

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Strasbourg, July 2012

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## I. THE CONSTITUTIONAL COURT'S RELATIONSHIP TO PARLIAMENT AND GOVERNMENT

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### 1. The role of Parliament (as the case may be, of the Government) in the procedure for appointing judges to the Constitutional Court. Once appointed, can judges of the Constitutional Court be revoked by that same authority? What could be the grounds/ reasons for such revocation?

#### 1.1. Parliament's role in the procedure for appointing judges to the Constitutional Court

With their specific characteristics, parliaments have an important, sometimes exclusive role in the appointment of constitutional judges.

##### a – Parliament has exclusive power to appoint judges to the Constitutional Court.

Thus, in *Germany*, all constitutional judges are appointed by the Parliament. Half of the justices of a chamber are elected by the *Bundestag*, whereas the other half – by the *Bundesrat*, i.e. by the directly elected parliamentary assembly which represents the people and by the *Länder* representatives, based on the rules of proportional representation. In *Switzerland*, the federal Parliament elects the judges of the Swiss Federal Supreme Court, based on proposal by the Judicial Committee. In *Poland*, the fifteen constitutional judges are individually appointed for a nine-year term of office, by the first Chamber of the Parliament. In *Hungary*, the eleven constitutional justices are elected by the Parliament. In *Croatia*, all thirteen justices are elected by the Parliament. In *Montenegro*, the Constitutional Court judges are appointed by the Parliament. In *Lithuania*, all of the nine justices are appointed to the Constitutional Court by the institution of legislature – the *Seimas*.

##### b – Parliament appoints part of the judges to the Constitutional Court

In *France*, the nine members of the Constitutional Council are appointed for a nine-year term of office, that is, three of them are appointed every other third year. Upon each renewal, one appointment is made by the President of the Republic, the president of the National Assembly, and the president of the Senate. In *Latvia*, of the seven judges of the Constitutional Court validated by the Parliament, three are proposed by at least ten members of the Parliament. In the *Republic of Moldova*, two judges are appointed by the Parliament, two by the Government and two by the Superior Council of Magistracy. In *Portugal*, the Parliament appoints ten out of the thirteen judges. In *Romania*, three judges are appointed by the Chamber of Deputies, three by the Senate and three by the President of Romania. In *Spain*, of the twelve constitutional judges, four are appointed by the Congress of Deputies and four by the Senate. In *Armenia*, the National Assembly appoints five of the nine members of the Constitutional Court. In *Belarus*, the Council of the Republic (one of the Houses of Parliament) elects six of the twelve constitutional judges and gives its consent to the appointment of the Chairperson of the Constitutional Court; other six are appointed by the President of the Republic. In *Turkey*, three of the seventeen justices of the Constitutional Court are elected by the Turkish Grand National Assembly, while the other members are selected by the President of the Republic from different sources (members of the judiciary and high public officials).

##### c – Parliament appoints constitutional judges based on a proposal by the Head of State

In *Russia*, the judges of the Constitutional Court are appointed by the Federation Council, upon the submission of the President of the Russian Federation. In *Slovenia*, judges at the Constitutional Court are elected by the National Assembly, on the proposal by the President of the Republic. In *Azerbaijan*, the appointment of Constitutional Court judges is made by the Parliament, based on recommendation by the President of the Republic.

##### d – Parliament makes proposals to the Head of State with respect to the appointment of judges to the Constitutional Court

Thus, in *Austria*, the constitutional judges are appointed by the Federal President who, however, is bound by the recommendations made by the other constitutional bodies. Consequently, of the fourteen constitutional judges, three are appointed based on the recommendation by the National Council (the

House of Parliament elected through a direct vote based on a proportional system), whereas three more members are appointed based on a proposal by the Federal Council (the Parliamentary Chamber appointed indirectly and which represents the *Länder* of Austria). In *Belgium*, all twelve judges are appointed by the King based on a list that is alternatively presented to him by the House of Representatives and the Senate. Usually, the King shall appoint the person who ranks first on the list of that House. Hence, appointment as a judge is made in reality not by the King, but either by the Deputies or the Senators.

**e – Parliament expresses its consent in connection with the proposals of the Head of State concerning the appointment of judges to the Constitutional Court**

In *Albania*, the members of the Constitutional Court are appointed by the President of the Republic, with consent given from the Assembly. In the *Czech Republic*, the Constitutional Court judges are appointed by the President of the Republic, based on consent of the Senate.

**f – Parliament does not participate in the appointment of judges to the Constitutional Court**

In *Luxembourg*, Parliament is not involved in the procedure of appointment of judges, the same in *Ireland*, whose Parliament has no direct role in the appointment of justices to the Supreme Court. Nor does in *Cyprus*, where the President of the Republic makes the appointment of judges to the Supreme Court – in whose jurisdiction fall proceedings of constitutional reviews. But the President will also seek the Court's opinion, and usually keeps to it. In *Malta*, the President appoints all members of the Judiciary on the advice of the Prime Minister.

**1.2. The Government's role in the procedure for appointing judges to the Constitutional Court**

In a number of States, the Government plays an important, sometimes exclusive role, in the appointment of constitutional justices.

**a – Government has exclusive power to appoint judges to the Constitutional Court**

Thus, in *Ireland*, the Cabinet has the exclusive jurisdiction to nominate candidates as constitutional judges. After having selected a candidate for nomination, the Cabinet recommends the nominee to the President, and the President formally appoints the

candidate. In *Norway*, Parliament does not take part in the appointment of judges. Judges are appointed by the King-in-council.

**b – Government appoints part of the judges to the Constitutional Court**

In *Spain*, of the twelve constitutional judges, two are appointed by the Government.

**c – Government makes proposals for the appointment of judges to the Constitutional Court**

As already shown, in *Austria*, constitutional justices are appointed by the Federal President who, however, is bound by the recommendations from the other constitutional bodies. Thus, of the fourteen constitutional justices, the President, the Vice-President and six judges are appointed based on proposal by the Federal Government. In *Latvia*, of the seven justices of the Constitutional Court who are to be validated by the Parliament, two are proposed by the Cabinet of Ministers. In *Denmark* judges are formally appointed by the Queen via the Ministry of Justice, but the Minister acts upon recommendation from the Council for the Appointment of Judges.

**1.3. Once appointed, may the same authority revoke the judges of the Constitutional Court?**

In the majority of States, a constitutional judge cannot be dismissed by the appointing authority.

As an exception, revocation is possible in the following instances: in *Albania*, after being appointed, the judge of the Constitutional Court can be removed only by the Assembly by two-thirds of all its members. In *Armenia*, membership in the Constitutional Court can be terminated by the appointing body, on the basis of the conclusion of the Constitutional Court. In *Azerbaijan*, should a judge commit an offence, the President of the Republic of Azerbaijan, based on conclusions of Supreme Court, may make statement in *Milli Mejlis* (Parliament) of the Republic of Azerbaijan with the initiative to dismiss judges from office. Decision on dismissal of judges of Constitutional Court is taken by *Milli Mejlis* by a majority vote. In *Belarus*, the President is empowered to dismiss the Chairperson and judges of the Constitutional Court on the grounds provided by law with notification of the Council of the Republic. In *Russia*, the termination of powers of a judge of the Constitutional Court of the Russian Federation shall be effected by the Federation Council, upon submission of the Constitutional Court.



## 1.4. Which are the reasons/ grounds for such dismissals?

In *Albania*, the judge of the Constitutional Court can be removed by the Assembly by two-thirds of all its members for violation of the Constitution, commission of a crime, mental or physical incapacity, or acts and behaviour that seriously discredit judicial integrity and reputation. The decision of the Assembly is reviewed by the Constitutional Court, which, when it determines the existence of one of these grounds, declares the removal from office. The examination procedure of the Assembly for the removal from office of the member of the Constitutional Court, for one of the aforementioned grounds, is initiated on the basis of a reasoned petition presented by not less than half of all members of the Assembly. In *Armenia*, the membership in the Constitutional Court shall be terminated on the basis of a conclusion of the Constitutional Court when the Member: has been absent for three times within one year from the sessions of the Court without an excuse; has been unable to exercise his/her powers as the Constitutional Court Member for six months because of some temporary disability or other lawful reason; violates the rules of incompatibility related to the Constitutional Court Member prescribed by the Law; expressed an opinion in advance on the case being reviewed by the Constitutional Court or otherwise raised suspicion in his/her impartiality or passed information on the process of the closed door consultation or broke the oath of the Constitutional Court Member in any other way; is affected by a physical disease or illness, which affects the fulfilment of the duties of a Constitutional Court Member. In *Russia*, termination is possible if the procedure to appoint the Constitutional Court judge was violated, as provided in the Constitution of the Russian Federation and the Federal Constitutional Law.

## 1. To what extent is the Constitutional Court financially autonomous – in the setting up and administration of its own expenditure budget?

### 2.1. General aspects

The legal framework establishing the Constitutional Courts' financial autonomy and its scope present certain particularities, especially in connection with: funding, determination of the budget for expenses, its endorsement (including from the perspective of the margin of appreciation and decision-making entrusted to the executive and legislative authorities involved in this process), management of the endorsed budget. In a few cases, either there is no such autonomy (for

example, the Constitutional Court of *Luxembourg*) or, even if guaranteed, financial autonomy does not exist from a practical point of view (for example, the Constitutional Court of the *Republic of Croatia*).

### 2.2. Funding of Constitutional Courts

Constitutional Courts have their own budget, which is integral part of the State budget approved by the Legislature; the financial resources of the Courts consist in the appropriations transferred by the State on a yearly basis. A particular case appears to be *Portugal* where, besides the financial resources allocated by the State, the Constitutional Tribunal also has its own resources. According to Article 47-B of the Organic Law on its own organisation, functioning and procedure, "*in addition to the state budget appropriations, own funds of the Constitutional Tribunal are deemed to comprise the balance managed and carried over from the previous year, the proceeds of expenses and fines, the profit derived of the sale of publications, issued by the Tribunal, or of the services supplied by the documentation department, as well as all the other earnings, which are allocated to it by laws, contracts or in any other way.*"

### 2.3. Drafting the budget for expenses

- In most of the cases, the draft budget of Constitutional Courts (Tribunals) is determined by them and submitted to the executive authority to include it in the draft general budget law and then submitted to the endorsement of the law-making authority.

However, there are also exceptions from the above-mentioned rule. Thus, the budget of all Courts in *Ireland*, including the Supreme Court, is determined by the Government and submitted to Parliament for approval. The budget is negotiated by a consultative process whereby the Courts Service, an independent statutory body which manages the courts and provides administrative support to the judiciary, makes a submission to the Department of Justice and Law Reform. The Department of Justice then negotiates with the Department of Finance on behalf of the Courts Service, but with the participation of the Courts Service, regarding the level of funding. Arising from this process the level of funding made available to the Courts Service is decided by the Government and submitted to the *Oireachtas* (the National Parliament). In *Monaco*, the budget of the Supreme Tribunal is integrated in the general budget of courts and tribunals, set and managed by the Director of the Judicial Services (compared to a Minister of Justice). The Supreme Court of *Norway* does not set up its own budget. However the Court presents a budget proposal to the

National Courts Administration, which is an independent administrative body. The NCA then presents a draft budget for the courts to the Ministry of Justice. The Ministry thereafter presents its frame-work budget to the Parliament for approval as part of the Government's overall draft annual State Budget. The budget of the Supreme Court is independent of the budget of the lower courts and will thus be dealt with separately.

- There are also cases when the draft budget developed by the Court is sent or directly presented to the law-maker. In *Belgium*, for instance, according to a customary rule derived from an agreement between the Chamber of Representatives and the Constitutional Court, the latter determines its budget and, on that basis, it shall submit its appropriations application directly to the Chamber of Representatives, whereas it shall also notify it to the minister for budgetary affairs. In *Switzerland* as well, the Swiss Federal Supreme Court determines its own budget, and presents it to the competent parliamentary committees and in the plenary of the Parliament. The Federal Department of Justice and Police (the Ministry of Justice) does not have a say within the budget adoption procedure.
- A matter that calls into debate the real nature of the financial autonomy of Constitutional Courts has to do with the possibility of the executive authority to intervene on the draft budget submitted by the Constitutional Court. There are differences among the participating states in connection with this point.

For instance, in *Poland*, neither the Ministry of Finance, nor the Government have the possibility to interfere with the content of the draft budget sent by the Constitutional Tribunal.

In *Estonia*, the reasonableness and advisability of the budget expenditure is negotiated between representatives of the Ministry of Finance and the Supreme Court. Following the negotiations and resolution of disagreements at the governmental level the Ministry of Finance draws up the draft state budget and submits it to the Parliament via the Government. In the budget negotiations with the officials of the Ministry of Finance the Supreme Court is represented by the Director of the Supreme Court and in negotiations with the members of the Government and the Parliament by the Chief Justice. Upon amendment or omission of amounts allocated to the Supreme Court in the draft state budget, the Government of the Republic shall present the amendments with justification therefore in the explanatory memorandum to the draft State budget aimed at the Parliament.

In *Germany*, according to the provisions of the Federal Budget Code (BHO), the Ministry of Finance is not required to accept all registered estimates presented by the Court. In the event that the estimates of the Federal Constitutional Court are derogated from, it is nonetheless safeguarded that its registrations are forwarded to the further deciding agencies. The Federal Budget Code provides that derogations in the draft of the Ministry of Finance from the preliminary estimates of the President of the Federal Constitutional Court, just as derogations from preliminary estimates of the Federal President and of the Presidents of the *Bundestag*, of the *Bundesrat* and of the Federal Audit Office, are to be notified to the Federal Government if they have not been carried out in agreement. A corresponding arrangement is provided for in case the draft adopted by the Federal Government on the basis of the draft of the Ministry of Finance which forms the basis of Parliament's deliberations derogates in a not consented manner from the preliminary estimates of the organs in question.

In *Latvia*, the budgetary request of the Constitutional Court shall not be amended, up to the submission of the draft budget law to the Cabinet, without the consent of the submitter of the request. Consequently, the Minister of Finance does not have the right to introduce amendments into the budgetary request of the Constitutional Court. The Cabinet of Ministers, however, does have the right to introduce such amendments without co-coordinating them with the Court. The Constitutional Court examines a case on compliance of this provision with the Constitution.

In *Portugal*, the possibility of the Government to amend the draft budget developed by the administrative departments of the Court is not completely excluded either.

A special situation is highlighted by the Constitutional Court of the *Republic of Macedonia*. According to the national report, at the end of every financial year, the Constitutional Court drafts a Proposed Budget. This proposal is submitted to the Ministry of Finance, which prepares the Draft Budget of the Republic of Macedonia and submits it to the Government, which defines the text and submits it to the Assembly of the Republic of Macedonia for adoption. In this long way the needs are not taken into consideration, and the Court never receives the funds it requests, that is, besides its modesty, in an average it receives 20% less than the funds needed.

Also, in *Bosnia and Herzegovina*, even if the relevant rules provide that the Constitutional Court is financially autonomous, it is emphasised that this presents a problem which the Constitutional Court is continuously faced with in its practice.

## 2.4. Management of the expenditure budget

Most of the Constitutional Courts have pointed out that until now they have not had any problems with the determination of their own budget or with its management.

Still, there are exceptions, one of which is presented by the Constitutional Court of the *Republic of Croatia*, namely that, even if formally the Act on the Court's operation contains the guarantee with constitutional force that "the CCRC may independently distribute the assets approved in the State Budget for the functioning of the activities of the CCRC, in accordance with its annual budget and the law", this formal guarantee has not yet been realised in practice. Likewise, the Constitutional Court of the *Republic of Macedonia*, even when using the funds approved in the Budget, has a problem in the enforcement of the payment orders for certain needs.

As to changing the amount of endorsed funds, such may take place during the year within the budgetary correction procedure. In principle, following the endorsement of the budget by law, the appropriations of the Court cannot be decreased any longer. However, such a possibility is provided, for instance, in *Lithuania*, where the appropriations may be reviewed if the State goes through a severe economic and financial situation. Also, in *Croatia*, even if endorsed and established in the State budget, the appropriations for the yearly budget of the Constitutional Court are not sheltered against the interventions of the executive branch of power during the execution of the budget.

- Constitutional Courts draw up reports concerning the execution of their budgets, which are submitted to the Minister of Finance, respectively, to the Parliament and are subject to inspection by the Courts of Accounts. Particular aspects are highlighted in the report of the Constitutional Court of *Italy*, where it is stated that, within the endorsed budget, expenses are set by the Court and its internal bodies, in full autonomy, without any type of external interferences, including for purposes of audit or control. In that regard, it appears that the Constitutional Court does not fall within the scope of application of Article 103.2 of the Constitution, which provides: "*The Court of Accounts has jurisdiction in matters of public accounts and in other matters laid out by law.*" The Court itself – in Case no. 129 of 1981 – decided a dispute stemming from the claim, of the Court of Accounts, to audit the Treasurers of the Presidency of the Republic and of the two Houses

of Parliament. Although the Constitutional Court was not directly involved in the dispute, the *ratio decidendi* of the decision, which rejected the claim advanced by the Court of Accounts, can also be extended to include the Constitutional Court.

## 3. Is it customary or possible that Parliament amends the Law on the Organisation and Functioning of the Constitutional Court, without any consultation of the Court itself?

### 3.1. Regulating the organisation and functioning of the Constitutional Court

Since statutory provisions of the highest rank in the normative hierarchy lie at the foundation of constitutional jurisdiction, to change the provisions regulating the organisation and functioning of the Constitutional Court is not quite a simple matter to deal with, the legislature not being in a position to significantly alter the nature of constitutional justice (in that regard, see reports by the Constitutional Courts of *Austria, Belgium, Croatia, Poland, Romania*). That is regarded as one of the strongest guarantees in order to preserve the independent position of the Constitutional Court within the system of political power, as it prevents the law-maker to influence its status through frequent changes of the law (see the report of the Constitutional Court of *Croatia*).

The provisions in the Constitution are further developed in special laws, based on which the Constitutional Courts shall adopt their own Rules of organisation and functioning.

A particular aspect is highlighted in the report of the Constitutional Court of *Bosnia and Herzegovina*, whose Constitution does not provide that a Law on the Constitutional Court shall be enacted but establishes that the Constitutional Court shall adopt its own Rules of the Court. Thus, apart from the Constitution, the only act which regulates the activity of the Constitutional Court is the Rules of the Court of Bosnia and Herzegovina which have force of an organic law. According to these Rules, the Constitutional Court is the only competent authority to amend such. Also, in the *Republic of Macedonia* the organisation and functioning of the Constitutional Court is not subject of any legal regulations, but have been established by the Constitutional Court itself under the Book of Procedures.

### 3.2. Relationship between the legislative and the Constitutional Court in the framework of the procedure of amending the Act on the Court's organisation and functioning

As a general rule, the organisation and functioning of the Constitutional Court is governed by law, which means an act adopted by the Legislative that can be amended without consultation of the Constitutional Court, in the sense that no regulation exists such as to oblige the law-maker to do so, seen as a rule stemming out from the general principle of separation of powers.

In a very few cases, it has been pointed out that specific regulations exist nonetheless, either concerning an obligation to send the amending draft law to the Constitutional Court (*Czech Republic*), or that the President of the Constitutional Court has the possibility to attend and speak in the parliamentary session (Standing Rules of the Parliament of *Hungary*). In other states, the amendment of such law was conducted at the very proposal of the Constitutional Court (for instance, in *Andorra* or *Norway*).

Even if there is no statutory obligation for the legislator to consult the Constitutional Court for the purpose of making amendments to the law concerning its organisation and functioning, in practice such consultation actually takes place (*Albania, Austria, Belarus, Belgium, Cyprus, Croatia, Estonia, Germany, Ireland, Latvia, Lithuania, Luxembourg, Portugal, Norway, Republic of Moldova, the Russian Federation, Serbia*), and some of the reports (*Azerbaijan, Cyprus, Slovenia*) indicate the existence of a practice or a custom in this respect. Consultation may be more or less formal, it may be under the form of invitations addressed to the Constitutional Court to express an opinion at the onset of the legislative procedure, of requests for an opinion or recommendation, it may materialise in a debate throughout the preparation of the draft law or participation in the committee of experts that contribute to the drafting of a new law or to a major review of the law in force.

As an exception from the above-mentioned rule, such consultation is not allowed, and the reasons invoked in this respect are either the separation between the respective activities of the Constitutional Court and of the Parliament (for instance, *Italy*) or that the operated changes may be subsequently examined by the Court itself within the constitutionality review of laws (for instance, *Armenia*). In that regard, the report by the *Turkish* Constitutional Court points out that, in practice, at least verbal consent of the Constitutional Court is taken into account for the amendment of its

law, however, since the Constitutional Court examines the constitutionality of laws, that is seen as a rather delicate issue. It is likely that the law amending the Law on the Organisation and Functioning of the Constitutional Court may be brought before the Constitutional Court, and for that reason, the Court avoids to express its views on a draft law. For this reason, also in *Ukraine* such consultations are limited in practice.

## 4. Is the Constitutional Court vested with review powers as to the constitutionality of Regulations/ Standing Orders of Parliament and, respectively, Government?

### 4.1. Constitutionality review of Regulations/Standing Orders of Parliament

Constitutional Courts, in their large majority, have competencies to review the constitutionality of the Standing Orders (or equivalent acts) of Parliament (as a generic name of the legislative authority).

There are also situations where no such jurisdiction has been provided. For example, the Constitution of *Bosnia and Herzegovina* does not explicitly provide that the constitutionally review body has jurisdiction to examine the constitutionality of the Rules on Procedure of the Parliamentary Assembly, and the Constitutional Court so far has not had an opportunity to interpret its jurisdiction in a case on this matter. The Constitutional Court of *Belgium* does not have jurisdiction to review the rules that govern the operation of the Federal Parliament and Government. In *Luxembourg*, the Constitutional Court has no special jurisdiction to review the Standing Orders of Parliament, respectively of the Government (also, in the *Republic of Moldova*). The Constitutional Court of *Italy* has clearly excluded any possibility to review the Standing Orders of Parliament. A well-established jurisprudence is invoked in their report, and also its leading case, no. 154 of 1985, in which the declaration of inadmissibility of the issue (and, therefore, the impossibility for the Court to engage in an examination of the merits) was justified on the basis of two sets of reasons; the first of these regarded the extraneousness of Parliamentary regulations to the measures envisaged by Article 134.1 of the Constitution (according to which "*The Constitutional Court shall pass judgment on [...] controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions*"), and the second related instead to the institutional position of the Houses of Parliament ("immediate expression of the sovereignty of the People").

There also exist situations where this prerogative is conditional. For example, in *Albania* the Regulation of Parliament can be object of constitutional review only in cases when there have been affected provisions of constitutional level.

In *Ireland*, the Supreme Court established in its case-law that the courts cannot intervene in the right of the *Oireachtas* to establish its own rules and Standing Orders. However, it may be noted that some justices of the Supreme Court felt that there may be exceptions to this principle where the rights of an individual citizen are at stake.

- In the cases where the Constitutional Courts do have such power, it is explicitly provided by national Constitutions and by the laws for the organisation and operation of the Constitutional Court or, in certain situations, it is inferred by interpretation, while considering that regulations of this type come under a certain category (laws) or their position in the hierarchy of normative acts.

Thus, for instance, the Standing Orders of the National Assembly of the *Republic of Armenia* have the status of a law. Since the Constitutional Court has jurisdiction to exercise constitutionally review of laws, the Standing Orders of the National Assembly can also be subject to constitutionality review.

Similarly, the Constitutional Court of the *Republic of Croatia*, having stated, in principle, on the legal nature of the Standing Orders of the Croatian Parliaments, found that such have the legal force of a law. With some specific distinctions (determined, in the case of Austria, by the meanings of the legal term "regulation" in this country), the same reasoning is a common denominator of the Constitutional Court's jurisdiction in *Austria, Estonia, Republic of Macedonia, Poland, Slovenia, Ukraine*.

In the same line, in *Lithuania*, neither the Constitution nor the Law on the Constitutional Court, in which the competence of the Constitutional Court is defined, have literally established that the constitutionality of norms of the Statute of the *Seimas* or the lawfulness of the provisions of the Working Rules of the Government may become the object of investigation by the Constitutional Court. Such powers of the Constitutional Court stem from the principles of the supremacy of the Constitution, a state under the rule of law, hierarchy of legal acts and other constitutional imperatives.

In *Germany* there are certain proceedings under which the Rules of Parliament and the Government can become – directly, in part, or only indirectly – the subject of constitutionality review by the Federal Constitutional Court. Thus, in the proceedings for the

abstract review of statutes, by request of the Federal Government, of a *Land* Government or of one-third of the members of the *Bundestag* the Federal Constitutional Court can – inter alia – review the compatibility of federal law with the Basic Law. According to the prevailing view, "federal law" within the meaning of these provisions includes legal provisions of all levels, including the rules of procedure of the constitutional organs. In practice, however, the Rules of Procedure of the German *Bundestag* and of the Federal Government have so far never yet been reviewed *in this procedure*. However, provisions contained in the Rules of Procedure of the *Bundestag* have been the subject-matter of a review in disputes between organs several times.

#### 4.2. Constitutionality review of Standing Orders/Regulations of the Government

From the examination of the national reports, one may note that those Constitutional Courts which do not have jurisdiction to perform the constitutionality review of the Standing Orders of Parliament also lack jurisdiction to perform the constitutionality review of Rules of the Government. This because of similar reasons, as shown in the report of the Constitutional Court of *Italy*, which points out that the impossibility for the Court to operate a scrutiny for constitutionality is also confirmed in regard to Government regulations; on one hand, it could be considered possible to simply extend part of the considerations in support of the unreviewability of Parliamentary Standing Orders, and especially in light of the constitutional nature of the organ from which the regulation originates, or on the secondary nature of the rules for the operation and functioning of the Government.

There are also Constitutional Courts empowered to perform the constitutionality review with respect to the Standing Orders of Parliament, however, unable to perform the constitutionality review of the Rules of Government, such as in *Andorra*.

There are cases when the Constitutional Court has exclusive jurisdiction to perform the constitutionality review of legal acts, but does not have any powers of review over the acts of the executive power (for instance, *Belgium*).

In other cases, the particular elements pertaining to constitutionality review of the Standing Orders of the Parliament apply also in case of constitutionality review of the Rules of the Government (for example, *Belarus, Germany, Republic of Macedonia*), as well as when the Court's said prerogative has its own characteristic features or may know further distinctions.

Therefore distinction should be made in relation to:

- the nature and the issuer of the normative act that governs the organisation and functioning of the Government;
- the nature of the acts issued by the Government, whereas individual acts are excluded from the scope of the constitutionality review.

Thus, in certain cases, review powers in respect of the Rules of the Government are derived from the Constitutional Court's general competence to conduct constitutional review of all acts issued by the Government, without any distinction whatsoever as to their subject matter. Accordingly, to the extent that the rules of organisation and functioning of the Government are established in an act issued by this authority, the respective act implicitly belongs to the sphere of acts subject to constitutional review by the Constitutional Court. For instance, the Cabinet of Ministers of *Ukraine*, within the limits of its competence, issues resolutions and orders that are mandatory for enforcement. Since one of the powers of the Constitutional Court is to decide on issues of constitutionality of acts of the Cabinet of Ministers, and the Rules of procedure of the Cabinet of Ministers of Ukraine were approved by a Resolution of this Cabinet, then such fall under the review exercised by the Constitutional Court of Ukraine. Similar reasoning shall apply to the power of the Constitutional Court of the *Russian Federation* and of *Lithuania*.

In other States, the rules on the organisation and functioning of the Government are established by means of acts issued by another authority which fall under the Constitutional Court jurisdiction. For instance, in *Armenia*, the procedure of functioning of the Government of the Republic of Armenia is defined by a decree of the RA President. Taking into consideration that the RA President's decrees are the subject to constitutional review, also the legal act regulating the working procedure of the Government is subject to examination by the Constitutional Court.

The report by the Constitutional Court of *Romania* points out to the fact that normative acts regulating the organisation and functioning of the Government shall be subject to review conducted by the Constitutional Court to the extent that they are primary statutory acts – laws (which are enacted by the Parliament) or ordinances (that shall be issued by the Government). Government Decisions issued for the organisation of the enforcement of laws, which constitute secondary legislation, escape review by the Constitutional Court, nonetheless they may be subject to the legality review carried out by the administrative courts.

In connection with the distinction based on the nature of acts issued by the Government, it should be mentioned that, generally speaking, only the normative or general acts fall under the Constitutional Court's powers of review. With regard to individual administrative acts, such cannot be subject to constitutionality review, as specifically pointed out in the report of the Constitutional Court of the *Republic of Moldova* (also see the reports from the Constitutional Court of the *Czech Republic*, the Constitutional Tribunal of *Poland*, the Constitutional Court of *Georgia* or the Supreme Court of *Estonia*).

A special situation is presented in the report by the Constitutional Court of *Austria* which, after showing that "real" regulations (regulations specifying a law) adopted by the Federal Government are subject to constitutional review just as any other regulation, and that the Constitutional Court is not entitled to review internal acts by the Federal Government, points out to the fact that, as regards the Rules of Procedure of the Federal Government, there is a particular situation: they do not exist, a fact quite unusual measured by international standards. The internal rules for Government's operating activities are based on individual decisions and "customs" developed in the legal practice of Federal Governments since 1945.

## **5. Constitutionality review: specify types / categories of legal acts in regard of which such review is conducted.**

### **A. General and individual acts / Statutory (normative) and non-statutory acts.**

Practically, a uniform approach as to which categories of acts are subject to constitutional review is quite difficult to make, considering the many particularities in the regulation of powers ascribed to Constitutional Courts, and the differences between the legal systems in various countries which is determined, *inter alia*, by the structure of these States – unitary or federative, as well as their different conception in regard of the constitutional review.

Furthermore, the national reports have addressed the issue in a complex manner, so that merely listing the categories of acts subject to review by the constitutional courts will barely cover a small portion of the rich information conveyed.

Some of the reports have distinguished between general acts and individual acts, respectively, and in the latter case, also based on the issuing entity.

In specific cases, the sphere of the acts subject to review is established as such, in the sense that various normative or general acts fall under this category.

For example, the Constitutional Court of the *Republic of Belarus* shows that in performing the *a posteriori* constitutional review the Constitutional Court delivers judgments on the constitutionality of the normative legal acts as specified in the Constitution provided that one of the qualified subjects submits the relevant proposal.

The Constitutional Court of the *Czech Republic* performs the review of the laws, as well as of the "other legal regulations". These are legal documents that have been adopted and exist in the required form. The basic requirements for these legal regulations fall into two groups: general (the regulation is of a regulatory nature and is binding on a wide – indefinite – group of subjects) and specific requirements (the regulation must be duly adopted and published, valid and in effect).

Likewise, in proceedings for the review of constitutionality, the Constitutional Court of *Slovenia* decides upon the constitutionality (and legality) of laws, regulations, local community regulations, and general acts issued for the exercise of public authority.

The Constitutional Court of *Serbia* is competent to perform the review of a large set of acts, issued by various authorities and legal entities, the common feature of which is their general nature, more specifically: laws and other general acts of the National Assembly, President or Government, general acts of the other authorities and State bodies, statutes and other general acts of the authorities from the autonomous provinces, the statutes and other general acts of the local self-governing entities, general acts of the political parties, trade unions, and citizens' associations, general acts of the organisations that exercise public functions, statutes and other general acts of companies and institutions, general acts of chambers and other associations, general acts of funds and other associations, collective agreements.

Actually, the rule is that it falls under the jurisdiction of the Constitutional Courts to carry out review of general acts. Nevertheless, there are cases when the Constitutional Court is competent to take under its review also various individual acts.

Thus, the Constitutional Court of *Austria* indicates that, according to the concept of the Austrian Federal Constitution, every legal act directly interfering with the legal sphere of the addressee is subject to review

when it constitutes, abolishes or amends rights and duties. Any such legal act having general effect is subject to review, as are all individual legal acts provided they are issued by an administrative authority (laws, regulations, agreements concluded between the Federation and the lands, respectively, between the lands in their specific area of jurisdiction). By contrast, individual legal acts by ordinary courts (judgments and decisions) may not be reviewed by the Constitutional Court at all. An exception exists however in the field of asylum law: judgments and decisions of the Asylum Court may be challenged before the Constitutional Court.

The Constitutional Court of *Croatia* performs the constitutionality review of individual decisions of all State/governmental bodies (including final judgments and rulings of the Supreme Court of the Republic of Croatia, as well as of the other courts), bodies of local and regional self-government and legal entities with public authority, with regard to the violation of human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia.

The Constitutional Court of *Lithuania* is competent to review all the legal acts adopted by the Parliament, Government and the President, and decides on their compatibility with the Constitution and the laws, irrespective whether they are statutory or individual, whether they have one time applicability (*ad-hoc*) or permanent validity.

In *Germany*, both provisions adopted by the Government, and any other acts or omissions on the part of the Government, may become subject-matter of a constitutional review where the possibility exists that they violate constitutional rights of those who may initiate proceedings of the respective type to protect their rights.

The Constitutional Court of the *Republic of Macedonia*, within the framework of the abstract constitutional review, the Court may review acts of general nature (general acts): laws, by-laws, decisions of the Government or ministries and other public bodies, collective agreements, and programmes and statutes of political parties and NGOs, but may not review the individual acts of the Assembly and the Government. Within the framework of the competence for the protection of the freedoms and rights of the individual and citizen, the Court may appraise individual acts (court judgments and individual acts of the bodies of administration and other organisations carrying out public mandates) or actions which have violated certain rights or freedoms of the citizens, which are safeguarded by the Constitutional Court and may annul the same.

In *Norway*, the courts have the right to review the constitutionality of legislation and to review administrative decisions, however they will not review constitutionality *in abstracto*.

Also the *Portuguese* Constitutional Tribunal sets forth a distinction in this respect, establishing that, in principle, only the normative acts issued by public entities are subject to its constitutionality review. Yet the Tribunal has abandoned the concept of law in a purely formal sense and developed a broader and, at the same time, formal and functional concept of the legal norm. By this new concept, the review of a legal act should scrutinise into certain cumulative requirements. First of all, its prescriptive character, particularly the prescription of a conduct or behaviour rule; secondly, its heteronomous nature; thirdly, its obligatory character (its binding content). Consequently, various types of legal norms may be subject to constitutionality review. Further to legal norms in a traditional sense (namely general, abstract, imperative rules issued by public entities), there are also other legal acts, namely the public norms with binding external effect, of an individual and concrete nature, as they are set forth in a piece of legislation, but also norms issued by private entities, if such enjoy normative delegated powers assigned to them by the public entities.

Similarly, in respect of its competence to review constitutionality of other acts issued by the bodies of State administration, the Constitutional Court of *Hungary* emphasises its unified examination practice concerning the other legal means of state administration, which has depended on whether the act in question had normative content.

## B. Primary legislation and secondary legislation

In respect of the acts subject to constitutionality review, some reports make a distinction between primary and secondary legislation (normative acts).

Primary legislation, with its specific characteristics, may be subject to review by Constitutional Courts; secondary legislation however does not in all the cases.

For example, the Constitutional Court of *Belgium* has exclusive competence to review the constitutionality of legislative acts, but no control prerogatives on the acts of the executive. According to the report of the Constitutional Court of the *Czech Republic*, the Court is not authorised to review the conformity of sub-statutory legal norms, even if they are of varying legal force and conflict with each other. In *Italy*, the Constitutional Court's power of review does not extend to secondary legislation, such as regulations issued by

the Government. These acts are, indeed, subjected to a review for legality, or conformity to primary law – a review which falls to be performed by ordinary and administrative judges.

Concerning the acts issued by the Government, the Constitutional Court of *Romania* points out that only Government Ordinances, that are primary legislation, just like laws and parliamentary regulations; thus ordinances alone may be subject to constitutionality review by the Constitutional Court. Government Decisions are issued for organising the enforcement of laws, so they constitute secondary regulatory acts that cannot be reviewed by the Constitutional Court, however, may be submitted to a legality review carried out by administrative courts.

## C. Categories of acts reviewable by the Constitutional Court

In a synthetic presentation, the following acts are concerned:

### a. Laws

The national reports have revealed a complex approach to the concept of *law*, as defined under its formal and also substantive aspects.

Some reports indicate that constitutional review can be exerted on laws and normative acts having the force of law, whose sphere is, for example, in *Italy*: laws enacted by the State, delegated legislative decrees (legal measures issued by the executive upon delegation from the Parliament) and decree-laws, legal measures issued by the executive in necessary and urgent response to emergency situations and that, after sixty days, must be converted by the Parliament into laws. The Court can also adjudicate upon the constitutionality of laws enacted by Regions and by the two Autonomous Provinces to which the Constitution has granted legislative powers (i.e. the Provinces of Bolzano and Trento, which constitute the Region of Trentino-Alto Adige). The Court's capacity for review for constitutionality also extends to Presidential decrees that declare the abrogation of a law or of legal measures operated through a referendum as established by Article 75 of the Constitution.

Similarly, in *Spain*, in abstract constitutionality review proceedings, both in an appeal and in a matter of unconstitutionality, the Tribunal verifies compliance with the Constitution of "the laws, provisions of regulations or acts having the force of law" or, in concise wording, of any "norms having status of a law", namely: autonomy statutes and other organic laws; other laws, provisions of regulations and of State enactments having the force of law;



international treaties; regulations of the Chambers and of the *Cortes Generales* (the Parliament); laws, regulatory acts and provisions adopted by the Autonomous Communities, with said exception in cases of a legislative delegation; regulations of the Legislative Assemblies of Autonomous Communities.

A reference to both criteria – the substantive and the formal one – is also made in the report of the Constitutional Court of *Hungary*, as shown above.<sup>1</sup>

However, in most of the cases, the law is regarded in its formal sense, as enactment of a general nature adopted by the legislative power under pre-established procedure. Normally, all categories of laws – in a formal sense – may be subjected to review by the Constitutional Court. But there are also cases when specific categories of laws are excluded from the review conducted by the Constitutional Courts, in consideration of either their typology or their scope of regulation.

In *Switzerland*, for example, federal laws are excluded from the constitutionality review, because the Swiss Federal Supreme Court has the obligation to apply them. *Abstract review* is excluded in all these cases. Instead, within *concrete review* proceedings, the Court may find that a federal law violates the Constitution or the international law. In the first situation, it can neither annul the law nor refuse to apply it. It has the possibility to flag unconstitutionality first through its judgment, then also in its annual report which is submitted to the Parliament. Federal orders cannot be brought before the Swiss Federal Supreme Court. It results that also *abstract review* is excluded for this category of normative acts. However, concrete review by the Federal Court is possible, and its extent depends on whether the order is based directly on the Federal Constitution or a delegation contained in federal legislation. Cantonal laws and ordinances (including communal laws and ordinances) may be subject to *abstract* and *concrete review* without restrictions.

In *Luxembourg*, the Constitutional Court decides upon compliance of the laws with the Constitution, except for the legislation under which treaties are approved.

In *France*, starting from March 1, 2010, the Constitutional Council conducts *a posteriori* reviews by preliminary rulings on the issue of constitutionality of any legal provisions in force, upon referral by the State Council or the Court of Cassation with exceptions raised during trial proceedings, in regard of compliance of such provisions with “*the rights and freedoms guaranteed by the Constitution*”.

In *Hungary*, the Constitutional Court shall annul laws and other legal norms which it finds to be unconstitutional. The Constitutional Court may annul laws on the State Budget and its execution, on central taxes, stamp and customs duties, contributions, as well as on the content of the statutes concerning uniform requirements on local taxes only if the content of these statutes violates the right to life and human dignity, the right to the protection of personal data, the right to freedom of thought, conscience and religion or the right connected to the Hungarian citizenship.

#### b. International treaties

International treaties are usually subject to review by Constitutional Courts.

Review is conducted prior to ratification/promulgation, as a preventive measure or, possibly, as a sanction where a treaty was concluded overstepping the boundaries allowed by the Constitution (for example, *Albania, Andorra, the Czech Republic, Russian Federation, France, Lithuania, Latvia, Poland, Romania*) and, in some cases, following ratification (for example, *Serbia, Latvia*).

In most of the reports reference has been made to the category of international treaties in general, although a few of them took to distinctions within this category.

Thus, the Constitutional Court of *Azerbaijan*, for example, examines the interstate agreements of the Republic of Azerbaijan prior to their coming into force and intergovernmental agreements of the Republic of Azerbaijan. The Constitutional Tribunal of *Portugal* reviews international treaties and agreements in their simplified form, including international contract-treaties. Review by the Constitutional Court of the *Russian Federation* is carried out on treaties concluded between State bodies of the Russian Federation and state bodies of entities of the Russian Federation, treaties concluded between state bodies of entities of the Russian Federation and international treaties of the Russian Federation that have not come into force.

A special situation in respect of both laws and international treaties can be found in *Austria*, where the Constitutional Court is competent to review the republication of a law or of a state treaty. According to the Austrian Constitution the responsible highest constitutional organs of the Federation and the *Länder* may republish laws and state treaties. This means that the text of a legal norm in force at the relevant time is approved as authentic and that its wording is binding for the addressees in future. The purpose of this provision is to make laws or state treaties in the form

<sup>1</sup> *Supra*, point A.

of a continuous text easily accessible again if they have become too complicated to be understandable at a glance because of numerous amendments made in the course of time. The Constitutional Court reviews whether the limits for republication have been exceeded, i.e. it examines whether the republished text including all amendments has actually been enacted by the competent legislator in the exact wording that has been republished.

### c. Regulations of Parliament<sup>2</sup>, other acts of Parliament

As a rule, enactments of a general nature adopted by Parliament, other than laws, are subject to review by Constitutional Courts (for example, *Armenia, Azerbaijan, Denmark, Russian Federation, Georgia, the Republic of Moldova, Estonia, Serbia, Spain, Ukraine*).

In *Denmark*, subject to constitutionality review are not only laws, but also decisions by the Parliament.

In *Estonia*, also the resolutions adopted by the Standing Committee of the *Riigikogu* are subject to review by the Constitutional Court.

In *Romania*, apart from the Standing Orders of the Parliament, resolutions by the Plenary of the Chamber of Deputies, the Plenary of the Senate and the Plenary of joint Chambers of Parliament are reviewable.

In *Ukraine*, legal acts of the Supreme Rada of Ukraine (resolutions, statements etc.), among which “*normative acts of the Presidium of the Verkhovna Rada of Ukraine, which follows from the special status of the Presidium of the Verkhovna Rada of Ukraine in the system of state power of Ukraine before February 14, 1992*”, as well as legal acts of the Supreme Rada of the Autonomous Republic of Crimea are subject to review by the Constitutional Court.

### d. Decrees/Resolutions/Orders/General Acts of the President of the Republic

Some of the Constitutional Courts have the competence to review general acts issued by the President of the Republic (for example, *Armenia, Azerbaijan, Russian Federation, Georgia, the Republic of Moldova, Estonia, Serbia, Ukraine*).

### e. Decrees having the force of law (Decree – Laws)/Ordinances/Resolutions/General acts of Government/Council of Ministers

Normative acts of the Government are subject to review by Constitutional Courts in countries such as *Andorra* (decrees issued based on a legislative delegation), *Armenia, Azerbaijan* (resolutions and orders of the Cabinet of Ministers), *Belarus* (resolutions of the Council of Ministers), *Denmark* (executive orders issued by the Government and any decisions issued by an administrative body, including decisions by the Government), *the Russian Federation, the Republic of Moldova, Montenegro* (general acts adopted by the Government: regulations, ordinances, decrees etc), *Georgia, Portugal* (legislative acts of the Government, namely decree-laws), *Romania* (ordinances and emergency ordinances), *Serbia* (decrees, resolutions and other general acts adopted by the Government), *Spain, Ukraine* (acts of the Council of Ministers), *Turkey* (where the Parliament may approve, through a law, authorisation of the Council of Ministers to issue “decrees having the force of law”).

### f. Resolutions of the Prime Minister (e.g. Armenia);

### g. Normative acts of the central executive administration bodies (e.g. Azerbaijan);

### h. Acts/Decisions of the local public administration/local autonomous bodies

- decisions of local autonomous bodies (*Armenia*)
- normative acts of the central public administration bodies (*Albania*)
- acts issued by the municipality (*Azerbaijan*)
- decisions of legal entities with public authority, including bodies of local and regional self-government (*Croatia*).

### i. Other acts:

Acts of the courts of law (other than individual acts, *supra*, point A) /acts of the General Prosecutor:

- decisions of the Supreme Court of the Republic of Azerbaijan (*Azerbaijan*);
- acts of the Supreme Court, the Supreme Economic Court and of the General Prosecutor (*Belarus*);

<sup>2</sup> See answers to question no. 4

- regulatory decisions (*assentos*)<sup>3</sup> rendered by the Supreme Tribunal of Justice; decisions by the Supreme Tribunal of Justice for the unification of case-law; judge-created norms (acting in the interpretation of the law) "in the spirit of the system" for the purpose of filling legislative gaps; regulations established by voluntary arbitration jurisdictions (*Portugal*).

Traditional (customary) norms, to the extent and in the areas where these are accepted as a source of domestic law (*Portugal*);

Decisions of election commissions (on avenues of appeal – *Estonia*; in *Lithuania*, the Court examines the decisions made by the Central Electoral Commission or its refusal to adjudicate complaints concerning the violation of laws on elections in cases when such decisions were adopted or other deeds were carried out by the said commission after the termination of voting in the elections of Members of the Seimas or the President of the Republic, i.e. the Constitutional Court virtually investigates into the lawfulness of the act of the Central Electoral Commission (whether the Central Electoral Commission has not violated election laws);

Programs of the political parties, in respect of their constitutionality (*Croatia, the Republic of Macedonia*) or Statutes of political parties and civic associations, in respect of their constitutionality (*Republic of Macedonia*);

Norms contained in the articles of the associations public utility and in the regulations of associations of public utility or other private entities, where they enjoy delegation of authority on the part of the public entities (*Portugal*);

Norms emanating from competent bodies of the international organisations, and effective in the domestic legal order (*Portugal*).

**6.a) Parliament and Government, as the case may be, will proceed without delay to amending the law (or another declared unconstitutional) in order to bring such into accord with the Constitution, following the Constitutional Court's decision. If so, what is the term established in that sense? Is there also any special procedure? If not, specify alternatives.**

**6.a) 1. If Parliament and Government, as applicable, proceeds without delay to the amendment of the law (or another act) declared unconstitutional in the sense of bringing it in compliance with the basic law, according to the decision of the Constitutional Court.**

In most of the countries, the authorities comply with decisions of the Constitutional Court. However, the nature and timeliness of compliance measures will very much differ; under this aspect, a number of factors, principally in connection with the existence of specific deadlines and procedures regulated by law and the complexity of the problems which must be addressed in order to bring the act declared unconstitutional into compliance with the Constitution, as sometimes it may require a longer period of time on coordinating the solution.

There have been also cases of non-compliance with the decisions of the Constitutional Court (for example: *Croatia, Luxemburg, Poland, Romania*), including under the aspect of incorporating a legislative solution declared unconstitutional by the Court in the text of a new legal norm, as well as cases where such compliance is questionable (for example, *Estonia*).

The Constitutional Court of *Croatia*, in regard to a case of non-execution of its decisions, affirms that, although this is a very rare case that happened in the last 20 years, it nevertheless shows that there are no legal mechanisms in the legal order of the Republic of Croatia which could force the Croatian Parliament or the Croatian Government to enforce the Court's decisions. However, the situation is quite different when some other bodies have the obligation to enforce a decision. In these cases Article 31.3 of the Constitutional Act on the Constitutional Court applies, which stipulates "*the Government of the Republic of Croatia ensures, through the bodies of central administration, the execution of the decisions and the rulings of the Constitutional Court*".

<sup>3</sup> A category which is now obsolete.

Also other Constitutional Courts (for example, in the *Czech Republic, Italy, Poland*) indicate the lack of legal means in order to obligate the legislature to adopt new regulations.

Still, the Constitutional Court may sanction a normative act or norm if such has replicated a legislative solution declared as being unconstitutional. The Constitutional Court of *Romania* illustrates a case where, having observed that the unconstitutionality previously found was perpetuated in a new legal norm adopted by Parliament, has established that also the new act is unconstitutional (Decision no. 1018/2010<sup>4</sup>).

In the report of the Constitutional Tribunal of *Poland* it is shown that the introduction of legislative amendments necessary to re-establish the integrity of the legal system, after the Tribunal repeals non-complying provisions, has represented a serious issue for years. The incompetence of the legislature in this respect impedes the efficiency of the Tribunal decisions and impacts adversely the authority of laws. However, it is mentioned that, recently, the situation has been improved. The introduction of a special procedure in the Senate – which seeks to monitor the Tribunal jurisprudence and to prepare specific legislative initiatives based on such monitoring – should be assessed as very beneficial.

## 6.a) 2. Regulation of terms and procedures. Alternatives

In the majority of countries there is no special procedure or terms regulated under which the Parliament or the Government, as applicable, would have to amend an act, once it was declared unconstitutional, in the sense of harmonising it with the Basic Law<sup>5</sup> in accordance with the decision of the Constitutional Court.

But there are cases where such terms or procedures are regulated, either in Constitution or the normative acts on the organisation and operation of the aforementioned authorities, or through laws on the organisation and operation of Constitutional Courts. Many of the reports reveal in this context the possibility for the Constitutional Courts to postpone the entry into force of their decisions of unconstitutionality, which amounts to setting a deadline for the law-maker in order to bring the normative act into line with the Constitution. As for the terms established by the decisions of Constitutional Courts, their purpose is, in

most cases, to grant the legislator the time necessary to take the measures required for eliminating a legislative gap or to regulate a specific issue in accordance with the Constitution. This happens because, as stated in some of the reports, the Constitutional Court may neither oblige the legislative to adopt a law, nor may it set terms for this purpose, considering the principle of separation of powers.

### a. Terms and procedures regulated by the Constitution

According to Article 147.1 of the Constitution of *Romania*, provisions of the laws and ordinances in force, as well as regulations which are held as unconstitutional, shall cease their legal effects within 45 days from publication of the decision rendered by the Constitutional Court if Parliament or Government, as may be applicable, have failed, in the meantime, to bring these unconstitutional provisions into accord with those of the Constitution. For this limited length of time the provisions declared unconstitutional shall be suspended as of right.

According to Article 125.3 of the Constitution of the *Slovak Republic*, if the Constitutional Court holds by its decision that there is inconformity between legal regulations, the respective regulations, their parts or some of their provisions shall lose effect. The bodies that issued these legal regulations shall be obliged to harmonise with the Constitution, with constitutional laws and with international treaties promulgated in the manner laid down by a law, and in cases stipulated by the Constitution also with other laws, governmental regulations and with generally binding legal regulations of Ministries and other central state administration bodies within six month from the promulgation of the decision of the Constitutional Court. If they fail to do so, these regulations, their parts or their provisions shall lose effect after six months from the promulgation of the decision.

### b. Terms and procedures regulated by the Legislative's Standing Orders/Statute

In *Lithuania*, the Statute of the Seimas has had since 2002 a special chapter designed for implementation of the Constitutional Court rulings, conclusions and decisions, which provides for the procedure for implementation of the Constitutional Court rulings by which a certain legal act was recognised as conflicting with the Constitution and concrete terms for doing so. In order to secure that the rulings of the Constitutional Court be properly implemented and that a legal act, which is in conflict with the Constitution, be amended, one of the Deputy Speaker of the Seimas is appointed to be responsible for this procedure at the Seimas. The procedure of implementation of Constitutional Court

<sup>4</sup> Published in the Official Gazette of Romania, Part I, no. 511 of 22 July 2010.

<sup>5</sup> For example: *Armenia, Belarus, Cyprus, Croatia, Estonia, Latvia, Luxembourg, the Republic of Macedonia, Ireland, the Czech Republic, Monaco, Poland, Georgia.*

decision may run till one-and-a-half year. Article 181<sup>2</sup> of the Statute of the Seimas provides that within a month after the receipt of a ruling of the Constitutional Court in the Seimas, the Legal Department of the Office of the Seimas shall submit to the Seimas Committee on Legal Affairs respective proposals on the implementation of this ruling, and the latter shall consider such not later than within 2 months after the receipt in the Seimas of this ruling. At the Seimas, a corresponding committee or a working group set up for this purpose must, not later than within 4 months, prepare and submit to the Seimas for consideration a draft amending that law (or a part thereof) or any other act (or a part thereof) being passed by the Seimas which is not in compliance with the Constitution. If a draft is complex, the Board of the Seimas may expand the time limit of its preparation, but not exceeding 12 months. It may be proposed that the Government prepare a draft amending the appropriate law (or a part thereof). Drafts for amending unconstitutional laws, prepared in order to implement rulings of the Constitutional Court, are deliberated and adopted in the parliament while following the general procedure of legislation established in the Statute of the Seimas. The legislator, while passing new or amending and supplementing the valid laws, may not disregard the concept of the provisions of the Constitution and other legal arguments which are set forth in rulings of the Constitutional Court.

In the same report it is also stated that, in actual practice there are also such situations where the legislator is granted more time than provided for in the Statute of the Seimas so that the corresponding amendments to the legal act (part thereof) recognised as conflicting with the Constitution could be made. This is possible when the Constitutional Court, in the same ruling wherein the legal acts is recognised as being not in line with the Constitution, postpones the official publishing of its own ruling. It means that the legal regulation continues to be in force until the official publishing of the Constitutional Court ruling, even though it was recognised to be in conflict with the Constitution. The legislator, while being aware of the fact that from a certain day this legal regulation will become invalid, has an opportunity to discuss and prepare for its amendment in advance. The Constitutional Court may postpone the official publishing of its ruling if it is necessary to give the legislator certain time to remove the *lacunae legis* found. The said postponement of official publishing of the Constitutional Court ruling is meant in order to avoid certain effects, unfavourable to the society and the state as well as the human rights and freedoms, which might appear if the relevant Constitutional Court ruling was officially published immediately after its official announcement in the hearing of the Constitutional Court and if it became effective on the same day after it had been officially published.

In *Romania*, the Chamber of Deputies amended its Standing Orders<sup>6</sup> in 2010, and introduced certain rules and deadlines as regards the procedure to be followed in the event that the Court has declared the unconstitutionality of legal provisions in an *a priori* or an *a posteriori* review. Thus, according to Article 134 of the Chamber of Deputies' Regulations, in cases of unconstitutionality of laws prior to their promulgation, and where the Chamber of Deputies was the first Chamber notified, the Standing Bureau, in its first meeting held after the publication of the Constitutional Court's decision in the Official Gazette of Romania, shall notify the Committee for Legal Affairs, Discipline, and Immunities and the specialised Standing Committee which was notified in first instance with the draft law or the legislative proposal, in order to reconsider the provisions declared unconstitutional. The same procedure applies also in the situation where the relevant provisions are remitted by the Senate, having acted as the first Chamber notified. The deadline set by the Standing Bureau for the report drafting by the mentioned committees may not be longer than 15 days, such report shall be included in the agenda on a priority basis, and adopted with the majority required by the ordinary or organic nature of the legislative initiative subject to re-examination. Upon re-examination, the necessary technical-legislative correlations will be done and, after adoption, said provisions are sent to the Senate, if the latter is the decision-making Chamber. According to Article 134<sup>2</sup> of the Chamber of Deputies' Regulations, in cases of unconstitutionality of provisions of the laws and ordinances in force, as well as of those of Regulations which pursuant to Article 147.1 of the Constitution cease their legal effects within 45 days from the publication of the Constitutional Court's decision (term during which these are suspended *de jure*), and in the event that the Chamber of Deputies was the first Chamber notified, the Chamber's Standing Bureau shall notify the Committee for Legal Affairs, Discipline, and Immunities, and also the specialised Standing Committee under whose scope of activity the respective legal norm falls, in order to review the provisions, thus harmonizing them with the provisions of the Constitution. The reviewed provisions shall be included in a legislative initiative, which is distributed to the Deputies and, after expiry of the 7-day deadline, inside which amendments may be submitted, the two committees shall, no later than 5 days, draft a report on that legislative initiative, which is taken for debate and adoption by the Plenary of the Chamber of Deputies. Such legislative initiative must be adopted with the majority required by the nature of the legal norm in question and thereafter sent to the Senate.

<sup>6</sup> Resolution no. 14/2010, published in the Official Gazette of Romania, Part I, no. 397 of 15 June 2010.

### c. Terms and procedures regulated by the Law on the Organisation and Operation of the Constitutional Court

For instance, in the *Russian Federation*, Article 80 of the Federal Constitutional Law "on the Constitutional Court of the Russian Federation" regulates this issue as follows. In the event that a provision of a federal constitutional law or a federal law (or several such provisions) has been found unconstitutional in its entirety or partially by a decision of the Constitutional Court, or if a need to eliminate a lacunae in legal regulation proceeds from a decision of the Constitutional Court, the Government of the Russian Federation shall, not later than three months after publication of the decision of the Constitutional Court, introduce to the State Duma a new draft federal constitutional law, or a new draft federal law, or several linked new draft laws, or a draft law amending the law found partially unconstitutional. The said draft laws shall be considered by the State Duma extraordinarily. If a provision of a normative act of the Government of the Russian Federation has been found unconstitutional in its entirety or partially by a decision of the Constitutional Court, or if a need to eliminate a lacunae in legal regulation proceeds from a decision of the Constitutional Court, the Government of the Russian Federation shall, not later than two months after publication of the decision of the Constitutional Court, abrogate its normative act and either adopt a new normative act or introduce amendments and/or supplements to the normative act found partially unconstitutional.

In the *Republic of Moldova*, according to Article 28.1<sup>1</sup> of the Law, the Government, within maximum 3 months from the publication date of the Constitutional Court's decision, submits to the Parliament the draft law amending and supplementing or repealing a normative act or its parts that were declared unconstitutional. The draft law shall be examined by the Parliament on a priority basis. Paragraph 2 of the same article sets forth that the President of the Republic of Moldova or the Government, within maximum 2 months from the publication date of the Constitutional Court's decision, shall amend and supplement or repeal the act or its parts declared unconstitutional and, as applicable, shall issue or adopt a new act. In the event that the Constitutional Court, in examining a case, confirms the existence of gaps in the legislation, due to failure to observe specific provisions of the Constitution, it shall first draw the attention of the relevant bodies, through a letter. The Constitutional Court's observations regarding the gaps (omissions) existing in norms due to the non-observance of certain constitutional provisions, as are mentioned in its letter, are to be examined by the authority concerned, which shall duly inform the Constitutional Court on the examination results, within maximum 3 months.

### d. Terms and procedures regulated by other special laws

In Romania, Law no. 590/2003 on Treaties<sup>7</sup> specifies that if the Constitutional Court, in fulfilling its review powers, decides that the provisions of a treaty which is in force are unconstitutional, the Ministry of Foreign Affairs, together with the ministry or institution under whose jurisdiction falls the main area regulated by that treaty, shall take steps, within 30 days, to initiate the necessary procedures for the treaty renegotiation or validity termination as against the Romanian party or, as applicable, for the revision of the Constitution.

### e. Terms set by the Constitutional Court decisions

The Constitutional Court of the Republic of Slovenia, if it finds that a law, other regulation or a general act issued for the exercise of public authority is unconstitutional or unlawful as it does not regulate a certain issue which it should regulate or it regulates such in a manner which does not enable annulment or abrogation, adopts a declaratory decision on such. The legislature (or the authority which issued such unconstitutional or unlawful regulation or general act issued for the exercise of public authority) must remedy the established unconstitutionality or unlawfulness within a period of time determined by the Constitutional Court. The time limit determined by the Constitutional Court depends on the circumstances of the case at issue, and may be a six-month or one-year period in which the legislature must remedy the unconstitutionality or unlawfulness.

In the *Republic of Belarus*, the Constitutional Court, in some of its decisions, set a term for their execution.

In *Hungary*, within the *ex post facto* review, if the Constitutional Court establishes, *ex officio* or upon anyone's petition that a legislative organ failed to fulfil its legislative tasks issuing from its lawful authority, thereby bringing about the unconstitutionality, it instructs the organ which committed the omission, setting a deadline, to fulfil its task. The Act on the Constitutional Court does not contain sanction, it only prescribes that the organ which committed the omission shall fulfil the task by. The Act on the Constitutional Court does not contain sanction, it only prescribes that the organ which committed the omission shall fulfil the task by deadline. Furthermore, the Act on the Constitutional Court renders possible that the Constitutional Court may set a different time for an unconstitutional law to become ineffective or for its applicability in a particular case, if this is

<sup>7</sup> Published in the Official Gazette of Romania, Part I, no. 23 of 12 January 2004

justified by the interest in legal certainty or a particularly important interest of the entity initiating the proceedings.

Similarly, in the *Czech Republic*, the Act on the Constitutional Court provides that its judgments are enforceable on the day they are published in the Collection of Laws, unless the Constitutional Court decides otherwise. Thus, in order for the Constitutional Court to limit the creation of gaps mentioned above, it often defers the enforceability of its judgments, in order to provide the legislature sufficient time to adopt a new legal regulation that will reflect the Constitutional Court's decision and remove the unconstitutional state of affairs. If the Constitutional Court decides to postpone the enforceability of a judgment in which it annuls a legal regulation or part thereof, its decision on the length of such deferment is influenced primarily by considerations of the complexity of the legal framework to be replaced and the complexity of the legislative process. In general, enforceability can be deferred for up to 18 months.

In *Austria*, the Constitutional Court may set a deadline for the respective normative legal act's expiration which must not exceed 18 months. The normative legal act continues to apply to circumstances realised before the repeal (with the exception of the case that gave reason for it), unless the Constitutional Court in its judgment decides otherwise.

In *Poland*, for the similar reasons as mentioned above, the Tribunal may defer the date at which the provision, on the unconstitutionality (illegality) of which the Tribunal has adjudicated, loses its binding force [the first sentence *in fine* of Article 190.3 of the Constitution]. In the case of laws, such period of deferment may not exceed 18 months, counted from the day of publication of the relevant judgement, and with regard to other types of normative acts under examination – it may be no longer than 12. The report also mentions a special procedure that has only been set out in the Rules and Regulations of the Senate. In accordance with that procedure, judgements of the Tribunal are referred, by the Marshal of the Senate, to the Senate Legislation Committee. Next the Committee examines whether it is necessary to take legislative measures in the given area (e.g. in order to eliminate gaps and inconsistencies in the legal system). After considering the matter, the Committee submits, to the Marshal of the Senate, a motion to adopt a legislative initiative or informs the Marshal of the Senate that there is no necessity for taking legislative measures. On the basis of the motion of the Legislation Committee, the Senate may refer an appropriate legislative initiative to the Sejm. However, the Sejm may reject the initiative of the Senate.

In order to draw the legislator's attention to the need for amending defective normative solutions, the Tribunal additionally is entitled to: express, in the reasoning for its judgement, the need for enacting amendments which would restore the integrity of the legal system; to issue signalling decisions and to include relevant observations in the annual publication entitled "*Information on Substantial Problems Arising from the Activities and Jurisprudence of the Constitutional Tribunal*".

In the same way, in *Bosnia and Herzegovina*, according to the Rules of the Constitutional Court, a time-limit may be set for the harmonisation of the law which is declared unconstitutional by the Constitutional Court, which shall not exceed 6 months.

In *Latvia*, when the Court recognises a contested norm or act as null and void as from a certain date in future, it may establish another date when contested norms recognised as non-constitutional lose force. The Court usually gives the legislator time to solve the situation if immediate repealing of the norm would cause a worse or inadmissible situation. Usually the legislator is given the term of 6 months to prevent all deficiencies established.

In *Turkey*, the provisions of the laws that have been annulled by the Constitutional Court cease producing effects as from the publication date of the motivated annulment decision in the Official Journal. If the Court deems necessary, it may also decide the date on which the annulment decision comes into force, a date that may not be later than one year from the publication date of the decision in the Official Journal.

In *Ukraine*, where necessary, the Constitutional Court may determine in its decision or opinion the procedure and terms of their execution and oblige appropriate state bodies to ensure execution of the decision or adherence to the opinion. Also, in accordance with Article 70.3 of the Law of Ukraine "On the Constitutional Court of Ukraine" the Constitutional Court has the right to demand from bodies stated in this Article a written confirmation of execution of the decision or adherence to the opinion of the Court.

## **6.b) Parliament can invalidate the Constitutional Court's decision: specify conditions**

The Constitutions of the various States or their infra-constitutional legislation do not confer to either Parliament or to any other public authority the competence to invalidate decisions of the Constitutional Courts.

In some cases there had existed such a possibility for the Parliament, but that was eliminated, and the Constitution amended in that sense. In *Poland*, for example, in the period from 1985 (the year of establishing the Constitutional Tribunal) until 1997 (the year of enactment of the present Constitution) the judgments of the Tribunal could be subject to rejection by the Sejm. This was a consequence of the assumption, adopted in the communist doctrine of the constitutional law, that the Sejm was the supreme organ in the area of state authority, superior to all other state bodies (including courts and tribunals). The situation changed with the entry into force of the Constitution of 1997. The situation changed with the entry into force of the Constitution of 1997. Since then the Sejm has had no power to reject the Tribunal's judgements. In accordance with Article 190(1) of the Constitution of 1997, all judgments of the Tribunal have become final in the sense that they may not be challenged or rejected by any other organ of public authority. They are of universally binding application. Similarly, in *Romania*, that possibility was provided by the 1991 Constitution which, prior to its revision in 2003, established, in Article 145.1, that "*In unconstitutionality situations confirmed in compliance with Article 144, letters a) and b), the law or regulation shall be sent for re-examination. If the law is adopted in the same form by a majority of at least two thirds of the number of members of each Chamber, the unconstitutionality objection is eliminated, and promulgation becomes mandatory*". Following the 2003 revision of the Constitution, the possibility for Parliament to invalidate a decision of the Constitutional Court was eliminated, so that all decisions of the Constitutional Court are, according to Article 147.4 of the Constitution, generally binding.

As shown in some of the reports, even though Parliament is not conferred the competence to invalidate a decision of the Constitutional Court, it may nonetheless, in exercising its constituent powers, revise the Basic Law in such manner as to allow to overcome the effects of a decision of the court of constitutional jurisdiction. For example, in *Slovenia*, the Constitutional Court held in Decision no. U-I-12/97, dated 8 October 1998, that the legislature must enact a majority voting system for elections of deputies to the National Assembly in accordance with the outcome of the referendum, and the National Assembly subsequently amended Article 80 of the Constitution and determined that the deputies are elected on the basis of the principle of proportional representation (i.e. by means of a proportional voting system). The *Spanish* Constitutional Tribunal stated in 1992 that the right granted to European citizens under the Treaty of the European Union – signed in Maastricht, to be elected to the governing organs of the local communities was contrary to the Spanish Constitution. In order to be able

to ratify the Treaty of Maastricht, the Parliament had to revise the constitutional provisions. In that regard, the Constitutional Court of *Austria* mentions that, in principle, Parliament cannot invalidate a decision of the Constitutional Court, it may, however, enact a new law which might possibly be unconstitutional as well. In this case, the Constitutional Court may review the law again. Since compared to other states, the Austrian Constitution can be easily amended (the only requirement are the presence of at least half of the members of the National Council and a two thirds majority of the votes cast), there occurred in the past that Parliament (re)enacted a repealed law again in the form of a law amending the Constitution. This practice has been criticised repeatedly by legal doctrine and does not occur often (any more). However, in such a case the Constitutional Court also examines whether the constitutional law possibly entails a total revision of the Constitution.

Particular aspects are stressed upon in the report of the Constitutional Tribunal of *Spain*, which makes a distinction in what concerns the possibility that Parliament invalidates its decisions, based on the object of the constitutionality review or on the ground for unconstitutionality. In that sense, when the Constitutional Tribunal does not declare that the law, but its interpretation and application by the courts is contrary to the Constitution, it is always possible to revise the laws that gave rise to such disaccord in case-law, and the new law may specifically establish the norm that the judicial organs had deducted from previous legislation. Also, if the Constitutional Tribunal declares nullity on grounds related to formal flaws (competence or procedure) or if it interprets a law in its sense according to the Constitution, its decision does not prevent the legislature to amend the law, with the procedure prescribed by the Constitution. Therefore, in such cases, it is possible that the legislature establish a norm different from the one deducted by the Constitutional Tribunal from a previous reading of the law, in light of the Constitution.

## **7. Are there institutionalised co-operation mechanisms between the Constitutional Court and other bodies? If so, what is the nature of such contacts/what functions and powers are exercised on both sides?**

### **7.1. General aspects**

Having examined the institutionalised cooperation mechanisms between the Constitutional Court and other bodies, as revealed by the reports which confirm the existence of such leverage, it can be



noted that, in essence, they envisage either application of conjunct competencies, as are established by the Constitution and laws, or individual duties and prerogatives of a specific body or authority or, in a broader sense, the area of research or international collaboration.

The following are mentioned as institutionalised cooperation mechanisms, in relationship to: creation of the Constitutional Court; procedure before the Constitutional Court; other cooperation forms with various bodies in fulfilling their competencies; optimisation of the legal order; participation of the Court, its judges or President as members in various bodies or organisations.

## 7.2. Creation of the Constitutional Court

Judges of the Constitutional Courts are appointed or elected by State authorities, according to a specific procedure,<sup>8</sup> which is regulated by the Constitution or by the Law on the Organisation and Operation of the Constitutional Court.

## 7.3. Participation in the procedure before the Constitutional Court within the exercise of its powers

Such implication materialises in:

a) referral to the Constitutional Court by the bodies established under the Constitution or law, respectively, in order to review constitutionality of specific legal norms<sup>9</sup>; in this context, one should underline the specific form of collaboration existing between the Constitutional Court and the courts of ordinary jurisdiction in the procedure concerning exceptions of unconstitutionality, as emphasised, for example, in the reports of the Constitutional Court of *Italy*, and *Romania*);

b) referral to the Constitutional Court for exercising another of its prerogatives (for example, in *Belarus*, upon referral by the President of the Republic, the Constitutional Court presents its conclusions in relation to the existence of acts of blatant systematic violation of the Constitution by the Chambers of the National Assembly. When referred by the Presidium of the Council of the Republic of the National Assembly, the Constitutional Court shall also decide upon the existence of acts of blatant systematic violation of the provisions of laws by the local

councils; in *Slovakia*, the Constitutional Court conducts the disciplinary procedure against the President of the Supreme Court of the Republic of Slovakia, the Vice-president of the Supreme Court and the General Prosecutor; also, it gives a consultative approval for the initiation of criminal proceedings against or preventive arrest of a judge or of the General Prosecutor; in *Ukraine*, the bodies of the state power set forth by law and bodies of local autonomy may apprise the Constitutional Court in respect of issues of official interpretation of the Constitution and laws of Ukraine; also, the *Verkhovna Rada* of Ukraine is entitled to a constitutional petition on issues of observance of the constitutional procedure of investigation and consideration of case of the removal of the President of Ukraine from office in order of *impeachment*;

c) filing of memoranda or opinions in cases pending before the Constitutional Court, upon request/notification by the Court (for example, *Belgium*, *the Republic of Macedonia*, *Romania*, *Serbia*);

d) participation, in determined cases, in proceedings before the Court (for example, in the *Republic of Macedonia*, in the procedure upon a request for the protection of the freedoms and rights, the Constitutional Court compulsory summons the Ombudsman at the public debate, and upon need it may also summon other persons, bodies or organisations; in *Portugal*, the General Prosecutor participates in the procedures before the Tribunal, as may be appropriate in a specific case; in the *Russian Federation*, there are plenipotentiary representatives of the President of the Russian Federation, the Federation's Council, the State Duma, the Government of the Russian Federation, the Ministry of Justice of the Russian Federation and of the General Prosecutor's Office of the Russian Federation who participate in the proceedings conducted before the Constitutional Court);

e) the obligation of public authorities and any other persons to provide, upon request by the Constitutional Court, information, documents or deeds held by them, as required by the Constitutional Court in order to fulfil its powers (for example, *Armenia*, *the Republic of Macedonia*, *the Republic of Moldova*, *Portugal*, *Romania*, *the Russian Federation*, *Slovakia*, *Ukraine*).

In some cases, the information so requested may concern even the manner of interpretation of a legal norm, in jurisprudence or in the legal doctrine – thus, in countries such as *Portugal*, the Constitutional Tribunal may demand information concerning the interpretation of the legal provisions subject to review in the case-law of the Supreme Court and the Superior Administrative Court. In *Romania*, the

<sup>8</sup> See the answer to question 1 of the Questionnaire.

<sup>9</sup> See the answer to question 3 of the Questionnaire.

Regulations on the Organisation and Operation of the Constitutional Court establish that the judge-rapporteur may request specialised consultancy from individuals or institutions, based on prior approval from the President of the Court.

#### 7.4. Other forms of cooperation with various bodies, in fulfilment of their duties and prerogatives

The following can be enumerated:

a) cooperation with the Government Agent representing the State in the proceedings before the European Court of Human Rights, in compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms, where the respective State is a party (providing of information, documents or copies of the requested documents, drafting of conclusions and reports in order to answer *de facto* and *de jure* matters related to the alleged violation of the Convention, organisation of direct consultations – see for this purpose the report of the Constitutional Court of the *Czech Republic*);

b) relations with the administration in charge of publication of the Official Gazette of the State, in view of fulfilling the duty for the official publication of the decisions (thus, in *Spain*, the Constitutional Tribunal cooperates with the Ministry of the Presidency [the Government], to which the Official Journal State Agency is subordinated, but also directly with the Agency. Ever since 1982, the Tribunal has concluded collaboration agreements with the body that ensures publication of the State's Official Journal, in order to arrange dissemination of the constitutional doctrine;

c) obligation of the Constitutional Court to inform/communicate its rendered decisions to the authorities established by law (for example, *Belgium*, *Switzerland*, *Romania*);

d) obligation of State authorities to enforce decisions of the Constitutional Court (for example, in *Croatia*, Article 31.3 of the Constitutional Act on the Constitutional Court, which specifies that "*The Government of the Republic of Croatia ensures, through its central administration bodies, enforcement of the decisions and rulings of the Constitutional Court*".

e) approval of the Constitutional Court's budget<sup>10</sup>.

#### 7.5. Cooperation mechanisms aimed at optimisation of the legal order

For example, in *Armenia*, according to Article 67 of the Law of the Republic of Armenia "On the Constitutional Court", the Court publishes a report about the situation on executing its decisions at the end of each year. It is sent to the relevant state and local self-government bodies.<sup>11</sup>

In *Belarus*, one of the forms of cooperation of the Constitutional Court with the President and the Legislative is the Court's annual message on constitutional legality in the State, which is adopted on the basis of verified materials. Such messages foster the optimisation of legal order; moreover, with a view to either fill gaps and settle conflicts of law as well as provide for optimum legal regulation or establish unified law-enforcement the Constitutional Court is entitled to submit proposals to the President, the Houses of Parliament, the Government and other state authorities according to their competence on the required changes and (or) additions to acts of legislation or on the adoption of new normative legal, respectively.

The *Swiss Federal Supreme Court* drafts an annual management report intended for the Parliament, which also contains a section entitled "Indications to the attention of the legislature." In this section, the Tribunal may flag the inconsistencies existing in legislation or its findings regarding the unconstitutionality of federal norms. The report is then taken to discussion in the specialised commissions of Parliament, which may subsequently initiate the necessary legislative amendments, in order to harmonise the provisions of these federal norms with the Constitution.

In *Germany*, following a long-standing tradition, the Federal Constitutional Court meets at roughly two-year intervals with the Federal Government and meets the Presidium of the *Bundestag* and the chairpersons of the parliamentary groups in the *Bundestag* for a general exchange of information once per legislative term; however, it is very closely observed that ongoing or foreseeable sets of proceedings and legal issues relating to such sets of proceedings are not discussed at these meetings.

<sup>10</sup> See the answer to Question no. 2 of the Questionnaire

<sup>11</sup> It should be mentioned that the RA National Assembly has formed a separate working group (of Deputies) to prepare suggestions on necessary legislative amendments based on the decisions rendered by the Constitutional Court.

In *Serbia*, according to Article 105 of the Law on Constitutional Court, “*The Constitutional Court shall bring to the knowledge of the National Assembly the situations and issues occurred in ensuring constitutionality and legality in the Republic of Serbia, shall issue opinions and shall indicate those cases where adoption and amendment of legislation is necessary or any other steps required for defending constitutionality and legality*”.

### **7.6. Participation of the Court, its judges or its President as members in various bodies or organisations, as applicable**

For example, in *Estonia*, the Chief Justice of the Supreme Court is a member of the Council for Administration of Courts. The Council attends to with general issues of the administration of justice and issues of the courts of the first and second rank, but does not decide or discuss matters concerning the Supreme Court or the Constitutional Review Chamber.

In *Romania*, according to the provisions of Article 48 of the Regulations on the Organisation and Operation of the Constitutional Court, the Court establishes cooperation relations with similar authorities from abroad and may become a member of international organisations in the area of constitutional justice.

### **7.7. Other forms of cooperation**

In their reports, some Constitutional Courts<sup>12</sup> (*Albania, Andorra, Cyprus, Croatia, Luxembourg, France, Ireland, Lithuania, Latvia, Turkey*) point to the fact that normative acts have not established any institutionalised cooperation mechanisms between the Constitutional Court and other bodies.

This notwithstanding, certain forms of cooperation with other institutions or unofficial contacts among institutions have been mentioned, such as, for example, those set forth in point 5 of Article 46 of the Law on the Constitutional Court of the *Republic of Armenia*, according to which, “*Representatives of the President of the Republic, of the National Assembly, of the Government, and of the Court of Cassation, of the Ombudsman, or of the Chief Prosecutor interested in participating in sessions of the Constitutional Court, may submit an application for this purpose to the Constitutional Court and may receive the documents and deeds of the case under review in advance. Also, they may bring clarifications related to the questions asked by the Constitutional*

*Court in a status of invitees to the case hearing*”; in *Azerbaijan*, close contacts between the Constitutional Court and the Ombudsman of the Republic; in *France*, the memoranda of understanding with State authorities (the Presidency of the Republic, the Prime Minister, the Presidency of the National Assembly, and the Presidency of the Senate), which allow for an electronic exchange of documents within proceedings of referral and notification of the file items and of the decisions; while in *Turkey*, occasional cooperation of the Constitutional Court with a series of national public bodies, including the Judicial Academy, universities, some international organisations and other high courts (the High Court of Appeals, the Council of State), contacts that are limited, in general, to symposiums, specific projects etc.



<sup>12</sup> Supreme Courts, or Constitutional Council, as applicable.

## II. RESOLUTION OF ORGANIC LITIGATIONS BY THE CONSTITUTIONAL COURT

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### Introduction

Each Constitution, as the basic law of a State, has the specific regulatory object of organising public powers and regulating the relationships between them, by establishing the State's bodies, by establishing both their composition and the appointment procedures and by establishing the jurisdiction of public authorities and the relationships between them. As Thomas Paine<sup>13</sup> stated, "A Constitution precedes a government; a government is only a brainchild of the constitution," and a constitution establishing a governing also commands both substantial and procedural limits in the exercise of power by such government.

In exercising the duties and jurisdiction specific to the unitary or federal character of the State, such State bodies may, vertically or horizontally, generate legal disputes resulting from legal acts or from the deeds, actions or omissions thereof. As mentioned in Germany's Report, the resolution of disputes between organs (*Organstreit*) is not intended to reconcile subjective rights but rather to clarify the jurisdiction system set up by the Constitution.

In most States, such legal disputes are settled by the Constitutional Courts except for the following states: *Denmark*, *Ireland*<sup>14</sup>, *Luxembourg*, *Monaco*<sup>15</sup>, *Norway* and *Turkey*, where such a procedure does not exist.

The analysis of all national reports shows that the control exercised by the Constitutional Court as regards legal disputes between authorities is not intended to secure their rights but to settle such disputes primarily in order to ensure compliance of the State bodies' conduct with their jurisdiction as

<sup>13</sup> Writings of Thomas Paine, Vol.II (1779-1792): The Rights of Man, p.93

<sup>14</sup> Its Report points out that, if the Government, a state body or a public body exceeds its constitutional or legal responsibilities, any person injured by the act issued by such body may turn to the courts of law.

<sup>15</sup> Where the relationships between the Prince, the Government and the National Council are "government acts," therefore they are exempted from any jurisdictional control.

stipulated in the Constitution, for a good functioning of the State based on the separation of its powers and, finally, for safeguarding the supremacy of the Constitution in a State governed by the rule of law.

### 1. What are the main characteristics of the organic litigations (legal disputes of a constitutional nature between public authorities)?

In the States where the Constitutional Court settles legal disputes between institutions, the following main features can be identified depending upon the nature, object, parties and legal grounds of the dispute as well as upon the character of the constitutionality review:

a) As regards the nature of the dispute, it has to be a *legal dispute*, not a political one. Therefore, in all States, the settlement of institutional disputes is not a political, but a jurisdictional procedure. For instance, in *Germany*<sup>16</sup>, the political minority uses the settlement procedure of the litigation between constitutional bodies in the attempt of asserting its rights against the majority, the disputes between organs being a crucial instrument of the opposition; in *Lithuania*, the submission of such applications to the Constitutional Court is sometimes used as a legal instrument of political struggle, for instance whenever the opposition seeks to prove that the governing forces adopt acts contrary to constitutional norms or when it seeks to prevent the adoption of certain decisions.

b) As regards the object of the dispute, the analysis of the reports reveals the necessity to make a classification according to the structure of the public authority in that State and the specific ties between the "whole" and its "parts," as follows:

- in the case of a unitary state, there may be:

- *disputes of jurisdiction – horizontally* – between the State bodies. They can be *positive* (when one or several authorities assume powers, duties or jurisdiction incumbent on other bodies) or *negative* (when public authorities decline their jurisdiction or refuse to carry out actions that are amongst their duties), these being the most common ones, which occur in all States, for instance in *Portugal*, *Serbia*, *Slovenia*, *Slovakia* and *Ukraine*;

<sup>16</sup> According to the Federal Constitutional Court, the dispute between organs procedure is intended to protect the rights of the state organs in their relationships with one another, but not in terms of general constitutional "supervision" (BVerfGE 100, 266 <268>).

- *disputes of jurisdiction – vertically* – between central State bodies and regions, or disputes between regions in *Italy*, or disputes of jurisdiction between central bodies and local autonomous entities, in the *Czech Republic, Montenegro, Serbia, Ukraine*;
- *disputes related to the defence of local autonomy*; it is the case of *Croatia*, where each local or regional autonomous entity may turn to the Court whenever the State, by its decision, infringes the right to local or regional autonomy secured by the Constitution<sup>17</sup>; furthermore, Article 161 of *Spain's* Constitution regulates the disputes for the defence of local autonomy or statutory autonomy, which allows the Municipalities, General Councils or other local bodies to defend their autonomy against the laws of the State or of own Autonomous Communities<sup>18</sup>.
- in the case of a federative State, there may be *federal disputes* (between the State and the bodies of the entities – communities/regions/ cantons/lands) or between the bodies of the entities themselves, as well as *legal disputes/institutional disputes at the state level* – between the federative State's institutions. This is the case of *Austria, Belgium, Bosnia and Herzegovina, Germany, Russia and Switzerland*.

Another feature regarding the object of legal disputes between state bodies – in the States where the Constitutional Court has an express duty thereupon – is that such cannot envisage violations of fundamental rights and cannot serve as an avenue in order to exercise the constitutionality review of normative acts. This is the case with *Germany*<sup>19</sup>, *Ukraine, Romania, Italy and the Czech Republic*. Excepted from this rule are *Bosnia and Herzegovina, Albania and Ukraine*.

From among other States, in which the Constitutional Court indirectly sees to the observance of the rules of separation of competencies *via* the constitutionality review, *Portugal's* example is noteworthy, because tends to avoid that the Constitutional Court should turn

<sup>17</sup> In addition, if the representative body of a local or regional autonomous entity considers that a law regulating the organisation, responsibilities or financing of local and regional autonomous entities does not comply with the Constitution, it can appeal to the Constitutional Court to examine the constitutionality of the law or provisions thereof.

<sup>18</sup> The recent Organic Law 1/2010 dated February 1 also stipulates the possibility of settling a dispute for the defence of the statutory autonomy of the historical territories of the Basque Autonomous Community;

<sup>19</sup> For this there is an abstract control of laws, initiated as per Article 93.1 no. 2 of the Fundamental Law corroborated with §§ 13 no. 6 and 76 and the following of the Law of the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz* – BVerfGG), upon the request of the Federal Government, of a *Land* government or of one-third of the *Bundestag* members.

itself into a super-court authorised to regulate State institutions or into an arbitrator.

Also a feature related to the object of the dispute is that, in most of the States, such procedures cannot handle conflicts of jurisdiction. For instance, in *Spain* the disputes opposing the executive authorities to the ordinary courts have a specific means for settlement, i.e. the jurisdiction conflicts which are settled by the Tribunal for Jurisdiction Disputes<sup>20</sup>. In the *Czech Republic*, such jurisdictional disputes concerning authority to decide/issue a resolution, where the parties involved are courts and autonomous, executive, territorial, interest-based or professional bodies, or courts in civil proceedings and administrative courts, shall be examined and settled by a special panel made up of three judges from the Supreme Court and three judges from the Supreme Administrative Court. An exception from this rule can be seen in *Slovenia*, where the Constitutional Court decides upon jurisdictional disputes between courts and other state authorities, and in the *Republic of Macedonia*.

c) As regards parties to the dispute, they always have to be State bodies. However, depending upon the structure of the public power in the State and also the type of dispute, these may be central state bodies (in *Italy, Germany, the Republic of Macedonia, Montenegro, Poland, Serbia, Slovakia*), local bodies (*Romania, the Republic of Macedonia and Slovakia*), autonomous territorial bodies (*Spain, Croatia, Italy, Serbia, the Czech Republic, Ukraine*) or the bodies of the entities in federative states (in *Russia, Germany, Switzerland and Bosnia and Herzegovina*).

Furthermore, while in some countries such as *Andorra and Albania* any constitutional organs can be a party in the dispute, in other countries such as *Poland* only central state bodies can.

d) As regards the legal grounds of the dispute, it must be noted that in all States it takes a relationship under constitutional law which exists between the parties. Therefore, the dispute has to derive from powers stipulated in the Constitution or from the interpretation of constitutional provisions. For instance, in *Germany*<sup>21</sup>, *Lithuania, Slovenia and Romania*.

<sup>20</sup> Presided over by the Chief Justice of the Supreme Court and consisting of an equal number of Supreme Court magistrates and permanent councillors of the State Council (Resolution TC 56/1990 dated March 29, F J 37).

<sup>21</sup> In case of a dispute between organs, the Federal Constitutional Court decides upon the interpretation of the Constitution. Even when the decision is essentially given to settle the dispute between organs, the Federal Constitutional Court may, by the same decision, also decide upon a legal matter relevant for the

e) As regards the character of the control exercised by the Constitutional Court, from the analysis of all reports it can be seen that such is a concrete, not an abstract one, that the authors of the complaint must have a current and concrete interest in its resolution (*Italy, Latvia, Slovenia and Germany*). Furthermore, *Poland's* Report points out that the dispute must be real, and it may not have a merely hypothetical character.

## 1. Whether the Constitutional Court is competent to resolve such disputes.

In the majority of States the Constitutional Court has, pursuant to the Constitution, the jurisdiction to settle legal disputes of a constitutional nature. In the case of *Albania, Andorra*<sup>22</sup>, *Azerbaijan, Cyprus*<sup>23</sup>, *Croatia, Spain, Georgia, Italy*<sup>24</sup>, *Hungary, the Republic of Macedonia, Poland, Russia, Serbia*<sup>25</sup>, *Slovakia, Slovenia, the Czech Republic and Ukraine*, the Constitutional Court is empowered to settle *disputes of jurisdiction*. They can be: positive or negative, and can occur both horizontally (between central, legislative, executive and legal powers) and vertically (between central powers and local powers).

A special situation exists in *Belgium*, where the Constitutional Court has the power to settle only disputes of jurisdiction between the legislative assemblies of the federal State, of communities and of regions.

Moreover, in other states such as *Bosnia and Herzegovina, Italy, Germany*<sup>26</sup>, *Montenegro*<sup>27</sup>, *Romania*<sup>28</sup>, *Slovakia, Switzerland and Ukraine*, the national Constitution establishes the Constitutional Courts' power to examine not only disputes of jurisdiction between State bodies but also *any other*

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interpretation of the provision in the Basic Law to which reference was made (cf. § 67 sentence 3 in BVerfGG).

<sup>22</sup> Pursuant to article 98 letter d) of the Constitution.

<sup>23</sup> Pursuant to article 139 of the Constitution, the Supreme Court pronounces in last instance on the appeals submitted as regards a dispute of jurisdiction between the Chamber of Representatives and the Communal Chambers or between any of them and the bodies or authorities of the Republic.

<sup>24</sup> Pursuant to article 134 of the Constitution, Italy's Constitutional Court may examine and settle the disputes arisen between state powers (for instance, between the legislative and the executive), between central state bodies and a certain region, or between regions.

<sup>25</sup> Pursuant to article 167 par. 2, items 1-4 of the Constitution of the Republic of Serbia.

<sup>26</sup> Pursuant to article 93.1 no. 1 of the Basic Law.

<sup>27</sup> Any infringement of the Constitution.

<sup>28</sup> The Constitutional Court of Romania has held that the Basic Law stipulates the jurisdiction of the Court to settle any constitutional legal dispute arisen between public authorities and not only the disputes of jurisdiction, positive or negative, arisen from them (Decision no.270/2008, published in the Official Gazette of Romania, Part I, no. 290 of 15 April 2008) [http://www.ccr.ro/decisions/pdf/en/2008/D0270\\_08.pdf](http://www.ccr.ro/decisions/pdf/en/2008/D0270_08.pdf).

*disputes arising between them*. Thus, in *Bosnia and Herzegovina*, the Constitutional Court has the jurisdiction to settle positive or negative disputes of jurisdiction or any other litigation arisen in the relationships between the state and the authority of an entity<sup>29</sup> and/or State institutions. In *Croatia* and *Spain*, besides the disputes of jurisdiction, the Croatian Constitutional Court and the Spanish Constitutional Tribunal, respectively, may also settle a dispute for the defence of local autonomy. In the *Czech Republic*, the Constitutional Court extended this concept beyond the positive or negative disputes of jurisdiction. In *Slovakia*, the Constitutional Court adjudicates on any disputes between State bodies as regards the interpretation of the Constitution or of the constitutional laws, as well as on the complaints submitted by the local public administration authorities against an unconstitutional or otherwise unjustified intervention, in matters related to local autonomy, except for the situation when another court has the jurisdiction to offer legal protection.

In *Germany*, the jurisdiction of settling litigations between the bodies of a *Land* lies in principle with the Constitutional Court of that land<sup>30</sup>.

On the other hand, *Armenia, Belarus, Estonia, France, Ireland, Latvia, Lithuania*<sup>31</sup>, *Luxembourg, the Republic of Moldova, Monaco, Norway, Portugal and Turkey* do not have a special prerogative stipulated in the Constitution regarding the jurisdiction of the Constitutional Court to settle such disputes, but in some of these states, i.e. in *Armenia, Belarus, France, Estonia, Latvia, Lithuania, the Republic of Moldova and Portugal*, the Constitutional Court has the possibility to settle such disputes, indirectly, whenever it exercises an *a priori* or *a posteriori* review of the constitutionality of normative acts. Thus, in *Portugal*, the coexistence of several regulatory powers, mainly of several law-making powers deriving from the Portuguese Constitution<sup>32</sup>, also involves the possibility

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<sup>29</sup> Amendment I to the Constitution of Bosnia-Herzegovina, adopted in March 2009, supplemented art. VI with a new paragraph, (4), stipulating that the Constitutional Court of Bosnia and Herzegovina is competent to decide upon any litigation related to the protection of the established status and jurisdiction of the Brčko autonomous district in Bosnia and Herzegovina, litigation that might arise between one or the two entities and the Brčko district or between Bosnia and Herzegovina and the Brčko district, pursuant to the provisions of the Constitution and the sentences given by the Arbitration Tribunal.

<sup>30</sup> Only under exceptional circumstances, when for instance there is no Constitutional Court in a land, litigation between the bodies of that *Land* can be brought to the Federal Constitutional Court, pursuant to Article 93.1 no. 4 of the Basic Law.

<sup>31</sup> Most disputes between authorities refer to the interpretation and implementation of the constitutional principle of the separation of powers in the state.

<sup>32</sup> The autonomous regions of Azores and Madeira have legislative and regulatory autonomy. Local bodies have only regulatory autonomy.

that a body or an entity violates another body's or entity's responsibilities. In *Armenia*, the Constitutional Court is competent to settle only those disputes related to the decision made by electoral commissions on the results of the elections.

Special situations can be encountered in:

- *Austria*, where the Constitutional Court decides: upon the divergent opinions between the Court of Audit and the public administration as regards the interpretation of the legal provisions setting the jurisdiction of the Court of Audit; upon the divergent opinions between the Ombudsman and the federal government or a federal ministry as regards the interpretation of the legal provisions setting the Ombudsman's jurisdiction; upon the disputes of jurisdiction between the Federation and a Land, or between lands, in case both regional authorities claim the same jurisdiction (the so-called positive disputes of jurisdiction); it also decides upon the disputes of jurisdiction between courts of law and administrative authorities as well as between ordinary courts and other jurisdictions, the Constitutional Court included; it is competent to decide whether a legislative or execution act is of the jurisdiction of the Federation or of the lands; it decides whether there are agreements concluded between the Federation and the lands, or between the lands, as well as in connection with the meeting of the requirements under such agreements by the Federation or by the lands; it pronounces on the *impeachment* procedure initiated against the supreme constitutional bodies of the Republic.
- *Latvia*, where although the Constitution does not explicitly establish powers to that effect the Constitutional Court settles institutional disputes as well. Taking into consideration the Constitutional Court's powers, adjudication of such matters can be still commissioned to the Court, in its review proceedings, but only when the contested norm or act refers to (or affects) the relationships between state institutions or bodies.
- *Switzerland*, where the Swiss Federal Supreme Court adjudicates – by way of proceedings in one (single) instance – disputes of jurisdiction between federal authorities and canton authorities and also adjudicates on civil law or public law litigations between the Confederation and cantons or between cantons.

## 1. Which are the public authorities among which such disputes may arise?

Depending upon the structure of the public power in the State and upon the jurisdiction of the Constitutional Court in settling institutional disputes, such disputes may arise as follows:

### A. In case of disputes of jurisdiction, horizontally:

- between the central state bodies: in *Montenegro*, *Poland*<sup>33</sup>, *Romania*, *Serbia*, *Slovakia*, *Spain*<sup>34</sup>, *Italy*<sup>35</sup>, *Ukraine*<sup>36</sup>
- only between legislative, executive and legal powers: in *Azerbaijan* and *Croatia*
- only between various law-making bodies: in *Belgium*
- only between supreme State bodies: in the *Czech Republic*<sup>37</sup> (Chamber of Deputies, Senate, the President, the Government, the Constitutional Court, and – as the case-law shows – the two supreme courts as well).

### B. In case of the disputes of jurisdiction, vertically:

- between central bodies and local bodies: in *Slovakia*, *the Republic of Macedonia*, *Romania*
- between State bodies and autonomous territorial bodies: in *Italy*<sup>38</sup>, *Serbia*, *the Czech Republic*, *Ukraine*, *Montenegro*.

<sup>33</sup> The bodies of local autonomy units as well as the disputes of jurisdiction between their bodies and the central administration bodies are settled by administrative courts, except for the cases when the law stipulates differently (see art. 4 of the August 30, 2002 Law – Law on the procedures in administrative courts).

<sup>34</sup> But not the King of Spain, whose person is inviolable (Article 56 of Spain's Constitution) and, therefore, it is impossible to initiate a dispute or any kind of legal proceedings against him.

<sup>35</sup> In the sense of the dispute settled by the Constitutional Court, state power can also be one of the independent public entities that do not classify in the traditional trichotomy of roles, but does exercise the functions stipulated by the Constitution, in full autonomy and independence. Examples can be given: the Constitutional Court itself, the President of the Republic and the Court of Audit in exercising its audit role.

<sup>36</sup> The President of Ukraine; a number of at least 45 deputies; the Supreme Court of Ukraine; the Human Right Parliamentary Advocate; the Supreme *Rada* of Ukraine; the Supreme *Rada* of the Autonomous Republic of Crimea (article 150 of Ukraine's Constitution).

<sup>37</sup> The dispute of jurisdiction between the Chief Justice of the Supreme Court and the minister of justice as regards authority to appoint a judge at the Supreme Court (case nr. Pl. ÚS 87/06).

<sup>38</sup> Where the main categories of disputes appear, on the one hand, between bodies or subjects of the state apparatus and, on the other hand, between the state and the autonomous

### C. In cases of disputes for the defence of local autonomy:

- between general institutions of the State and the Autonomous Communities: in *Spain*
- between the State and the representative body of a local or regional autonomous entity (when the constitutionality of a law regulating the organisation, jurisdiction or financing of local and regional autonomous units is challenged) or the representative body of a local or regional autonomous unit or the executive power representative in a county, town or municipality (prefect, mayor of the town or of the municipality) if the issue refers to an complaint regarding the infringement of the right to local or regional autonomy, by an individual act issued by the State bodies, in *Croatia*

### D. In case of federative States:

- between the federative State institutions or between the State and the entity bodies or between the bodies of the entities: in *Belgium*, *Bosnia and Herzegovina*<sup>39</sup>, *Russia*<sup>40</sup>, *Germany*<sup>41</sup>, where parties in litigation can be both supreme federal bodies and other participants<sup>42</sup>,

territorial bodies (mainly, the Regions; in theory, also the Provinces and Municipalities can be included here).

<sup>39</sup> Disputes may arise between entities, or between Bosnia and Herzegovina and one or both entities, or between the institutions in Bosnia and Herzegovina.

<sup>40</sup> Pursuant to article 125 of the Constitution of the Russian Federation, such disputes may arise: a) between the federal bodies of the state power; b) between the state power bodies of the Russian Federation and the state power bodies of the entities in the Russian Federation; c) between the higher entities of the state bodies in the entities of the Russian Federation.

<sup>41</sup> Among the supreme federal bodies are the *Bundesrat*, the Federal President, the *Bundestag*, the Federal Government, the Joint Parliamentary Commission (*Gemeinsamer Ausschuss*) and the Federal Assembly (*Bundesversammlung*).

<sup>42</sup> Other parties, in the meaning of § 93.1 no. 1 of the Basic Law, vested with rights of their own by the Basic Law or by the regulations of a supreme federal body, are firstly the sections or subdivisions of the supreme federal bodies. Among them are the presidents of *Bundestag* and *Bundesrat*, the members of the Federal Government, political commissions, parliamentary groups, parliamentary groups in sub-commissions and the groups in the meaning of § 10.4 of the *Bundestag* Regulation (GO-BT) (groups of deputies who associate but do not reach the number required to set up a parliamentary group. On the contrary, it is considered that an occasional majority or minority, coagulated as a simple vote, cannot have the capacity of "party." In *Bundesrat* it is considered that parties in institutional disputes can be the president, presidium, commissions and members of *Bundesrat*, in general, as well as the total number of the members of a *Land* in *Bundesrat*.

The applications for the settlement of institutional disputes by the Federal Constitutional Court have been lately filed mainly by the *Bundestag* parliamentary groups.

- *Switzerland, Austria* (between the Federation and one land or between lands).

In some countries institutional disputes may arise only between constitutional bodies, such as in *Albania*<sup>43</sup>, *Andorra*<sup>44</sup>, *Spain*, *Romania*, while in others they may arise between any State bodies: in *Armenia*<sup>45</sup>, *Cyprus*<sup>46</sup>, *Georgia*, *Montenegro*<sup>47</sup>, *Serbia*.

In *Germany* a special situation is related to the possibility of political parties to become parties to disputes between organs. Thus, the Federal Constitutional Court has however afforded<sup>48</sup> to the parties which are active at federal level in the exercise of their functions a quality as an organ and has upheld this case-law despite being the object of considerable criticism in the literature<sup>49</sup> insofar as the constitutional legal dispute relates to the status of a political party as a subject of political will-formation and the opposing party is another constitutional organ<sup>50</sup>.

Other special situations are to be found in *Serbia* and *Ukraine*, where the Ombudsman can be a party in an institutional dispute, while in *Austria* he is party in the opinion divergence procedure between the Ombudsman and the federal Government or a federal ministry as regards the interpretation of legal provisions setting the Ombudsman's jurisdiction.

As to the Constitutional Court, it can be party in an institutional dispute in *Italy* and the *Czech Republic*, while in *Romania* and *Germany*<sup>51</sup> the Constitutional Court cannot be a party in such a dispute.

<sup>43</sup> By its Decision no. 20/2007 the Constitutional Court of the Republic of Albania held that parties in a dispute of jurisdiction can be a constitutional body, on the one hand, and one of its components, on the other hand, as for instance *at least 1/4 of the number of deputies and Parliament*.

<sup>44</sup> Co-Princes, the General Council, the Government, the Superior Council of Justice and the Communes (which are the representative and administration bodies of "parishes" or *parròquies*, public collectivities with legal personality and the right to adopt local regulations, in keeping with the law, in the form of orders, regulations and decrees.

<sup>45</sup> Institutional disputes may arise not only between constitutional bodies, but also any state bodies.

<sup>46</sup> The Supreme Court pronounces in last instance on the appeals submitted with regard to a dispute of jurisdiction arising between the House of Representatives and the Communal Chambers or any one of them and between any organs of, or authorities of the Republic.

<sup>47</sup> Parliament, the Government, ordinary courts, local public administration authorities and other state authorities.

<sup>48</sup> Basically, by decision, cf. BVerfGE 4, 27 <31>

<sup>49</sup> Cf. Pietzcker, in: *Festschrift 50 Jahre Bundesverfassungsgericht* Vol. I, 2001, 587 <595>

<sup>50</sup> Cf. BVerfGE 66, 107 <115>; 73, 40 <65>; 74, 44 <48 and following.>; 79, 379 <383>).

<sup>51</sup> The Federal Constitutional Court does not act within the state's leadership, it therefore cannot initiate disputes between



**4. Legal acts, facts or actions which may give rise to such litigations: do they relate only to disputes on competence, do they also involve cases when a public authority challenges the constitutionality of an act issued by another public authority? Whether the Constitutional Court has adjudicated such disputes.**

As shown by the majority of the reports, the sources that give rise to constitutional legal disputes can be classified into: a) legal acts and b) actions, measures or omissions.

a) In all the States where the Constitutional Court settles institutional legal disputes, such can be generated by legal acts issued by the public authorities involved in the dispute. Thus, in *Spain* the disputes of jurisdiction can be caused by the provisions, decisions and any kind of acts adopted, issued or made by any authority, by the State or by one of the 17 Autonomous Communities.

In *Bosnia and Herzegovina* the following acts can generate disputes of jurisdiction: the Agreement on the establishment of special parallel relationships between the Federal Republic of Yugoslavia and the Srpska Republic<sup>52</sup>, which caused a dispute of jurisdiction between the State of Bosnia and Herzegovina and one of the two component entities, the Srpska Republic<sup>53</sup>; the Insurance Agency Law in Bosnia and Herzegovina, which generated litigation on the distribution of jurisdiction between the state and the entities.

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organs; Stern, in: *Bonner Kommentar zum GG – Zweitbearbeitung* –, Art. 93, margin no. 92 and following).

<sup>52</sup> See the decision made by the Constitutional Court of Bosnia-Herzegovina No. *U 42/01* dated March 5, 2001.

<sup>53</sup> In particular, the issue was whether the consent of the Parliamentary Assembly of Bosnia and Herzegovina had to be asked for before ratifying the Agreement. In connection with this aspect, the Constitutional Court found that, pursuant to art. III (2) of the BiH Constitution, an agreement regarding the establishment of a special parallel relationship includes a constitutional restriction on the sovereignty and territorial integrity because the agreements with states and international organisations can be concluded (exclusively) with the consent of the Parliamentary Assembly of Bosnia and Herzegovina. Therefore, an agreement setting up special parallel relationships falls under the Constitutional Court's control because the agreements with states and international organisations require the consent of the Parliamentary Assembly. In this case the Constitutional Court decides that the consent of the Parliamentary Assembly is not required to set up special parallel relationships with neighbouring countries and, therefore, the Agreement was concluded in compliance with the Constitution of Bosnia and Herzegovina.

*Romania* indicates as example the decisions rendered by the High Court of Cassation and Justice in cases where, instead of confining itself to clarify the meaning of certain legal regulations or their scope of application, it also decided, while invoking legislative technique or unconstitutionality flaws, to reinstate in vigour norms whose validity had ceased before, being repealed by normative acts issued by the law-making authority, accrued to a legal dispute of a constitutional nature between the judiciary, on the one hand, and the Parliament of Romania and the Romanian Government, on the other hand.<sup>54</sup>

In *Italy* the disputes between the State and Regions can also refer to acts other than those having legal force, such cases being specifically termed as "conflicts of attribution."

In *Montenegro* the Constitutional Court decides upon all forms of "breaches of the Constitution" that were caused occurred by an unconstitutional law, regulation or other general or individual act.

b) Moreover, in all the States where the Constitutional Court settles institutional legal disputes, they can be generated by actions or measures or omissions, materialised or not in legal acts of the public authorities involved in the dispute. Thus, in *Germany*<sup>55</sup> any conduct on the part of the opposing party can be regarded as legally material which is suited to harm the legal status of the applicant. An "act" within the meaning of § 64.1 of the Federal Constitutional Court Act is not restricted to only being one single act, but may also be the issuance of a law or cooperation in an act of creating provisions; the resolution of parliament on the rejection of a legal initiative can also be qualified as an act in the dispute between organs. Also, the issuance of or change to a provision of the Rules of Procedure of the German *Bundestag* may constitute an act within the meaning of § 64.1 of the Federal Constitutional Court Act if it is able to mean that the applicant is currently legally. The application of the Rules of Procedure themselves, by contrast, is not a permissible object of attack in disputes between organs. The rejection of a motion for recognition as a parliamentary group or as a group in the German *Bundestag* according to § 10.4 of the Rules of Procedure of the *Bundestag* also does not constitute

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<sup>54</sup> Decision no. 838/2009, published in Romania's Official Gazette, Part I, no.461 of 3 July 2009.

<sup>55</sup> The subject-matter of disputes between organs is the concrete dispute regarding the competences or the status of constitutional organs. §64.1 sentence 1 of the Federal Constitutional Court Act (BverfGG) defines it in terms of "an act or omission of the opposing party" whereby the applicant's rights and duties stipulated by the Basic Law were harmed or directly endangered. The impugned measure or omission must exist in objective terms and be legally material.

an act which is able to give rise to a dispute between organs. Omission, conversely, means to not carry out an act<sup>56</sup>. A constitutionally relevant omission may, for instance, consist of the Federal President refusing to sign a federal statute, the Federal Government refusing to respond to a parliamentary question or the Federal Government refusing to permit the *Bundestag* or the committee of inquiry to inspect the files.<sup>57</sup>

In *Italy* the disputes between central State bodies and regions or between regions can arise in connection with any type of measure or act, except for the primary ones, for which there is a special procedure: the one for the review of constitutionality of laws. The disputes between State powers (i.e. the executive, legislative and legal powers but also between the State and other bodies) can refer to adopted measures but also to a legally relevant conduct or action which allegedly violates the integrity of the autonomy and independence granted to a certain body by the Constitution. The aforementioned actions can consist of deeds, formalised or not in acts, positive or negative, which lead to a certain result. Inactions, in the mentioned meaning, are also to be included here.

In the *Czech Republic* the disputes of jurisdiction, pursuant to Article 120 par. 1 of the Constitutional Court Law, mean the disputes between state bodies related to the authority to issue decisions, to implement measures or perform other actions in the area specified in the complaint. In the Czech Republic's legal system, the Constitutional Court cannot decide upon other disputes than those related to the actual putting of regulations into practice.

In regard to the second question, one may separate the following situations:

a) In most States, the situations having generated disputes are linked only to the jurisdiction of the public authorities involved.

Thus, if an encroachment of powers arises due to a law, the dispute has to be settled in compliance with the procedure for the constitutional review of normative acts. It is the case of *Andorra* where, if the infringement of powers was caused by a law of the General Council

<sup>56</sup> Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, *Bundesverfassungsgerichtsgesetz*, §64, marginal no. 36. Even more than with a positive action, the issue of legal relevance appears in the case of an omission. Omissions only take on legal consequences if there is a legal obligation to act (Klein, in: Benda/Klein, *Verfassungsprozessrecht*, 2nd ed. 2001, § 26, marginal no. 1025). If this is not the case, the application for the acknowledgement of an unconstitutional omission must be denied as inadmissible because of the lack of admissible subject-matter (BVerfGE 104, 310).

<sup>57</sup> Bethge, in: Maunz/Schmidt-Bleibtreu/Klein/Bethge, *Bundesverfassungsgerichtsgesetz*, § 64, marginal no. 36.

or by a legislative decree of the Government, the dispute must be settled in compliance with the procedure used in the constitutionality review provided in Chapter II of Title IV of the special Law on Constitutional Tribunal, in all its aspects, including that related to the active procedural capacity.

In *Italy* the Court pointed out that it is possible to challenge legislative measures through such avenues only if the measure giving rise to the detriment in question could not be the object of a referral order for proceedings made on an interlocutory basis (an exception of non-constitutionality).<sup>58</sup>

b) The situations having generated legal disputes are also linked to the constitutionality of the act in question. Such situations can be seen in *Albania, Bosnia and Herzegovina, Estonia, Latvia, Lithuania, the Republic of Moldova, Montenegro, Russia and Ukraine*.

In *Albania*, when the settlement of the dispute of jurisdiction refers to acts issued by the bodies in dispute, the Constitutional Court also examines the constitutionality or legality of such acts in order to settle the dispute.<sup>59</sup>

In *Latvia* the institutional disputes are settled only in jurisdictional framework, when the Court pronounces on the compliance of the challenged norm or act with the higher legal rule. Thus, if certain challenged rule is in any way connected to the jurisdiction of an institution, it will be examined in the concrete case.

In *Lithuania*, the majority of the disputes between state institutions, settled by the Constitutional Court, are related to the interpretation and application of the constitutional principle of separation of powers. Such are the petitions requesting to investigate the constitutionality of legal acts wherein the powers of state institutions are entrenched and their interrelations are regulated, in which the principle may be indicated directly or be implicit.

<sup>58</sup> The procedure which represents the "normal" way to challenge a law or enactment, but might be affected by some "bottlenecks" - as defined by the ex-President of the Constitutional Court, Gustavo Zagrebelsky - stemming from the fact that if the Court is to be apprised, the relevant law must be applied in a case, a fact that can be all but taken for granted for certain categories of laws, such as electoral laws, those which allocate funds, etc.

<sup>59</sup> In its decision no. 20 dated 04.05.2007, the Constitutional Court, considering the right of parliamentary minority (1/4 of the deputies) to establish an investigation commission as a "constitutional authority," has ascertained that the decision of the parliament on the refusal to establish such commission had given rise to a conflict of competences. Consequently, it decided to resolve the conflict of competences arisen between the 1/4 of the deputies, on the one hand, and the parliament on the other, repealing on unconstitutional grounds the act that brought about such conflict - *decision of the parliament*.

In the *Republic of Moldova*, the Constitutional Court declared as unconstitutional several Government decisions for having breached upon the principle of the separation of powers. On 5 October 1995 the Constitutional Court examined the Government Decision no. 696 of 30 December 1994 within constitutional review proceedings.

In *Ukraine*, the main characteristic is that such disputes of jurisdiction vary depending upon the object of the petition filed by the subject entitled to address to the Court, concerning the constitutionality of the acts adopted by a body of state power or concerning the official interpretation (usually in systemic connection with the provisions of Ukraine's Constitution). Subject to Article 152 of the Constitution of Ukraine, laws and other legal acts, upon the decision of the Constitutional Court, are declared unconstitutional, in whole or in part, in the event that they do not conform to the Constitution of Ukraine, or if there was a violation of the procedure established by the Constitution of Ukraine for their drafting, adoption or their entry into force. So the Constitutional Court decides on disputes of the constitutional nature between public bodies of state power of Ukraine that are stated in Article 150 of the Constitution of Ukraine regarding issues on the constitutionality of acts of these bodies, including disputes regarding competence as well as those regarding constitutionality of the relevant act.

Special situations can be found in:

- *Serbia*, where institutional disputes brought to the Constitutional Court of Serbia refer to the disputes of jurisdiction between public authorities, but it is possible that an authority in conflict of jurisdiction initiate a review of the constitutionality and legality of a general legal act within the proceedings on a conflict of jurisdiction. In such instances, the Constitutional Court treats the review of the constitutionality and legality of the legal act as a preliminary issue, on which the outcome of the proceedings on the conflict of jurisdiction depends. In such situation, it suspends consideration of the conflict of jurisdiction until the completion of the normative review proceedings. The Constitutional Court may decide to launch the proceedings for the review of a general legal act *ex officio*, in which case it suspends the proceeding on the conflict of jurisdiction until the review proceedings is completed.
- *Slovenia*, where in the settlement of a disputes of jurisdiction the Court can decide *ex officio* to exercise the constitutionality control of the regulation if it considers that this contributes to the settlement of the dispute and can repeal or annul the regulation or the general act issued in

exercising public authority which is found unconstitutional or illegal in that procedure<sup>60</sup>.

- *Switzerland*, where the Swiss Federal Supreme Court cannot be apprised in matters concerning legislation, except in order to decide whether a canton rule usurps the legislative jurisdiction of the Confederation but not the other way round.

## 5. Who is entitled to submit proceedings before the Constitutional Court for the adjudication of such disputes?

The analysis of the reports points to a necessity to classify the entities having the right to apply to the Constitutional Court – depending on whether there is explicit regulation of the Constitutional Court's powers to settle institutional disputes. Hence the following differences can be observed:

A. In the States where the Constitutional Court has the express authority to settle constitutional legal disputes, the following situations can be distinguished:

a) In most of the countries, the entity entitled to approach the Constitutional Court in order to settle an institutional dispute can be any party to the dispute. This is the case, for instance, of *Albania, Bosnia and Herzegovina, Cyprus, Croatia, the Republic of Macedonia, Montenegro, Serbia, Slovenia, Italy, Germany and Russia*.

b) In other states, such as *Azerbaijan, Andorra, Georgia, Spain, Romania, Poland, Slovakia, Ukraine*, the entities having the right to address the Constitutional Court in order to settle an institutional dispute are expressly and restrictively enumerated by the Constitution and/or by laws and they can be both the public authorities placed "at the apex" of the state powers, and the supreme bodies of autonomous entities. Thus, such entities may be:

- the President of the country: in *Azerbaijan, Georgia, Poland, Ukraine, Romania, Slovakia*,
- the King: in *Spain*
- the Chambers of Parliament/the presidents of one Chamber of Parliament / a certain number of MPs: in *Georgia* (one fifth of the Parliament members), *Poland* (the Marshals of the Sejm and of the Senate), *Romania* (one of the presidents of the two Chambers of the Parliament), *Spain*

<sup>60</sup> Article 61 para.4 of the Constitutional Court Law.

(Congress/Senate), *Ukraine* (a number of at least 45 deputies, *Ukraine's* Supreme *Rada* and the Supreme *Rada* of the Autonomous Republic of *Crimea*),

- the Government/the head of the Government: in *Andorra, Georgia, Romania, Poland, Spain, Slovakia, Croatia*
- one fifth of the total number of members of the National Council of the Republic: in *Slovakia*
- the supreme court: in *Poland* (the President of the Supreme Court/ the President of the High Administrative Court), *Ukraine* (the Supreme Court), *Azerbaijan*
- any court of law: in *Slovakia*
- the Prosecutor General/the Prosecutor General's Office: in *Slovakia* and *Azerbaijan*
- the President of the Superior Council of Magistracy or of the General Council of the Judicial Power: in *Romania* and in *Spain*, respectively
- one-fifth of the number of members of the General Council in *Andorra*
- autonomous entities/their supreme bodies: in *Andorra* (the 3 Communes), *Georgia* (supreme representative bodies in Abkhazia and Ajara)
- authorities of local public administration: in *Slovakia*
- the Ombudsman: in *Ukraine* (Human Right Parliamentary Advocate) and *Serbia*

B. In the States where the Constitutional Court does not have the explicit authority to settle constitutional legal disputes but it has the possibility to settle such disputes indirectly when exercising an *a priori* or *a posteriori* control of the constitutionality of normative acts, the entities that have the right to approach the Constitutional Court in order to resolve an institutional dispute are the same public authorities that can lodge an application for reviewing the constitutionality of normative acts. Such situations can be found in *Armenia, Belarus, France, Estonia, Lithuania, the Republic of Moldova* and *Portugal*.

## 6. What procedure is applicable for the adjudication of such a dispute?

In all the States where the Constitutional Court can settle institutional disputes, initiation of proceedings must be made by a written act (application/ complaint/ resolution), which is drawn up in accordance with certain formal requirements, and motivated.

In some States, there is also a time limit set during which such complaint can be lodged: for instance, in *Germany* the application must be made within 6 months after the impugned measure or the omission was has become known; in *Cyprus*, the application has to be filed within 30 days of the date when such power or competence is contested; in *Slovenia* the affected authority has to formulate an application for the settlement of the dispute within 90 days from the date when it discovered that another authority intervened or assumed the jurisdiction.

Moreover, in all States the first procedural step is done in writing.

Special situations can be encountered in *Spain*, where there is an obligation to fulfil a preliminary procedure<sup>61</sup> and in *Azerbaijan*, where the examination of the admissibility of the request is compulsory<sup>62</sup>.

Another special situation is in *Andorra*, where discontinuation of proceedings by either party results in the annulment of the action. In the *Czech Republic*, before the Constitutional Court makes its

<sup>61</sup> Before apprising the Constitutional Tribunal, the body considering that its powers were trespassed against has to address to the body having abusively exercised such powers, and require the repeal of the decision which caused the undue assumption of powers. To this end it has a one-month period from the date of taking knowledge of the decision which generated the dispute. If the body thus notified affirms that it has acted within the limits of the constitutional and legal exercise of its powers, the body which considers that its powers were unduly overtaken will refer the dispute to the Constitutional Tribunal within one month from that date. It can also do so if the notified body has failed to correct its decision within one month of receiving the notification. Proceedings are simple. Having received the seizing application, the Tribunal sends it within ten days to the challenged body, also setting a deadline of one month in order to formulate submissions as may be deemed necessary.

<sup>62</sup> The request concerning the examination into the disputes regarding the separation of powers between legislative, executive and judiciary powers shall be brought, as a rule, to the Panels of Constitutional Court which adopts within 15 days a ruling on admissibility or inadmissibility for examination. The ruling of Panel of Constitutional Court on admissibility or inadmissibility for examination of such request shall be sent on the day of its adoption to the body or official person who submitted the claim. The examination of a request on the merits by Constitutional Court should be commenced within 30 days after its admission for proceedings.

pronouncement, the author of the application – with the consent of the Constitutional Court – is allowed to withdraw it. The Constitutional Court may decide, however, that the interest in settling the disputes of jurisdiction in a particular case exceeds the plaintiff's will, so it will continue the procedure. But when it accepts the withdrawal of the application, it stops the procedure. Furthermore, during the procedure, the Constitutional Court can decide to deny the application if: the settlement of the disputes of jurisdiction lies with another body, pursuant to a special law, or the settlement of the disputes of jurisdiction lies with a body higher than the two bodies between which the disputes of jurisdiction appeared.

In other cases, the Constitutional Court pronounces on the merits of the case, deciding which body is competent to settle the problem having generated the dispute. When the disputes of jurisdiction appeared between a State body and an autonomous region, it decides whether the problem is of the jurisdiction of the State or of the autonomous region.

In *Estonia*, the Supreme Court may suspend with good reason the enforcement of the challenged normative act or a provision thereof, until entry into force of the judgment of the Supreme Court, while in *Croatia* the Constitutional Court can order the suspension of procedures before the bodies in dispute, until its decision. Likewise, in *Italy* the plaintiff is ensured a preliminary protection in the form of an order whereby the challenged act is suspended<sup>63</sup>.

According to the national reports, there are also oral proceedings (hearings) in the following states: *Belarus, Bosnia and Herzegovina, Romania, Poland*<sup>64</sup>, *Italy*<sup>65</sup>. During such procedure evidence is brought and any clarifications needed for the case are made.

<sup>63</sup> The Court can run an investigation as well, which the President of the Court assigns to a judge-rapporteur. Sometimes the investigation is also meant to offer the plaintiff a preliminary protection in the form of an order suspending the challenged act (in the disputes of jurisdiction, this authority has already been recognised by Law no. 87 / 1953; in cases filed directly, suspension of the implementation of a law was approved only by Law no. 131 / 2003).

<sup>64</sup> Mention is made that there is no special procedure for settling institutional disputes, and the same procedure as that for the review of constitutionality / hierarchical conformity of norms has to be followed.

<sup>65</sup> After the investigation is completed, a hearing takes place during which the parties in the dispute can express their opinions, pointing out and integrating, as the case may be, the content of the application or of the initial action, or subsequent conclusions registered around the date of the hearing.

In *Italy* the disputes between State powers show several significant characteristics. The body claiming that its legal authority was violated will apprise the Court, but its application will comprise only the description of facts and probably the responsible act. The Court decides whether the application is admissible; if it is, the Court will establish the body (or bodies) that are to be summoned as defendant. The plaintiff will have the obligation to notify the defendants and to file the application once more with the court registry, together with the proof of the delivery of notifications. From that moment on the dispute between the state powers begins the settlement procedure, which is similar to the one applicable in the constitutionality control and the disputes of responsibilities between the state and the regions. The most important difference is that, with the disputes between state powers, the issuance of a suspending order related to the challenged measure is not possible.

In all States the settlement of the institutional dispute by the Constitutional Court is made in the Plenum, and in all cases the Constitutional Court pronounces an act in writing, which is binding on the parties (such being a decision in *Montenegro, Poland, Italy, Romania, Croatia*), and is published in an official publication (only its operative part is published in Poland).

## 7. What choices are there open for the Constitutional Court in making its decision (judgment)

Depending on whether there is express regulation of the Constitutional Court's powers to settle institutional disputes, the possible solutions are as follows:

A. In the States where the Constitutional Court has express jurisdiction to settle constitutional legal disputes, the following solutions can be distinguished:

a) In the majority of States, the adopted solution can be the annulment/ invalidation/repeal of the act having generated the dispute: in *Albania, Andorra, Azerbaijan*<sup>66</sup>, *Cyprus, Montenegro, Serbia, Slovenia, Ukraine*.

b) In other States the Constitutional Court establishes the competent body to decide on the case. Thus, in *Croatia*, in the case of a positive/negative dispute of jurisdiction, the Constitutional Court pronounces a decision whereby it establishes the competent body to decide on the case. In *Hungary*, before 2005, the Constitutional Court –

<sup>66</sup> The Constitutional Court annulled two Orders issued by the head of the executive in Baku.

either established the competent body and appointed the body bound to take action; or – rejected the application because there was no dispute. In the *Republic of Macedonia* the Constitutional Court establishes the competent body to decide on the case. In *Poland* the Constitutional Tribunal pronounces a decision appointing the competent state body to adopt certain measures or to perform an action (to settle a certain case)<sup>67</sup>. In *Serbia* the Court will pronounce a decision annulling any measures adopted by the authority found to be without jurisdiction. In *Romania* the Constitutional Court can pronounce: the acknowledgement of the existence of a dispute between two or several authorities and its settlement consisting in the conduct to be followed; the acknowledgement of the existence of a dispute and also of its extinction because of having adopted an attitude complying with the Constitution; the acknowledgement of the non-existence of a constitutional legal dispute; the acknowledgement of the Court's lack of jurisdiction in examining certain acts of public authorities; the acknowledgement of the non-admissibility of a request for the settlement of a dispute between state "powers." In the *Czech Republic* the Constitutional Court makes a decision on the merits of the case, establishing which body has authority to settle the problem which the dispute concerns;

c) another solution may be rejection of claim, i.e. the acknowledgement of non-foundedness of the application/complaint, as in *Italy* and *Romania*, where the Constitutional Court can find that a constitutional legal dispute does not exist<sup>68</sup>.

B. In the States where no express jurisdiction has been ascribed to the Constitutional Court to settle constitutional legal disputes but where it has the possibility to settle such disputes, indirectly, when exercising an *a priori* or *a posteriori* review on the

<sup>67</sup> The Tribunal defines the area of that body's jurisdiction and the way they "differ" from other State bodies' jurisdiction (see below the comments on the decision in the case Kpt 2/08). To date, the Tribunal has pronounced only in two cases related to disputes of jurisdiction (cases Kpt 1/08 and Kpt 2/08). In the case Kpt 1/08, the First President of the Supreme Court referred to the Tribunal requesting it to settle a dispute over powers which – in his opinion – arose between the President of the Republic of Poland and the National Council of the Judiciary of Poland (KRS) with regard to appointing judges. In the case Kpt 2/08, the Tribunal dealt with a dispute over powers which arose between the President of the Republic of Poland and the Council of Ministers (the Government) in the context of distribution of powers as regards representing the Republic of Poland at a session of the European Council.

<sup>68</sup> The Constitutional Court of Romania acknowledged its lack of jurisdiction in examining several acts by public authorities (Decision no.872 of 9 October 2007) as well as inadmissibility of a request for the settlement of the dispute between state "powers." (Decision no.988 of 1 October 2008).

constitutionality of normative acts, it may be noted that the Constitutional Court, upon examination on the application or the complaint concerning the unconstitutionality of a particular norm, may pronounce one of the following solutions:

a. it declares the norm as unconstitutional (in its entirety or in part);

b. it declares norm as constitutional;

Such situations can be found in *Albania*, *Belarus*, *Bosnia and Herzegovina*, *Russia*, *Armenia*<sup>69</sup>, *Estonia*, *Ukraine*.

## 8. Ways and means for implementing the Constitutional Court's decision: actions taken by the public authorities concerned afterwards.

In all the States, the decision of the Constitutional Courts on the settlement of institutional disputes is binding.

The analysis of national reports shows that in the majority of cases the public bodies involved in the dispute did comply with the judgment handed down by the Constitutional Court, in consideration of its binding character.

For instance, in *Germany* the provisions of Article 93.1 no. 1 Basic Law in conjunction with § 67.1 sentence 1 of the Federal Constitutional Court Act are conditional, within the interrelationship with the constitutional organs, on the organs observing the finding of unconstitutionality of an act made by the Federal Constitutional Court without the need for the pronouncement of an obligation and its execution. This state of respect (*Interorganrespekt*) between the constitutional organs, emerging from the principle of the rule of law contained in Article 20.3 of the Basic Law and the obligation of the executive and of the legislative to not commit acts that are in breach of the Basic Law, offer a sufficient guarantee that all parties to the proceedings submit to the legal findings of the Federal Constitutional Court.

<sup>69</sup> The Constitutional Court of the Republic of Armenia has recognized the disputed norm unconstitutional within interpretation given to it by the law-enforcement practice (see decisions CCD-844, 07.12.2009, CCD-782, 02.12.2008) or has recognized the disputed norm as constitutional within the legal positions of the Court (see decisions CCD-833, 13.10.2009, CCD-849, 22.12.2009, CCD-852, 19.01.2010, CCD-903, 13.07.2010).

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In most cases there is no special procedure for the enforcement of decisions/rulings made by the Constitutional Courts, e.g. in *Latvia*, *Lithuania*, *Poland*, *Romania*.

As an exception, in *Albania* the execution of the Constitutional Court decisions is ensured by the Council of Ministers through the relevant public administration bodies. Persons who fail to execute the Constitutional Court decisions or hamper their execution, where the action does not constitute a criminal offence, shall be liable to a fine up to 100 thousand *leke* imposed by the President of the Constitutional Court, whose decision is final and constitutes an executive title. Likewise, in *Montenegro*, the Government of the Republic of Montenegro, upon request by the Constitutional Court, secures the enforcement of the decision of the Constitutional Court and pays for that from its budget.

A special situation is to be found in *Croatia*, where the Constitutional Court determines the bodies authorised for the execution of its decisions, as well as the manner of their execution. In determining the manner of the execution of its decisions the Constitutional Court in fact orders the competent bodies to implement general and/or individual measures that could be compared to the measures forced on the responsible contracting states by the European Court of Human Rights.

In *Germany*, the Federal Constitutional Court is also entitled to pronounce a temporary injunction. In such cases, over and above the finding itself, the Court may impose conduct-related obligations on the opposing party; furthermore, where necessary, the Court may also secure the enforcement of its decision via an execution order<sup>70</sup>.



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<sup>70</sup> Voßkuhle, in: v. Mangoldt/Klein/Starck, GG, Vol. 3, 5th ed. 2005, Art. 93, marginal no. 115

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### III. ENFORCEMENT OF THE CONSTITUTIONAL COURT DECISIONS

PUSKÁS Valentin Zoltán, *Judge*

BENKE Károly, *Assistant-magistrate in chief*

#### 1. The Decisions of the Constitutional Court

a) are final;

b) may be appealed, in which case the holders of such right, the terms and the procedure shall be pointed out;

As a matter of principle in all the States, decisions rendered by the Constitutional Courts are final.

*Portugal's* is a particular instance, in that a finding of unconstitutionality made by the Constitutional Tribunal may be defeated in certain conditions. Thus, where an act has been found unconstitutional, the President of the Republic, who has a mandatory suspensive veto, must return it to Parliament. However, his veto can be overridden if Parliament approves it again by a two-thirds majority of the Members present, where that majority is larger than the absolute majority of the Members entitled to vote. Depending on the case, the act may end up again at the President, and he shall promulgate the law or sign the international treaty – or refuse to do so (Articles 279-2 and – of the Constitution of Portugal). In that case, the law or the international treaty cannot be enacted and cannot be applied.

**c/d) cause *erga omnes* / *inter partes litigantes* effects.**

With regard to the binding character of the Constitutional Court decisions, namely in terms of their effects *erga omnes* or *inter partes litigantes*, it should be noted that a decision of unconstitutionality in respect of a normative act will take on *erga omnes* effects in most of the States. Obviously, the situation is quite different in those States having embraced the American model of constitutional review, where either the rule of judicial precedent is applied (*Norway*), or the decision has *erga omnes* effect (*Denmark*).

In order to illustrate these points, but also some specific aspects indicated in the reports from various countries, their respective situation is presented as follows:

- the Federal Constitutional Court decisions, over and above their *inter partes litigantes* character, which is inherent to any court ruling having the *res judicata* authority, are binding for all courts

and for all other public institutions or authorities. The binding effect applies for decisions of the Plenum and for Chamber decisions. However, orders with which a constitutional complaint was not accepted for adjudication are not binding. The *erga omnes* effect of the Constitutional Court decisions is limited and does not extend to private third parties. A complete *erga omnes* effect is taken on by decisions handed down in the proceedings of abstract and concrete review of laws and in constitutional complaint proceedings which target statutes (normative acts). Consequently, only those decisions achieve the force of law with which a legal provision is found to be constitutionally null and void, compatible or incompatible with the Basic Law (*Germany*);

- only rulings made in the *amparo* constitutionality review have *inter partes* effects (*Andorra*);
- in *Austria*, decisions rendered within the constitutional review of general normative acts have *erga omnes* effects, but only for the future, while those concerning individual acts take *inter partes* effects. It may be interesting to note that it lies with the Constitutional Court to declare laws as unconstitutional also retroactively, although in principle non-retroactivity shall apply (unlike *Germany*, where retroactivity is the rule);
- the Constitutional Court has competence to suggest possible ways in order to overcome the unconstitutionality which has been identified. The public authorities and institutions which are the addressees of its decisions must react within the time-limit set by the court for the enforcement and observance of its decisions (*Belarus*);
- in *Estonia*, the Constitutional Court has the power to delay the entry into force of its judgment, which is seen as a limitation of the *erga omnes* effect produced by the decision. Such postponement of the entry into force of the Constitutional Court decision is also to be found in *Georgia* or in *Poland*, but only in *Estonia* this is held as a limitation of the *erga omnes* effect of the judgment;
- the decision whereby the Constitutional Court finds that a legal provision is constitutional in a certain interpretation does not bind judges other than the judge *a quo*, hence one may assume that it only produces *inter partes* effects. However, if the ordinary courts seek to apply the interpretation rejected by the Court, it enables the Court to duplicate its initial rejection decision with a judgment that declares the law as unconstitutional – the so-called system of “double judgment” (in *Italy*);



- in *Latvia*, the binding character of the Court decision translates into the obligatoriness of the decision itself and the interpretation given by the Court to the norm being challenged;
- the binding character of the decisions is doubled by the binding content of the act whereby the Constitutional Court has interpreted the Constitution (*Lithuania*);
- in *Poland*, *Romania* or *Serbia*, the decisions of the Constitutional Courts are generally binding;
- in *Russia*, the *erga omnes* effect of the decision also translates into the fact that it can make grounds for the abrogation by the competent authority of any legal provisions similar to those found unconstitutional. Moreover, the revision of court rulings is possible not only in the concrete case concerned, but also in relation to cases of other persons for which the decision presents interest;
- in *Serbia*, decisions on constitutional appeals which find that an individual act or action breached or deprived the appellant(s) of a constitutionally guaranteed human or minority right may also apply to individuals who have not filed an appeal if they are in the same situation. However, if such connection cannot be proven, the decision shall keep to its *inter partes* character;
- in *Slovenia*, even though the decisions handed down on constitutional complaints have *inter partes* effects, they may acquire *erga omnes* effects but only if the legal regulation on which the challenged individual act was based has been found unconstitutional. However, in principle, the procedure applied for the resolution of constitutional complaints acknowledges only *inter partes* effects to decisions of the Constitutional Court;
- in *Switzerland*, within the abstract review, where the disputed cantonal rule has been annulled, the decision produces *erga omnes* effects. However, no such effects partake of a decision rendered in the concrete review; although a finding of unconstitutionality, even within such review, may as well bestow certain *erga omnes* nuances to the decision, which means that if the unconstitutional norm continues to be applied in a concrete case, anyone concerned may proceed to have it once again declared unconstitutional. Therefore, public authorities, taking into account the situation, will choose not to enforce the unconstitutional norm any longer, despite the fact that the decision made by the Swiss Federal Supreme Court a priori has *inter partes* effects.

Not in the least, it is worth mentioning that in certain countries the Constitution provides *in terminis* that the decisions of the Constitutional Court are enforceable (e.g. *Republic of Macedonia*, *Montenegro*, *Serbia*).

In terms of the decisions which reject claims of unconstitutionality during the *a posteriori* review, they take on in principle *inter partes* effects, except for countries such as *France* or *Luxembourg*, where a new challenge concerning the unconstitutionality of a norm already contested before cannot be founded on the same reasons or grounds<sup>71</sup>. In *Turkey*, since the binding force of rejection decisions is limited to the case under review, it is possible to make a new claim for annulment of that same norm. Hence, the authority of rejection decisions (which is relative) should be considered in contradistinction to annulment decisions (whose *res judicata* authority extends *erga omnes*). But if the Constitutional Court rejects the exception of unconstitutionality after having examined the case on the merits, a new exception in regard of the same legal provision may be raised again only after a period of 10 years since publication of the Court's initial decision.

By contrast, rejection decisions on applications of unconstitutionality within the *a priori* review take on *erga omnes* effects, which is obviously limited to the circle of the subjects involved in the promulgation (signing-in) procedure.

## **2. As of the day of publication of the decision in the Official Journal/ Gazette, the legal provision is declared unconstitutional:**

- a) shall be repealed;
- b) shall be suspended until the legal provision/ law declared unconstitutional has been accorded with the provisions of the Constitution;
- c) shall be suspended until the legislature has invalidated the decision of the Constitutional Court;
- d) other instances.

A decision which makes a finding of unconstitutionality of a normative act enters into force either as of the day when such is delivered or announced (for example, that is the case in *Armenia*, *Belarus*,

<sup>71</sup> It should be noted that in *Portugal* or *Romania*, even if the contested normative act has been found in conformity with the Constitution, it can be still challenged anew by another exception (plea) of unconstitutionality, that because the norm's constitutionality is not an absolute one.

Estonia, Georgia, Ukraine, Republic of Moldova<sup>72</sup>) or as of the date of publication (for example, in Austria, Croatia, France, Italy, Latvia, Serbia, Turkey, Albania, Romania, the Czech Republic), or as provided in the decision itself (for example, this is the case in Azerbaijan<sup>73</sup> in connection with laws and other normative acts or their provisions, or the inter-governmental agreements of the Republic of Azerbaijan; also in Belarus), or on the first day following the publication of the decision (for example, in Bosnia and Herzegovina, Slovenia).

However, in most of the countries, national legislation has provided the possibility for the Constitutional Court to postpone the entry into force of its decision of unconstitutionality until a certain date (up to one year since publication of the decision – Turkey, up to six months since publication of the decision – Bosnia and Herzegovina<sup>74</sup>, up to six months since delivery of the judgment – Estonia, 12-18 months in Poland, up to 18 months in Austria<sup>75</sup>, one year in Slovenia; in that sense, see also the example of Germany<sup>76</sup>, Croatia<sup>77</sup>,

<sup>72</sup> The rulings made by the Court may enter into force as of the date of publication or the date provided therein.

<sup>73</sup> An interesting situation can be found in Azerbaijan, where the decisions of the Constitutional Court may enter into force at various moments, depending on the subject area concerned:

- from a date specified in the decision itself in cases of finding the unconstitutionality of laws and other legislative acts or their provisions, the intergovernmental agreements of the Republic of Azerbaijan;

- from the date when the decision concerning the separation of the powers between the legislative, the executive and the judiciary, as well as concerning the interpretation of the Constitution and the laws of the Republic of Azerbaijan is published;

- from the date when the decision on other matters under the jurisdiction of the Constitutional Court is announced.

<sup>74</sup> So as to bring the unconstitutional provision in line with the Constitutional Court decision. If the incompatibility is not eliminated within the time-limit specified, the Constitutional Court will declare in a subsequent ruling that the provisions found unconstitutional are no longer in force.

<sup>75</sup> This deadline has no effect on the case that gave reason for repealing the norm, but is applicable to all other decisions to be taken by administrative authorities or the courts until its expiry (Austria). So, the norm becomes incontestable for everyone until the expiry of the deadline, after which it *ipso iure* ceases to exist.

<sup>76</sup> In Germany, where the Federal Constitutional Court finds that the legal act impugned is incompatible with the Constitution, it does not declare it null and void, in order to give the legislature a margin of appreciation and sufficient time to adopt new regulations, in the following cases: (1) if the legislature is to have diverse possibilities to eliminate the breach of the Constitution; and (2) if in the interest of the common good a gentle transition from the unconstitutional to the constitutional legal situation is required, in particular if a state were to be created in the case of nullity which would be even less compatible with the Constitution than the current one. Amongst others, orders of unchanged or indeed modified further application of the unconstitutional law can initially be considered. But if the Federal Constitutional Court is unable to accept the unconstitutional provision as a transitional provision, even in a modified form, the Court itself formulates in turn a transitional provision or one that should serve as “catch-all”. When the Federal Constitutional Court makes a declaration

Belgium<sup>78</sup>, the Czech Republic or Georgia). In other countries, the length of this time-limit is a matter for the Constitutional Court to decide (Armenia<sup>79</sup>, Belarus<sup>80</sup>, France, Russia<sup>81</sup>).

Quite the opposite, there are also countries in which the Constitutional Court does not have the power to delay the effects of its decision, i.e. cannot postpone the date when the legal norm found unconstitutional loses vigour – for instance, in Portugal or Romania.

Depending on the constitutional system, the decisions of the Constitutional Courts are governed either by the principle of non-retroactivity, or the principle of retroactive application, or they accept both principles with certain nuances, as is shown here below.

The first category includes the following countries: Romania, Belarus (where the phrase being used is that the unconstitutional act “shall have no legal force”), Republic of Moldova (where the unconstitutional provisions shall become null and no longer applicable as from the adoption of the decision by the Constitutional Court) or Serbia.

of incompatibility, it can also refrain from ordering the continued application of the unconstitutional law altogether. However, in contradistinction to a declaration of nullity – such choice is only justified if the Court also imposes a deadline on the legislature for the enactment of new legislation, in accord with the Constitution, whilst considering a transitional arrangement to be unnecessary until that time. The unconstitutional provision then remains inapplicable in the interim period until the entry into force of the new law; and any court proceedings already pending must be suspended.

<sup>77</sup> In order to avoid regulatory omissions.

<sup>78</sup> Setting a deadline in which the lawmaker should take steps, maintaining the effects of an unconstitutional normative act until a given future date, finding a legislative gap as unconstitutional, all these techniques are but forms of self-limitation for the constitutional judge who, far from suppressing the power to legislate, actually restores these powers to the law-maker (Belgium).

<sup>79</sup> If the Constitutional Court finds that declaring the normative act unconstitutional and, consequently, invalidating it or any of its provisions from the moment of the announcement of the Court decision will inevitably cause such severe consequences for the citizens and for the state authority which will harm the legal security expected from the nullification of the respective act, then the Constitutional Court has the right to declare the act as unconstitutional and, at the same time, to postpone the day when the act becomes invalidated.

<sup>80</sup> Such postponement may be enforced until to the occurrence of a certain event/ act in order to allow sufficient time for the authority that adopted the unconstitutional legal provision to repeal it, amend it, supplement it.

<sup>81</sup> If the immediate annulment of the normative provisions could have a negative effect on the balance of the constitutional values, the Constitutional Court may stay the enforcement of its ruling and may provide a subsequent date to repeal the legal provisions declared unconstitutional.

*Germany* belongs to the second category where, according to the tradition of the German public law, a provision which violates higher-ranking law shall be null and void *ipso jure* and *ex tunc*, from which the *eo ipso* nullity of a law contrary to the Constitution<sup>82</sup> can be derived. In *Belgium*, the annulled legal norm disappears from the legal order, as if it had never been adopted<sup>83</sup>. In *Ireland*, where The Supreme Court is tasked with the constitutionality review, the law is deemed void *ab initio*, if it is a law enacted after entry into force of the 1937 Constitution; or from the coming into force of the Constitution, if it is a pre-constitutional law.

The third category includes *Austria*: here, even if principally the decision takes effects only for the future, the Court may choose to declare inapplicable a general normative act with retroactive effect (still, this entails difficult questions with respect to the *res iudicata* effect of decisions that have been issued but have remained uncontested), alongside with *Armenia* (where the Court's decision will retro activate only when the provisions recognised unconstitutional are of the Criminal Code or the law on administrative liability), the *Republic of Macedonia* or *Slovenia*, countries where the Constitutional Court may not only repeal a law, but also repeal or annul regulations or general acts adopted to exercise the public authority, as well as adopt a declaratory ruling wherein it may state that the act it reviewed was unconstitutional or unlawful.

In *Italy* or in *Montenegro*, the decision of unconstitutionality produces retroactive effects, except for the cases already finally concluded – *facta praeterita*.<sup>84</sup> There are also cases when the Constitutional Court has competence to provide that the judgment of

unconstitutionality shall take effect as from the date of coming into force of the contested norm (act) or as of the date when it was enforced with respect to the author of the motion (*Latvia*<sup>85</sup>).

To decide whether to annul or repeal a law, a regulation or a general act, the Constitutional Court must take into account all circumstances which are relevant for the observance of the constitutionality and lawfulness, especially the severity of the breach, its nature and significance with respect to the exercise of the citizens' rights and freedoms or the relationships established based on those acts, the legal certainty, as well as any other aspects which are relevant for the settlement of the case (*Republic of Macedonia*).

As regards the effects of substantive law that are taken by the decisions of Constitutional Courts or courts of constitutional review, it is possible to discern the following:

A) Effect of repeal or elimination of the unconstitutional law from the legal system (*Albania, Armenia, Andorra, Estonia, Romania*<sup>86</sup>, *Croatia, Hungary, Italy, Ireland, France, Latvia, Lithuania*<sup>87</sup>, *Republic of Macedonia, Republic of Moldova*<sup>88</sup>, *Poland, Russia*<sup>89</sup>, *Turkey, the Czech Republic, Ukraine, Slovenia*).

<sup>82</sup> See the example of Denmark, too.

<sup>83</sup> Retroactivity inherent to restoration of a *status quo ante* implies abolishment of the norm *ex tunc*. Retroactivity is thus seen as a logical aftermath of unconstitutionality, that because the annulled provision has been vitiated from the very beginning. With a view to tempering the effects of such annulment, which can severely harm legal certainty, the Court, if it deems necessary, also indicates the effects of invalidated provisions that shall be considered final or those that shall be temporarily maintained for a period which is specified. The Constitutional Court shall annul the contested provision in whole or in part. Consequently, annulment may target all challenged provisions, but also confine itself to a single provision, phrase or even a single word. At other times it may be that the Court decides to *modulate* the annulment: it shall so invalidate a legal provision or its part but only "to the extent that" such is unconstitutional.

<sup>84</sup> It is worth mentioning that the enforcement of the decision of unconstitutionality in pending cases is deemed retroactive as it is enforced to acts which had already occurred. Italy also acknowledges the concept of "intervening unconstitutionality", more specifically, a limitation of the effects of the declaration of unconstitutionality, in that the Court declares that a particular legal provision, which was compatible with the Constitution upon its entry into force, became unconstitutional only later, when certain events arose, so that the effects of the decision will begin only upon the materialisation of such events.

<sup>85</sup> If the Constitutional Court finds that the challenged norm is not conform with a higher-ranking legal act, and declares it null as of the date when the act came into force or was enforced, with respect to the author of the motion or a certain circle of persons, the effects of the decision by the Court shall begin to surface as of the date when the act came into force or was enforced. The procedure is applied by the Constitutional Court to prevent most efficiently the violation of individual rights.

<sup>86</sup> Loss of constitutional legitimacy of a normative act shall be "a different sanction, which is much more severe than with mere abrogation of a legal text - Decision no. 414 of 14 April 2010, published in the Official Gazette of Romania, Part I, no.291 of 4 May 2010.

<sup>87</sup> For example, in Lithuania, even if the text of the Constitution uses the phrase according to which the provision found unconstitutional "shall not be applied," the Court in its jurisprudence interprets this phrase in the sense that the unconstitutional law shall be eliminated from the legal system. The Seimas, the President of the Republic, or the Government, as the case may be, are bound by the Constitution to acknowledge that such a legal act (part of it) shall no longer be valid or (if it is impossible for them to perform this without appropriately regulating the respective social relationships) they shall amend it so as the new regulation should not be in conflict with the legal acts of a higher order, among which (and in the first place) the Constitution. However, even until the date when this constitutional obligation is fulfilled, the legal act (part of it) shall not be applied in any case, and the legal power of the law shall be cancelled.

<sup>88</sup> In the *Republic of Moldova*, apart from the repeal effect of the ruling made by the Constitutional Court, the Government, no later than three months of the date of publication, shall submit in Parliament a draft law for the amendment, supplementation or abrogation of the legal act or its parts declared

B) Material non-enforceability, which is where the unconstitutional act remains in force, so formally it can be applied (*Cyprus, Luxembourg, Norway and Belgium*<sup>90</sup>), as regards preliminary questions of unconstitutionality. Parliament can repeal the unconstitutional act or if it fails to do so the law remains in existence but should not be applied in any other act or decision taken by the authorities (*Cyprus*). A similar situation is in *Norway*, where the Supreme Court may state that a law is unconstitutional, but cannot declare it invalid as such. It is for the competent bodies to repeal / amend it according to the decision delivered by the Court.

C) Non-enforceability, possibly accompanied by the action of the authority that adopted the unconstitutional legal norm (*Belarus*). Normative acts found unconstitutional shall no longer be applied by courts until the authority that adopted them has introduced the required amendments.

D) Non-enforceability accompanied by invalidation/ repeal, according to the type of review which is carried out (*Portugal*<sup>91</sup>). In *Switzerland*, while no duty arises for the law-maker as far as the constitutionality review of the federal laws is concerned, where it comes to cantonal laws, instead, a norm which is found unconstitutional within the abstract review must be repealed, and that which is found unconstitutional within the concrete review shall be invalidated, to the effect that neither authorities can enforce it, nor must private individuals observe it anymore. However, abrogation / amendment of such norm are to be dealt with by the law-making authority.

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unconstitutional. The respective draft law shall be examined by the Parliament as a matter of priority.

<sup>89</sup> The repealing of normative provisions found unconstitutional shall not annul the obligation of respective law-making body, which has adopted the provisions, to remove them from the legal system following the procedure and the time limits established by the Federal Constitutional Law.

<sup>90</sup> The legal norm found unconstitutional shall continue to exist in the legal order and must be applied in any situation outside the dispute in which the preliminary question has been raised, even though the provision is declared unconstitutional. A preliminary ruling shall be binding only for the courts, and not for the administrative authorities or the private persons. The finding of unconstitutionality comprised in the preliminary ruling has no incidence on court decisions with *res judicata* authority, where such are based on the unconstitutional norm. Unlike cases when it deals with an appeal for annulment, this procedure does not enable the Court to temper effects of its ruling on a preliminary question. But indeed, also in that case a finding of unconstitutionality is likely to impair the legal certainty. Sometimes the Court itself tries to modulate the temporal effects of its ruling.

<sup>91</sup> Depending on the nature of its review, the Court will either annul the legal norm or, where such is found unconstitutional, simply discard the norm upon delivery of judgment, because no longer applicable in the instant case. To fill the legal gap created by its decision, the Constitutional Tribunal may order re-entry into force of the norm(s) that may have been repealed under the provision declared unconstitutional.

E) Finally, in *Germany*, the decision by which the Federal Constitutional Court declares the legal act as unconstitutional does not have a constitutive character; it has neither a quashing, nor an invalidating or a reforming impact on the law, but only makes a finding and at the most eliminates the legal appearance in terms of the validity of the law<sup>92</sup>.

### Effects on individual acts

Apart from its direct effects on the normative act found to be unconstitutional, the respective decision of unconstitutionality may also have incidence on administrative or courts' individual acts adopted in the application of the unconstitutional text. Thus, in *Austria*, the finding of unconstitutionality of a law on which a decision of a last instance administrative authority or the Asylum Court (for asylum-seekers) was based, when the decision itself is challenged directly before the Constitutional Court, may result in the annulment thereof, the administrative authority being obliged to issue a decision in conformity with the Constitutional Court's legal opinion<sup>93</sup>. This is also the case in *Belgium* – where the annulment of a legal norm disposes court decisions based on the invalidated norm of their legal grounds, although the rulings themselves do not altogether vanish *ipso facto* from the legal order<sup>94</sup>. In other States, *Lithuania* for instance, the decisions based on the legal acts recognised as being in conflict with the Constitution or

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<sup>92</sup> Unconstitutionality may be expressed either by finding the legal act incompatible with the Basic Law or by declaring it null and void. However, the material advantage of finding the incompatibility resides most particularly in that, unlike the declaration of nullity, it does not create direct facts, and the declaration of incompatibility may be accompanied by transitional enforcement arrangements ordered by the Federal Constitutional Court. Hence, the legal consequences of the declaration of incompatibility are determined by the content of the enforcement order issued by the Federal Constitutional Court concurrently with the decision itself.

<sup>93</sup> In the specific case at the Constitutional Court (the situation of constitutional complaints) that gave reason for the norm review procedure, the decision of the Constitutional Court must be based on the so-called "adjusted legal situation" ("*bereinigte Rechtslage*"). This means that the Court, when assessing the case, must disregard the invalidated legal norm (the so-called "premium for the catcher"). Therefore, in most cases, the Constitutional Court also annuls the administrative authority's decision in the continued proceedings, as the legal situation has to be assessed as if the invalidated normative act had never existed.

<sup>94</sup> A six months' time limit begins to run on the date of publication in the Official Gazette (*le Moniteur belge*) of the annulment decision, allowing a withdrawal appeal be lodged against the respective court decisions. As for the administrative acts issued on the basis of an invalidated norm, special remedies are provided under the organic law, and such may be used within six months from publication of the Court decision in the Official Gazette. However, where the Court decides to maintain the effects of the invalidated provision, then it is no longer possible to launch any legal proceedings in order to annul the acts based thereupon.

the law shall no longer be executed if they had not been already executed before the ruling of the Constitutional Court has produced its effects<sup>95</sup>. In the same way, in *Montenegro*, the Court's decision of unconstitutionality suspends the irrevocability clause of individual acts, while the competent authority, at the request of the person concerned, following specific terms and conditions will have to amend the individual act that is based on the unconstitutional law.

In *Serbia*, anyone whose rights have been violated by an individual act adopted on the basis of a general act declared unconstitutional is entitled to file a request with the competent authority in order to have the respective act amended in line with the decision of the Constitutional Court, within 6 months<sup>96</sup>. Also in the *Republic of Moldova* the acts issued to enforce normative acts or parts thereof declared unconstitutional shall become null and shall be repealed. In the *Republic of Macedonia* as well, the general act found unconstitutional ceases effects and may not be a legal ground for the adoption of individual acts in the future or for the enforcement of individual acts adopted on its basis.

In *Germany*, if the Federal Constitutional Court, on the basis of constitutional complaint, finds not also the law, but only measures taken by the authorities or certain court rulings to be unconstitutional – then it shall establish which provisions of the Basic Law were violated by the concrete act or omission. Such finding of unconstitutionality already involves binding effects. Furthermore, the Federal Constitutional Court quashes the impugned decision, refers the matter back to the competent court, according to the judicial proceedings, which so eliminates the challenged decision, whereas the court to which the case was remitted shall be bound by this finding of unconstitutionality.

### **Suspension by the Constitutional Court of the challenged legal act**

This institution appears in States such as *Germany*, *Armenia*, *Belgium* or *Lithuania*. In *Belgium*<sup>97</sup> or in

<sup>95</sup> At the same time, a duty arises for all State institutions to revoke their substatutory acts (provisions thereof) which are based on the act declared unconstitutional.

<sup>96</sup> If the amendment of the individual act cannot obviate the consequences of the application of the general act found unconstitutional, the Constitutional Court may order that such consequences be removed by *restitutio in integrum*, damage compensation or in another manner. Such arrangement stems from the fact that a final individual act adopted on the basis of an unconstitutional normative act may no longer apply or be enforced. Any already initiated enforcement of such an act shall be discontinued.

<sup>97</sup> The Constitutional Court may suspend the legal norm that is the subject of an appeal for annulment. The Court takes the view that suspension is assimilated to a temporary annulment.

*Germany*, suspension lies at the Court's own discretion, while in *Lithuania*<sup>98</sup>, it is *ex officio* in the case of a certain type of complaints.

### **3. Once the Constitutional Court has passed a judgment of unconstitutionality, in what way is it binding for the referring court of law and for other courts?**

According to the American model of constitutional review, decisions delivered by the Supreme Court are binding for all lower courts, as well as for the Court itself (*Cyprus*, *Estonia*, *Ireland*, *Luxembourg*, *Monaco*, *Norway*). At the same time, the courts at lower levels will generally pursue to align their own case-law with the Supreme Court, in order to avoid that appeals be upheld against their own rulings (*Switzerland*).

In the European model of constitutional review, the decision of unconstitutionality rendered within the concrete review shall be binding not only for the referring court but also for all other national courts (*Germany*, *Lithuania*, *France*, *Hungary*, *Latvia*, *Republic of Moldova*, *Poland*, *Romania*, *Turkey*). In some instances, nonetheless, the legal text found unconstitutional shall continue to exist in the legal order and must be applied in any situation outside the dispute that gave rise to the preliminary question, even though such provision has been declared unconstitutional. But a court which – in a different dispute – may see itself confronted with an issue bearing upon the same subject matter will no longer have to refer to the Court; in that case, upon making its judgment, the court shall apply the solution given by the Court, which is binding thereon (*Belgium*<sup>99</sup>). A court ruling or judgments already pronounced will not lose their *res judicata* authority on account of a decision of unconstitutionality being handed down in proceedings concerning a question of unconstitutionality<sup>100</sup> (*Belgium*, *Spain*). A binding

Nonetheless, unlike annulment as such, suspension does not have retroactive effects.

<sup>98</sup> According to the Constitution, a legal act shall be suspended when the President of the Republic or the Seimas *in corpore* shall refer the Constitutional Court with an application to rule on its constitutionality. Once it has been found, following the examination of the case, that the challenged act is in line with the Constitution, its legal effects are reinstated.

<sup>99</sup> Since a preliminary ruling is only binding on courts and not administrative authorities or private individuals, the finding of unconstitutionality within the preliminary procedure allows a new time-limit to run for the submission of an appeal in annulment, which is part of the leverage in abstract review proceedings. The ruling of the Constitutional Court has *res judicata* authority as of the date it is received by the judge *a quo*.

<sup>100</sup> In *Portugal* there is no genuine exception of unconstitutionality, insofar as the ordinary courts themselves can deal with questions of unconstitutionality – having the authority to examine the constitutionality of norms and decide on their non-

decision means that both its operative part and the reasoning are binding<sup>101</sup> (*Germany, Lithuania, Romania*). Moreover, the courts are bound by the temporary injunctions ruled by the Federal Constitutional Court (*Germany*), but purely procedural rulings are not binding (*Germany, Romania*).

The consequences of the Constitutional Court decision are essentially quasi-normative (*Romania*). Also, the judgment determining that adoption of an act of legislation or execution falls into the competence of the Federation or the *Länder* has the rank of a constitutional law, therefore may only be amended by another constitutional law (*Austria*).

If the Constitutional Court decides that the legal norm impugned is unconstitutional and therefore invalid “in terms of the aspects mentioned in the decision” or “in connection with certain provisions,” the bindingness of that decision means that courts of general jurisdiction must apply the respective provision in conformity with the Constitution and the aspects highlighted by the Constitutional Court (*Romania, Armenia, Italy*<sup>102</sup>, *Belgium, Spain*<sup>103</sup>). Thus, in proceedings on a constitutional complaint, when the Constitutional Court annuls a court decision, the case is returned to that court, which must reopen

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applicability (diffuse control). This is rather an avenue for reviewing court decisions, but only on points concerning an issue of constitutionality. For this reason, the Constitutional Tribunal shall only be referred in order to adjudicate on issues of constitutionality as an appellate court.

<sup>101</sup> In the Czech Republic, a controversy exists in the legal doctrine as to the binding nature of the “essential grounds” set forth in the reasoning of the Constitutional Court decisions, while the Court itself has not yet taken an approach in a consistent manner; the Court’s case-law tends rather to consider these grounds (*ratio decidendi*) not as a binding precedent *de jure* for the public authorities and institutions, still binding for the Court itself, which cannot deviate from them unless by reconsidering its jurisprudence. Nonetheless, such grounds are observed *de facto* by public authorities and institutions.

<sup>102</sup> If a legal text establishing an exception in a particular case was annulled, then the judge will have to apply the general rule; if, instead, a law abrogating another law was declared unconstitutional, it is possible to “revitalize” the abrogated law. Judgments can be defined as ablative (in that they declare the unconstitutionality of a legal norm “to the extent that” it establishes a certain state of affairs), additive (as they declare the unconstitutionality of a legal norm “inasmuch as it does not” establish a certain outcome), substitutive (as they declare the unconstitutionality of a provision “to the extent that” it provides for one result “rather than” another), principle-additive (through which the Court declares the unconstitutionality of a regulation, however it does not specify the content that the legal norm should include, but limits itself to suggesting what the judge should bring about on applying the principle), and interpretative, which in a certain sense uphold the constitutionality of the law.

<sup>103</sup> All judges and all courts shall interpret and apply the laws and the regulations according to “the constitutional provisions and principles, in line with the interpretation arising from the decisions rendered by the Constitutional Tribunal, within any of its proceedings”.

proceedings and make another ruling (*the Czech Republic*). In proceedings related to complaints lodged against decisions of ordinary courts or other public authorities concerning violations of the rights and fundamental freedoms under the Constitution and the ECHR, the Court, while granting the appeal, shall quash the challenged decision, and refer the case back to the court in order to reopen judicial proceedings, and the latter shall be bound by the decision of the Constitutional Court (*Bosnia and Herzegovina*). The Constitutional Court may also establish the manner in which its decision shall be implemented, which is binding for the ordinary courts (*Slovenia, Serbia*); if the court decisions, regardless of their level of jurisdiction, are invalidated by the Constitutional Court, then such shall cease legal effects as of the date they have been handed down (*Albania*)<sup>104</sup>.

The Constitutional Court judgment of unconstitutionality constitutes the grounds for revision of a court decision, if the latter has not yet been executed (*Russia, Ukraine*). Following a finding of unconstitutionality, the respective decision shall be regarded as a new circumstance which was not taken into account at the initial trial of the case, therefore serve as a ground for the review of the judicial act rendered by the ordinary court against the person, on the basis of whose individual application the Constitutional Court declared that norm as unconstitutional and invalid (*Armenia, Azerbaijan*). Furthermore, subject to review based on the decision of unconstitutionality given by the Constitutional Court are the acts of ordinary courts against those persons which upon the date of adoption of the decision of the Constitutional Court on the issue of constitutionality of the legal provision enjoyed the possibility to exercise their right to apply to the Constitutional Court (*Armenia, Azerbaijan*).

A final criminal sentence, which was grounded on a legal provision that has been subsequently declared unconstitutional and repealed, shall cease effects from the date of entry into force of the Court’s decision (*Croatia*). Likewise, if the decision of unconstitutionality envisages criminal or administrative cases concerning sanctionary proceedings in which – following the declaration of nullity of the legal norm applied – there results a reduction of punishment or sanction, or an exclusion, exoneration or limitation of liability, such judgment shall be subject to review (*Spain*). Judgments of the Supreme Court in constitutionality review cases shall bring about procedural consequences in civil, criminal and administrative court procedure and serve as the basis for revision in all the three procedures (*Estonia*); the Constitutional Court shall

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<sup>104</sup> The case shall be sent for review to the court whose ruling was quashed.

also order the review of the criminal proceedings concluded with a non-appealable verdict (*Hungary*). At the same time, insofar there is no more possibility to suspend proceedings in the court *a quo* upon referral to the Constitutional Court with an exception of unconstitutionality, the finding of unconstitutionality handed down following such referral shall serve as grounds for the revision of the court decision delivered in the meantime, upon request, both in civil and in criminal cases (*Romania*). Even if the procedural laws do not comprise any specific provision on the possibility to apply for the retrial of a case, on account that the law based on which the court returned its final judgment has been annulled by the Constitutional Court, such a legal remedy should be allowed by the courts because of the *erga omnes* effect of unconstitutionality decisions (*Republic of Macedonia*).

Everyone whose right was violated may apply to the competent authority to change/annul the individual act adopted on the basis of the unconstitutional law (*Republic of Macedonia, Montenegro, Croatia*). When issuing a new individual act, the issuing authority shall be obliged to obey the legal opinion expressed by the Constitutional Court in the decision repealing the act whereby the applicant's constitutional right was violated (*Croatia*). However, if the consequences from the implementation of the general act or regulation which was annulled by a decision of the Constitutional Court cannot be removed with a change of the individual act, the Court may order that such consequences be removed by restoration to previous condition, with damage compensation or in some other way (*Republic of Macedonia, Croatia*).

### **1. Is it customary for the legislature to fulfil, within specified deadlines, the constitutional obligation to eliminate any unconstitutional aspects that may have been found – as a result of a *posteriori* and/or a *priori* review?**

A) Replies to the questionnaire have particularly tackled with cases where the Constitutional Courts postpone the entry into force of their decisions of unconstitutionality, which amounts to setting a deadline for the legislature in order to bring the act in line with the decision of the Constitutional Court (*Austria, Slovenia*). Harmonisation of an unconstitutional text can be done either by amendments to the act concerned or its abrogation followed by the adoption of a new normative act regulating the social relations envisaged by the respective unconstitutional act (*the Czech Republic, Norway*). It is customary for the legislature to comply with such a mandate by the deadline set, even where the subject-matter of regulations to be made is politically controversial

(*Germany, Austria*). If the legislature fails to take action by that deadline, the decision of the Constitutional Court shall enter into force (*Germany, Austria*).

In other constitutional systems – the legislature is under no obligation to repeal a law that was declared unconstitutional but in practice it complies with the decision of unconstitutionality (*Cyprus, Luxembourg*). Likewise, in *Switzerland*, at the federal level, no obligation arises for the law-maker in instances where the Swiss Federal Supreme Court has found a federal law unconstitutional within proceedings of concrete review of constitutionality.

B) In connection with deadlines set for the lawmaker in order to take steps, the legislation of the *Republic of Moldova* establishes that the Government must take action within two months from the date of publication of the Constitutional Court ruling; while Article 147.1 of the Constitution of Romania sets an obligation for the Parliament or the Government, as the case may be, to bring the unconstitutional act in line with the decision rendered by the Constitutional Court in the *a posteriori* constitutional review, within 45 days from the date of publication. Time limits for this purpose are also set in *Lithuania*, too<sup>105</sup>.

In other States, even though national legislation does not provide for a deadline or the manner in which the legislature should take action (*Serbia, Russia, Portugal, Norway, Denmark, Republic of Macedonia, Georgia, Armenia, Azerbaijan, Romania*<sup>106</sup>, *Belarus, Belgium*), still it must do so promptly (*Andorra*).

The decisions of unconstitutionality are adequately enforced (*Montenegro, Croatia, Azerbaijan; Republic of Moldova*<sup>107</sup>; *Lithuania; Hungary*<sup>108</sup>; *Belarus*<sup>109</sup>; *Bosnia and Herzegovina*<sup>110</sup>), since the law-maker is under an obligation to execute the decisions of the Constitutional Court (*Belgium*). In *Albania*, instead, where the normative act is invalidated and the new relationships call for juridical regulation, the decision of the Constitutional Court is notified to the relevant bodies, so that they undertake the measures laid down in its decision, without having a time limit provided in that sense. In quite exceptional cases, albeit rarely, when the

<sup>105</sup> Out of 144 rulings finding unconstitutional acts, 101 were enforced.

<sup>106</sup> In the *a priori* constitutional review.

<sup>107</sup> In 2009, 2 rulings remained unexecuted.

<sup>108</sup> The legislature has not yet fulfilled its obligation to eliminate unconstitutional omissions in 18 cases out of 103 in all.

<sup>109</sup> 215 out of 292 decisions of the Constitutional Court have been executed in full, the rest have been executed in part or are being executed.

<sup>110</sup> For the period August 2009 - March 2010, all decisions relating to the abstract review of constitutionality have been enforced.

legislature was reluctant to eliminate certain provisions, the Constitutional Court saw itself compelled to invalidate subsequent legislation that was adopted in disregard of constitutional doctrine (*Spain, Republic of Macedonia*).

Owing to the Constitutional Tribunal's prestige, its decisions are fully complied with by all other judicial bodies, political and administrative bodies (*Portugal*). It is often the case that the legislature eliminates the situation of unconstitutionality even before the Constitutional Court adopts a decision (*Latvia*), that is to say after a particular case is initiated, the legislature, having established deficiencies in regulatory framework that serves as the grounds for submitting an application to the Constitutional Court, eliminates them by amending the contested norm.

Furthermore, with a view to increasing the number of enforced decisions, the Constitutional Court may come to prepare a package of proposals on change and addition to its own Law on the organisation and operation, directed on the further perfection of execution of decisions of the Constitutional Court (*Azerbaijan*), or is authorised to give recommendations to the legislative and executive authorities concerning envisaged changes to a normative act according to legal positions of the Constitutional Court or concerning the adoption of regulations on the legal question considered by the Constitutional Court (*Azerbaijan*), or may have developed a system for the exchange of letters with the Parliament (*Republic of Moldova*). Mention should also be made that under the Law of 25 April 2007 a parliamentary committee has been set up, being tasked to track legislative developments and draft, as appropriate, legislative initiatives for enforcing the decisions of the Constitutional Court (*Belgium*).

As a conclusion, heed should be paid to the classification made in the report from *Estonia* in regard of the Legislature's conduct when confronted with various decisions of unconstitutionality, namely:

1. extraordinary events when the legislature has very quickly and accurately complied with the judgments of the constitutional review court;
2. ordinary events where the time spent by the lawmaker for implementation is in correlation with the complexity of the issue;
3. slow events where the time spent is obviously too long, that is where the *Riigikogu* is manifestly lacking political willingness to attend to the problem pointed out by the Court.

C) In some other States, the Court's judgment of unconstitutionality does not generally require further

action on the part of the legislature to remove the situation of unconstitutionality, because the decision itself has already taken the effect that the act is repealed (*Poland, Armenia*). However, a legislative intervention within preset deadlines will be particularly needed where the Constitutional Court has found the legal norm under examination as unconstitutional "in the frames of legal positions expressed in the decision" or in "this or that part" (*Armenia*), in the case where the Constitutional Court – by its decision – has created a legal gap (*Armenia, Belgium, Poland, Hungary*), where a preliminary ruling is handed down (*Belgium, Switzerland* – in the case of cantonal norms), where such concerns a principle-additive judgment (*Italy*), where the unconstitutionality has been established, but not declared as such (*Italy*, if the Court does not proceed to annul the law, but rather highlights doubts as to its constitutionality, and so the legislature must intervene as soon as possible in order to avoid a situation of unconstitutionality) or where the Court draws the attention to Parliament in respect of an incoherence with the Constitution (*Republic of Moldova*).

In certain cases, the legislature's obligation appears to run in the direction of making amendments to the Constitution, which would allow the contested regulation to become part of the positive law.<sup>111</sup>

D) In the case of the *a priori* review, a finding of unconstitutionality ends the legislative process with respect to the bill, although it remains open to the Government or Legislature to introduce a similar bill which avoids the unconstitutional aspect(s) identified by the decision (*Ireland*).

## 5. What happens when the lawmaker fails to remove the unconstitutionality within the timeframe provided in the Constitution and/ or legislation?

A) There are also situations when it is not obvious from the decision of unconstitutionality which changes must be made in order to make the provision comply with the Constitution, so it may take quite some time and consideration to decide upon a new formulation or new political solution (*Norway*). There also may be cases when the legislature does not know how to implement the Constitutional Court ruling whereby a particular legal act has been declared unconstitutional. Then, the Speaker of the Seimas applies to the

<sup>111</sup> See, for instance, the case of Ukraine, where the Constitutional Court found the Rome Statute of the International Criminal Court to be unconstitutional, and the treaty has remained non-ratified because of a lack of political willingness in what concerns a revision of the Constitution.



Constitutional Court with a petition requesting to construe the provisions of a previously adopted ruling, and after such interpretation is received, corresponding measures are taken (*Lithuania*).

B) Every State has designed a system aimed at imposing an obligation of compliance with the Constitutional Court decisions on the lawmaker, and to determine it take action to that effect. Such systems involve an administrative or, as the case may be, criminal corrective component, but also constitutional facets.

The first category includes administrative (*Republic of Moldova* and *Albania*) or criminal liability (*Russia, Bosnia and Herzegovina, Montenegro*) for failure to enforce the decisions of the Constitutional Court.

A more diversified array of instruments falls under the second category, which places at the forefront the necessity to have decisions of Constitutional Courts enforced by the legislature. In that sense the following examples are relevant:

- if the legislature fails to comply with the decision of the Federal Constitutional Court whereby it demands adoption of new legislation, the Court may impose various execution measures (*Germany*). Accordingly, where deadlines set for the legislature have not been observed, the Court may act as a positive quasi-lawmaker (and, for instance, decide on the quantum of maintenance allowances for civil servants with three and more children). It may also instruct the legislature to adopt a new regulation by a set deadline and may order that the previous law be applied "until this time at most".<sup>112</sup> Also, if deemed necessary, the Court could have imposed a retroactive limitation of the duration of the continued application of legal provisions, thus exerting pressure on the legislature by the threat of loss of tax revenue for the budget (*Germany*);
- the competent bodies (Parliament or Government) may request a prolongation of the deadline set for the legal provisions declared unconstitutional to lose their legal force, in which case the Constitutional Court must return a decision (*Croatia, Belarus*). Such practice has led to the unreasonably long extension of the term set for unconstitutional laws to lose their force, with all damaging consequences deriving from it (*Croatia*);

- there are no legal mechanisms in the legal order which could force the Parliament or the Government to enforce the Court decisions repealing laws or other regulations, or their separate provisions, for their unconstitutionality (*Croatia*). The Supreme Court does not have any specific means either, to oversee the observance of its judgments (*Estonia*);
- the legislature's failure to act can sometimes give rise to an unconstitutional state of affairs (*the Czech Republic*). However, omission of the legislature to enact a new law may not constitute a big problem in those cases which are not so important for the public opinion (*Turkey*);
- in exceptional situations, whereas the Constitutional Tribunal considers that a legislative intervention is necessary in order to bring the laws in line with the Constitution, it has also suggested a "reasonable deadline" for the law-maker to take action, even if, in principle, no such time limits are provided under the Spanish law up till when the lawmaker should act with a view to complying with the constitutional decisions (*Spain*);
- failure to conform with a previous decision of the Constitutional Court may result in the unconstitutionality of the law adopted in disregard of said decision (*Armenia*);
- in certain circumstances, the lawmaker is likely to be held accountable and obliged to pay damage compensation if it has adopted a legal norm found unconstitutional (*Belgium*);
- the law (respectively, the general normative act) shall cease to exist (*Austria, Spain, Romania*), which means that a certain area of the social relations might remain unregulated, thus legal gaps occur. Such lacunae may be eliminated within the process of interpretation and application of the law by the courts of general jurisdiction and specialised tribunals (*Lithuania*). Where the legislative body has not filled legal gaps, such can be overcome in extremis through the precise application of the Constitution by the courts (*Republic of Macedonia*). Also, since the legislature failed to reach a political compromise acceptable to all parties, the court had to solve the issue on the basis of constitutional values and the general legislation (*Estonia*). Moreover, if the legislature fails to remove unconstitutional flaws, a person could exercise his or her rights, for instance, by directly applying the Constitution and the interpretation included in the judgment of the Constitutional Court (*Latvia*);

<sup>112</sup> Such a situation occurred when certain provisions concerning taxes, although declared unconstitutional, had not been followed by new legislation, so that the respective legal text had not been applied subsequent to that date.

- if the legislature had not remedied the established unconstitutionality, since the Court can abrogate a law, it may also suspend a law (temporarily exclude its application), which must be seen as a milder intervention than abrogation, when the threatened constitutional values cannot be protected in the usual manner (*Slovenia*);
- the constitutional liability provides for measures such as a dissolution of the legislative (representative) body of State power or a discharge of the chief official of an entity (*Russia*);
- in the event of a failure to enforce a decision, or a delay in enforcement or in giving information to the Constitutional Court about the measures taken, the Constitutional Court shall render a ruling in which it shall establish that its decision has not been enforced and it may determine the manner of enforcement of the decision. This ruling shall be transmitted to the competent prosecutor or another body competent to enforce the decision, as designated by the Constitutional Court (*Bosnia and Herzegovina*).

**6. Is the legislature allowed to pass, through another normative act, the same legislative solution which has been declared unconstitutional? Also state the arguments.**

A) First of all, a distinction should be made between formal and material requirements. If the law has been found unconstitutional on formal grounds, compliance with the specific requirement (adoption of the act concerned by the competent body, provision of the legislative solution under a certain type of normative act) gives the possibility to re-enact the same solution, as regards the substance previously contained in the respective regulation (*Estonia, Spain, Romania, Denmark*).

Insofar as unconstitutionality refers to points of substance, it appears that the answers can be categorised according to the criterion whether or not domestic legislation contains an interdiction.

In a number of States, such as *Russia* or *Lithuania*, a prohibition is inscribed in the Law on the organisation and operation of the Constitutional Court. The express interdiction to repeatedly adopt a legal regulation which has been declared in conflict with the Constitution is also endorsed by the Constitutional Court's case-law (*Lithuania*).

An interdiction as such is not established by legislation in the majority of States, which does not necessarily mean that the legislature is automatically entitled to consecrate once again the legislative solution declared unconstitutional. Such possibility has been restrained either:

1. by the interpretation of the constitutional and legal texts regulating the effects of the decisions of the Constitutional Courts<sup>113</sup> (*Armenia, Cyprus, Georgia, Ireland, Latvia, Republic of Moldova, Montenegro, Turkey*); or
2. by the case-law of Constitutional Courts<sup>114</sup> (*Germany, Croatia, Spain, France, Azerbaijan, Belarus, Republic of Macedonia, Poland, Romania, Serbia, Ukraine*); or (3) the possibility recognised to the Constitutional Courts to invalidate once more the legislative solution, as being unconstitutional (*Austria, Italy*<sup>115</sup>, *Luxembourg, Norway, Slovakia, Slovenia, Switzerland, the Czech Republic*).

<sup>113</sup> That is a situation which has in view the meaning and effects stemming out from the binding character of the Constitutional Court decisions.

<sup>114</sup> Recognition by the Constitutional Court as unconstitutional of any legal norm makes impossible not only for the lawmaker to adopt another norm with an identical content, but also for the courts to apply similar provisions from other normative acts (*Azerbaijan*).

The interdiction of re-instating a legislative solution is not an absolute one in *Germany* or *Croatia*, where, as a matter of principle, the legislature cannot have the right to pass again a legislative solution declared unconstitutional if all relevant aspects and circumstances have remained unchanged.

A special situation is to be found in *Germany*, where the First Chamber (Senate) of the Federal Constitutional Court considers in this respect that the legislature has a special responsibility for adjusting the legal system to changing social demands and changed ideas concerning legal order, and consequently, it can in principle also comply with this responsibility by adopting a new provision the content of which is identical. What is more, if the legislature were subject to an obligation, this would lead to the "paralysis" of the Court's case-law, so that decisions which have once been handed down by the Court would hence be established for all time, and would leave the legislature without any latitude to adjust as necessary to social and economic developments in a modern, free, dynamic society. However, in the case of the repetition of a provision, the First Chamber demands that the legislature does not disregard the grounds found by the Federal Constitutional Court for the unconstitutionality of the original law, and that special reasons are to be required in order to use such legal construct.

The Second Chamber (Senate), even though does not share these views, considers that the legislature may re-adopt the legislative solution found to be unconstitutional under the condition of changed factual circumstances, as well as new legal arguments for the lawmaker.

<sup>115</sup> If a change occurred with the factual and legal circumstances, a provision that was at some point in time declared unconstitutional may not be incompatible with the Constitution any longer, given the new factual and legal status (*Italy*).

B) Since other States have never been confronted with such a situation, legal doctrine considers that the lawmaker is barred from adopting a legal provision identical to the one declared unconstitutional (*Belgium*<sup>116</sup>), or the doctrine is controversial as to whether decisions of unconstitutionality shall be binding only for the executive and the judicial branches, or for the legislative as well (*Portugal*).

C) The impossibility to pass again the legislative solution declared unconstitutional may be overcome by making amendments to the Constitution, that especially where the European accession process is at stake (*Spain, France, Hungary*), but also when the legislature refuses to become any more subjected to a certain jurisprudence of the Constitutional Court (*Hungary*).

## 7. Does the Constitutional Court have a possibility to commission other state agencies with the enforcement of its decisions and/or to stipulate the manner in which they are enforced in a specific case?

From the reports presented it follows that, in principle, based on the criterion whether national legislation has ascribed to Constitutional Courts the power to commission other bodies with the enforcement of their decisions and/ or provide the manner in which they shall be executed, there are two categories of States, namely:

A) States where no such leverage exists (*Armenia, Azerbaijan, Cyprus, Hungary, Ireland, Latvia, Lithuania, Luxembourg, France, Republic of Moldova, Montenegro, Romania, Poland, Russia, Slovakia, the Czech Republic, Turkey*). If so, it remains a task for the administrative and judicial authorities to see to it that the Court decision shall be observed, therefore the execution of the judgments made by the Court largely depends upon cooperation on part of other subjects within the legal system (*Italy*). At the same time, even if the Constitutional Tribunal may decide to provide some guidelines as to the way of implementing in its decision, their effectiveness depends on the authority of the Tribunal and the extent to which executive organs are open to cooperation with the Constitutional Tribunal (*Poland*).

B) States where, in some way or another, the Constitutional Courts may have a role in designating

the body which is authorised to enforce their decisions and/ or in establishing the manner of enforcement. It is worth mentioning, for example, that:

- in *Albania*, execution of the Constitutional Court decisions is ensured by the Council of Ministers through the relevant public administration bodies, but the Constitutional Court may itself designate another body tasked with the execution of its decision, and where appropriate, the manner of its execution. Moreover, the President of the Constitutional Court, whose decision is final and constitutes an executive title, may impose an administrative fine if the decision of the Court is not observed;
- in *Austria*, execution of decisions rendered by the Constitutional Court is implemented by the ordinary courts or by the Federal President, according to the distinctions made in the Federal Constitution. Where the Federal President is the one authorised to enforce such decisions, then the request to the President has to be made by the Constitutional Court. Furthermore, the execution shall, in accordance with the President's instructions, lie with the Federal or the *Länder* authorities, including the Federal Army, appointed at his discretion for the purpose;
- in *Croatia*, the Government ensures the execution of the Court decisions and rulings through the bodies of the central administration; however, the Court itself may determine which body shall be tasked for the execution of its decision or its ruling, as well as the manner in which the decision or ruling must be executed. Consequently, the Court in fact orders the competent bodies to implement general and/ or individual measures which derive of its decisions. At the same time, the Court is authorised to indicate the procedure, the deadlines and the specific means for the enforcement of its decisions (*Russia*), but it may also place an obligation on the competent state bodies to ensure execution of its decision or adherence to its opinion (*Ukraine*);
- in the *Republic of Macedonia*, the decisions of the Constitutional Court are enforced by the body that adopted the law, the other regulation or general act which was annulled or repealed by the decision of the Constitutional Court. If necessary, the Court requests from the Government of the Republic of Macedonia to ensure the enforcement of its decisions;

<sup>116</sup> In accordance with the special law, that new legal norm might as well be suspended by the Court, without any further pre-requisites such as to adduce solid evidence and to prove damage otherwise difficult to redress.

- in *Germany*, the Court itself may ensure the execution of its decisions by means of independent transitional arrangements or orders on the further application of laws which have been rejected.<sup>117</sup>

Where the Court has held a political party to be unconstitutional, it shall mandate the *Länder* Ministers of the Interior to dissolve the party and to implement the ban on replacement organisations;

- in *Serbia*, the Constitution has vested the Constitutional Court with the power to issue a special ruling regulating the manner in which its decision will be enforced and which is also binding. Enforcement is either made directly or via a competent state administration authority in the manner laid down in the Constitutional Court ruling;
- the Court may determine which authority should implement the decision and the manner of implementation, if necessary. This practically entails an authorisation for the Constitutional Court to fill the legal gap arising from its finding of unconstitutionality. In terms of their legal nature, such a decision differs from those rendered within the constitutional review<sup>118</sup> (*Slovenia*);
- in the case of the *amparo* constitutional review, the organic Law of the Constitutional Tribunal provides that it may order “who shall bear the responsibility to enforce judgment and, as the case may be, resolve the incidents arising in the course of enforcement.” Executory provisions may also be included in the decision passed or in any other subsequent acts. The Tribunal may also declare null any decision that would go against the one being handed down in the exercise of its powers (*Spain*);

- in cases where the Supreme Court, in addition to adjudicating the constitutionality issue, also decides on matters pertaining to the specific case, it has developed a very accurate procedure for compliance with its judgments (*Estonia*);

- in the *Republic of Moldova*, the Government has issued a decision concerning the legal mechanism applicable for its actions and also actions to be taken by subordinate public authorities for the enforcement of the Constitutional Court rulings, while in the *Republic of Macedonia*, the direct monitoring of the enforcement of the decisions of the Court is within the tasks and responsibilities of its Secretary General;

- in *Norway*, which applies the American system of constitutional review, the decisions of unconstitutionality will be enforced *inter partes*, which means, in terms of their enforcement, that if one of the parties does not fulfil its obligation, the other party may seek assistance from the enforcement authorities.



<sup>117</sup> The Federal Constitutional Court was given jurisdiction for also executing its decisions; consequently, the Court itself may state in the respective decision by whom it is to be executed, it may further on regulate the “method of execution” in individual cases and issue all orders required to effectively “enforce” its decisions. The Federal Constitutional Court is also entitled to task individuals, authorities or organs which are subject to German state power to carry out concrete execution measures. Therefore, the Federal Constitutional Court knows two forms of tasking to execute decisions: the Court may either task an agency in general terms to execute decisions and leave it to implement the execution measures at its own discretion, or the Court may entrust an agency with a concrete execution measure which is precisely determined, and hence make the tasked party “the executing organ” of the Federal Constitutional Court. Inasmuch as it may be necessary, it can also commission other agencies to implement temporary injunctions.

<sup>118</sup> Moreover, determining the manner of its implementation may also temporarily fill the unconstitutional legal gap.

## Constitutional Justice: Functions and relationship with the other public authorities

### I. – The Constitutional Court's relationship to Parliament and Government

1. The role of Parliament (as the case may be, of the Government) in the procedure for appointing judges to the Constitutional Court. Once appointed, can judges of the Constitutional Court be revoked by that same authority?

2. To what extent is the Constitutional Court financially autonomous – in the setting up and administration of its own expenditure budget?

3. Is it customary or possible that Parliament amends the law on the organisation and functioning of the Constitutional Court, yet without any consultation with the court itself?

4. Is the Constitutional Court vested with review powers as to the constitutionality of Regulations/Standing Rules of Parliament and, respectively, Government?

5. Constitutionality review of laws and Government decisions (specify categories of acts).

6. Parliament and Government, as the case may be, will proceed without delay to amending the law (or another act declared unconstitutional) in order to bring such into accord with the Constitution, following the Constitutional Court's decision. If so, what is the term established in that sense? Is there also any special procedure? If not, specify alternatives. Give examples.

### II. – Resolution of organic litigations by the Constitutional Court

1. What are the characteristic traits of organic litigations (legal disputes of a constitutional nature between public authorities)?

2. Specify whether the Constitutional Court is competent to resolve such litigation.

3. Which public authorities may be involved in such disputes?

4. What kind of (juridical) acts or action may give rise to such litigation? Whether your Constitutional Court has adjudicated upon such disputes; please give examples.

5. Specify the legal entities/subjects that have a right to initiate proceedings before the Constitutional Court for the adjudication of such disputes.

6. What procedure is applicable for the adjudication of such a dispute?

7. What choices are open for the Constitutional Court in making its decision (judgment). Examples.

8. Ways and means to implement the Constitutional Court's decision. Examples.

### III. – Enforcement of Constitutional Courts' decisions

1. The Constitutional Court's decisions are:

- a) final;
- b) subject to appeal; if so, please specify which legal entities/subjects are entitled to lodge appeal, the deadlines and procedure;
- c) binding *erga omnes*;
- d) binding *inter partes litigantes*.

2. As from publication of the decision in the Official Gazette/Journal, the legal text declared unconstitutional shall be:

- a) repealed;
- b) suspended until when the act/text declared unconstitutional has been accorded with the provisions of the Constitution;
- c) suspended until when the legislature has invalidated the decision rendered by the Constitutional Court.
- d) other instances.

3. Where there is also a *posteriori* review: once the Constitutional Court has admitted an exception of unconstitutionality, what is the judgment that may be delivered by the referring court of law when hearing the case on its merits?

4. Is it customary that the legislature fulfils, within specified deadlines, the constitutional obligation to eliminate any unconstitutional aspects as may have been found – as a result of a *posteriori* and/or a *priori* review?

5. What happens if the legislature has failed to eliminate unconstitutional flaws within the deadline set by the Constitution? Give examples.

6. Is legislature allowed to pass again, through another normative act, the same legislative solution which has been declared unconstitutional? Also state the arguments.

7. Does the Constitutional Court have a possibility to commission other state agencies with the enforcement of its decisions and/or to stipulate the manner in which they are enforced in a specific case?



# Albania

## Constitutional Court

### Important decisions

*Identification:* ALB-2001-1-001

**a)** Albania / **b)** Constitutional Court / **c)** / **d)** 07.02.2001 / **e)** 5 / **f)** Case Huqi v. United Chambers / **g)** *Fletorja Zyrtare* (Official Gazette), 10/2001, 351 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions.**

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

1.6.9.2 Constitutional Justice – Effects – Consequences for other cases – **Decided cases.**

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**

2.3.8 Sources – Techniques of review – **Systematic interpretation.**

4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction.**

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

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

*Keywords of the alphabetical index:*

Court, decision, execution / Interpretation, law, universally binding / *Res judicata*, Constitutional Court, judgment / Decision, final and binding / Trial *in absentia*.

*Headnotes:*

The exercise of the right of appeal against a criminal court decision, exercised by the advocate of the accused tried *in absentia* (where the advocate may be officially appointed or appointed by the family of the accused) constitutes a fundamental guarantee protecting the interests of the accused and respecting the principle of a fair trial.

The interpretation of this law is a power that the Constitution has left to the discretion of each state body dealing with the implementation of the law, but the Constitutional Court is the only body competent to make a final interpretation of this law. Supreme Court decisions which unify or change judicial practice may not be excluded from this constitutional review.

Constitutional Court decisions have general binding force. They are final and must be implemented. State bodies cannot question their implementation.

*Summary:*

The Constitutional Court in its Decision no. 17/2000 decided to set aside Decision no. 386/1999 of the United Chambers of the Supreme Court (the United Chambers) on constitutional grounds, and to return the case to the Supreme Court. According to the Constitutional Court decision, the United Chambers infringed the individual's right to a fair trial, through denial of his right to a defence and of access to the courts, guaranteed by Articles 31.c and 42 of the Constitution and Article 6 ECHR. The United Chambers reviewed the case, but did not apply the Constitutional Court decision. The United Chambers concluded that the advocate of the accused tried *in absentia*, who may be officially appointed or appointed by the family of the accused, is not a legitimate person to appeal against the decision delivered *in absentia* of the accused. The applicant submitted his application before the Constitutional Court again.

The applicant requested the setting aside of Decision no. 371/2000 of the United Chambers on constitutional grounds, arguing that they resolved the case in the same way as in their Decision no. 48/1999, which is set aside by Decision no. 17/2000 of the Constitutional Court as unconstitutional. The applicant adds that the United Chambers, through the denial of the advocate's right of appeal, has infringed the right to a defence and this constitutes a violation of the principle of a fair trial. Finally, the applicant alleges that Decision no. 371/2000 of the United Chambers, which does not recognise or implement the Constitutional Court decision, is contrary to Article 132 of the Constitution and constitutes a violation of the Constitution.

The Constitutional Court underlined that its Decision no. 17/2000 set aside Decision no. 386/1999 of the United Chambers on constitutional grounds and that it had returned the case to the Supreme Court. According to the terms of that decision, the Court held that the decision of the United Chambers infringed the individuals' right to a fair trial. It denied the right to a defence and the right of access to the courts, which

are guaranteed by Articles 31.c and 42 of the Constitution and Article 6 ECHR. Nevertheless, in its decision the United Chambers adopted the same interpretation of the procedural provisions, and reached the conclusion that “the advocate, who may be officially appointed or appointed by the family of the accused in order to defend the accused tried *in absentia*, is not a legitimate person to appeal against the decision delivered *in absentia* of the accused”. They concluded that the trial had been lawful.

The Constitutional Court considered the analysis of arguments about the constitutional functions or limits of powers and competencies of each of the state bodies – the Constitutional and Supreme Courts. The Court reconfirmed that it is the only body assigned to finally decide and resolve conflicts of competencies between the powers, to guarantee the upholding of the Constitution and to make a final interpretation.

After having mentioned that the disposition of its Decision no. 17/2000 consists of two important elements – the first relating to the setting aside of the United Chambers decision on constitutional grounds and the second relating to the return of the case to the Supreme Court – the Constitutional Court observed that only the second element had been implemented. As to the arguments propounded in its reasoning, which have to do with the irregularities and infringements of the right to a defence and the right to a fair trial, the United Chambers have not obeyed them, but they have resolved the case in contradiction to the correct constitutional interpretation.

The applicant repeated his allegations about the denial of the advocate’s right of appeal and the infringement of the right to a fair trial while presenting the case before the ordinary courts. The Constitutional Court decided that further examination and analysis of constitutional arguments employed in its previous decision would be in contradiction to the principle of *res iudicata*.

The problem concerning the advocate’s right of appeal as the representative of the accused tried *in absentia* is resolved once and for all, and according to the principle of *res iudicata*, it cannot be reviewed in the future. In its respective decision, the Constitutional Court has expressed that, “[T]he appointment of the advocates according to the ways and criteria provided by the law, including where officially appointed, and... the right of appeal against the court decision, aim at respecting the fair trial in each instance of judgment, as it has been settled by Article 2.2 Protocol 7 ECHR and by Article 14.5 of the International Covenant for Civil and Political Rights”.

The applicant’s allegation relating to the problem of the non-implementation of Decision no. 17/2000 of the Constitutional Court by the United Chambers of the Supreme Court represents the essence of this examination. This is an examination of the same case between the same parties, but it contains a new allegation about constitutionality, and so it would not represent a case of *res iudicata*.

The compulsory implementation of Constitutional Court decisions is guaranteed by Articles 132 and 145 of the Constitution. Constitutional Court decisions have general binding force and are final. They form part of a constitutional jurisprudence and, as a consequence, they have legal force. None of the state bodies can question Constitutional Court decisions.

Leaving the assessment of constitutional decisions to other bodies generates a dangerous precedent of denying the Constitutional Court its function as guarantor of the Constitution. The efficiency of Constitutional Court decisions lies exactly in their binding force. Even the reasoning found in a constitutional decision has legal force. It is compulsory and extends its effect to each state body, including the courts. The constitutional lawmaker has attributed unequivocal binding force to Constitutional Court decisions, which stems from the authority of the body. By refusing to apply the Constitutional Court decision, the United Chambers have adopted an attitude that constitutes an infringement of the Constitution and generates a dangerous precedent for institutional relations.

In the appealed decisions the United Chambers have interpreted some constitutional provisions to mean that certain court decisions should be excluded from constitutional review. Article 131.f of the Constitution vests the Constitutional Court with the authority to give a final decision on an individual’s application concerning the infringement of his constitutional right to a fair trial. When the individual has exhausted all the instances of ordinary judicial review, the Constitutional Court, upon an individual request, exercises constitutional review of court decisions. In this respect, the Constitutional Court clarifies that, as with any other legal act, the United Chambers decisions regarding the unification or changing of judicial practice – as unique and compulsory decisions only for the ordinary courts – must not be immune from constitutional review.

In reasoning its decision, the United Chambers expressed the view that the Constitutional Court does not enjoy the authority to interpret a law: this interpretation is the exclusive competence of the United Chambers. The Constitutional Court considers that it is necessary to emphasise the fact that interpretation of a law is not an exclusive attribute of



the courts of ordinary jurisdictions. Article 142.2 of the Constitution has attributed to the United Chambers the authority to unify or change judicial practice, which can be based on interpretation of the law relating to a concrete case. The Court observes that each state body, including the Supreme Court, that deals with the implementation of a law may exercise the competence to make an interpretation, but it emphasises that such an interpretation may not be considered as final and of general binding force. In this case, the Court has exercised constitutional review concerning the respect of the fundamental right to a fair trial and this is considered a final interpretation. The application before the Constitutional Court did not consist of an interpretation of a law, but on the judgment of an individual's application about the infringement of the right to a fair trial. According to Article 124 of the Constitution, its final interpretation is competence of the Constitutional Court. When the Constitutional Court, during the examination of an individual's application, comes to the conclusion that a right during a criminal trial must be respected, this does not imply that the Constitutional Court has made an interpretation of a law. Through its interpretation, the court has reconfirmed an essential principle that constitutes a constitutional guarantee for the individual involved in a trial.

When the Court makes a final interpretation of the Constitution and exercises the constitutional review of legal norms, this interpretation becomes law itself. Interpretation of law in conformity with the constitutional principles takes the qualities of a final interpretation, compulsory for everybody. That is the reason why the Constitutional Court insists that each decision given by it constitutes a constitutional jurisprudence. The examination of the given case cannot be exempted from this.

Based on the above-mentioned arguments, the Court concludes that the United Chambers, by not accepting the implementation of Decision no. 17/2000, have infringed the Constitution, an infringement that in the concrete case has led to the denial of the right to a defence and the right of access to the courts.

For these reasons, the Court decided to set aside Decision no. 371/2000 of the United Chambers on constitutional grounds and to return the case to the Supreme Court.

#### *Languages:*

Albanian.



#### *Identification:* ALB-2002-1-005

**a)** Albania / **b)** Constitutional Court / **c)** / **d)** 19.04.2002 / **e)** 75 / **f)** / **g)** *Fletorja Zyrtare* (Official Gazette), 13, 387 / **h)** CODICES (English).

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

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.3.4.13 Constitutional Justice – Jurisdiction – Types of litigation – **Universally binding interpretation of laws.**

2.3.8 Sources – Techniques of review – **Systematic interpretation.**

3.18 General Principles – **General interest.**

4.7.4.1.6.3 Institutions – Judicial bodies – Organisation – Members – Status – **Irremovability.**

4.7.4.3.5 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **End of office.**

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

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

Constitutional Court, interpretative decision, effects / Constitutional Court, jurisdiction, limits / Constitution, interpretation / Decree, presidential / Dismissal, proceedings, right to defend oneself / Prosecutor, responsibility.

#### *Headnotes:*

The interpretation that the Constitutional Court gives to constitutional provisions has the purpose of analytically identifying the criteria, basic concepts and principles on which the competent body should rely in the procedure for discharging the justices of the Constitutional Court or the Supreme Court or for removing the General Prosecutor. The actions or inactions that might constitute the reasons for their dismissal must be verified by the body that carries out this procedure of dismissal. The wrongful acts and undignified conduct committed should be so serious as to have discredited the position of the judge or prosecutor and to have lowered the dignity of the body they represent so seriously as to compel the competent body to take the measure of removing him or her from duty.

In cases when fundamental elements of the procedure for dismissing a judge or the General Prosecutor do not find detailed regulation in the Constitution or other laws, such procedural rules cannot be filled in through the Constitutional Court's interpretative decision. Parliament can adopt special rules for a concrete case, but must always ensure the respect for the constitutional principles of due process of law.

### *Summary:*

A group of deputies requested the Constitutional Court to interpret Articles 128, 140 and 149.2 of the Constitution, which provide the grounds for the removal of a justice of the Constitutional Court, a justice of the Supreme Court or the General Prosecutor. Out of the grounds established in the above-mentioned articles, two of them, specifically the commission of a crime and mental or physical incapacity, are such that cannot be verified directly by Parliament, as they require a preliminary determination of the competent bodies.

The Constitutional Court underlined that it cannot perform the role of the positive legislator, contemplating all the grounds that might be included in the aforementioned constitutional articles.

The Constitutional Court considered that the meaning of the constitutional terms related to the reasons for dismissal should be seen as closely connected to the whole legal process that Parliament follows in cases when it initiates the procedures for the dismissal of judges of the Constitutional or Supreme Court or the General Prosecutor. This legal procedure of disciplinary adjudication, similar to investigative administrative procedures, has its own principles that are related to the verification, analysis and determination of the concrete reasons that lead to the taking of measures for the dismissal of a court officer.

Following this general conclusion, the Constitutional Court examines the existence of the reasons for dismissal. The Constitutional Court examines not only the procedure of dismissal, but also the merits of the case. In order to ensure that the decision of Parliament on the dismissal of the official in question is well grounded and constitutional, it has to meet all the essential elements of a fair procedure.

The Court noted that the expression "acts and behaviour that seriously discredit the position and reputation of a judge..." established by Articles 128, 140 and 149.2 of the Constitution comprises a number of elements, which may and must be identified on a case by case basis by the body competent to take a decision on the dismissal of

judges of the Constitutional or Supreme Court or the General Prosecutor. The "behaviour" may have been committed not only during the exercise of the officer's professional duty, but also outside of it.

On the other hand, in the expression "serious violation of the law during the exercise of his duties" committed by the General Prosecutor (Article 149.2 of the Constitution) the seriousness relates to the importance of the violation of the law, to the consequences that ensued, to the duration of these consequences, as well as to the subjective position that the particular person holds towards it.

Two justices considered that the case was not within the competencies of the Constitutional Court for the following reasons: the Constitutional Court has the authority to give the final interpretation of constitutional provisions, namely after the competent body has made its interpretation by taking a certain decision. This was not the situation in the present case. Since there is no other previous interpretation by a competent body, the Constitutional Court cannot make a final interpretation of the Constitution. Furthermore, mentioning the principles of due process is not an interpretation of the procedures to be applied in such cases, but an unnecessary declaration that does not respond to the reasons for the application. The Constitutional Court cannot add other procedures by means of interpretation, because it would come outside the content of the respective constitutional provisions and, at the same time, outside its competencies.

Another judge considered that the Constitutional Court is not competent to examine the case submitted for the following reasons: the Constitution of Albania foresees the interpretative function of the Constitutional Court, but does not specify the cases when this Court can be called upon for the purpose of exercising this function. The reason for the interpretative function of the Constitutional Court was the existence of different interpretations given by Parliament of the provisions as to which the interpretation has been sought. However, this does not constitute a reason for putting the Constitutional Court into motion. The Constitutional Court can be asked to give the final interpretation of the constitutional provisions only in cases when different powers interpret these provisions in different ways. In the present case, the Constitutional Court has been requested to give an opinion of a consultative nature, which stems from the content of the application. Finally, taking into consideration the fact that, during the examination of the case in question, Parliament finalised the procedure for the dismissal of the General Prosecutor, the Constitutional Court should have refused to continue the examination of the case.

*Supplementary information:*

Following the pronouncement of decisions ALB-2002-1-005 and 006, high political representatives began a ferocious campaign of attacks and denigrations towards the Court and its President. Some suggested these decisions should not be applied, others went further in suggesting a reduction of the Court's powers, or even its disappearance altogether. The President of the Assembly resigned, describing these decisions as unconstitutional, while the President of the Republic stated his intent "... to advise the Prime Minister to consider a revision of the law governing the organisation and the operation of the Court".

In the beginning of June 2002, the Plenary Session of the Assembly of the Republic, ended the debates concerning the execution of decisions ALB-2002-1-005 and 006 by adopting a decision ordering the Parliamentary Commission on Immunities, Mandates and Rules of Procedure to draft "... an amendment project of the Assembly's rules of procedure with a view to improve the rules pertaining to the nomination and the destitution of high public officials... which must now be followed by the Assembly". This section of the Assembly's decision thus evidences that steps are taken towards the execution of these decisions. On the other hand, the Assembly remained silent the reopening of the destitution procedure of the General Prosecutor of the Republic. Moreover, the Assembly ordered the Council of the Ministers "... to promptly elaborate and deliver to the Assembly necessary amendments to Law no. 8577 of 10.02.2000 on the organisation and the operation of the Constitutional Court".

*Languages:*

Albanian, English (translation by the Court).

*Identification:* ALB-2003-1-002

**a)** Albania / **b)** Constitutional Court / **c)** / **d)** 17.04.2003 / **e)** 15 / **f)** Constitutionality of the law / **g)** *Fletorja Zyrtare* (Official Gazette), 26/03, 844 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**  
 1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**  
 1.6.3 Constitutional Justice – Effects – **Effect erga omnes.**  
 1.6.6 Constitutional Justice – Effects – **Execution.**  
 1.6.7 Constitutional Justice – Effects – **Influence on State organs.**  
 2.1.3.1 Sources – Categories – Case-law – **Domestic case-law.**  
 3.9 General Principles – **Rule of law.**  
 3.16 General Principles – **Proportionality.**  
 3.22 General Principles – **Prohibition of arbitrariness.**  
 4.7.7 Institutions – Judicial bodies – **Supreme court.**  
 5.2 Fundamental Rights – **Equality.**  
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**  
 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**  
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**  
 5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Equality of arms.**

*Keywords of the alphabetical index:*

Constitution, violation, substantial / Constitutional Court, decision, binding force / Constitutional Court, decision, disregard / Criminal procedure / Defence, effective / Remedy, effective / Lawyer, appointment / Lawyer, right of choice / Supreme Court, jurisdiction / Trial, *in absentia*, lawyer, appointment.

*Headnotes:*

A criminal legislative provision that provides for the exercise of the right to a defence by the advocate of an accused tried *in absentia* only where the advocate has in his or her possession a power of attorney granted by the accused is incompatible with the Constitution and international agreements. Otherwise, an accused tried *in absentia* would be denied the right to a defence, thereby infringing upon the constitutional principles and the principles guaranteed by the international agreements ratified by the Albanian state.

### Summary:

At the request of the Albanian Helsinki Committee, the Constitutional Court examined a provision of the Criminal Procedure Code allowing for the exercise of the right of appeal by the advocate of an accused tried *in absentia* only where the advocate has in his or her possession a power of attorney granted by the accused. The Court found that provision unconstitutional on the ground that it denied an accused tried *in absentia* the exercise of two fundamental rights: the right to a defence and the right of appeal. Those rights are guaranteed by the Constitution and the international agreements whose implementation is compulsory for the Albanian state. Where an accused is tried *in absentia*, he or she is incapable of providing the advocate with a power of attorney. As a result, the accused does not have an effective possibility of exercising the right of appeal or even the right to a defence. According to the Constitutional Court, the guarantees of the right of effective appeal found in the Constitution, the European Convention on Human Rights and other international agreements put the legislative body under the obligation not to hinder the individual in the exercise of such a right and to provide the individual with all the necessary means for its effective exercise. The restriction imposed by the impugned provision did not fulfil the requirements foreseen by the above-mentioned legal instruments, and it ran contrary to them.

The Constitutional Court found that the creation of a situation where an accused tried *in absentia* may not appeal against a court decision puts the parties in an unequal position. The principle of equality before the law should not be understood as an exclusion of arbitrariness only during the implementation phase, but also, and first of all, during the adoption phase of laws that prevent inequality. The Constitutional Court considered that the principles of proportionality and equality should have been taken into consideration by the lawmaker because of the risks that might otherwise arise of a partial adjudication of the case and a rendering of an unjust decision. Such a decision would violate the individual's right and would have an effect on the foundations of the rule of law.

Regarding that issue, the Constitutional Court has expressed its opinion before, more specifically, in its Decision no. 17 of 17 April 2000 and Decision no. 5 of 7 February 2001, in which it annulled two decisions of the United Chambers of the Supreme Court on the grounds that the court trials had been unfairly conducted and the constitutional principles guaranteeing the individual's rights and freedoms had been infringed. In its previous decisions, Constitutional Court found that the Supreme Court had erred in its interpretation of the law when it had imposed

restrictions on the rights of appeal and defence of an accused tried *in absentia*. Moreover, the Constitutional Court has expressed that its decisions are binding on all state bodies and should be implemented by them in such a way so as to be reflected in the practice of ordinary courts and in the compilation of legislative and rule-making acts by the competent bodies. It was those very decisions that were not taken into consideration by the Assembly during the amendment of the Criminal Procedure Code. The Constitutional Court did not have doubts as to the authority and will of the legislature to pass laws, amend and add to them, but the Court did insist that legislation should not be contrary to the Constitution and ratified international agreements. As the Constitutional Court decisions had been based on the Constitution and international agreements, the Assembly should have acted in conformity with them.

The Constitutional Court found the provision, which stated that the right of appeal by the advocate of an accused tried *in absentia* could only be exercised when the advocate was in possession of power of attorney granted by the accused, unconstitutional. For these reasons, it decided to annul that provision of the law

### Supplementary information:

The Constitutional Court has expressed that same opinion in two of its previous decisions, both of which were disregarded by the legislative body when drafting the provision in question.

### Cross-References:

- Decision no. 17 of 17.04.2000, *Bulletin* 2000/1 [ALB-2000-1-003];
- Decision no. 5 of 07.02.2001, *Bulletin* 2001/1 [ALB-2001-1-001].

### Languages:

Albanian.



*Identification:* ALB-2005-1-001

**a)** Albania / **b)** Constitutional Court / **c)** / **d)** 07.01.2005 / **e)** 1 / **f)** Constitutionality of the law / **g)** *Fletore Zyrtare* (Official Gazette), 4, 207 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

1.2.2.4 Constitutional Justice – Types of claim – Claim by a private body or individual – **Political parties.**

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

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

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

4.9.3 Institutions – Elections and instruments of direct democracy – **Electoral system.**

4.9.4 Institutions – Elections and instruments of direct democracy – **Constituencies.**

4.9.7 Institutions – Elections and instruments of direct democracy – **Preliminary procedures.**

5.2 Fundamental Rights – **Equality.**

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

*Keywords of the alphabetical index:*

Election, constituency, boundaries / Election, law, electoral / Election, vote, right, obligation.

*Headnotes:*

While the lawmaker has the right to define and evaluate criteria, it is the duty of the Constitutional Court to review whether the lawmaker's solution is in conformity with the Constitution. The term 'voter' includes even those persons that for various reasons have not exercised the right to vote. The participation in the voting process is not an obligation of the citizens. It is one of their rights and they should not be prejudiced and left out of the voting process for this reason. Consequently, any other meaning given to the term 'voter' would be a constitutional limitation and would have an impact on the exercise of the right to vote.

By substituting a partial concept, which has a narrow and detached meaning, for the entire one, the electoral law departed from the constitutional provision (Article 64.1), which provides for the division of electoral zones according to the approximate number of voters and not according to the number of voters who took part in the voting in the last elections.

*Summary:*

The Social Democratic Party applied to the Constitutional Court, seeking to have the provision in Article 73.1 of the Electoral Code struck out on the ground that that provision laid down a criterion for establishing the boundaries of electoral zones that was different from the criterion provided for by the Constitution. According to the applicant, the Constitution set out that the criterion to be used for establishing the boundaries of electoral zones was that of the approximate number of voters, whereas Article 73.1 of Electoral Code provided for the division of electoral zones on the basis of the number of voters who had taken part in the voting in the last elections. That lack of conformity led to the unconstitutionality of that legal provision, since that provision intended to divide the Albanian territory in such a way as to have regions with greater electoral weight, which would produce more deputies than other regions with the same population. The applicant also contended that the implementation of such a principle would even violate the principle of equality of citizens in the voting process.

Firstly, the Constitutional Court considered the submissions made by a party having an interest in the proceedings (the Democratic Party of Albania) concerning the lack of standing of the applicant, which allegedly lacked an interest that was directly related to the case, a prerequisite provided for by Article 134.2 of the Constitution in order for a party to bring an application before the Constitutional Court. The Constitutional Court held that political parties amount to an important factor not only during the electoral process itself, but also during its initial phase. Representative democracy cannot be understood without the presence of political parties, so their interest is totally justified as to their legal standing as applicants in proceedings for constitutional review.

As to the instant case, the Constitutional Court held that the right to vote is a constitutional right of citizens, guaranteed by Article 45 of the Constitution. This right is enjoyed not only by the voters, but also by the persons standing for elections, and through them, the political parties. The principle of the equality of votes is closely related to the electoral system. Thus, in the majority or plurality voting electoral system (first-past-the-post system), this principle is understood as an equal opportunity for succeeding, whereas in the proportional representation electoral system, this principle is understood to mean that votes are to have both the same weight and the same impact in the result. Albania has adopted the mixed system of elections, which should reflect the idea of the same impact of votes in the result of elections.

That being so, the establishment of the boundaries of electoral zones has a direct influence. The Albanian Constitution provides for the criterion of “an approximate number of voters”, whereas the law (the amended Electoral Code) provides for the number of voters who have taken part in the voting in the last elections.

For this reason, the Constitutional Court decided to strike out the expression “voters who have taken part in voting” as a criterion for establishing the boundaries of electoral zones.

#### *Languages:*

Albanian.



#### *Identification:* ALB-2007-2-003

**a)** Albania / **b)** Constitutional Court / **c)** / **d)** 21.12.2006 / **e)** 29/06 / **f)** Resolution of disagreements over powers between central and local government, interpretation of Article 13 of the Constitution / **g)** *Fletore Zyrtare* (Official Gazette), 140, 5533 / **h)** CODICES (English).

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

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

1.3.4.4 Constitutional Justice – Jurisdiction – Types of litigation – **Powers of local authorities.**

1.4.9.1 Constitutional Justice – Procedure – Parties – **Locus standi.**

2.1.1.4.14 Sources – Categories – Written rules – International instruments – **European Charter of Local Self-Government of 1985.**

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

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

4.8.4.2 Institutions – Federalism, regionalism and local self-government – Basic principles – **Subsidiarity.**

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

Autonomy, local / Powers, separation and interdependence, principle / *Res judicata*, definition / Local self-government, legislative power / Decentralisation, principle / Decentralisation, administrative / Decentralisation, financial.

#### *Headnotes:*

Conflicts of laws arising from issues related to disputes about power between constitutional organs are issues which should be resolved through the exercise of constitutional review.

Local government is established and should function on the basis of the principle of decentralisation of power. The principles of decentralisation of power and of the autonomy of local government are pivotal to the establishment and functioning of a democratic state under the rule of law. Abusive exercise of central power may lead to the impediment or reduction of competence that the Constitution has attributed to the local government authorities. The government may issue acts with the force of law, but it should be careful not to hinder the exercise of legal and constitutional competence by local government authorities. On the basis of the principle of devolution of power, the legislator may modify the competences assigned by it to local government, but it should be careful not to encroach upon the main competences that the Constitution has vested in local government.

Restrictions on the field of activity of local authorities carry the risk of substantially diminishing their status and role, which would run counter to the constitutional principles upon which the local government has been established and functions.

#### *Summary:*

The Municipality of Tirana referred a claim to the Court regarding disagreements in the exercise of constitutional competences between local and central government. The appellant had identified the exercise by several organs of central government of competences of the organs of local government in the field of planning and urban management, as well as supervision of the territory. The exercise of competences had come to light when some subordinate legislation was issued, bestowing upon the prefect the power to call a meeting of the Council of the Regulation of the Territory (CRT) at the municipality. The enactment of this legislation had blocked the activity of the Municipality of Tirana and the CRT and was at the root of disagreements of competences arising between the central and local government the field of city planning and supervision of the territory.

The Court began by analysing in depth the meaning of a disagreement of competences between the powers, (including disputes between central and local government), and to give an extensive definition of those subjects who have the right to start constitutional proceedings in these circumstances.

The Constitution provides that the Court should decide upon disagreements of competence between powers, including disagreements between central and local government. This includes disagreements arising in the sphere of the separation of powers on the horizontal plane (legislative, executive and judicial) as well as the vertical plane (central and local government).

The separation of powers is essentially nothing more than a separation of competences. A competence is a right that is legally given to an organ or a power in order to decide on specific issues. For a disagreement of competence to be included in constitutional jurisdiction, it should arise between organs that belong to different powers. Each of them should ask the other separately to materialise the will of the power to which it belongs, issuing acts that it considers to belong to its own sphere of competences.

Disagreements of competence can arise where legislation attributes the same competence to two or more institutions, or where different legislation attributes the same competence to two institutions, or where legislation prescribes a competence but does not specify the organ which should exercise it.

According to the organic law, a complaint before the Court is brought by the subjects in conflict or by the subjects directly affected by the conflict. Referring to the principle of the decentralisation of power and local autonomy, the Court held that the Municipality of Tirana had *locus standi* to bring a case of this nature.

The Court dismissed the claim by another party that the case could not be re-examined because of the legal impediment created by the principle of *res judicata*. *Res judicata* is recognised as one of the three forms of effects that a judicial decision has in the abstract procedure of supervision of the constitutionality of legal norms. The Court concludes that, both in the formal aspect as well as in the substantial aspect, the case does not constitute *res judicata*.

The Municipality of Tirana and several authorities belonging to the central power had had a dispute, which resulted in failure to carry out their normal legal and constitutional activities. The Court took the view that the dispute had arisen because of a duality in the legislation designating the organs that should exercise competences in the field of city planning and supervision of the territory.

The Albanian normative system is not decentralised but hierarchical. In such a normative system, there is very precise detail of the separation of powers at local level. Local government slots into the system of a unitary state. The Albanian normative system is not based on the principle of devolution, which means granting of power by central government to the local units.

On the other hand, local governance means the right of people in a designated territorial community to govern their lives, either through bodies they themselves elect, or directly. The principle of decentralisation of power is pivotal to the establishment and functioning of local government, in a democratic state under the rule of law. It is exercised through the constitutional principle of local autonomy. The manner of organisation and functioning of local government, as well as the relationship that it has with the central power, depends on the constitutional and legal meaning given to the decentralisation of power, local autonomy and self-government.

Decentralisation is a process in which authority and responsibility for particular functions are transferred from central power to units of local government. The principle of subsidiarity is at the root of decentralisation. Under this principle, "the exercise of public responsibilities should, in general, belong more to the authorities that are closer to the citizens." Decentralisation is political and includes the transfer of political authority to the local level through a system of representation based on local political elections. Through administrative de-centralisation, responsibility is transferred for issues of the administration of several functions to local units, while financial decentralisation refers to the transfer of financial power to the local level.

The Constitution has adopted a concept of decentralisation, which refers to the restructuring or reorganisation of power and which makes possible the creation and functioning, under the principle of subsidiarity, of a system of joint responsibility of institutions of government at both the central and local level. This concept responds better to the need for substantial autonomy of local government, to the ability of the latter to facilitate central government, and to the beneficial resolution of local problems.

Autonomy is a legal regime in which the organs of local units operate independently in order to resolve those issues that fall within their competence, under the Constitution and the laws. Local government autonomy is most apparent in the separation of competences, in terms of the powers local government institutions have, or should have, to make their own decisions about problems within their jurisdiction.

Local self-governance is an institution by means of which the citizens' political right of self-government, as their political right, is manifested. Local government institutions cannot be hindered in carrying out their duties; neither can their powers be reduced, as their field of activity is set out within the Constitution. Local self-government is at the root of a democratic state under the rule of law, because of the role it plays in the separation and balance of powers.

The Court emphasised that local self-government is enshrined within the Constitution, and its independence is guaranteed through it. Local government can be described as the combination of *constitutional regime* with parliamentary devolution. The Constitution also connotes respect for two important criteria, exclusivity of competence and complementarity.

The Court viewed the legal provisions which had given rise to the dispute in the context of the constitutional concept of the principle of decentralisation of power and local autonomy and, specifically, against the background of the democratic standards recognised by the European Charter of Local Autonomy (ECLA). The purpose of ECLA is to create in its member states the necessary scope for local authorities to have a wide scope of responsibilities capable of being realised at a local level.

The Court noted that it would be considered a violation of the right to local self-government if the legislator, by removing power from local organs, were to weaken their role to such an extent that their existence or self-government became insignificant. The Court held that the polarisation of power to central government in respect of the approval of construction permits was out of line with constitutional principles and the standards of ECLA. The Court considered that Article 8 of the contested law was unclear and open to misinterpretation, as it did not give a clear technical and legal definition of the terms "important objects" and "city centres". As a result, it created a confusion of competences between local and central government.

The Court decided to resolve the dispute as to competences by determining the organ that is competent to examine the issues that are the object of disagreement. The Court declared some legal provisions of the contested law to be incompatible with the Constitution and with the standards of ECLA.

Three members expressed a dissenting opinion.

*Languages:*

Albanian.





# Andorra

## Constitutional Court

### Important decisions

*Identification:* AND-2001-2-001

**a)** Andorra / **b)** Constitutional Court / **c)** / **d)** 16.12.1994 / **e)** 94-1-CC / **f)** / **g)** *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 19.12.1994 / **h)**

*Keywords of the systematic thesaurus:*

1.3 Constitutional Justice – **Jurisdiction.**  
 1.3.4.2 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between State authorities.**  
 3.4 General Principles – **Separation of powers.**  
 4.6.6 Institutions – Executive bodies – **Relations with judicial bodies.**  
 4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**

*Keywords of the alphabetical index:*

Budget, justice, administration / Supreme Judicial Council, budget, management.

*Headnotes:*

In the event of a dispute between constitutional organs about the exercise of a power, the Constitutional Court's decision shall assess that disputed power and assign it to one of the parties, without taking the place of the legislature.

*Summary:*

The Judicial Service Commission referred to the Constitutional Court a dispute about powers between itself and the government, for it took the view that it had power to manage the budget allocated for the administration of justice.

The Judicial Service Commission had in practice managed its budget from the date on which it was set up, 25 October 1993, until the General Budget Law of 1994. After that law had been adopted, the government included implementation of the justice budget in that of the general government budget.

The Judicial Service Commission had expressed the view that the government had encroached onto a power held by itself, seriously jeopardising the principle of the separation of powers.

In this judgment, the Constitutional Court points out that both the Constitution and the Special Law on Justice (*Llei Qualificada de la Justícia*) explicitly lay down the powers of the Judicial Service Commission, which do not encompass the management and implementation of the justice department budget. Nor is it the Court's role to take the place of the legislature in the drafting of new laws or the amendment of those in force, or to decide on laws which are not disputed within the framework of a conflict of powers.

*Supplementary information:*

The Constitutional Court deals with conflicts of powers between constitutional organs. It is the Coprinces (joint and indivisible Heads of State), the General Council (parliament), the government, the Judicial Service Commission and the *Comuns* (representative and administrative organs of the *Parròquies*, Andorra's territory being divided into seven *Parròquies*) that are defined as constitutional organs.

The Judicial Service Commission is the organ which represents, manages and administers the organisation of the courts and ensures that the courts are independent and function properly.

*Languages:*

Catalan.



*Identification:* AND-2003-2-001

**a)** Andorra / **b)** Constitutional Court / **c)** / **d)** 09.05.2003 / **e)** 2003-1-CC / **f)** / **g)** *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 14.05.2003 / **h)**

*Keywords of the systematic thesaurus:*

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

#### 4.6.3 Institutions – Executive bodies – **Application of laws.**

4.8.8.2.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione materiae*.**

4.8.8.4 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Co-operation.**

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

Environment, protection / Health, public, power / Building permit, issue, conditions.

#### *Headnotes:*

An act of the *Comú* which seeks to protect environmental health conditions does not interfere with the powers of the Government. On the contrary, that allows a greater and improved guarantee of the coordination of the public powers in the interest of constitutional values.

#### *Summary:*

The government requested the Constitutional Court to settle a conflict of powers between it and the *Comú* of Andorra-la-Vella. The Government maintained that the *Comú* had encroached upon its powers in relation to public health.

The government ordered the closure of a waste disposal incinerator and declared the area in which it was situated more or less dangerous to human and animal health according to the level of pollution found. Thus, before granting a building permit for the neighbouring areas, the *Comú* of Andorra-la-Vella requires that the applicant submit a certificate issued by the Government stating that the land to be built upon does not show a degree of pollution representing a danger to health and to human life.

The government maintains that in demanding this certificate the *Comú* is exceeding the powers conferred on it in town and country planning matters and is interfering in the area of health protection, thus encroaching on the powers which, under the Constitution and the law, belong to the government.

In this judgment, the Court considers that an act of the *Comú* which merely requires, for the exercise of its power to grant a building permit, that the applicant present a certificate issued by the state relating to the conditions of environmental health, on matters where the Government has intervened pursuant to the provisions of Article 59 of the Health Act, does not impinge upon the powers of the State; quite to the

contrary, it allows a greater and improved guarantee of the coordination of the public powers in the interest of the constitutional values. In the dispute before the Court, therefore, the *Comú* of Andorra-la-Vella did not interfere in the area of powers of the Government, it did not create a State rule relating to the grant of building permits and it did not impose a burden on the Government. It merely adopted a guarantee permitting compliance with the planning rule, following the general principle of town and country planning.

#### *Supplementary information:*

1. The Constitutional Court adjudicates in disputes as to powers between the constitutional organs. The following are considered constitutional organs: the Co-Princes (joint and indivisible Heads of State), the General Council (parliament), the government, the Judicial Service Commission and the “*Comuns*”.

2. The *Comú* is the representative and administrative organ of the “*Parroquies*”, roughly equivalent to the district council; Andorra is composed of 7 “*Parroquies*” (Canillo, Encamp, Ordino, La Massana, Andorra-la-Vella, Sant Julià de Lòria and Escaldes-Engordany).

#### *Languages:*

Catalan.



#### *Identification:* AND-2004-2-001

**a)** Andorra / **b)** Constitutional Court / **c)** / **d)** 01.06.2004 / **e)** 2004-1-RE / **f)** / **g)** *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 36, 2004 / **h)** CODICES (Catalan).

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

1.6.6 Constitutional Justice – Effects – **Execution.**

4.7.1 Institutions – Judicial bodies – **Jurisdiction.**

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

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

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

*Keywords of the alphabetical index:*

*Res judicata* / Court, discretion, lack / Company, shareholders, general meeting.

*Headnotes:*

The ordinary courts may not exercise discretion in respect of the merits; instead, they are obliged to apply the law and convene a General Meeting of a company's shareholders. The decision to do so, which they are under an obligation to take, is considered by the Constitutional Court to constitute *res iudicata* and is not subject to appeal.

By failing to apply the mandatory provisions of the law, the ordinary court violated the right to a hearing guaranteed by the Constitution.

*Summary:*

In response to an initial application for protection, the Constitutional Court had held that, under Article 34.3 of the Companies Act, the Court was required to convene a General Meeting of a company's shareholders if such a meeting had not been convened within the statutory time-limit set by that law. When finding in favour of the defendant, the Civil Division of the High Court of Justice considered that in view of the persistent disputes and differences of opinion between the parties, these non-contentious court proceedings should be converted into contentious proceedings.

A second application for protection was filed with the Constitutional Court against the decision of the Civil Division of the High Court of Justice on the ground of a violation of the right to a fair hearing within a reasonable time guaranteed by Article 10 of the Constitution, because the High Court had failed to apply a judgment of the Constitutional Court.

There was no need therefore to examine the particular question of whether the non-contentious proceedings should be converted into contentious proceedings or not if there was of a dispute (which would have had the effect of rendering Article 34.4 of the Companies Act meaningless) or to examine the right to a fair hearing in the presence of both parties during the non-contentious proceedings.

As far as the protection of the shareholders was concerned, the Court was obliged therefore to convene the General Meeting, pursuant to the Constitutional Court's initial decision and in accordance with the mandatory provisions of Article 34.4 of the Companies Act, otherwise it would have been denying the applicants their constitutional right to a fair trial.

*Languages:*

Catalan.



# Argentina

## Supreme Court of Justice of the Nation

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### Important decisions

*Identification:* ARG-2008-1-002

**a)** Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 18.09.2007 / **e)** D. 587. XLIII / **f)** Defensor del Pueblo de la Nación v. Estado Nacional y otra (Provincia de Chaco) s/ proceso de conocimiento / **g)** *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 330 / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.1.4.3 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Executive bodies.**

4.8.8.3 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Supervision.**

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

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

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

5.5.5 Fundamental Rights – Collective rights – **Rights of aboriginal peoples, ancestral rights.**

*Keywords of the alphabetical index:*

Judicial review, over other state powers, necessity / Aboriginal, people, right, protection by the judiciary.

*Headnotes:*

The judiciary should exercise supervision over the activities of the other State powers where individuals' right to life and bodily integrity are at issue. This is not to be regarded as interference on the part of the judiciary, the sole aim being to endeavour to protect these rights, or to rectify their omission.

*Summary:*

The national defender of human rights (ombudsman) had requested that the State and the Province of Chaco be ordered to take the necessary steps to change the living conditions of the inhabitants of a region of that province, belonging mainly to the Toba aboriginal ethnic group. They were described as being in a situation of extreme precariousness since their most basic needs were not fulfilled owing to the State and provincial authorities' inaction and failure to discharge the duties imposed on them by the applicable laws, the national Constitution, international treaties and the Constitution of the Province of Chaco.

The gravity and urgency of the reported facts warranted the exercise of the supervision assigned to justice over the activities of the other State powers and, in that context, over the adoption of measures which, without encroaching on the functions of the State, are conducive to the observance of the national Constitution, above and beyond the possible decision in the proceedings as to the court's competence to hear and determine the case by way of the appeal provided for in Article 117 of the Constitution.

The judiciary should seek avenues for ensuring the effectiveness of rights and averting their infringement, this being its fundamental and guiding aim in the administration of justice and the reaching of decisions on the disputes referred to it, especially where individuals' right to life and bodily integrity were at issue. This was not to be regarded as interference on the part of the judiciary, the sole aim being to endeavour to protect these rights, or to rectify their omission.

The State and the Province of Chaco were asked to submit, within thirty days a report on the measures to protect the indigenous community living in the region.

*Supplementary information:*

Two judges expressed dissenting opinions.

*Languages:*

Spanish.



# Armenia

## Constitutional Court

### Important decisions

*Identification:* ARM-2008-3-008

**a)** Armenia / **b)** Constitutional Court / **c)** / **d)** 25.11.2008 / **e)** DCC-758 / **f)** On the conformity with the Constitution of Article 80.1, 80.4 and 80.5 of the Law on Amendments to the Civil Procedural Code / **g)** *Tegekagir* (Official Gazette) / **h)**.

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Judgment, revision / Obligation, international, state / *Restitutio in integrum.*

*Headnotes:*

The system for the review of judicial acts can only proceed effectively if the opportunity is provided to review judicial acts from courts of all instances where new circumstances have arisen; provisions whereby only the court of first instance that adopted the judicial act can review it would constitute a considerable hindrance to such progress.

*Summary:*

The Constitutional Court examined a case arising from an individual application, relating to the constitutional compliance of various norms of the Civil Procedural Code regulating the review of judicial acts where new circumstances have arisen. These norms stipulated that only judicial acts by first instance courts could be subject to review on the basis of new circumstances. Thus, where the Constitutional Court or international courts have pronounced an applied legal norm unconstitutional, only the court of first

instance that adopted the judicial act in question is entitled to review it. Judicial acts by the Court of Appeal and the Cassation Court are not subject to review.

The Constitutional Court noted for the record the practical possibility that the restoration of a violated right should exclusively require the review of judicial acts made by the Appeal or Cassation Courts, on the basis that norms found to be contrary to the Constitution could be implemented by those courts. In this context, the Constitutional Court examined Article 101.6 of the Constitution (governing an individual's right to appeal to the Constitutional Court). The above paragraph allowed for the possibility of a challenge, in the course of an individual application, of the legal provision applied by the final judicial act. There were certain cases where judicial acts made by courts of different instances (such as first instance courts, the Appeal Court or the Cassation Court) could constitute final judicial acts. More commonly, the Cassation Court's decision is the final judicial act.

The Constitutional Court stressed that under Article 101.6, the criterion for the admissibility of the individual application is that the disputed provision should be applied by the final judicial act. However, the provision applied by the final judicial act does not necessarily have to be applied by the court of first instance or the Court of Appeal: the application of the legal provision by the final judicial act will suffice for a challenge to the provision in the Constitutional Court. Accordingly, under Article 101.6, it is possible to challenge legal provisions in the Constitutional Court that have been applied by a final judicial act by the Appeal Court or the Court of Cassation, but which have not been applied by the first instance court. Where this is the case, and legal provisions are to be pronounced in contravention of the Constitution and null and void by the Constitutional Court, the review of the judicial act made by the court of first instance based on the Constitutional Court's corresponding decision becomes pointless and does nothing to assist the making good of the individual's violated right. Restoring the individual's violated right on the basis of the Constitutional Court's decision only requires that the final judicial act be reviewed.

In its decision, the Constitutional Court touched on the problems the disputed provisions could cause in terms of executing judgments of the European Court at a domestic level. Regarding the obligation to execute European Court's judgments under Article 46 ECHR, the Constitutional Court noted that, in order to execute these judgments, High Contracting States, including the Republic of Armenia, should, *inter alia*, take individual measures in favour of the applicant.

The aim is to put an end to continuing violations and, as far as possible, erase their consequences (*restitutio in integrum*). Individual measures, as a rule, entail the revision of domestic judicial acts on the basis of European Court's judgments. The review of domestic judicial acts is of fundamental importance for the execution of the European Court's judgments, when the infringement of procedural norms during trial entails violations of rights. Violations of procedural norms can occur at any instance in the domestic court system, and in terms of executing judgments of the European Court, it is necessary to review the judicial act of the court that has violated the procedural norms.

The Constitutional Court found that the current legal regulations governing the review of domestic judicial acts on the basis of European Court judgments offer no opportunity for the restoration of the individual's violated right. They also hamper the Republic of Armenia in its execution of European Court's judgments, and pose problems in the meeting of its obligations under the European Convention on Human Rights.

The Constitutional Court referred in its decision to the consistent development within the practice of the European Court of what are known as "pilot judgments". In view of these current developments in European Court practice, and the need to provide opportunities for the restoration of the rights of individuals on the basis of European Court judgments at a domestic level, a clear definition of the review of judicial acts is needed in domestic legislation.

The Constitutional Court observed that the problem with the disputed norms is that they deprive individuals of the possibility of a complete restoration of their rights through the review of judicial acts on the basis of new circumstances. This threatens the legal security of the state and the stability of the civil order, increases the risk of corruption and prevents the Republic of Armenia from executing its duties in its capacity as Contracting Party to international treaties.

The Constitutional Court held the disputed norms to be in contravention of the Constitution.

#### *Languages:*

Armenian.



#### *Identification:* ARM-2008-3-010

**a)** Armenia / **b)** Constitutional Court / **c)** / **d)** 25.11.2008 / **e)** DCC-780 / **f)** On the conformity with the Constitution of several provisions of the Civil Code, Law on Taxes, and Articles 15 and 118 of the Administrative Procedural Code / **g)** *Tegekagir* (Official Gazette) / **h)**.

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

3.9 General Principles – **Rule of law.**  
 3.10 General Principles – **Certainty of the law.**  
 3.12 General Principles – **Clarity and precision of legal provisions.**  
 4.7.9 Institutions – Judicial bodies – **Administrative courts.**  
 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**  
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**  
 5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

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

Freedom of enterprise / Administrative justice / Effective remedy.

#### *Headnotes:*

Under the Armenian Constitution, the universal right to freedom of enterprise (provided this is not prohibited by law), comprises all legal remedies creating preconditions for an individual to make his or her own decisions on economic activity. It includes fair competition, the opportunity to set up economic enterprises without restriction, to change the format and direction of one's activity, to wind up existing businesses and to sign contracts. A vital component of the right to freedom of enterprise is the opportunity for somebody wishing to engage in business to enter or leave the market without any artificial obstacles.

The Constitution allows the legislator the discretion to create a court of appeal within the framework of administrative justice. Nonetheless, in exercising this discretion, the legislator should be guided by the necessity to protect fundamental human and civil rights provided by the Constitution and by international treaties. The rights to judicial protection and to appeal require special safeguarding.

Judgments by the specialised administrative court could not be reviewed by the court, where there is no appropriate specialised judicial chamber. Guarantees under the Constitution of the existence of the chambers within the Cassation Court will make sense once the Cassation Court has its own specialised chamber with the power to examine the facts of a given case and make a decision on it.

### *Summary:*

The applicant argued that the uncertainty of the notion of “entrepreneurial activity” and the wording determined in various normative acts were open to different interpretations, as they allowed an individual’s activity to be considered both entrepreneurial and non-entrepreneurial.

In its analysis of the legislation, the Constitutional Court noted that the legislator had outlined the basic features of the notion of “entrepreneurial activity” and had placed no restrictions on the inclusion of additional features. The Cassation Court, within the scope of its function of ensuring uniformity in the implementation of the law and within the scope of its authority to contribute to the development of law, had interpreted the legislative meaning of the notion and the ambit of the features.

The Constitutional Court found no uncertainty in the disputed norms.

The applicant also challenged the norms of the Administrative Procedural Code, according to which judgments of the Administrative Court are final and binding from the moment they are handed down, and the procedure of bringing an administrative case before the Cassation Court and proceedings of that case in front of the Cassation Court were regulated by the relevant norms of the Civil Procedural Code.

Systematic analysis of the Administrative Procedural Code led the Constitutional Court to pinpoint the following elements of the legal regulation on the lodging of an appeal against judgments of the Administrative Court:

- judgments of the Administrative Court become binding from the moment they are handed down and cannot be brought before the Appeal Court;
- judgments of the Administrative Court can only be brought before the Cassation Court;
- as it is not possible to bring judgments of the Administrative Court before the Appeal Court, they can be brought before the Cassation Court

on the same basis as judgments of the Civil Court of Appeal;

- the criteria of admissibility of appeals against judgments of the Administrative Court are the same as those governing appeals against judgments of the Civil Court of Appeal;
- the Cassation Court examines appeals against the judgments of the Administrative Court within the same ambit as appeals against judgments of the Civil Court of Appeal and exercises the same authority.

The Constitutional Court made reference to the fundamental legal opinion expressed consistently in the case-law of the European Court of Human Rights, under which the European Convention on Human Rights does not compel contracting states to create appeal courts or cassation courts. However, if they are created, those involved must exercise all the guarantees enshrined in Article 6 ECHR. In the case under review, the Constitutional Court began by examining whether the legal provision for appeal against administrative court judgments could safeguard the effective exercise of the right to a fair trial within the administrative justice system.

The Constitutional Court found that the effectiveness of exercising the right to a fair trial within administrative justice primarily hinged upon the two-tier system of administrative justice of the Republic of Armenia and the effectiveness of that system. The efficiency of and access to the Cassation Court were particularly important, given that this was the only court to which an appeal could be lodged.

The Constitutional Court observed that the disputed norms of Article 118 of the Administrative Procedural Code, without taking into account the features of administrative justice and the features of determination of disputes in public law, had extended the regulations on the Cassation Court within the three-instance system of civil procedure to appeals against administrative court judgments, including the criteria for appealing to the Cassation Court and the criteria of admissibility of an appeal. This restricted access to the Cassation Court. Because there was no recourse to the Appeal Court in administrative cases, the Constitutional Court deemed it inadmissible to use the same basis for appealing against administrative court decisions and criteria for the admissibility of an appeal, within the three-instance system of civil procedure. The Constitutional Court called for a clear definition within the Administrative Procedural Code of the procedure for lodging appeals against decisions by administrative courts, the basis for bringing an appeal before the Cassation Court, and

rules of appellate procedure. Reference should be made to other laws only if such references fell within the general constitutional principles of the judicial system.

The Constitutional Court emphasised that the provision in Article 115.1 of the Administrative Procedural Code underlined the inefficiency of the current two-instance system of administrative justice. Under this provision, the judgments of the Administrative Court deciding the case in point become binding from the moment they are handed down. The Constitutional Court found that taking administrative court judgments to the Cassation Court under such circumstances not only makes the protection of rights inefficient in the Cassation Court, but also violates the principles of legal certainty and security. These are elements of a democratic state governed by the rule of law, and are enshrined in Article 1 of the Constitution.

The Constitutional Court noted that it is not possible to file an appeal against a decision by the Cassation Court which declared the case inadmissible. This differs from the situation governing decisions by the Appeal Court to declare a case inadmissible. This has an impact on access to and efficiency of the two-instance system of administrative justice. Thus, in instances of an appeal being declared inadmissible by the Cassation Court, an individual is not only deprived of the opportunity to file an appeal against that decision, (and therefore any effective remedy against that decision), but the right to a fair trial is effectively only available within the Court of First Instance.

The Constitutional Court also commented that the requirement that appeals before the Cassation Court can only be lodged through accredited advocates is a factor that restricts access to the Cassation Court. Yet this is the only judicial instance available for appeals against administrative court acts.

The Constitutional Court observed that in the sphere of administrative specialised justice the right to a fair trial is only effective where there is access to an efficient Cassation Court. A specialised chamber is also needed, for effective judicial protection, in the form of a separate specialised chamber vested with the power to examine facts, and to organise the examination of cases according to the features of administrative justice.

The Constitutional Court pronounced the disputed norms of the Administrative Procedural Code contrary to the Constitution and accordingly null and void.

Within the framework of the given case, the Constitutional Court also touched upon another manifestation of imperfection of the institute of specialised administrative justice, which is set out in Article 135 of the Administrative Procedural Code. The latter has included the subject of the constitutional justice in the sphere of the administrative justice, setting out that the Administrative Court deals with the issue of conformity of the departmental normative legal acts with the Constitution.

The Constitutional Court, touching upon the issue of separation of the functions and competence of the Constitutional Court and the Administrative Court, mentioned that the Constitution makes a distinction between the constitutional and common jurisdictional functions in Article 93 directly prescribing the constitutional justice function to the Constitutional Court. Such a separation of the constitutional and common jurisdiction functions, which is set out in the Constitution, ensures the functional dynamic balance of the whole system. Moreover, it is in the competence of the Constitutional Court to ensure the supremacy of the Constitution and direct action in the legal order through constitutional justice. In turn, the specialised body of administrative justice is called to ensure the legality of the activity of the administrative bodies, by implementing the right of judicial protection of the physical and legal entities against the administrative and normative acts, actions and inactions of the state and bodies of local self-governmental and their officials, as well as the examination of the claims of administrative bodies and their officials against physical and legal entities.

The Constitutional Court held that the given confusion of the administrative and constitutional justice in the law-enforcement practice can create different approaches in the interpretation of constitutional norms, which can seriously jeopardise the supremacy of the Constitution and its direct action, as well as the implementation of a united policy of constitutionalisation of public relations.

#### *Languages:*

Armenian.





*Identification:* ARM-2011-1-001

**a)** Armenia / **b)** Constitutional Court / **c)** / **d)** 25.02.2011 / **e)** DCC-943 / **f)** On the conformity with the Constitution of Article 426.3, Part 1, Point 4, Article 426.4, Part 1, Point 1 of the Code of Criminal Procedure and Article 69, Part 12 of the Law on the Constitutional Court / **g)** *Tegekagir* (Official Gazette) / **h)**.

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Constitutional Court, decision, recognition.

*Headnotes:*

Failure to recognise as a new circumstance decisions of the Constitutional Court, in the operative part of which it is stated that the challenged norm is recognised as constitutional within the framework of the Constitutional Court's legal position, does not provide the opportunity of restoration and protection of violated human rights and freedoms.

*Summary:*

On 25 February 2011, the Constitutional Court, having considered various individual complaints, held that Point 4, Part 1, Article 426.3 of the Code of Criminal Procedure was in conformity with the Constitution within the framework of the prescribed limits of the Decision in question.

Point 1, Part 1, Article 426.4 of the Code of Criminal Procedure, in the context of the practice of law enforcement, did not allow for the possibility of restoring human rights violated as a result of the implementation of the Law with an interpretation which differed from the Constitutional Court's legal positions, by means of the reviewing of the case on the basis of new circumstances. The Constitutional Court found this state of affairs to be out of line with the requirements of Articles 3, 6, 18, 19 and 93 of the Constitution.

The Constitutional Court stressed in the above Decision that when it finds an act to be in conformity with the Constitution, in its interpretation of the challenged legal norms, it reveals their constitutional-

legal contents and acknowledges in the operative part of the Decision the conformity of the norms concerned with the Constitution or their conformity with the Constitution in the framework of concrete legal positions.

It draws attention to legal frameworks where the perception and implementation of the norms ensures their constitutionality and to legal frameworks where the implementation and interpretation of the given norm could lead to unconstitutional consequences, as well as the constitutional/legal standards which the relevant bodies of public power must consider, in their additional legal regulation of the fully-fledged implementation of the norm in question.

The Constitutional Court started from the basic premise that the meaning of constitutional justice guarantees the supremacy of the Constitution and its direct application. Certain procedural norms, when inaccurately formulated, can stand in the way of the realisation of the constitutional function and the rule of law.

The Constitutional Court noted that failure to recognise as a new circumstance decisions of the Constitutional Court, in the operative part of which it is stated that a norm is recognised as constitutional in the framework of the legal position of the Constitutional Court, does not allow for human rights and freedoms which have been breached to be restored and protected. Such decisions relate to cases where an unconstitutional state of affairs has arisen, not because of *lacuna* or ambiguity of the norm, but because the norm has been implemented with an interpretation contradicting the Constitution. These situations highlight the implementation of the principle of the rule of law and the supremacy of the Constitution.

*Languages:*

Armenian.



# Austria

## Constitutional Court

### Important decisions

*Identification:* AUT-1954-C-001

a) Austria / b) Constitutional Court / c) / d) 03.07.1954 / e) GZ V 14/54; GZ G 16/61; GZ G 14/62; GZ V 75-78/68; GZ G 20/70; GZ G 36/77; GZ V 28/79; G 6,25,54/79; V 30/79; G 68/80; G 113/84, G 134/84, G, 135/84 *et al.*; G 153/84; G 151/85; G 175/84; G 224/85; G 1/86; B 556/85; G 261-267/86, G 11/87, G 39/87 *et al.*; G 142/87; V 5-9/87, G 26-30/87; V 204-209/90, V 232-254/90 *et al.*; G 86/91, G 137/91; G 72,73/91; G 187/91, G 269/91; G 103-107/92, G 123-127/92 *et al.*; G 76/92; G 212-215/92, G 242-245/92 *et al.*; V 21,22/92; G 67/93, G 81,82/93, G 89,90/93 *et al.*; G 400/96, G 44/97; B 1917/99, G 96/99, G 117/00 / f) / g) *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest), 2713/1954 of 03.07.1954, 4158/1962 of 24.03.1962, 4318/1962 of 05.12.1962, 5872/1968 of 13.12.1968, 6278/1970 of 14.10.1970, 8253/1978 of 01.03.1978, 8647/1979 of 13.10.1979, 8871/1980 of 26.06.1980, 9089/1981 of 19.03.1981, 9167/1981 of 26.06.1981, 10.311/1984 of 11.12.1984, 10.456/1985 of 15.06.1985, 10.580/1985 of 30.09.1985, 10.705/1985 of 29.11.1985, 10.841/1986 of 20.03.1986, 10.904/1986 of 13.06.1986, 10.925/1986 of 20.06.1986, 11.401/1987 of 29.06.1987, 11.466/1987 of 01.10.1987, 11.580/1987 of 11.12.1987, 12.564/1990 of 03.12.1990, 12.776/1991 of 26.06.1991, 12.811/1991 of 30.09.1991, 12.883/1991 of 16.10.1991, 13.179/1992 of 01.10.1992, 13.335/1993 of 13.03.1993, 13.336/1993 of 13.03.1993, 13.571/1993 of 11.10.1993, 13.704/1994 of 05.03.1994, 14.805/1997 of 12.04.1997, 15.293/1998 of 26.09.2000 / h).

*Keywords of the systematic thesaurus:*

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

1.2.4 Constitutional Justice – Types of claim – **Initiation ex officio by the body of constitutional jurisdiction.**

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.1.1 Constitutional Justice – Jurisdiction – Scope of review – **Extension.**

1.3.4.10 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the constitutionality of enactments.**

1.3.5.13 Constitutional Justice – Jurisdiction – The subject of review – **Administrative acts.**

1.4.1 Constitutional Justice – Procedure – **General characteristics.**

1.5.2 Constitutional Justice – Decisions – **Reasoning.**

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

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

1.6.9 Constitutional Justice – Effects – **Consequences for other cases.**

1.6.9.1 Constitutional Justice – Effects – Consequences for other cases – **Ongoing cases.**

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

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

3.13 General Principles – **Legality.**

*Keywords of the alphabetical index:*

Legislation, reviewed, relevance to a specific case / Legislation, reviewed, amended in the course of proceedings / Legislation, interpretation / Legislation, re-examination / Reason, statement / Referral, compulsory / Reasoning, limitation of arguments advanced.

*Headnotes:*

Relations between the Austrian Constitutional Court and other courts in Austria are determined by the former's jurisdiction, since the Constitutional Court has a monopoly on reviewing the constitutionality of legislation or its conformity with higher-ranking laws. No other court or executive body has authority to perform such reviews. Accordingly, under Article 89.2 of the Constitution, the courts are in principle obliged to apply to the Constitutional Court should they have doubts about the constitutionality of a law which they must enforce (or the lawfulness of a regulation). Similarly, the Constitutional Court is required to institute review proceedings *ex officio* where it itself has doubts – by reason of a specific case – about a regulation. Any application to the Constitutional Court challenging legislation must set out in detail the “doubts” or the reasons why the impugned law or regulation may be contrary to the constitution or the law (VfSlg – Official Digest – 12.564/1990, 13.571/1993). The reasons stated in a sense constitute the “subject matter” of the review proceedings before the Constitutional Court, which is

solely required to determine whether the reservations expressed are founded. In deciding the case, the Constitutional Court is therefore bound by the grounds of unconstitutionality or unlawfulness relied on (VfSlg 8253/1978, 9089/1981, 11.580/1987, 13.335/1993, 13.704/1994). In practice, the Constitutional Court will dismiss any legislative review application which it deems to be based on clearly irrelevant grounds, in other words where the critical relevance of the legislation challenged can be seen to be “manifestly lacking”, is “ruled out *prima facie*” or is considered “inconceivable”. At the same time, the Constitutional Court’s verdict concerning the relevance of the challenged legislation must not bind the applicant court to interpret it in a given manner, thus anticipating that court’s decision (VfSlg 2713/1954, 4158/1962, 4318/1962, 6278/1970, 8871/1980, 12.811/1991).

When assessing the constitutionality of a challenged law (or the lawfulness of a regulation), the Constitutional Court is nonetheless obliged to give its own interpretation of the legislation under consideration. In this connection, it is bound by the reservations expressed by the referring court, since it cannot annul the challenged legislation for a reason not set out in the application. It can, however, dismiss an application at any time on the ground that the ordinary law would have to be interpreted differently in the light of the Constitution, since, where a number of interpretations are possible, priority must be given to that which “shows the legislation to be in conformity with the Constitution” (VfSlg 11.466/1987, 12.776/1991, 12.883/1991, 13.336/1993, 15.293/1998). The Constitutional Court has in practice frequently opted for this solution, finding the challenged legislation to be in conformity with the Constitution (decisions of 02.12.1999, G 96/99, and 08.03.2001, G 117/00). Where the Constitutional Court rejects an application on the ground that the challenged legislation should be interpreted differently in the light of the Constitution, the applicant court is bound by that interpretation in the case which it has to determine.

Similarly, the challenged legislation can be cancelled only for reasons advanced by the court referring it for review. For example, if a law is challenged on the ground that it is inconsistent with the fundamental principle of freedom of opinion, and the Constitutional Court holds that that is not the case, it is obliged to dismiss the application even if the same legislation breaches the principle of compliance with the law. Furthermore, since a decision by the Constitutional Court to dismiss an application is binding only within the limits of the reservations and grounds set out in that application, the Constitutional Court can still re-examine the same legislation on some other ground (VfSlg 5872/1968, 10.311/1984, 10.841/1986, 12.883/1991, 13.179/1992).

The legal position is somewhat different where review proceedings are initiated by the Constitutional Court *ex officio*. This is permitted when, in the course of administrative review proceedings (under Article 144 of the Constitution), doubts arise as to the constitutionality of a law or the lawfulness of a regulation applied by the administrative authorities. In such circumstances, the Constitutional Court regards as “relevant”, and accordingly open to a review of their constitutionality or lawfulness, the provisions effectively applied by the authorities in the individual case under consideration (VfSlg 10.925/1986), those which the authorities should have applied (VfSlg 8647/1979), and those which constitute a “prior condition for the Constitutional Court’s decision”, that is to say all provisions which, without being really “relevant”, form a sort of substantive whole with the case in which the preliminary question of law must be settled (VfSlg 10.705/1985, 10.904/1986). This means that review proceedings can, for example, also relate to special provisions which are not applicable in that case but limit the basic circumstances thereof (VfSlg 14.805/1997).

Under the Austrian Constitution (Articles 139.4 and 140.4), the legislature can “intervene” in legislative review proceedings in progress by revoking the provisions under review. Where the legislation is amended with retrospective effect, it loses its relevance as a result and the referring court’s application must immediately be withdrawn (Sections 57.4 and 62.4 of the Constitutional Court Act). An application that is not withdrawn must be dismissed, and the Constitutional Court must drop any review proceedings it has itself instituted (VfSlg 9167/1981, 10.456/1985, 10.580/1985, 11.401/1987). On the other hand, where the change in legislation takes effect from the date of its adoption (*ex nunc*), and consequently has no impact on the legal proceedings already pending, the Constitutional Court can no longer annul the challenged provisions. In such cases it is expressly empowered to hold that the law under consideration “was anti-constitutional” or the regulation “was in breach of the law” (Articles 139.4 and 140.4 of the Constitution). The effect of such a finding is that the provisions in question must no longer be applied in the proceedings concerning which the preliminary question of law has been referred.

#### *Languages:*

German.



*Identification:* AUT-1968-C-001

**a)** Austria / **b)** Constitutional Court / **c)** / **d)** 13.12.1968 / **e)** B 622/78; G 113/84, G 134/84, G 135/84 *et al.*; B 168/85; G 224/85; G 187/91, G 269/91; G 103-107/92, G 123-127/92 *et al.*; K I-2/94; B 1171/94; G 388-391/96; G 363-365/97, G 463,464/97 *et al.*; G 48-55/99 / **f)** / **g)** *Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes* (Official Digest), 5872/1968 of 13.12.1968, 9690/1983 of 10.06.1983, 10.311/1984 of 11.12.1984, 10.616/1985 of 09.10.1985, 10.841/1986 of 20.03.1986, 12.883/1991 of 16.10.1991, 13.179/1992 of 01.10.1992, 13.951/1994 of 29.11.1994, 14.304/1995 of 11.10.1995, 14.723/1997 of 24.01.1997, 15.129/1998 of 11.03.1998, 15.506/1999 of 09.06.1999 / **h)**.

*Keywords of the systematic thesaurus:*

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.2.4 Constitutional Justice – Types of claim – **Initiation ex officio by the body of constitutional jurisdiction.**

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

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

1.3.4.8 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of jurisdictional conflict.**

1.3.4.9 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the formal validity of enactments.**

1.3.4.10 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the constitutionality of enactments.**

1.5.4.4 Constitutional Justice – Decisions – Types – **Annulment.**

1.6.3.1 Constitutional Justice – Effects – Effect *erga omnes* – **Stare decisis.**

1.6.5.2 Constitutional Justice – Effects – Temporal effect – **Retrospective effect (ex tunc).**

1.6.5.4 Constitutional Justice – Effects – Temporal effect – **Ex nunc effect.**

1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect.**

1.6.9.1 Constitutional Justice – Effects – Consequences for other cases – **Ongoing cases.**

1.6.9.2 Constitutional Justice – Effects – Consequences for other cases – **Decided cases.**

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

*Keywords of the alphabetical index:*

Cancellation, effects / Decision, administrative, individual / Proceedings, pending, application / Decision, constitutional, compliance / Constitutional appeal / Enactment / *Stare decisis*, binding force.

*Headnotes:*

Where the Constitutional Court holds that a provision is unconstitutional or unlawful, it must cancel that provision. This cancellation usually takes effect within the express limits of the grounds relied on or, where the Constitutional Court institutes review proceedings *ex officio*, solely in the case pending before it where it is itself required to apply the provision in question. The Constitutional Court can annul an entire law only in quite exceptional circumstances: where the legislative body that passed the law lacked authority to do so or where its publication was procedurally flawed (Article 140.3 of the Constitution).

Cancellation in principle takes effect as of the date of the decision (*ex nunc*) and is binding on all courts and administrative authorities. It does not have retrospective effect, which means that the provision remains applicable to events which took place up to that point in time. The Constitutional Court may also decide to postpone the effect of a cancellation decision for a period not exceeding 18 months. The provision in question then continues to apply until expiry of the time-limit (Articles 139.5, 139.6, 140.5 and 140.7 of the Constitution).

In practice, a time-limit is set where the legislature has to take remedial action and this will in all probability require some time.

A departure from the *ex nunc* rule exists regarding the case in which the preliminary ruling on a point of law is sought (the *Anlaßfall*). The *Anlaßfall* concept refers to the legal proceedings at the origin of cancellation of a provision by the Constitutional Court. The provision annulled will not be applicable in those proceedings (this is known as “the applicant’s reward”). In addition, its cancellation will also be effective in all similar cases that were pending in the Constitutional Court when it began to decide the issue (*VfSlg* – Official Digest – 10.616/1985, 14.304/1995). Otherwise, it is left to the Constitutional Court’s discretion to declare the cancellation valid also in respect of earlier cases, that is to say to give it retrospective effect (Articles 139.6 and 140.7 of the Constitution). This retrospective effect may solely concern cases which were already pending

in the courts at the time of the judgment (“selective retrospective effect”) or all events arising prior to the cancellation (“general retrospective effect”). In one particularly noteworthy case, the Constitutional Court ruled that the retrospective effect extended even to disputes in which a final decision had already been given. Since the outcome was that the relevant administrative decisions were also deemed to have been cancelled, all applications already lodged with the Constitutional Court were dealt with accordingly (*VfSlg* 14.723/1997).

In general, cancellation of a legal provision normally results in the re-entry into force of provisions repealed by the law held to be unconstitutional by the Constitutional Court. That court may nonetheless rule otherwise. It must then specify in its judgment which provisions will re-enter into force (Article 140.6 of the Constitution).

As regards regulations, the cancellation process is in the main identical to that applicable to laws. However, cancellation of a regulation by the Constitutional Court does not result in the re-entry into force of the regulation previously applicable (*VfSlg* 9690/1983).

When new legislation is promulgated as a result of a cancellation decision by the Constitutional Court, the relevant decision must be taken into consideration in the new legislation’s content, if the legislative or regulatory body does not wish to run the risk of a further challenge and cancellation. However, the Constitutional Court has no possibility of interpreting its own decision or giving official explanations and guidance. It has no part in the legislative process and can only take action anew if an application is filed, challenging the newly promulgated legislation. In reality, the legislature has on several occasions been unsuccessful in managing to “repair” legislation annulled by the Constitutional Court in a manner compatible with the Constitution (*VfSlg* 15.129/1998, *Bulletin* 1998/1 [AUT-1998-1-004]; *VfSlg* 15.506/1999).

Where an application for review of the constitutionality or the lawfulness of a provision is dismissed by the Constitutional Court, the decision is binding only within the limits of the reservations and grounds set out in the application for cancellation. It remains possible for the Constitutional Court to re-examine the same provision on other grounds (*VfSlg* 5872/1968, 10.311/1984, 10.841/1986, 12.883/1991, 13.179/1992).

In constitutional appeals against individual administrative decisions, the Constitutional Court’s Decision is in principle binding only with regard to the specific case under consideration. In other cases – even those which are similar – the court can choose to interpret the

relevant legal provisions differently and is not bound by its own earlier reasoning. Nevertheless, in practice, the Constitutional Court generally attempts to adhere to a constant line of decisions (*stare decisis*).

As regards compliance with decisions, the Constitutional Court enjoys considerable prestige, and its decisions are usually respected by the courts. This is also partly due to the fact that the Constitutional Court has no jurisdiction to review other courts’ decisions.

However, in a dispute as to jurisdiction (where two courts either claim or refuse jurisdiction to deal with a case) the Constitutional Court may be obliged to set aside all legal decisions conflicting with its verdict. It will then exceptionally be empowered possibly to overturn the decisions of other courts (*VfSlg* 13.951/1994).

Should the Constitutional Court decide not to cancel a legal provision, the applicant court is required to apply that provision, as interpreted by the Constitutional Court. However, where the court concerned fails to follow this interpretation, in breach of the law, an appeal against its decision may solely be brought in the ordinary courts. As a result, where the question has already been decided by one of the highest courts (the Supreme Court or the Administrative Court), the failure to comply with the Constitutional Court’s ruling cannot be challenged in the courts.

#### *Languages:*

German.



#### *Identification:* AUT-1984-C-001

**a)** Austria / **b)** Constitutional Court / **c)** / **d)** 01.10.1984 / **e)** B 327/80; B 211/84; G 274-283/90, G 322/90, G 46-51/91; B 1071/91; B 102/93; B 1172/98; B 10/97 / **f)** / **g)** *Erkenntnisse und Beschlüsse des Verfassungsgericht-shofes* (Official Digest), 10.163/1984 of 01.10.1984, 10.549/1985 of 27.09.1985, 12.649/1991 of 01.03.1991, 13.242/1992 of 30.11.1992, 13.830/1994 of 30.06.1994, 15.385/1998 of 16.12.1998 / **h)**.

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.2.4 Constitutional Justice – Types of claim – **Initiation ex officio by the body of constitutional jurisdiction.**

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.2 Constitutional Justice – Jurisdiction – **Type of review.**

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**

1.3.5.13 Constitutional Justice – Jurisdiction – The subject of review – **Administrative acts.**

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

3.21 General Principles – **Equality.**

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

4.7.9 Institutions – Judicial bodies – **Administrative courts.**

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

*Keywords of the alphabetical index:*

Constitutional Court, Administrative Court, jurisdiction, attribution / Decision, authority / Interpretation / Appeal, 'successive' / Decision, administrative, parallel review / Supreme courts, parity.

*Headnotes:*

As regards review of an individual administrative decision (*Bescheid*), the jurisdiction of the Constitutional Court is, in a sense, "shared" with the Administrative Court.

One of the conditions for lodging an appeal with the Constitutional Court is exhaustion of administrative remedies (Article 144.1 of the Constitution). In proceedings involving a number of parties, these remedies must be exhausted by the appellants themselves, not merely by other parties to the proceedings (*VfSlg* – Official Digest – 13.242/1992 and decision of 10.06.1997, B 10/97). The number of levels of proceedings in the case under consideration depends on the relevant administrative provisions. Usually there are two, and at most three. To appeal to the Constitutional Court it is not necessary to have challenged the individual administrative decision in the Administrative Court.

A final administrative decision can therefore be challenged not only in the Constitutional Court, but also in the Administrative Court. The difference lies in the grounds of appeal that can be relied on. Whereas the Constitutional Court in principle only accepts applications alleging a violation of constitutionally guaranteed rights or inconsistency with general law, in the Administrative Court appellants can solely allege a violation of their individual rights guaranteed by ordinary law. The Constitutional Court consequently finds itself obliged to decide cases "in parallel", as it were, with the Administrative Court.

A number of measures exist with a view to coordinating the conduct of the two sets of proceedings, so as to avoid duplicate administrative review. For instance, the applicant may first refer the matter to the Constitutional Court, which performs a sort of "rudimentary verification" aimed at determining whether the general rule applied was unlawful or fundamental rights were interfered with. Should the Constitutional Court deem the application inadmissible, the applicant may lodge a "successive appeal" with the Administrative Court, which, after performing a "detailed verification", must decide whether the challenged administrative decision was in breach of ordinary law.

Although the Constitutional Court enjoys some precedence in such cases, neither of the two courts has jurisdiction to review the other's decisions (the fundamental principle of "parity" between supreme courts).

However, the distribution of jurisdiction between the Constitutional Court and the Administrative Court is clear-cut in appearance only. This is because fundamental rights have become so complex in substance, on account of the precedents established over the past few decades, that any allegation of a breach of individual rights safeguarded by ordinary law may at the same time be considered to involve a breach of fundamental rights. Any procedural irregularity in the handling of an administrative dispute amounts to "arbitrariness" on the part of the administrative authorities and, consequently, constitutes a breach of the fundamental right to equal treatment (*VfSlg* 10.163/1984, 10.549/1985, 13.830/1994, 15.385/1998, *Bulletin* 1998/3 [AUT-1998-3-009]); failure to consider the parties' arguments may be construed as a breach of the right to a fair trial (*VfSlg* 12.649/1991); and virtually any materially significant breach of the law may qualify as "disproportionate" interference and hence violation of a fundamental right.

This system doubtless has its advantages. On the basis of what is often a routine complaint, the Constitutional Court manages to express its doubts about the general rules on which the individual administrative decision appealed against was based and to conduct an *ex officio* review of their constitutionality. This obliges the administrative authorities to interpret legal rules in a manner compatible with the Constitution. However, this organisation of jurisdiction has three undesired effects: firstly, a very heavy case-load in the Constitutional Court; secondly, a sometimes very negative perception in the Administrative Court of the precedence enjoyed by the Constitutional Court in interpreting ordinary law; and, lastly, the question of the mutually final and binding nature of the two courts' decisions.

#### *Supplementary information:*

"Individual administrative decision" is generally understood to mean an official individual administrative decision by an entity exercising public authority. As a general rule, the term therefore also applies to the legal outcome of an administrative dispute.

#### *Languages:*

German.



## Azerbaijan Constitutional Court

### Important decisions

*Identification:* AZE-2005-1-001

**a)** Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 25.01.2005 / **e)** 1/13/2005 / **f)** / **g)** Azerbaijan, Respublika, *Khalg gazet*, *Bakinski rabochiy* (Official Newspapers); *Azərbaycan Respublikası Konstitusiyası Məhkəməsinin Məlumatı* (Official Digest) / **h)** CODICES (English).

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

1.6.6.1 Constitutional Justice – Effects – Execution – **Body responsible for supervising execution.**  
 1.6.9 Constitutional Justice – Effects – **Consequences for other cases.**  
 2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**  
 4.7.2 Institutions – Judicial bodies – **Procedure.**  
 4.7.7 Institutions – Judicial bodies – **Supreme court.**  
 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:*

Remedy, violation, constitutional right / Proceedings, reopening, ground.

#### *Headnotes:*

The recognition of a decision of the Supreme Court or a judicial act as one violating the right of access to court contrary to the Constitution and laws constitutes one of the grounds for revision of judicial acts on new circumstances relating to the violation of human rights and freedoms. According to the amendments and additions introduced into procedural law by legislation, the Plenum of the Supreme Court shall examine only circumstances on legal issues relating to the execution of the decisions of the Constitutional Court and European Court of Human Rights with a view to restoring the human right or freedom that has been violated.

*Summary:*

Some provisions of the Law "On Introduction of Amendments into Certain Legislative Acts" provide that when executing the decisions of the Constitutional Court, the Plenum of the Supreme Court shall examine only the circumstances that relate to legal issues. The Ombudsman applied to the Constitutional Court alleging that those provisions created artificial obstacles for the execution of Constitutional Court decisions aimed at restoring the human rights and freedoms that had been violated. He requested the verification of the conformity of those provisions with the Constitution.

The Plenum of the Constitutional Court noted that the petition related to the judicial guarantee of human rights and freedoms listed under fundamental rights, as well as the clarification of principles concerning the full judicial protection of human rights and freedoms as well as the clarification of a number of issues and administration of justice. The Plenum also noted that the petition was important from the point of view of the clarification of questions that might arise as a result of carrying out of proceedings on new circumstances connected with the violation of human rights and freedoms, for instance, with the Article 6 ECHR.

The Constitutional Court noted that according to the constitutional guarantee of human rights and freedoms, only courts acting within the principles and procedures established by legislation should implement the settlement of conflicts and disputes. It is the Constitutional Court's opinion that universal values such as the supremacy of law and justice, the domestic law (which is the reflection of the people's will in a state), as well as the principles of judicial proceedings and international law applicable in contemporary democratic society are of high importance.

The Plenum of the Constitutional Court considered that the issue of the compatibility of the impugned provisions (provided for by procedural legislation) with the Constitution should be resolved within the framework of competences of the supreme body of constitutional justice and the Supreme Court as provided for by legislation. The impugned provisions are compatible with the Constitution where the Plenum of Supreme Court:

1. holds proceedings on new circumstances in connection with the violation of human rights and freedoms, within the framework of legislation of the Azerbaijan Republic;

2. taking into account the binding nature of the legal positions of the Constitutional Court's decisions, including this decision, settles the legal issues that are necessary for their unconditional execution; does not admit any distortion (revision, enlargement, limitation or interpretation in any other form) of the decisions of the Constitutional Court;

3. and when dealing with the revision of cases, adopts concrete decisions aimed at the elimination, within the time-limits prescribed in legislation, of judicial errors in judicial proceedings, as specified in the decision of the Constitutional Court, not only with the purpose of the revision of cases but also with the purpose of a speedier restoration of the human rights and freedoms that have been violated.

*Languages:*

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





# Belarus

## Constitutional Court

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### Important decisions

*Identification:* BLR-2002-B-010

**a)** Belarus / **b)** Constitutional Court / **c)** / **d)** 24.12.2002 / **e)** D-152/02 / **f)** / **g)** / *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2002 / **h)**.

*Keywords of the systematic thesaurus:*

1.6.6 Constitutional Justice – Effects – **Execution**.  
 4.7.1 Institutions – Judicial bodies – **Jurisdiction**.  
 4.7.4.3.1 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Powers**.  
 5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees**.  
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.  
 5.3.37 Fundamental Rights – Civil and political rights – **Right of petition**.

*Keywords of the alphabetical index:*

Convicted person, imprisonment / Penalty, imposition, administration, reformatory / Limitation period, non applicability.

*Headnotes:*

The constitutionally protected right of any person to judicial remedies (Articles 59, 60 and 137 of the Constitution), which is also guaranteed by Article 3 of the International Covenant on Civil and Political Rights, shall ensure the right of convicted persons serving prison sentences to appeal to the courts of law against penalties imposed on them by prison administrations.

The limitation period for appeals is not applicable to persons having suffered the violation of this right in the past.

Such persons have the right to address the procurator's office directly to seek the application of appropriate measures by the prosecutor and for the restoration of the violated constitutional rights.

*Summary:*

The present decision was based on repeated complaints lodged with the Constitutional Court by convicted persons serving prison sentences concerning the refusal of the courts of law to hear their appeals against the application of penalties imposed on them by prison administrations.

Irrespective of the fact that Article 60 of the Constitution, which is directly applicable, guarantees everyone the right to judicial protection, and of the fact that the Constitutional Court had previously adopted two decisions on this issue confirming the right of imprisoned persons to appeal to the courts against the penalties imposed on them, the courts of law still continued to refuse to examine the complaints of these persons, on the grounds that the relevant legislation failed to lay down the procedure to be followed in the appeals in question.

The Court was therefore required to examine this issue again, to adopt its decision in the present case and to confirm once again the constitutional right of convicted persons serving prison sentences to appeal to a court of law in connection with the imposition on them of penalties. This right is also guaranteed under the Constitution (Articles 59, 60 and 137 of the Constitution), as well as by Decree no. 29 of the President of Belarus of 26 July 1999 on Additional Measures for the Improvement of Labour Relations, Strengthening of Labour and Discipline in the Work Force.

The Court also emphasised that persons who had previously been unlawfully denied access to the courts had the right to judicial protection, since the time limitation for appealing to a court of law would not be applicable in such cases.

Such persons had the right to address the prosecutor's office directly to seek the application of appropriate measures by the prosecutor and for the restoration of the violated constitutional rights.

*Cross-References:*

Former decisions concerning the constitutional right of convicted persons serving a prison sentence to appeal to the court of law due to imposition on them of the penalties:

- Decision no. D-111/2001 of 02.04.2001 on the right of convicted persons serving prison sentences to appeal to the courts against penalties imposed on them [BLR-2001-B-002] and

- Decision no. D-145/2002 of 19.07.2002 on securing the constitutional right of convicted persons serving prison sentences to appeal to the courts against penalties imposed on them.

### Languages:

Russian, English (translation by the Court).



### Identification: BLR-2009-1-006

**a)** Belarus / **b)** Constitutional Court / **c)** / **d)** 29.12.2008 / **e)** D-312/08 / **f)** / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2008 / **h)** CODICES (Belarusian, Russian, English).

### Keywords of the systematic thesaurus:

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

3.14 General Principles – **Nullum crimen, nulla poena sine lege.**

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

### Keywords of the alphabetical index:

Proceedings, administrative / Penalty, determination.

### Headnotes:

In the legislation under dispute, the list of administrative offences carrying longer terms of administrative penalties was neither defined in full nor enshrined at the legislative level. The general wording of the list may give rise to a broad interpretation by practitioners. It was suggested that the legislator should make appropriate alterations and addenda.

Norms that specify an exception to the general rule require the fullest possible definition in order to rule out any ambiguous interpretation and application.

### Summary:

The Constitutional Court considered a request regarding the validity of the application of longer terms of administrative penalties set forth in Article 7.6.1.4 of the Code of Administrative Offences of the Republic of Belarus.

The Code imposes longer terms for administrative penalties by comparison with ordinary terms for the commission of administrative offences in certain spheres of activity. These include administrative offences in the financial area, bond market, banking and entrepreneurship or offences against the fiscal regime and customs regulation. It is also established that administrative penalties may be imposed in the form of longer terms and for the commission of “other administrative offences expressed in non-execution or improper execution of legislative acts regulating economic relations”.

The Constitutional Court noted in its decision that the legislation of the Republic of Belarus does not explain the concept of “economic relations”, giving rise to the possibility of ambiguous interpretation of the provision “other administrative offences”. This could in turn give rise to an unreasonably large list of administratively punishable acts at the legal practitioner’s discretion.

The Constitutional Court stated that norms that specify an exception to a general rule require the fullest possible definition in order to rule out any ambiguous interpretation and application. The list of constituent elements of administrative offences carrying longer terms of administrative penalties to be imposed should be enshrined directly in the above Code. The Constitutional Court therefore proposed that the House of Representatives should make the necessary alterations and addenda to this Code.

### Languages:

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



*Identification:* BLR-2009-2-007

a) Belarus / b) Constitutional Court / c) / d) 26.03.2009 / e) D-319/09 / f) / g) / *Vesnik Kanstytucyjnaha Suda Respubliki Belarus* (Official Digest), no. 1/2009 / h) CODICES (English, Belarusian, Russian).

*Keywords of the systematic thesaurus:*

1.2.1.3 Constitutional Justice – Types of claim – Claim by a public body – **Executive bodies.**

1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation.**

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

5.3.37 Fundamental Rights – Civil and political rights – **Right of petition.**

*Keywords of the alphabetical index:*

Petition, Government, procedure, absence / Constitutional Court, government, appeal / Government, Constitutional Court, appeal, petition, procedure.

*Headnotes:*

A provision of the Code on the Judicial System and Status of Judges gave citizens, public associations and other organisations the right to petition the Government to initiate the process of forwarding motions to the Constitutional Court on the examination of the constitutionality of normative legal acts. There was no provision in the Rules of Procedure of the Council of Ministers for an appropriate exercise of the Government's right to move such motions to the Constitutional Court, either on its own initiative or on that of the subjects mentioned above. The lack of such provision interfered with the realisation of this constitutional right.

*Summary:*

The Constitutional Court made an *ex officio* decision on the Rules of Procedure of the Council of Ministers.

Under the constitutional provisions, the Code on the Judicial System and the Status of Judges (hereinafter, the "Code") and the Law on the Council of Ministers, the latter has the right to forward motions to the Constitutional Court on the examination of the constitutionality of normative acts. This right is exercisable on petitions with the initiative to review/ examine the Constitutionality of the act to the Council of Ministers

by those state bodies which do not have a direct right of appeal to the Constitutional Court as well as by public associations, other organisations and citizens. However, there is no provision in the Rules of Procedure of the Council of Ministers, which regulate its organisation and *modus operandi*, for the procedure of the consideration of these petitions to the Government, neither is there a framework decision for their approval or dismissal.

The above legal gap may result in poor performance of the state duties specified in Article 59 of the Constitution to take all measures at its disposal to create the domestic and international order necessary for the exercise in full of the rights and liberties of the citizens of Belarus. The state bodies, officials and other persons who have been entrusted to exercise state functions are to take the necessary measures to implement and safeguard the rights and liberties of the individual.

In the Constitutional Court's opinion, the right set out in Article 22 of the Code for citizens and organisations to appeal by initiative for a constitutional review to those bodies and persons entitled to forward motions to the Constitutional Court should correspond to the duty of those bodies and persons to consider petitions of this kind. Provision was needed for such a procedure.

In order to fill the legal gap and to ensure the rule of law, the Constitutional Court decided to make the necessary changes and additions to the Rules of Procedure of the Council of Ministers.

*Languages:*

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



# Belgium

## Court of Arbitration



### Important decisions

*Identification:* BEL-1993-1-004

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 11.02.1993 / **e)** 9/93 / **f)** / **g)** *Moniteur belge* (Official Gazette), 06.03.1993, 46, 4884; *Cour d'arbitrage – Arrêts* (Official Digest), 1993, 93 / **h)**.

*Keywords of the systematic thesaurus:*

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**

3.20 General Principles – **Reasonableness.**

3.21 General Principles – **Equality.**

*Keywords of the alphabetical index:*

Jurisdiction of the Constitutional Court / Equality / Non-discrimination.

*Headnotes:*

When the national authority responsible for legislation or legislative decrees regulates an aspect of social life, it assumes the task of assessing which factors determine differences or equality of treatment in given situations.

Article 107<sup>ter</sup> of the Constitution does not confer on the Court of Arbitration powers of discretion and of decision comparable to those of the national legislative or decree-making authority. The Court has no power to substitute its own assessment for that of the competent legislator with regard to the choice of criteria on which distinctions are based, provided that the choice in question is not guided by a manifestly erroneous assessment. The Court can only denounce regulations when the latter establish a distinction for which there is no objective and reasonable justification. (B.2.5)

*Languages:*

Dutch, French, German.

*Identification:* BEL-1996-2-003

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 15.05.1996 / **e)** 31/96 / **f)** / **g)** *Moniteur belge* (Official Gazette), 25.06.1996; *Cour d'arbitrage – Arrêts* (Official Digest), 1996, 403 / **h)** *Information et documentation juridiques* (IDJ), 1996, liv. 7, 18; *Tijdschrift voor Bestuurswetenschappen Publiek Recht* (T.B.P.), 1996, 564; *Revue régionale de droit* (R.R.D.), 1996, 396; CODICES (French, German, Dutch).

*Keywords of the systematic thesaurus:*

1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation.**

3.1 General Principles – **Sovereignty.**

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

3.16 General Principles – **Proportionality.**

4.5.4 Institutions – Legislative bodies – **Organisation.**

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

4.7.1 Institutions – Judicial bodies – **Jurisdiction.**

5.2 Fundamental Rights – **Equality.**

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:*

Parliamentary Assembly, official, right of appeal.

*Headnotes:*

The lack of a procedure granting officials of legislative assemblies the right to appeal against the administrative decisions of these assemblies or their bodies, while officials of administrative authorities can appeal to the *Conseil d'Etat* to have these authorities' administrative decisions set aside, infringes the constitutional principle of equality and non-discrimination established in Articles 10 and 11 of the Constitution. However, this discrimination stems from a loophole in the law which the Court cannot fill. Only the introduction of relevant legislation could remedy this situation.

*Summary:*

A candidate for a post in the Regional Council of Brussels Capital, the legislative body of the Brussels Capital Region, appealed to the *Conseil d'Etat*, the highest administrative court, against the decision of the panel set up by the Council not to place him on the reserve list for the post. Without prejudicing the protection of their individual rights before the ordinary courts and tribunals, persons who can establish an interest may file an application to the *Conseil d'Etat* to have "the decisions and rulings of various administrative authorities" set aside by virtue of Article 14.1 of the *Conseil d'Etat's* consolidated Acts. This provision is, however, interpreted in such a way that it does not allow for appeals to have the administrative decisions of legislative assemblies or their bodies set aside.

The *Conseil d'Etat* asked the Court of Arbitration the preliminary question as to whether Article 14, thus interpreted, did not violate the principle of equality established in Article 10 of the Constitution. The Court confirmed that the particular nature of legislative assemblies, which are elected and hold residual sovereignty, requires that their independence be fully guaranteed, but added that this did not justify the fact that officials of legislative assemblies could not appeal against the administrative decisions of these assemblies or their bodies. The lack of this judicial review procedure, which is available to officials in administrative authorities, is disproportionate to the legitimate concern of safeguarding the freedom of action of elected representatives, because the interest protected by an application to have a decision set aside is as real and legitimate for officials of legislative assemblies as it is for those of administrative authorities.

According to the Court, the real discrimination does not arise from Article 14 but from a loophole in the law, namely the fact that there is no right of appeal against the administrative decisions of legislative assemblies or their bodies. The Court held that this situation could only be remedied by the introduction of relevant legislation, at which point consideration could be given to providing specific safeguards taking into account the independence that must be guaranteed to legislative assemblies.

*Languages:*

French, Dutch.

*Identification:* BEL-1997-3-011

a) Belgium / b) Court of Arbitration / c) / d) 06.11.1997 / e) 64/97 / f) / g) *Moniteur belge* (Official Gazette), 17.01.1998 / h).

*Keywords of the systematic thesaurus:*

2.1.2.2 Sources – Categories – Unwritten rules – **General principles of law.**  
 3.4 General Principles – **Separation of powers.**  
 3.10 General Principles – **Certainty of the law.**  
 5.2 Fundamental Rights – **Equality.**  
 5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law.**

*Keywords of the alphabetical index:*

Judicial guarantee, violation / Circumstance, exceptional.

*Headnotes:*

A retroactive statutory provision is at variance with the constitutional rule of equality and non-discrimination when its effect is to influence the outcome of pending legal proceedings, whereas no exceptional circumstances are present which justify the violation – to the detriment of a certain category of citizens – of judicial guarantees to which everyone is entitled.

*Summary:*

The *Conseil d'État* (the highest administrative court) had put a preliminary question to the Court of Arbitration concerning the compatibility with the principle of equality and non – discrimination, enshrined in Article 10 of the Constitution, of a statutory provision (Article 43 of the decree of the Flemish Community of 10 April 1995 on urgent measures in the field of education) which had retroactively altered a legal situation that was the subject of proceedings before the *Conseil d'État*.

A singing teacher appointed on a permanent basis had lodged an appeal with the *Conseil d'État* concerning the appointment of a colleague to a post to which the singing teacher believed he was entitled under the terms of a posting scheme applicable in higher education in the arts. The legislation at the origin of this special scheme was repealed first by the French Community, by a decree dated 22 December 1994, and subsequently, with retroactive effect, by the above-mentioned decree of 10 April 1995, after the case in question had been brought before the *Conseil d'État*, which had already heard a similar case and delivered a ruling which strengthened the applicant's case.

The Court of Arbitration held that retroactive statutory provisions, which undermine the certainty of the law, were justifiable only under special circumstances, for example when they were necessary to ensure the smooth operation or the continuity of the civil service. In the event that the retroactive nature of a statutory provision should also happen to influence the outcome of one or more legal proceedings in a certain way, or prevent the courts from ruling on a given point of law, the nature of the principle at issue demanded that such action by the legislator, in violation of judicial guarantees enjoyed by all and to the detriment of a certain category of citizens, be justified by exceptional circumstances.

In view of the absence of exceptional circumstances in the case in point, the Court declared the disputed statutory provision to be contrary to Article 10 of the Constitution.

#### Languages:

French, Dutch, German.



#### Identification: BEL-2004-1-002

a) Belgium / b) Court of Arbitration / c) / d) 29.01.2004 / e) 17/2004 / f) / g) *Moniteur belge* (Official Gazette), 29.04.2004 / h) CODICES (French, Dutch, German).

#### Keywords of the systematic thesaurus:

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

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

4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**

5.2 Fundamental Rights – **Equality.**

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

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

#### Keywords of the alphabetical index:

Measure, administrative, statement of reasons / Parliament, staff.

#### Headnotes:

The independence of the parliamentary assemblies is not affected by the obligation to state the reasons for a decision which they take in respect of their staff, provided that the decision is not of a political nature and does not in any way involve the exercise of the legislative function.

In order to be consistent with the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), the law on the formal reasons for administrative acts must be interpreted as meaning that even the parliamentary assemblies must state the reasons for decisions concerning their staff (decisions which are subject to judicial review by the Supreme Administrative Court).

#### Summary:

A staff member of a legislative assembly brought an application before the *Conseil d'État*, the Supreme Administrative Court, for judicial review of the appointment of another candidate for a post of management assistant to the Chamber of Representatives. He claimed, in particular, that the appointment decision did not contain a convincing statement of reasons.

The Law of 29 July 1991 on the formal reasons for administrative acts provides that unilateral legal acts of individual scope issuing from an administrative authority (for example, appointment decisions) must state the reasons on which they are based, in order to make clear what considerations of law and of fact serve as a basis for the decision. For the definition of "administrative authority", reference is made in the 1991 Law to Article 14 of the Consolidated Laws on the *Conseil d'État*.

In its Judgment no. 31/96 (see [BEL-1996-2-003]), the Court had stated that "the absence of any action or application for judicial review of the administrative acts issuing from a legislative assembly or from its organs, when such an action or application may be brought against administrative acts issuing from an administrative authority, infringes the constitutional principle of equality and non-discrimination laid down in Articles 10 and 11 of the Constitution". In order to give effect to that judgment, Article 2 of the Law of 25 May 1999 amended Article 14.1 of the Consolidated Laws on the *Conseil d'État* in such a way as to authorise the administrative section of the *Conseil d'État* also to adjudicate on applications for judicial review of "the administrative acts of the legislative assemblies or their organs [...] relating to public contracts and to members of their staff".

Since in 1991 the legislature could not foresee that amendment, and since the Law of 29 July 1991 on the formal reasons for administrative acts had not also been amended, the *Conseil d'État* referred to the Court of Arbitration the question whether that law is contrary to the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), whether it is to be interpreted as not including within its scope the administrative acts of the administrative assemblies or their organs in relation to members of their staff.

In reply, the Court stated that the Law of 1991 infringes Articles 10 and 11 of the Constitution if it is interpreted in that sense. Provided that the legislature has decided to subject the administrative acts of the legislative assemblies or of their organs, in respect of their staff, to the same arrangements for legal protection as that applicable to the acts of the administrative authorities, there are no valid grounds on which the formal obligation to state reasons should not apply to the former. Apart from the fact that members of the staff of the legislative assemblies or their organs would be deprived of a guarantee against possible arbitrariness, the absence of a formal obligation to state reasons would preclude the *Conseil d'État* from exercising effective review.

The Court observed, however, that the Law of 1991 may also be interpreted as bringing within its scope the administrative acts of the legislative assemblies or their organs relating to members of their staff and that, as thus interpreted, it is in fact consistent with Articles 10 and 11 of the Constitution.

#### *Supplementary information:*

See [BEL-1996-2-003]. Comparison should also be made with a later Judgment, no. 89/2004 of 19 May 2004, in which a distinction is drawn, as regards recourse to the courts by the staff of the parliamentary assemblies, between the individual decisions of the assemblies and decisions having the status of regulations.

In Judgment no. 93/2004 of 26 May 2004, the Court accepted that Article 14.1 of the Laws on the *Conseil d'État*, interpreted as meaning that the *Conseil d'État* has no jurisdiction to entertain an application for judicial review brought by a member of the Judicial College of the Region of Brussels-Capital against a decision of the Council of the Region of Brussels-Capital dismissing him from office, does not infringe the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), as the appointment of members of the Judicial College is connected to the political activities of that parliamentary assembly.

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2010-2-006

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 23.06.2010 / **e)** 76/2010 / **f)** / **g)** *Moniteur belge* (Official Gazette), 19.08.2010 / **h)** CODICES (French, Dutch, German).

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

4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces.**

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

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

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

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

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

Armed forces, discipline, judicial review / Military, discipline / Military, personnel, staff regulations / Military, disciplinary penalty, judicial review.

#### *Headnotes:*

Although those drafting the Constitution, in providing that the rights and obligations of the military are governed by law (Article 182 of the Constitution) and in adopting specific provisions relating to courts martial and the way in which the military can be deprived of their rank, honours and pensions (Articles 157.1 and 186 of the Constitution), themselves established a difference in treatment between the military and servants of other public departments, the legislature must nonetheless observe the rules on equality and non-discrimination (Articles 10 and 11 of the Constitution) when implementing the constitutional provisions relating to the military.

The need to maintain the operational capacity of the Armed Forces cannot justify members of the Armed Forces being deprived of the right to effective judicial review of the disciplinary penalties imposed on them.

*Summary:*

A preliminary question was referred to the Constitutional Court by the Council of State concerning the compatibility with the rules on equality and non-discrimination (Articles 10 and 11 of the Constitution) of Article 14.1 of the Laws on the Council of State, interpreted as meaning that certain disciplinary penalties imposed on the military were not amenable to annulment by the Council of State, whereas disciplinary penalties imposed on other civil servants were.

The Constitutional Court considered that the rules on equality and non-discrimination must be observed by the legislature when it implements the constitutional provisions on the military under which specific rules apply to them.

According to the case-law of the Council of State, a distinction must be drawn between what are classified as “minor disciplinary penalties” (call to order, reprimand, confinement to barracks, overnight arrest and house arrest) and those which according to the staff regulations constitute “major disciplinary penalties” (suspension or dismissal). Only the latter measures are acts amenable to annulment by the Council of State. According to the Council of State, which relies on statements made while the Law was at the drafting stage, judicial review of the disciplinary penalties imposed on members of the armed forces could undermine the cohesion of the army and the maintenance of its operational capacity.

The Constitutional Court considered that the difference in treatment between the military and civil servants was based on an objective criterion. It had yet to ascertain whether that difference was reasonably justified. The legislature’s objective was to maintain the armed forces in a constant state of preparedness to participate effectively in military operations, possibly at extremely short notice. It might have taken the view that such an objective required a particularly well-disciplined approach and that such discipline could not be maintained unless the military superior had the power to react immediately to any disciplinary misconduct.

However, that necessity could not justify the absence of judicial review. The interest safeguarded by the availability of judicial review of disciplinary penalties is as real and legitimate for the military as it is for civil servants. Nor did the Court see how the cohesion and operational capacity of the armed forces might be

undermined because judicial review, which in itself has no suspensory effect, might be introduced.

The Court concluded that, as interpreted in the manner described, the provision in question infringed the constitutional rules. It then proposed a different interpretation which permits judicial review and is therefore compatible with the Constitution. The operative part of the judgment sets out both interpretations.

*Languages:*

French, Dutch, German.





# Bosnia and Herzegovina

## Constitutional Court

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### Important decisions

*Identification:* BIH-1999-2-001

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 26.02.1999 / **e)** U 7/98 / **f)** Appeal of the Office of the Public Attorney of the Federation of Bosnia and Herzegovina against the Decision of the Human Rights Chamber of 11 March 1998 in Case no. CH/96/30, Sretko Damjanovic v. the Federation of Bosnia and Herzegovina / **g)** *Sluzbeni Glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina) 9/99, 15.6.1999 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**

1.3.4.8 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of jurisdictional conflict.**

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions.**

2.2.1.1 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and constitutions.**

2.2.1.5 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and non-constitutional domestic legal instruments.**

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

2.3.3 Sources – Techniques of review – **Intention of the author of the enactment under review.**

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

*Keywords of the alphabetical index:*

Human Rights, protection, highest domestic tribunal / Decision, final and binding, appeal / General Framework Agreement (Dayton) / Procedure, expenses, compensation / International body, power, nature.

*Headnotes:*

The Constitutional Court is not competent to review decisions of the Human Rights Chamber for Bosnia and Herzegovina under Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina.

*Summary:*

The appellant challenged the Decision of the Human Rights Chamber in Case no. CH/96/30 in which the Chamber had ordered the Federation of Bosnia and Herzegovina to pay to Sretko Damjanovic the amount of 16 750 DEM as a compensation for procedural expenses. The appellant argued that the order of the Human Rights Chamber was not in conformity with the national laws and international conventions, since compensation had not been requested and the death sentence had been pronounced before the General Framework Agreement was signed on 14 December 1995.

The Court denied its competence to review decisions of the Human Rights Chamber. According to Article VI.3.b of the Constitution of Bosnia and Herzegovina, the Court has jurisdiction over issues under the Constitution arising out of a judgment of any other court in Bosnia and Herzegovina. The Court did not consider the Chamber to be such a “court in Bosnia and Herzegovina”, even though, according to Article II.2 and II.3 as well as Article VI.3.b of the Constitution, the protection of human rights falls in principle within the Court’s jurisdiction. The Court found no mention in the Constitution nor in any other law of a specific hierarchy or other relationship between the Court and the Chamber. However, it observed that Article II.1 of the Constitution in conjunction with Annex 6 to the General Framework Agreement – Agreement on Human Rights – provided for an additional protection mechanism, the Human Rights Commission consisting of the Ombudsman and the Human Rights Chamber. The Constitution and Annex 6 General Framework Agreement were adopted at the same time as Annexes to the General Framework Agreement. They should therefore be considered to supplement each other and could not be contradictory. According to Article VIII of Annex 6 to

the General Framework Agreement, the Chamber shall have jurisdiction to examine questions of alleged human rights violations.

The Constitutional Court considered that although the Chamber exercised its judicial functions with respect to alleged violations of human rights in Bosnia and Herzegovina, it was an institution of a special nature. According to Article XIV Annex 6 to the General Framework Agreement, the Chamber would only function during a transitional five-year period, unless the Parties to the Agreement agreed otherwise. In the legal terminology of Annex 6 to the General Framework Agreement, the Chamber was neither a court nor (in view of Article XIV of Annex 6 to the General Framework Agreement) any institution of Bosnia and Herzegovina. Moreover, the Court found that the Constitution referred to the concept of a "court in Bosnia and Herzegovina" also in Article VI.3.c, according to which the Court has jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible, in particular, with this Constitution or the European Convention on Human Rights. In the Court's opinion, it was quite certain that the authors of this provision did not intend the Chamber to be included among those institutions which should be competent to refer human rights issues to the Court for preliminary consideration.

Finally, the Court argued that both, the decisions of the Court (Article VI.4 of the Constitution) as well as those of the Chamber (cf. Article XI.3 of Annex 6 to the General Framework Agreement) shall be final and binding. As these two provisions were adopted at the same time, the Court found the correct interpretation must be that the authors did not intend to give either one of these institutions the competence to review the decisions of the other, but rather considered that, in regard to human rights issues, the Court and the Chamber should function as parallel institutions, neither of them being competent to interfere in the work of the other and it being left in some cases to the discretion of applicants to make a choice between these alternative remedies.

Judge Begić expressed his separate opinion finding the Court to be competent to review decisions of the Chamber, mainly on the grounds that the Constitution of Bosnia and Herzegovina obliges the Court to protect human rights in Bosnia and Herzegovina.

#### *Supplementary information:*

Similar questions arose regarding acts of the Office of the High Representative (Annex 10 to the General Framework Agreement), the Provisional

Election Commission (Annex 3 to the General Framework Agreement) and the Commission for Real Property Claims (Annex 7 to the General Framework Agreement).

#### *Cross-References:*

- Decisions U 3/98, U 4/98 of 05.06.1998 (question left unanswered), *Bulletin* 1998/2 [BIH-1998-2-001];
- Decisions U 8/98, U 9/98, U 10/98, U 11/98 (almost identical reasoning as in U 7/98);
- Decision U 13/01 confirms Decision U 7-11/98.

#### *Languages:*

Bosniac, Croat, Serb.



#### *Identification:* BIH-2000-1-001

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 20.01.2000 / **e)** U 1/99 / **f)** / **g)** *Sluzbene Novine Fed. BiH* (Official Gazette of the Federation of Bosnia and Herzegovina), 41/99 / **h)**.

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

- 1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**
- 1.3.4.10 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the constitutionality of enactments.**
- 1.5.4.3 Constitutional Justice – Decisions – Types – **Finding of constitutionality or unconstitutionality.**
- 1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**
- 1.6.5.4 Constitutional Justice – Effects – Temporal effect – **Ex nunc effect.**

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

Constitutional Court, decision, execution.

#### *Headnotes:*

In Article 59 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina it is established that the Constitutional Court, in a decision

declaring an act unconstitutional under Article VI.3.a of the Constitution, may grant to the body that adopted the act a period of three months within which the act must be brought into line with the Constitution. If the incompatibility is not eliminated within the said period, the Court shall declare, in a decision, that the incompatible provisions cease to be valid on the day of publication of that decision in the Official Gazette of Bosnia and Herzegovina.

### Summary:

The Constitutional Court of Bosnia and Herzegovina established with Decision no. U1/99 dated 14 August 1999 (*Bulletin* 1999/3 [BIH-1999-3-003]), that some Articles of the Law on the Council of Ministers and the Ministers of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, no. 4/97) were inconsistent with the Constitution of Bosnia and Herzegovina.

The Parliamentary Assembly was given a three-month period from the date of publication of this decision in the Official Gazette to amend the Law so as to bring the provisions into line with the Constitution of Bosnia and Herzegovina.

The period determined in the decision elapsed on 28 December 1999 and the Parliamentary Assembly failed to comply with the decision within this period.

Hence, on 20 February 2000 the Court adopted a new decision. In this decision the Court specified which parts of Articles 3, 7, 19, 28 and 29 of the law were in conflict with the Constitution and declared, pursuant to Articles 26 and 59 of the Rules of Procedure, that these provisions as well as the other provisions mentioned in its decision of 14 August 1999 shall cease to be valid on the day of publication of this decision in the Official Gazette.

### Cross-References:

- Decision U1/99 of 14 August 1999 was published in *précis* form in *Bulletin* 1999/3 [BIH-1999-3-003].

### Languages:

Bosnian, Croatian, Serb, English.



### Identification: BIH-2000-1-002

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 30.01.2000 / **e)** U 5/98 / **f)** / **g)** *Sluzbeni Glasnik Bosne i Hercegovine* (Official Gazette of Bosnia and Herzegovina) 25/99, 15.12.2000 / **h)**.

### Keywords of the systematic thesaurus:

1.2.1.1 Constitutional Justice – Types of claim – Claim by a public body – **Head of State**.

1.3.4.3 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between central government and federal or regional entities**.

1.3.5.3 Constitutional Justice – Jurisdiction – The subject of review – **Constitution**.

1.4.9.1 Constitutional Justice – Procedure – Parties – **Locus standi**.

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

2.1.1.4.10 Sources – Categories – Written rules – International instruments – **Vienna Convention on the Law of Treaties of 1969**.

2.3.8 Sources – Techniques of review – **Systematic interpretation**.

3.8 General Principles – **Territorial principles**.

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

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

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

4.8.8.2.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione materiae***.

4.8.8.5 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **International relations**.

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

### Keywords of the alphabetical index:

Ambassador, nomination / Monetary policy, powers / Extradition, powers / Asylum, powers / Border, definition / Constitutional, autonomy, relative / Representation, international.

### Headnotes:

The constitutionally established jurisdiction of the Constitutional Court of Bosnia and Herzegovina covers the Entity's constitutions, since according to Article VI.3.a of the Constitution the Constitutional Court has exclusive jurisdiction to review whether any

provision of an Entity's constitution or law is consistent with the Constitution of Bosnia and Herzegovina. On 29 and 30 January 2000, the Court declared with a partial decision some provisions or parts of provisions of the Constitutions of the *Republika Srpska* and of the Federation of Bosnia and Herzegovina null and void on the ground that they were not in conformity with the Constitution of Bosnia and Herzegovina.

### Summary:

On 12 February 1998 Mr Alija Izetbegovic, Chair of the Presidency of Bosnia and Herzegovina, requested the Constitutional Court of Bosnia and Herzegovina to evaluate the constitutionality of some provisions of the Constitutions of the Federation of Bosnia and Herzegovina (the "Federation Constitution") and of the *Republika Srpska* (the "RS Constitution").

The Court found that the request was admissible, since it was submitted by the Chair of the Presidency, who is among the institutions entitled to refer disputes to the Constitutional Court under Article VI.3.a of the Constitution of Bosnia and Herzegovina.

According to Article 31 of the Vienna Convention on the Law of Treaties it is necessary to clarify the terms used in the Constitution of Bosnia and Herzegovina by interpreting them in the context of the entire General Framework Agreement for Peace (signed in Paris on 14 December 1995). It followed from an analysis of these texts that there was a consistent terminology, according to which "border" and "boundary" are given different meanings: Article III of the General Framework Agreement refers to "the boundary demarcation between the two Entities", but the term "border" is used in Article X when referring to frontiers between states. In such circumstances, the use of a different terminology in the RS Constitution cannot be considered consistent with the Constitution of Bosnia and Herzegovina and Article 2.2 of the RS Constitution was declared unconstitutional in so far as the term "border" is used in the wrong context.

According to Article III.1.g of the Constitution of Bosnia and Herzegovina, the institutions of Bosnia and Herzegovina are responsible for international and inter-Entity criminal law enforcement.

Article 6.2 of the RS Constitution, as supplemented by Amendment XXX, refers to citizenship, exile and extradition. The Court found that there is no doubt that extradition of persons against whom the authorities of another state are proceeding for an offence or who are wanted by the said authorities to carry out a sentence or detention order is covered by the term international law enforcement. Article 6 of

the RS Constitution thus regulates a matter which lies within the responsibility of the institutions of Bosnia and Herzegovina. The Court must, therefore, conclude that the words "or extradited" Article 6.2 of the RS Constitution are inconsistent with the Constitution of Bosnia and Herzegovina.

With regard to the challenged provision of Article 44.2 of the RS Constitution, the Entities cannot regulate the "asylum policy", since according to Article III.1.f of the Constitution of Bosnia and Herzegovina asylum policy and regulation are responsibilities of the institutions of Bosnia and Herzegovina.

With regard to the protection of fundamental rights in the RS Constitution, the question arises whether the Constitution of Bosnia and Herzegovina can be interpreted as prohibiting provisions in the Entity constitutions that are more favourable to the individual.

It is generally recognised in federal states that component entities enjoy "relative constitutional autonomy" granting their constitutions the right to regulate matters in such a way that they do not contradict the wording of the constitution of the respective state. The same principle can be seen as an inherent principle underlying the entire structure of the Constitution of Bosnia and Herzegovina.

Moreover, Article 53 ECHR (the former Article 60) provides that the protection granted by the European Convention on Human Rights is only a minimum protection and that States are not prevented by the Convention from granting the individual more extensive or favourable rights and freedoms. The same principle must apply to the interpretation of the Constitution of Bosnia and Herzegovina, which indeed makes the European Convention on Human Rights directly applicable in Bosnia and Herzegovina and grants it priority over all other law.

It follows from what has been stated that the Entities are free to provide for a more extensive protection of human rights and fundamental freedoms than required under the European Convention on Human Rights and the Constitution of Bosnia and Herzegovina. Amendment LVII, item 1, to the RS Constitution is therefore not in conflict with the Constitution of Bosnia and Herzegovina.

The Court found that the Entities have a right to establish representations abroad as long as this does not interfere with the power of Bosnia and Herzegovina to be represented as a State. Moreover, the Entities may propose their own candidates to be elected as ambassadors and other international representatives of Bosnia and Herzegovina; however such proposals

must be regarded as nothing more than proposals and cannot restrict the right of the Presidency of Bosnia and Herzegovina to appoint either the persons proposed by the Entities' institutions or persons who have not been proposed by them.

Hence the contested provisions of Articles 80 and 90 of the RS Constitution concerning the power to appoint and recall heads of missions of Republika Srpska in foreign countries and the establishment of missions abroad are in conformity with the Constitution of Bosnia and Herzegovina.

With regard to the contested provisions of Article 98 of the RS Constitution the Court found that since the power for issuing currency and for monetary policy through Bosnia and Herzegovina is given by Article VII of the Constitution of Bosnia and Herzegovina to the Central Bank of Bosnia and Herzegovina, there is no power left in this respect for the Entities under Article III.3 of the Constitution of Bosnia and Herzegovina.

Hence, the challenged provisions of Article 98 of the RS Constitution must be declared unconstitutional.

Moreover, the Court found that Article 76.2 of the RS Constitution is also not in conformity with the Constitution of Bosnia and Herzegovina, because the Central Bank is vested with the exclusive responsibility to make legislative proposals in the field of "monetary policy" as referred to above.

According to Article VI.3.a of the Constitution of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina has "exclusive jurisdiction", when serving as a protective mechanism in "any dispute". Moreover, Article 75 of its Rules of Procedure allows for preliminary measures to be granted by the Court, and therefore there is no room left for unilateral measures to be taken by institutions of the Republika Srpska. The Court thus found that Article 138 of the RS Constitution, as modified by Amendments LI and LXV, is unconstitutional.

With regard to the contested provisions of Amendment VII to Article II.A.5 of the Federation Constitution, the Constitutional Court found that the wording of this amendment simply refers to the citizenship requirements prescribed by Article I.7.a and I.7.d of the Constitution of Bosnia and Herzegovina. This contested provision must, therefore be considered to be in conformity with the Constitution of Bosnia and Herzegovina.

With regard to the power to appoint heads of diplomatic missions in the Federation of Bosnia and Herzegovina, as it has already been stated above,

Article V.3.b of the Constitution of Bosnia and Herzegovina vests the power to appoint them in the hands of the Presidency of Bosnia and Herzegovina without limits to its decision-making. Therefore, the Court found that the provisions of Article IV.B.7.a.i and IV.B.8. of the Federation Constitution clearly contradict the Constitution of Bosnia and Herzegovina since the contested provisions, unlike those of the RS Constitution, vest the power to make such an appointment in the President of the Federation.

#### *Languages:*

Bosnian, Croatian, Serb, English.



#### *Identification: BIH-2001-3-007*

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 05.05.2001 / **e)** U 10/01 / **f)** Preliminary question referred by the Cantonal Court of Zenica / **g)** Ruling not to be published / **h)** CODICES (English).

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

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**

2.2.1.1 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and constitutions.**

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

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

Judgment, execution, conditions.

#### *Headnotes:*

The Court may not pronounce itself on a question referred to it by a lower court if that question does not fall within the jurisdiction of the Court under Article VI.3.c of the Constitution of Bosnia and Herzegovina, even if it raises issues under the Constitution.

*Summary:*

The Cantonal Court of Zenica requested the Court to state its opinion on whether the judgment of the Supreme Court of Bosnia and Herzegovina no. KZ 30/92 of 6 July 1992 could be legally executed, despite the existence of a conflicting ruling of the Supreme Court of Republika Srpska no. KZ 40/93 of 17 November 1993.

In 1991, the Higher Court of Doboj had convicted Mirko Karatovic and Nikola Karatovic of murder and sentenced each of them to 10 years' imprisonment. In 1992, the Supreme Court of Bosnia and Herzegovina increased these sentences to 12 years' imprisonment. No further appeal was available against that judgment. Nevertheless, in November 1993, the Supreme Court of Republika Srpska annulled the judgment of the Higher Court of Doboj and referred the case back for retrial to the First Instance Court of Maglaj. In May 1994, the Higher Court of Doboj, upon a proposal of the President of the Higher Court of Maglaj, decided that the further criminal proceedings should be held before the First Instance Court of Doboj. That Court scheduled a main hearing to be held in March 2000, but the hearing was cancelled since the accused were not present.

The Court denied its competence to pronounce itself on the referred question. It observed, that in view of the continuing criminal proceedings, the question could arise as to whether or not the execution of the judgment of the Supreme Court of Bosnia and Herzegovina of 6 July 1992 would be compatible with Article 6 ECHR and Article 4 Protocol 7 ECHR. The European Convention and its Protocols are part of the constitutional protection in Bosnia and Herzegovina, and the courts in charge of the execution of the Supreme Court's judgment must therefore apply those provisions and have regard to the fact that, according to Article II.2 of the Constitution of Bosnia and Herzegovina, the European Convention on Human Rights and its Protocols shall have priority over all other law.

However, the Court found that at the present stage of the proceedings the conditions laid down in Article VI.3.c of the Constitution of Bosnia and Herzegovina were not satisfied. According to that provision, the Constitutional Court has jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with the Constitution, with the European Convention on Human Rights and its Protocols, or with the laws of Bosnia and Herzegovina, or concerning the scope of a general rule of public international law pertinent to the court's decision. In the case in point, the

Cantonal Court of Zenica had raised a specific issue of legal interpretation but had not referred to any law whose compatibility with the Constitution or with the European Convention on Human Rights or its Protocols would be at issue, or concerning the scope of a general rule of public international law (19, 20).

*Languages:*

Bosniac, Croat, Serb.

*Identification:* BIH-2004-S-001

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 26.03.2004 / **e)** U 42/01 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette) / **h)** CODICES (Bosnian, English).

*Keywords of the systematic thesaurus:*

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

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

4.3.1 Institutions – Languages – **Official language(s).**

4.8.8.2.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione materiae*.**

4.8.8.5 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **International relations.**

*Keywords of the alphabetical index:*

International agreement, constitutional requirements / International agreement, parliamentary approval / Language, official, used by the state authorities / Decision, execution, deadline.

*Headnotes:*

The consent of the Parliamentary Assembly is not required for the establishment of special parallel relationships of an entity with the neighbouring countries and entering into international agreements.

*Summary:*

I. The applicant filed with the Constitutional Court a request for review of the conformity of the Agreement on the Establishment of Special Parallel Relationships between the Federal Republic of Yugoslavia and the *Republika Srpska* (hereinafter, the "Agreement").

According to the applicant's request, the following constitutional and legal questions arise:

- whether the consent of the Parliamentary Assembly should have been sought prior to the ratification of the Agreement;
- whether the conditions for establishment of special parallel relationships were met since inter-state relations were not established at the time of the ratification of the Agreement (ambassadors to the two states were not appointed) and that only the representatives of the Serb people participated in the preparations for the conclusion of the Agreement;
- whether the provisions of Article 2 of the Agreement stipulating that the Parties shall in particular foster co-operation in the sphere of the economy and use of natural resources are consistent with Article II.5.b of the Constitution; whether the provision on co-operation in the sphere of privatisation and denationalisation is consistent with the fourth line of the Preamble to the Constitution, Articles I.4 and II.3.k of the Constitution;
- whether the provision on curbing crime is consistent with Article III.1 of the Constitution and whether the provision on co-operation in the sphere of defence in a fully transparent manner is consistent with the sixth sub-paragraph of the Preamble to the Constitution, Articles III.5 and V.5.a of the Constitution; and
- whether Article 11.2 of the Agreement in that it was drawn up in the official language of the *Republika Srpska*, namely the Serb language, was consistent with the Constitution.

II. The responsibilities of the entities in respect of the establishment of special parallel relationships with the neighbouring states and entering into agreements with other states and international organisations are based on Article III.2 of the Constitution. In pursuance of the provisions of the above-mentioned article, an Agreement on Special Parallel Relationships has a constitutional restriction with respect to the

sovereignty and territorial integrity of Bosnia and Herzegovina whereas agreements with states and international organisations may be entered into (exclusively) with the consent of the Parliamentary Assembly. Therefore, an Agreement on Special Parallel Relationships falls under the control of the Constitutional Court whereas agreements with states and international organisations require the consent of the Parliamentary Assembly.

The Constitutional Court, in view of the aforementioned provisions of the Constitution and its constitutional competence in respect of an entity's decision to establish a special parallel relationship with the neighbouring countries, concludes that the consent of the Parliamentary Assembly is not required for the establishment of special parallel relationships with neighbouring countries. The Agreement was, therefore, concluded in a manner consistent with the Constitution.

Regarding the statements made in the request that the basic inter-state relationships were not established at the time of conclusion and ratification of the Agreement as the basis for the establishment of "special parallel relationships", the Constitutional Court recalls that the diplomatic relations between Bosnia and Herzegovina and the Federal Republic of Yugoslavia were established on 15 December 2000, the date on which a Protocol on the Establishment of Diplomatic Relations between Bosnia and Herzegovina and the Federal Republic of Yugoslavia was signed. The ambassadors to both states were appointed in December 2001. Thereafter, other agreements were concluded with the Federal Republic of Yugoslavia: on social insurance, on establishment of an Inter-State Council for Co-Operation, on international transport of persons and goods in road traffic, etc.

Regarding the issues that relate to the successful functioning of the relationships between Bosnia and Herzegovina and a neighbouring state, as well as to the preparations for the conclusion of the Agreement, the Constitutional Court concludes that these issues are not within its competence.

Having examined the text of the contested Agreement, the Constitutional Court observes that the provisions of Article 2 of the Agreement referred to by the applicant are drafted in general terms and, according to the Constitutional Court, their implementation required drawing up Annexes to the Agreement that would form an integral part thereof as anticipated by Articles 10 and 11 of the Agreement. The Constitutional Court, noting that the OHR was directly involved in the "negotiations" for the conclusion of this Agreement, observes that it was envisaged in the

Agreement itself that the OHR would be consulted regarding the preparation of the Annexes to this Agreement and would oversee its implementation (Article 9). As regards the question of responsibilities of the institutions of Bosnia and Herzegovina and of the entities, the Constitutional Court refers to the view it took in its Second Partial Decision no. U-5/98/II of 18 and 19 February 2000.

Article III.1 and III.3 of the Constitution regulate the distribution of powers in principle in so far as responsibilities of the institutions of Bosnia and Herzegovina are enumerated whereas, again in principle, all other functions and powers not specified in the Constitution rest with the entities. However, it is not only within this general system of distribution of powers in Article III that the Constitution creates powers. In creating the institutions of the State of Bosnia and Herzegovina, the Constitution also confers upon them more or less specific powers, as may be seen from Article IV.4 as regards the Parliamentary Assembly of Bosnia and Herzegovina and Article V.3 as regards the Presidency of Bosnia and Herzegovina, which are not necessarily repeated in the enumeration in Article III.1. The Presidency of Bosnia and Herzegovina, for instance, is vested with the power of civilian command over Armed Forces in Article V.5.a, although Article III.1 does not explicitly refer to military affairs as being within the responsibility of the institutions of Bosnia and Herzegovina. It must then be concluded that matters which are not expressly enumerated in Article III.1 are not necessarily under exclusive competence of the entities in the same way as the entities might have residual powers with regard to the responsibilities of the institutions of Bosnia and Herzegovina. Reference can be made, for instance, to the responsibility of the institutions of Bosnia and Herzegovina with regard to foreign policy and foreign trade policy explicitly mentioned in Article III.1.a and III.1.b, since the entities also have, for instance, a right to establish special parallel relationships with the neighbouring states according to Article III.2.a.

In addition, the Constitution also establishes basic constitutional principles and goals for the functioning of Bosnia and Herzegovina as well as a catalogue of human rights and fundamental freedoms that must be perceived as constitutional guidelines or limitations for the exercise of the responsibilities of Bosnia and Herzegovina and the entities. According to sub-paragraph 4 of the Preamble to the Constitution, the Constitution was adopted in order to "promote the general welfare and economic growth through the protection of privately owned property and the promotion of a market economy". Furthermore, Article I.4 of the Constitution provides for freedom of movement throughout Bosnia and Herzegovina and explicitly states that neither Bosnia and Herzegovina

nor the entities shall "impede full freedom of movement of persons, goods, services and capital throughout Bosnia and Herzegovina" as a necessary prerequisite for the existence of a joint market. And finally, Article II.3.k guarantees the right to property in connection with the obligation of the entities under paragraph 6 of the said Article to "apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above". Since Article II.3 sub-paragraph 1 states that "all persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms..." enumerated there, the right to property is not only a right which all authorities have to respect, but there is also a positive obligation of the State to provide for conditions which are necessary for the enjoyment of this right. Article II.3 therefore gives a general competence to the joint institutions of Bosnia and Herzegovina to regulate all matters enumerated in the catalogue of human rights, which cannot exclusively be left to the entities since the protection has to be guaranteed to "all persons within the territory of Bosnia and Herzegovina".

Consequently, and in the light of the constitutional principle providing that all regulations must be interpreted in line with the Constitution to the extent possible, the Constitutional Court finds that the contested provisions insofar as they relate to co-operation in the areas of the economy and use of natural resources, planning, privatisation and denationalisation and curbing crime can be interpreted in a manner that is consistent with the Constitution. Given the fact that the aforementioned provisions are of a general nature and are not directly applicable, the Constitutional Court, in particular, points out that their application requires the drawing up of Annexes to the Agreement subject to review of constitutionality and conformity with the Constitution.

As regards the issue relating to the provision of the Agreement on co-operation in the field of "defence, in a fully transparent manner", the Constitutional Court observes that a Law on Defence in Bosnia and Herzegovina has been enacted in the meantime pursuant to Article III.5.a of the Constitution (Additional Responsibilities).

The Constitutional Court, noting that the Law on Defence of Bosnia and Herzegovina has been enacted and with the aforementioned reasoning of the Constitutional Court's view with respect to the other provisions of Article 2 of the Agreement, concludes that this provision of the Agreement can be interpreted in a manner consistent with the Constitution.



However, the applicant argues that the Agreement is inconsistent with the decision of the Constitutional Court which guarantees constituent status of all three peoples at the level of the entities, including the equality of the Bosnian, Croatian and Serbian languages and the Cyrillic and Latin alphabets, as it was made in the “official languages of the Federal Republic of Yugoslavia and the *Republika Srpska*” and published in the “Official Gazette of the *Republika Srpska*”, in the Serbian language, the ekavian dialect and the Cyrillic script.

The Constitutional Court recalls the position it took in Decision no. U-5/98-IV of 18 and 19 August 2000 when reviewing the conformity with the Constitution of Article 7 of the Constitution of the *Republika Srpska*, which reads:

“the Serbian language of iekavian and ekavian dialect and the Cyrillic alphabet shall be in official use in the Republic, while the Latin alphabet shall be used as stipulated by the law”, when it established as follows:

“32. A wide range of meaning of “official use” of the Serb language and the Cyrillic alphabet and the territorial restriction for the official use of other languages in Article 7 of the Constitution of the *Republika Srpska*, however, go far beyond per se the legitimate aim of regulating the use of languages insofar as these provisions have the effect of hindering the enjoyment of the rights under Article II.3.m and Article 5 of the Constitution. Moreover, they are also in contradiction with Article I.4 of the Constitution. The Constitutional Court thus declares Article 7.1 of the Constitution of the *Republika Srpska* unconstitutional”.

According to the above-mentioned decision adopted by the Constitutional Court, “provisions or parts of provisions of the Constitution of the *Republika Srpska* which the Constitutional Court found to be in contravention with the Constitution shall cease to be in effect as of the date of the publication of this decision in the Official Gazette of Bosnia and Herzegovina”. Pursuant to Article VI.4 of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court are final and binding.

By a decision of the High Representative on Constitutional Amendments in the *Republika Srpska* of 19 April 2002, Amendment LXIII reads as follows: “the official languages of the *Republika Srpska* are: the language of the Serb people, the language of the Bosnian people and the language of the Croat people. The official scripts are Cyrillic and Latin”.

The text of the Agreement states that it was made in “the official languages – the Serb language and the Cyrillic script”.

Noting that the Agreement was signed on 5 March 2001, thus upon the adoption of the decision by the Constitutional Court and prior to the publication of Amendment LXXI to the Constitution of the *Republika Srpska* in the Official Gazette of the *Republika Srpska*, the Constitutional Court concludes that, apart from the legal gap in the Constitution of the *Republika Srpska* that ensued upon the adoption of the decision of the Constitutional Court, the fact that it was not acted in accordance with the decision and the reasoning of Decision no. U-5/98 of the Constitutional Court is unjustifiable.

In view of the fact that the Amendment referring to official languages in the *Republika Srpska* was enacted in the meantime, the Constitutional Court considers that the Agreement should be published in the Croat and Bosnian languages and in the Latin script.

#### Cross-References:

- Constitutional Court Second Partial Decision no. U-5/98/II of 18 and 19.02.2000.

#### Languages:

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



#### Identification: BIH-2008-S-001

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 04.10.2008 / **e)** U 17/07 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette) / **h)** CODICES (Bosnian, English).

#### Keywords of the systematic thesaurus:

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

1.3.4.3 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between central government and federal or regional entities.**

1.3.4.8 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of jurisdictional conflict.**

4.8.8.2.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione materiae*.**

*Keywords of the alphabetical index:*

Conflict of powers / Constitutional Court, incompetence.

*Headnotes:*

The failure by the legislator to specify which is the competent body to resolve a conflict of jurisdiction does not automatically give the jurisdiction to the Constitutional Court.

*Summary:*

I. The applicant filed a request with the Constitutional Court for resolution of the conflict of jurisdiction between the Indirect Tax Authority of Bosnia and Herzegovina and the Federal Ministry of Finance.

The applicant requests that the Constitutional Court resolve the dispute between the Indirect Tax Authority as a body of Bosnia and Herzegovina and the Federal Ministry of Finance as a body of the entity. The applicant is of the opinion that the Constitutional Court is competent to act upon his request since the dispute has arisen between Bosnia and Herzegovina and the entity, and neither the Law on Administrative Disputes of Bosnia and Herzegovina nor any other regulation specifies the body competent to resolve the conflict of jurisdiction in the administrative procedure between the administrative bodies of Bosnia and Herzegovina and the administrative bodies of the entities.

II. The Constitutional Court must establish whether the present case relates to a dispute within the meaning of Article VI.3.a of the Constitution, which provides that the Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the entities or between Bosnia and Herzegovina and an entity or entities, or between institutions of Bosnia and Herzegovina, including but not limited to the matters mentioned in this provision (the matter of special parallel relationship of the entities and of the constitutionality of the entities' Constitutions and laws).

In analysing the present request i.e. in answering the question as to whether the present case relates to a

dispute under Article VI.3.a of the Constitution, the Constitutional Court notes that the Constitutional Court is not a court of law of the classic kind which is integrated within the judiciary, that is to say, within the system of separation of powers into three branches: legislative, executive and judicial. The competence and composition of the Constitutional Court are prescribed by the Constitution and, in this context, it is a matter of a special constitutional category whose main task is the protection of constitutionality and the promotion of the rule of law. Taking into account the particularity of the constitutional structure of Bosnia and Herzegovina, the Constitutional Court is entrusted with exclusive jurisdiction over resolution of disputes between the State and the entities – but disputes that arise under the Constitution.

The issue of interpretation of the relevant provisions regulating the proceedings pending in cases related to the collection of excise duties arose as a disputed issue in the proceedings that were the subject of the request in question. Namely, as the competence to collect these kinds of revenues was transferred to the State level i.e. to the Indirect Tax Authority on the basis of the Law on the Indirect Taxation System, the issue of jurisdiction arose over the pending cases, which had previously been within the competence of the entities' bodies. Interpreting the relevant provisions governing jurisdiction over such cases, both the State's and entities' authorities declined to take jurisdiction and, subsequently, the proceedings as to the resolution of conflict of jurisdiction were instituted before the Court of Bosnia and Herzegovina. That Court ruled that it did not have the jurisdiction to resolve such disputes. It follows that the dispute in question arose due to the different interpretation of the legal provisions enacted by the legislator to meet a new situation resulting from the transfer of competence from one administrative body to another. The fact that both the State's and entities' authorities are involved in this dispute does not imply that it is a dispute falling within the competence of the Constitutional Court under Article VI.3.a of the Constitution, as this dispute does not give rise to the constitutional issues.

The Constitutional Court notes that there is a legal gap as to the competence over such conflicts between the administrative bodies at State and entity levels. In particular, Article 25 of the Administrative Procedure of Bosnia and Herzegovina provides that the Court of Bosnia and Herzegovina shall be competent to resolve the conflict of jurisdiction between administrative authorities of Bosnia and Herzegovina, between administrative authorities of Bosnia and Herzegovina and institutions of Bosnia and Herzegovina with public authorisations and between institutions of Bosnia and Herzegovina with

public authorisations. Taking into account the aforementioned provision, the resolution of conflict of jurisdiction between the Indirect Tax Authority as the State's body and the Federal Ministry of Finance as the entity's body is not an issue falling within the competence of the Court of Bosnia and Herzegovina, the reason for which that Court refused to take jurisdiction. Moreover, no other legal provision entitles any other court or institution to resolve this type of conflict of jurisdiction. The Constitutional Court holds it necessary that, in order for the principles of the rule of law to be complied with, this issue ought to be resolved through establishing jurisdiction to resolve such disputes and, given his constitutional authority, the applicant himself may initiate the relevant proceedings.

#### Languages:

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



#### Identification: BIH-2009-S-001

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 28.03.2009 / **e)** U 12/08 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 62/09 / **h)** CODICES (Bosnian, English).

#### Keywords of the systematic thesaurus:

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts**.

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions**.

1.6.6 Constitutional Justice – Effects – **Execution**.

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

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

#### Keywords of the alphabetical index:

Constitutional Court, incompetence / European Court of Human Rights, judgment, execution.

#### Headnotes:

The Constitutional Court has no jurisdiction to determine whether a judgment of the European Court of Human Rights has been executed or to order certain public legal subjects in Bosnia and Herzegovina to fulfil the obligations referred to in that judgment.

#### Summary:

I. The applicants filed a request with the Constitutional Court for resolving a dispute between the *Republika Srpska* and the Federation of Bosnia and Herzegovina in relation to proceedings in execution of the judgment of the European Court of Human Rights in the case of *Karanovic v. Bosnia and Herzegovina* (Judgment of 20 December 2007, application no. 39462/03). The applicants requested that the Constitutional Court “eliminate discrimination from the pension legislation”, by ordering the Federation of Bosnia and Herzegovina to execute the judgment of the European Court of Human Rights in Strasbourg in the case of *Karanovic v. Bosnia and Herzegovina* and “allow transfer of the holder of the right to the Federation of Bosnia and Herzegovina Pension Fund”.

II. In the present case, the subject matter of the dispute is the execution of the international judgment. The Constitutional Court emphasises that such a request does not fall under the jurisdiction of the Constitutional Court. The execution of judgments of the European Court of Human Rights is an international legal obligation of Bosnia and Herzegovina. Pursuant to Article 46.1 ECHR, “the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties”, while pursuant to Article 46.2 “the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution”. Details regarding the proceedings relating to the supervision of the execution of judgments of the European Court of Human Rights are established by the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (adopted by the Committee of Ministers on 10 May 2006 at the 964<sup>th</sup> meeting of the Ministers’ Deputies).

Consequently, the Constitutional Court considers that the execution of the judgment in the case of *Karanovic v. Bosnia and Herzegovina* is an international legal obligation of Bosnia and Herzegovina. The system of the supervision of the execution of judgments of the European Court of Human Rights, including the possible adoption of measures in the event of failure to execute those judgments, falls under the full discretion of the

Council of Europe. For that reason, the Constitutional Court has no jurisdiction to determine whether the judgment was executed or to order certain public legal subjects in Bosnia and Herzegovina to fulfil the obligations referred to in this judgment.

Considering the nature of the request and bearing in mind the provisions of Article VI.3.a of the Constitution and Article 17.1.1 of the Rules of the Constitutional Court according to which a request shall be rejected as inadmissible where it has been established that the Constitutional Court is not competent to take a decision, the Constitutional Court has, in the operative part of the present decision, decided as stated.

#### Cross-References:

- Judgment of the European Court of Human Rights in Strasbourg in the case of *Karanovic v. Bosnia and Herzegovina*, Application no. 39462/03.

#### Languages:

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



#### Identification: BIH-2010-S-001

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 27.03.2010 / **e)** U 17/09 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 41/10 / **h)** CODICES (Bosnian, English).

#### Keywords of the systematic thesaurus:

1.3.4.3 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between central government and federal or regional entities.**

2.2.1.6 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Community law and domestic law.**

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

#### Keywords of the alphabetical index:

European Union, Association agreement, obligation / Insurance / Parliamentary Assembly, competences, harmonisation.

#### Headnotes:

The Parliamentary Assembly has the power to adopt legal provisions that are aimed at harmonising the entities' legislation in the area of insurance as well as at their harmonisation with the legislation regulating the matter within the European Union, and they are one of the means by which Bosnia and Herzegovina is meeting its obligations under the Stabilisation and Association Agreement.

#### Summary:

I. The applicant filed a request for review of the constitutionality of Article 6 of the Law on the Insurance Agency in Bosnia and Herzegovina. The Constitutional Court notes that the applicant maintains that the impugned legal provisions are inconsistent with the Constitution for the following reasons:

- a. in the light of the responsibilities set out in Article III.1 of the Constitution, Article IV.4.a of the Constitution does not provide for the responsibility of the Parliamentary Assembly to adopt the impugned legal provisions, which by providing for the sole responsibility of the Bosnia and Herzegovina Insurance Agency (hereinafter, the "Agency") in certain cases, restrict and derogate from the responsibilities of the *Republika Srpska* in the insurance industry; and
- b. the impugned legal provisions are inconsistent with other provisions of the Law on the Insurance Agency, as the Agency is granted sole power – thereby restricting and derogating from the responsibilities of the *Republika Srpska* in the insurance industry -, while the general provisions and the provisions setting out the purpose of the Law provide for only "the necessary coordination of insurance laws in both entities".

II. The Constitutional Court notes that the same issues relating to the responsibility of the Parliamentary Assembly of Bosnia and Herzegovina have already been examined by the Constitutional Court in a case relating to the consistency of the Law on Statistics with the Constitution. In that case, the Constitutional Court examined whether the Parliamentary Assembly had the competence to regulate the field of statistics through law by referring to

Article IV.4.a of the Constitution and considering the responsibilities specified in Article III.1.a of the Constitution. In that case, the Constitutional Court ruled that the Law on Statistics was consistent with Article IV.4.a of the Constitution.

The Constitutional Court holds that the opinions set out in the above-mentioned Decision may be essentially expressed as a duty of Bosnia and Herzegovina to meet the obligations undertaken by signing the Stabilisation and Association Agreement aimed at accession to the European Union. In the view of the Constitutional Court, those opinions are applicable to the present case. Namely, in the Bosnia and Herzegovina 2009 Progress Report, prepared by the European Commission and submitted to the European Parliament and Council of Europe on 14 October 2009, in Section 4 and 4.1 under the headings: "European Standards" and "Internal Market", the following is emphasised: "this section examines Bosnia and Herzegovina's capacity gradually to approximate its legislation and policies to the *acquis* in the areas of the internal market, sectoral policies and justice, freedom and security, in line with the Stabilisation and Association Agreement...". In Section 4.1.2 "Movement of persons, services and right of establishment", the following is stated: "[...] The State Insurance Agency has observer status in the International Association of Insurance Supervisors (IASA) and is a member of the International Insurance Foundation (IIF). However, the role of the agency is still limited, with licensing and supervision remaining the responsibility of the entity agencies. Little action has been taken to upgrade the supervisory enforcement capacity in this sector. A working group for the harmonisation of the entities' and Brcko District insurance laws is in place but results are still to be seen. The Insurance Ombudsman has been appointed, but the legal framework for his activities is still to be finalised...".

As to the 2009 Report cited above, the Constitutional Court underlines that the Report assesses Bosnia and Herzegovina's capacity gradually to approximate its legislation and policies to the *acquis* (the total body of European Union law applicable in the EU Member States) in the area of the internal market.

Therefore, there is an obligation to harmonise legislation in the area of the internal market. The insurance industry certainly relates to the internal market of Bosnia and Herzegovina. Without developing an effective insurance system (covering persons, property, business, loans, etc.), which is brought into line with European Union standards, it would be difficult to talk about the functional market and single

economic area in Bosnia and Herzegovina (which are also obligations undertaken by Bosnia and Herzegovina under the Stabilisation and Association Agreement). For these reasons, the Constitutional Court considers that it was necessary to specify, by the impugned legal provisions, the legislative responsibility of the Agency and to grant it powers as follows:

- a. to submit, to the entity ministries, draft laws concerning the implementation of European Union legislation or of guidelines for harmonisation of entity-level legislation;
- b. to submit, to the entity ministries of finance, draft amendments or draft changes to the existing entity-level insurance legislation, including proposals to introduce other types of insurance; and
- c. to approve drafts to amend or change entity-level insurance legislation, which are proposed by one or both entities. Furthermore, the entity parliaments are ordered by the impugned legal provisions that a draft law submitted by the Agency, which pertains to the implementation of the European Union Council regulations with a direct effect within the European Union, should be enacted and put into effect without amendments. The Constitutional Court emphasises that, without the impugned legal provisions, it would be impossible to bring the domestic legislation on the insurance industry into line with the EU *acquis*. Otherwise, it would be possible for entity ministries to implement mutually contradictory laws, for the two entities to apply different insurance regulations, or for the entities to choose whether or not to adopt and implement insurance industry regulations with a direct effect within the European Union.

The Constitutional Court emphasises that Bosnia and Herzegovina's membership in the European Union is certainly a matter related to the foreign policy of our country and that we have already committed ourselves to certain obligations in this respect by signing the Stabilisation and Association Agreement. Those obligations include, *inter alia*, the harmonisation of legislation with the EU *acquis* in the area of the internal market, more specifically, the insurance industry. Furthermore, pursuant to Article 9.4 of the Law on the Insurance Agency, the Agency is responsible for managing all issues related to the insurance of export credits extended to exporters from Bosnia and Herzegovina. In the opinion of the Constitutional Court, those matters relate to the foreign policy of Bosnia and Herzegovina (export credits) and must be seen in

connection with the obligation to harmonise the legislation in the area of the internal market as well as the application the EU *acquis* in the area of insurance. Therefore, the Constitutional Court holds that the impugned legal provisions relate to the foreign policy and foreign trade of Bosnia and Herzegovina, which certainly fall within the responsibility of the state institutions under Article III.1.a and III.1.b, which should be seen in connection with the provisions of Article III.2.b of the Constitution, according to which... "each entity shall provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honour the international obligations of Bosnia and Herzegovina..." In this case, the international obligations of Bosnia and Herzegovina entail the fulfilment of the requirements of the Stabilisation and Association Agreement, aimed at facilitating moving towards EU membership.

As mentioned above, the applicant raised an issue related to the inconsistencies between the provisions of the Law on the Insurance Agency, underlining that the Insurance Agency is granted the sole responsibility in the field of insurance – thereby restricting and derogating from the responsibilities of the *Republika Srpska* in the insurance industry -, while the general provisions and those setting out the purpose of the Law provide for only "the necessary coordination of insurance laws in both entities." In this regard, the Constitutional Court emphasises that, pursuant to Article VI.3.a line 2 of the Constitution, the Constitutional Court has exclusive jurisdiction to decide "whether any provision of an entity's constitution or law is consistent with this Constitution". Consequently, the Constitutional Court has jurisdiction to decide, *inter alia*, whether a certain legal provision is consistent with the Constitution. It does not have jurisdiction to decide on consistency between certain legal provisions, as proposed by the applicant. To this end, the Constitutional Court will not specifically consider this part of the applicant's allegations.

Therefore, the Constitutional Court concludes that the Parliamentary Assembly, in adopting the impugned legal provisions, acted in accordance with its responsibilities under Article IV.4.a of the Constitution. Consequently, the Constitutional Court concludes that the impugned Law is consistent with Article IV.4.a of the Constitution.

#### *Cross-References:*

- Decision of the Constitutional Court no. U-9/04 of 04.10.2008.

#### *Languages:*

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



# Brazil

## Federal Supreme Court

### Important decisions

*Identification:* BRA-2008-3-005

a) Brazil / b) Federal Supreme Court / c) / d) 22.06.2005 / e) MS 24.831 / f) / g) *Diário da Justiça* (Official Gazette), 04.08.2006 / h) CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.3.5.9 Constitutional Justice – Jurisdiction – The subject of review – **Parliamentary rules.**

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

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

*Keywords of the alphabetical index:*

Constitutional review, legislative act, possibility / Guarantee, constitutional inobservance / Parliament, investigating committee.

*Headnotes:*

The Judicial Branch, when intervening to guarantee constitutional franchises and to assure the integrity and supremacy of the Constitution, legitimately fulfils the duties granted to it by the Constitution, even if its institutional action projects itself in the organic domain of the Legislative Branch.

*Summary:*

I. Senators filed a petition for a “*mandado de segurança*” (a peculiar institute of the Brazilian judicial system, which shares some elements with the Common Law petition for a writ of *mandamus*; it seeks relief from a violation of a “liquid and certain” right which is threatened by action or inaction of a public entity and can be filed as a stand alone proceeding) against the Senate’s Directing Board for its omission in adopting the necessary procedures for the installation of a parliamentary investigating committee (Article 58.3 of the Constitution) charged with:

- a. probing the use of “bingo houses” in money-laundering crimes; and

- b. clarifying their possible connection, along with lottery concessionary companies, to crime organisations.

The Constitution establishes that parliamentary investigating committees can be created by the Chamber of Deputies and by the Federal Senate, jointly or separately, through a motion from one third of its members (Article 58.3 of the Constitution). The petitioners alleged that the specified omission would be in violation of the subjective public right of parliamentary minorities to the installation of a parliamentary committee.

II. In order to avoid that the legislative majority would deny the exercise of the right of parliamentary investigation by legislative minorities, the Plenary of the Court granted the writ. Article 58.3 of the Constitution establishes that a request for the instalment of a parliamentary investigating committee must:

- a. be subscribed by at least 1/3 of the members of the legislative chamber (in this case, the Senate);
- b. indicate a determined fact as the object of the investigation; and
- c. define a specific timeframe for the duration of the committee.

It was decided that if these constitutional requirements are met, a parliamentary investigating committee must be installed, without requiring approval by a majority, so that the chairman of the Legislative Chamber must adopt the subsequent necessary procedures for the effective installation of the committee.

The judgment asserted the possibility of judicial review of parliamentary acts as long as there is an allegation of inobservance of rights and/or guarantees of a constitutional nature. The occurrence of juridico-constitutional deviations in the works of a parliamentary investigating committee is exactly what justifies the exercise, by the Judiciary, of the activity of jurisdictional review over possible legislative abuses, without implying a situation of illegitimate interference in the organic sphere of another power of the Republic.

The decision defeated the theory/argument that, even if the majority would not appoint members to the parliamentary investigating committee, the committee could still function only with those members appointed by the minority, so that there would not be any obstacle to the exercise of the right to oversight.

Consequently, the Plenary of the Court granted the petitioned writ of *mandamus*, by a majority of the vote, in order to ensure to the petitioners the right to the effective installation of the parliamentary investigating committee object of Request no. 245/2004, determining – by analogically applying Article 28.1 of the Internal Rules of the Chamber of Deputies, combined with Article 85, *caput*, of the Internal Rules of the Federal Senate – that the President of the Senate himself proceed to appoint the missing members to the parliamentary investigating committee, observing also Article 58.1 of the Constitution.

#### *Supplementary information:*

Legal norms referred to:

- Article 58.1, 58.3 of the Constitution; Article 28.1 of the Internal Rules of the Chamber of Deputies;
- Article 85, *caput*, of the Internal Rules of the Federal Senate.

#### *Languages:*

Portuguese.



#### *Identification:* BRA-2008-3-009

a) Brazil / b) Federal Supreme Court / c) / d) 09.05.2007 / e) ADI 2.240 / f) / g) *Diário da Justiça* (Official Gazette), 03.08.2007 / h) CODICÊS (Portuguese).

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

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies**.  
 1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect**.  
 3.10 General Principles – **Certainty of the law**.  
 3.17 General Principles – **Weighing of interests**.  
 4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities**.  
 4.8.5 Institutions – Federalism, regionalism and local self-government – **Definition of geographical boundaries**.

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

Legislative body, omission / Fact, normative force / Municipality, creation, conditions / Law, unconstitutionality, nullity, postponement.

#### *Headnotes:*

The unconstitutionality of a State law in violation of a constitutional provision and well-established case law must also be considered in light of the exceptionality arising from a *de facto* situation and from the omission of federal lawmakers in regulating the constitutional provision through a required complementary law.

The decision of the Federal Supreme Court must take into account the normative force of facts and strike a balance between the nullity of the unconstitutional law and the safeguard of the principle of legal security. Thus, the Law can be declared unconstitutional without being annulled for a certain period of time, until state lawmakers adjust the legislation to constitutional requirements, as regulated in the complementary law to be enacted at the federal level.

#### *Summary:*

I. The Worker's Party (*Partido dos Trabalhadores, PT*) filed a Direct Unconstitutionality Action before the Federal Supreme Court against Law no. 7.619/2000 of the State of Bahia, which created the municipality of Luis Eduardo Magalhaes by dismembering the district of Luis Eduardo Magalhaes and part of the district of Sede from the municipality of Barreiras.

The petitioner alleged that the impugned Law violated Article 18.4 of the Constitution for creating a municipality in a year when municipal elections were being held, while the complementary Law mentioned in the Constitution had not yet been approved, determining the period during which States could create, incorporate, merge and dismember municipalities. Complementary laws are situated below constitutional norms and above ordinary legislation in the hierarchy of Brazilian laws. As they usually deal with quasi-constitutional matters, they do not follow the same degree of requirements of a constitutional amendment, but cannot be simply revoked by subsequent ordinary laws.

II. The Plenary of the Court, taking into account well-established case law on the unconstitutionality of laws that create municipalities disregarding Article 18.4 of the Constitution, recognised the unconstitutionality of the impugned Law, which created the municipality of Luis Eduardo Magalhaes.



Upon pronouncing the unconstitutionality of the Law, the Court had to face the fact that the municipality in question had been effectively established and already existed as a *de facto* federative entity for over six years. At this point, the Court envisaged the judicial chaos that a declaration of unconstitutionality, voiding the whole Law, could bring to the municipality. Thus, the Court recognised the need for striking a balance between the principle of nullity of the unconstitutional Law and the principal of legal security. Consequently, the Plenary of the Court, by unanimous vote, accepted the Action and, by a majority vote, applying Article 27 of Law no. 9.868/1999, declared the unconstitutionality without pronouncing the nullity of the impugned law, keeping it in force for a period of 24 months. This timeframe was considered reasonable for state lawmakers to reassess the issue taking into account the guidelines to be established by the federal complementary Law, according to the Court's ruling in the Direct Unconstitutionality Action 3.682.

#### *Supplementary information:*

Legal norms referred to:

- Article 18.4 of the Constitution;
- Law no. 9.868/1999;
- Law no. 7.619/2000 of the State of Bahia.

#### *Cross-References:*

- ADI 3682.

#### *Languages:*

Portuguese.



## Bulgaria Constitutional Court

### Important decisions

*Identification:* BUL-2005-1-003

**a)** Bulgaria / **b)** Constitutional Court / **c)** / **d)** 21.04.2005 / **e)** 11/04 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 37, 29.04.2005 / **h)** CODICES (Bulgarian).

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

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

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

Supreme Court, jury, power.

#### *Headnotes:*

Under Article 150.1 of the Constitution, the plenums of the Supreme Court of Cassation and the Supreme Administrative Court, comprising all the judges, as well as the general meetings of their chambers, have the power to refer to the Constitutional Court.

#### *Summary:*

The case was opened upon the request of the Chief Prosecutor. The Constitutional Court was requested to provide an interpretation of Article 150.1 of the Constitution to the effect that only the plenary panels of the Supreme Court of Cassation (SCC) and the Supreme Administrative Court (SAC) have the right to refer to the Constitutional Court under the procedure of the text quoted.

The considerations given maintain that the provisions of Article 84.1.2, second part of the sentence and Article 95.3, second part of the sentence of the Law on the Judiciary are in contradiction with Article 150.1 of the Constitution.

The Constitutional Court decided the following:

Under Article 150.1 of the Constitution, the right to refer to the Constitutional Court can be exercised by at least one fifth of all Members, one-fifth of all Members of the National Assembly, the President, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court, and the Chief Prosecutor. Municipal councils are also given the right to refer to the Constitutional Court to rule on conflicts of competence between the bodies of local self-government and the central executive branch of government. Along with this, Article 150.2 of the Constitution also provides that, should it find a discrepancy between a law and the Constitution, the Supreme Court of Cassation or the Supreme Administrative Court shall suspend the proceedings on a case and shall refer the matter to the Constitutional Court.

Under the procedural codes, the hearing of a case and the suspension of its proceedings may be made only by a particular court chamber. Hence, only a court jury is authorised to refer a case to the Constitutional Court when it finds in a particular case a discrepancy between a law and the Constitution. Neither the Supreme Court of Cassation or Supreme Administrative Court plenums, nor the general meetings of their chambers, can suspend the proceedings on cases which are before particular chambers of the supreme courts.

When the constitutional legislator speaks of supreme courts within the hypothesis of Article 150.2 of the Constitution, he is not referring to the supreme representative bodies of the Supreme Court of Cassation and the Supreme Administrative Court, but rather to the relevant Supreme Court as a body administering justice, i.e. its chambers. This conclusion can be drawn even if Article 150.2 of the Constitution does not explicitly provide for that the right belongs to the chamber hearing the case.

In its regular practice, the Constitutional Court has always decided that the plenums of the Supreme Court of Cassation and the Supreme Administrative Court and the general meetings of their chambers are entitled to refer to the Constitutional Court under Article 150.1 of the Constitution. The Constitutional Court has no grounds to diverge from its regular practice.

Under the considerations stated, the Constitutional Court ruled:

- Under Article 150.1 of the Constitution, the plenums of the Supreme Court of Cassation and the Supreme Administrative Court, comprising all the judges, as well as the general meetings of their chambers have power to refer to the Constitutional Court.
- The Court dismissed the request of the Chief Prosecutor of the Republic of Bulgaria to establish the unconstitutionality of Article 84 of the Law on the Judiciary.

*Languages:*

Bulgarian.



# Croatia

## Constitutional Court

### Important decisions

*Identification:* CRO-1997-S-001

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 08.01.1997 / **e)** U-IV 947/1996 / **f)** / **g)** *Narodne novine* (Official Gazette), 2/1997, 98-100 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

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

1.3.4.8 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of jurisdictional conflict.**

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

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

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

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:*

Disciplinary proceedings, judge / Judge, challenging / Judge, disqualification, procedure / State Judiciary Council, competencies.

*Headnotes:*

The State Judiciary Council itself decides on the motion for the disqualification of its president and/or of its members in disciplinary proceedings conducted before it against a president of a court or a judge.

Denial of disqualification in cases of disciplinary proceedings before the State Judiciary Council would mean the acceptance of partial judges in some cases, which would be a violation of the constitutional right to a fair trial before an impartial tribunal.

*Summary:*

I. In disciplinary proceedings against the then president of the Supreme Court of the Republic, he submitted a motion for the disqualification of the

president of the State Judiciary Council and two of its members, justifying the motion by the circumstances which made their impartiality doubtful.

The State Judiciary Council deferred the motion to the House of Counties, which also declared its incompetence in cases of disqualification of president and member of the State Judiciary Council, and expressed the view that disqualification is not acceptable in proceedings before the State Judiciary Council.

II. The case concerns the conflict of jurisdiction between legislative and judicial bodies i.e. between the House of Counties of the Parliament and the State Judiciary Council which appoints judges, relieves them of duty and deals with their disciplinary responsibility.

A president of a court and a judge may appeal to the House of Counties against decisions by which punishments are imposed upon them in disciplinary proceedings before the State Judiciary Council.

*Languages:*

Croatian, English (translation by the Court).



*Identification:* CRO-1999-3-019

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 26.11.1999 / **e)** U-VIII-1017/1999 / **f)** / **g)** *Narodne novine* (Official Gazette), 124/99 / **h)**.

*Keywords of the systematic thesaurus:*

1.1.4 Constitutional Justice – Constitutional jurisdiction – **Relations with other institutions.**

1.2.1.3 Constitutional Justice – Types of claim – Claim by a public body – **Executive bodies.**

1.3.4.7 Constitutional Justice – Jurisdiction – Types of litigation – **Restrictive proceedings.**

4.4.5.3 Institutions – Head of State – Term of office – **Incapacity.**

*Keywords of the alphabetical index:*

President, duties, temporary incapacity / Constitutional Court, jurisdiction.

*Headnotes:*

The Constitutional Court is competent to pass a decision that the President of the Republic is temporarily prevented from performing his duties.

*Summary:*

Such a decision was passed on 26 November 1999, on the basis of the Constitutional Act on the Temporary Prevention of the President of the Republic of Croatia from performing his duties. The Act was passed on 24 November 1999 and published in *Narodne novine*, 123/1999. On 25 November 1999 the Government of the Republic submitted a proposal to the Court to establish that the President was temporarily prevented from performing his duties as the President of the Republic. The government documented its proposal with an opinion of the Doctors' Consultation Council of 25 November 1999.

*Languages:*

Croatian, English (translation by the Court).

*Identification:* CRO-2002-1-004

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 28.11.2001 / **e)** U-III-302/1997 / **f)** / **g)** *Narodne Novine* (Official Gazette), 111/2001 / **h)** CODICES (Croatian).

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**

5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment.**

*Keywords of the alphabetical index:*

Dismissal, obligatory period / Worker, condition, collective settlement / Employment, notice of termination.

*Headnotes:*

In cases concerning alleged arbitrary displays of public power (e.g. no reasons given, relevant considerations ignored etc) and violations of the principle of equality guaranteed by Articles 14 and 26 of the Constitution, the Constitutional Court may exceptionally decide for itself on the correct application of the substantive law, despite the fact that it is the Supreme Court which is defined by the Constitution as the highest court in the country, competent to ensure the uniform application of laws and equal justice for all.

*Summary:*

The applicant in a constitutional complaint was a company whose headquarters were in Skopje. In the previous civil trial, the Court annulled the disputed act of the applicant, and ordered him to re-employ two workers (who were claimants in the previous trial) and enable them to perform their previous job.

The applicant claimed that in the meantime Croatia as well as "The Former Yugoslav Republic of Macedonia" had become independent states; that the Court did not respect the rules of the Law on Civil Procedure (LCP), according to which the court is obliged to stay within the limits of its jurisdiction during the procedure; and that the provisions of Article 55 of the Law on Resolving Disputes on Conflicts of Law in Particular Relationships (LRDCLPR) were violated. These provisions provide that the Croatian court has jurisdiction if a foreign legal person (i.e. the defendant) has its representative office or agency in Croatia, or if the legal person who acts in favour of the foreign legal person is based in the country.

Furthermore, the applicant pointed out that the court did not apply the relevant provisions of the Law on Basic Rights in Labour Relations and Collective Agreements that were in force at the time. He claimed that the relevant provisions provided that in case of dismissal due to incapacity for performing a particular job, and the failure to achieve set results, the employer is not obliged to give a dismissal period. This point of view is also supported by the current practice of the Court of Appeal and the Supreme Court.

The Constitutional Court rejected the applicant's complaints regarding the lack of jurisdiction of the Croatian courts and based its considerations on the application of the substantive law.

The contested judgments were adopted on the basis of the incorrect application of the substantive law, according to which the courts concluded that the dismissal period was not in question.

Since the obviously relevant provision of the substantial law was not applied, the Constitutional Court found that there had been a violation of the constitutional rights guaranteed by Articles 14 and 26 of the Constitution, which state that court and other bodies should judge similar cases equally.

#### *Languages:*

Croatian.



*Identification:* CRO-2002-1-007

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 19.12.2001 / **e)** U-I-137/2001 / **f)** / **g)** *Narodne Novine* (Official Gazette), 3/2002 and 11/2002 / **h)** CODICES (Croatian).

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

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.6.7 Constitutional Justice – Effects – **Influence on State organs.**

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

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

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

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

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

Constitutional Court, decision, execution / Pension, system, harmonisation / Precedent, improper application.

#### *Headnotes:*

The legal consequence of decisions of the Constitutional Court, by which a law, a regulation or some of their provisions are repealed is that they lose their legal force on the day of publication of the Constitutional Court decision. The legislator is free to decide how to fulfil the legal void created following such a decision of the Constitutional Court.

However, former decisions of the Constitutional Court cannot be the legal foundation for the review of constitutionality of a disputed act with the Constitution.

#### *Summary:*

In the proposal to institute proceedings to review the constitutionality of a law on the increase of pensions to eliminate the differences in the level of pensions realised over different periods of time (hereinafter, the “Law”), the following provisions had been reviewed:

- a. the provisions of Article 1 which determine that the purpose of the Law is to eliminate the differences in the levels of pensions realised over different periods of time (before and after 1 January 1999) by which the Constitutional Court decision no. U-I-283/1997 from 12 May 1998 is carried out according to the relative economic strength of the Republic of Croatia;
- b. the provision of Article 3.2 of the Law which defines the basis for the increase of the minimum pension as the amount that would belong to the beneficiary of the pension on 31 December 2000 without application of the provision on the minimal pension;
- c. the provisions of Article 4.1 and 4.3 of the Law according to which the “pension protective supplement”, the minimum pension and maximum pension determined according the regulation in force until 31 December 1998 are excluded from the increase;
- d. the provisions of Article 5 of the Law which determine that pensions of military pensioners, representatives of the Croatian Parliament and individual farmers are excluded from the increase; and
- e. the provisions of Article 6 according to which the increase of pensions should be done by increasing the beneficiary’s personal points, defined on 1 January 2001 and determined by the Croatian Pension and Disability Fund, without rendering a decision, *ex officio*.

The constitutional claim was based upon number of constitutional provisions, which by their contents correspond to provisions of Article 89.4 and 89.5 of the Constitution (non-retroactivity of regulations except for certain provisions only in specially justified cases), Article 117 of the Constitution (courts administer justice according to the Constitution and law) and Article 140 of the Constitution (presumption for application of the treaties in the internal legal order).

In their claim, the applicants maintained that:

- a. the disputed Law only partially adjusts the pensions realised under the same conditions in different periods of time;
- b. the Constitutional Court decision is not being executed by the disputed Law regarding the adjustment of pensions with wage increases in the period from 1993-1997;
- c. by referring to economic power of the State, fundamental constitutional rights and principles are violated.

Some of the applicants maintained that the State interferes unconstitutionally with the work of courts and administrative bodies, regulating retroactively the elements for computing the increased pensions and thus putting some categories of pensioners in a privileged position.

The Constitutional Court found the claim unjustified and decided not to institute proceedings for the review of constitutionality of the provisions of the Law with respect to Article 41 of the Constitutional Act on the Constitutional Court.

The Constitutional Court noted that the Law removes the differences between pensions realised in different periods of time. It also considered that it had no competence for ordering the legislator as to how it should fill in the legal void created after removal of the legislation from the legal system. In fact, the legislator is free to do so respecting the constitutional criteria as well as, among other things, the economic strength of the country.

The Constitutional Court did not find the disputed provisions of the Law to have a retroactive effect. Furthermore these provisions do not prescribe to the beneficiaries of pensions any other legal regime with respect to the one in force until the beginning of application of the disputed Law. It is the legal regime in force which continues to be applied and which refers to the particular categories of pensioners.

The computing and payment of increased pensions is to be executed in the same way as any other regular pension adjustment, and the common practice is to do this without rendering any special rulings. The dissatisfied party can initiate respective proceedings, demand the rendering of the ruling and use legal remedies and if necessary seek court protection.

The proponents' argument on initiated civil procedures connected to the Constitutional Court decision and unconstitutional interference of the legislator into

the jurisdiction of judicial power was refused with the explanation that the Constitutional Court reviews the validity of law only from the constitutional point of view, and that in that case would not deal with the request for a review of the constitutionality regarding legality of the individual acts of judicial bodies.

#### *Languages:*

Croatian.



#### *Identification:* CRO-2004-2-009

a) Croatia / b) Constitutional Court / c) / d) 08.07.2004 / e) U-IIIB-1005/2004 / f) / g) *Narodne novine* (Official Gazette), 96/04 / h) CODICES (Croatian, English).

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

- 1.4.4 Constitutional Justice – Procedure – **Exhaustion of remedies.**
- 1.6.3 Constitutional Justice – Effects – **Effect erga omnes.**
- 1.6.6 Constitutional Justice – Effects – **Execution.**
- 1.6.9 Constitutional Justice – Effects – **Consequences for other cases.**
- 4.7.15.1.2 Institutions – Judicial bodies – Legal assistance and representation of parties – The Bar – **Powers of ruling bodies.**
- 5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession.**
- 5.4.9 Fundamental Rights – Economic, social and cultural rights – **Right of access to the public service.**

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

Bar, admission, requirements / Constitutional Court, decision, binding force.

#### *Headnotes:*

With regard to the actions of competent bodies in renewed proceedings, pursuant to the provision of Article 31.1 of the Constitutional Act on the Constitutional Court, the decisions and rulings of the Constitutional Court are binding and every individual or legal person shall follow them. In renewed

proceedings, the competent judicial or administrative body, the body of a unit of local and regional self-government, and a legal person with public authority are obliged to follow the legal opinion of the Constitutional Court expressed in the decision annulling the act.

In renewed proceedings the Management and Executive Board of the Bar Association (the competent body) grossly violated the applicant's constitutional rights by not following the legal opinion of the Constitutional Court and by not respecting the binding legal standards laid down by the Constitutional Court in case-law regarding Article 49.2 of the Legal Profession Act. The disputed ruling is an absolute obstacle to the applicant's being able to practice law in Croatia and amounted to grave and irreparable consequences that endanger the applicant's constitutional right to be accepted in all public services in Croatia, under equal conditions for all, as guaranteed by Article 44 of the Constitution.

#### *Summary:*

The constitutional complaint was submitted pursuant to Article 63.1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (hereinafter, the "Constitutional Act") under which Constitutional Court proceedings may be initiated before all legal remedies have been exhausted in cases where the disputed individual act grossly violates the applicant's constitutional rights. It must be completely clear that if the Constitutional Court proceedings are not initiated, grave and irreparable consequences may arise for the applicant.

The matter for review before the Constitutional Court related to a decision of the Management and Executive Board of the Croatian Bar Association, rejecting the applicant's request to have his name entered in the Register of Attorneys and Trainee Lawyers of the Croatian Bar Association. The decision was contrary to the views of the Constitutional Court, expressed in its Decision no. U-III-706/2003 of 8 July 2003 (*Narodne novine*, no. 120/03).

In its Decision no. U-III-706/2003, the Court found that the competent bodies of the Croatian Bar Association had established, as the only legally relevant factors to the application of the provision contained in Article 49.2 of the Legal Profession Act (*Narodne novine*, no. 120/03), that the applicant in that case had not performed his duties as an attorney for more than six months in 1991 (behaviour which competent bodies of the Croatian Bar Association had found unjustified). For that reason, the Court found that "...establishing whether a person is worthy of being an attorney cannot be grounded on one

mistake made by the person in the past, because this may become an absolute obstacle for acquiring the right to practice law as a public service, which contravenes Article 49 of the Legal Profession Act, as well as Articles 44 and 54 of the Constitution."

According to Article 49.2 of the Legal Profession Act, a person is not worthy of being an attorney when his/her previous behaviour or activity does not guarantee that he/she will conscientiously practise the profession of attorney.

A new ruling of the Executive Board of the Croatian Bar Association, delivered after the decision of the Constitutional Court, explained that in the renewed proceedings the new ruling was based on the negative opinion of the Management Board of Osijek Local Bar Association regarding the entry of the applicant's name in the Register of Attorneys of the Croatian Bar Association and on the negative opinion of the Commission for Examining the Worthiness of Candidates for inclusion in the Register of Attorneys and Trainee Lawyers. The Executive Board of the Croatian Bar also noted that it accepted the views of the Constitutional Court on interpreting legally undefined terms, in the specific case "worthiness", expressed in the Decision no. U-III-439/1995 of 20 December 1995. Consequently, the decision on denying the request for inclusion in the Register of Attorneys in the renewed proceedings had not been based only on the fact that the applicant had not performed his duty for longer than six months, but also on the following facts; he had abandoned his clients and left for an unknown destination during war conditions at a time when clients had increased concern for their interests: had made it impossible to be called upon to defend his country in a war because he had not been available to state bodies; and instead of defending his country, he had engaged in entrepreneurial activities in his companies in H.

Having considered the reasons for the decision in the renewed proceedings, the Constitutional Court found that the grounds for refusing the request for inclusion in the Register of Attorneys were connected with the reasons stated by the Constitutional Court in its Decision no. U-III-706/2003 in its finding of insufficient reasons for determining that the applicant was unworthy of performing the duty of attorney. For the reason that he had not practised as attorney for a period longer than six months during 1991, his name had been struck from the Register of Attorneys; therefore, the Court held as especially unacceptable the part of the explanation for the disputed decision in which the Executive Board of the Croatian Bar Association had found that "in that whole period, from the state of war to the state of truce to the state of peace, the applicant did not show any care for his

clients who had given him his confidence.” When his name had been struck from the Register of Attorneys, the applicant ceased to be an attorney; therefore, the emphasis on his duty to care for his clients in the period after 1992 (through the period of truce to the state of peace) reflected an impermissible degree of arbitrary decision-making by a competent body. Equally, connecting the evaluation of worthiness to practise as an attorney with the work the applicant performed after his name had been struck from the Register of Attorneys was not, and could not be, a justified reason for refusing his request for entering his name in the Register as long as the applicant performed his new work in accordance with the law and the competent governmental bodies did not sanction his absence from the country in 1991 as illegal behaviour.

With regard to the actions of the competent bodies in the renewed proceedings, the Court recalled the binding force of the decisions and rulings of the Constitutional Court (Article 31.1 of the Constitutional Act). On the grounds of the provision of Article 77 of the Constitutional Act, the Constitutional Court, where it allows a constitutional complaint and annuls the disputed act, it states the reasons for which a particular constitutional right has been violated and the elements of that violation, and pursuant to the provision of Article 76.2 of the Constitutional Act, the competent judicial or administrative body, body of a unit of local and regional self-government, and legal person with public authority are obliged in the renewed proceedings to follow the legal opinion expressed by the Constitutional Court in the decision annulling the act.

The Constitutional Court found that the Executive and Management Board of the Croatian Bar Association did not follow the legal opinion expressed by the Constitutional Court in Decision no. U-III-706/2003, even though the Board had stated in the disputed ruling that the opinion of the Court regarding interpretation of the legally undefined concept of “worthiness” expressed in the Decision no. U-III-439/1995 of 20 December 1995 had been taken into account. However, the content of the decision showed the opposite.

By not following the legal opinion of the Constitutional Court and by not respecting the binding legal standards laid down by constitutional case-law regarding Article 49.2 of the Legal Profession Act, the Executive Board of the Croatian Bar Association had grossly violated the applicant’s constitutional rights, guaranteed in Articles 14.2, 29.1, 44 and 54 of the Constitution. However, the Court did not find a violation of Article 35 of the Constitution, as alleged by the applicant in the supplement to the constitutional complaint.

The Constitutional Court partly accepted the reasons stated by the applicant as to the grave and irreparable consequences that might arise as being relevant in constitutional law. The fact that the applicant had no other employment or source of income in the Republic of Croatia, and the impossibility of taking over his father’s office did not qualify as leading to grave and irreparable consequences in the sense of Article 63.1 of the Constitutional Act on the Constitutional Court, a requirement for his being able to institute the Constitutional Court proceedings before exhausting all legal remedies. On the other hand, the fact that the disputed rulings – and the reasons for making them as given by the first-instance body – would become an absolute obstacle to the applicant’s being able to practice law in the Republic of Croatia represented a grave and irreparable consequence and endangered the applicant’s constitutional right to be accepted in all public services in the Republic of Croatia, under equal conditions for all, as guaranteed in Article 44 of the Constitution.

#### *Languages:*

Croatian, English.



#### *Identification:* CRO-2005-1-001

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 12.01.2005 / **e)** U-I-2597/2003 / **f)** / **g)** *Narodne novine* (Official Gazette), 11/05 / **h)** CODICES (Croatian, English).

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

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

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

1.3.3 Constitutional Justice – Jurisdiction – **Advisory powers.**

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

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

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



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*Keywords of the alphabetical index:*

Law, consolidated text.

*Headnotes:*

The Constitutional Court is not competent to review the constitutionality of the consolidated wording of an Act, since the consolidated text cannot be considered an Act within the meaning of Article 128.1 of the Constitution and the addressees do not have the obligation to refer to the provisions of the consolidated wording of an Act.

However, the competent body of the Croatian Parliament must pay special attention to the authenticity of the contents and numerical designations when compiling the consolidated text of an Act.

*Summary:*

The applicant, the Croatian Legal Centre, submitted a proposal for a review of the constitutionality of the Criminal Procedure Act ("*Narodne novine*" no. 62/03 – consolidated text), which includes the Criminal Procedure Act ("*Narodne novine*", no. 110/97) and its revisions and amendments ("*Narodne novine*", nos. 27/98, 58/99, 112/99, 58/02 and 143/02) relating to the entry into force of the Act in question. In accordance with Article 194 of the Act on revisions and amendments of the Criminal Procedure Act ("*Narodne novine*" no. 58/02), on 14 March 2003 the Legislation Committee of the Croatian Parliament presented the cleared text of the Act at its 106<sup>th</sup> session.

The applicant pointed out several places in the consolidated text where the Legislative Committee had revised the Act. The applicant referred to the Conclusion of the Supreme Court of the Republic of Croatia of 6 June 2003 (no. II-1 Kr-27/03), which stated: "the numerical designation of legal provisions is part of the wording of an Act". The applicant then attempted to prove that there had been an unauthorised change of the wording of the Act. It alleged that the Legislative Committee, in preparing the consolidated wording of the Criminal Procedure Act, exceeded the limits of its authority established in Article 59.6 of the Rules of Procedure of the Croatian Parliament ("*Narodne novine*" no. 6/02), on the ground that only the legislator, acting in the manner and according to the procedures laid down by the Constitution, may enact and amend statutes. The consolidation of the wording of Acts should be carried out in such a way as to respect constitutionality, in particular, the principle of the protection of the legal certainty of citizens. The applicant argued that the

disputed consolidated wording of the Criminal Procedure Act was not in conformity with the provisions of Articles 3, 5, 80, 82.2, 83, 84, 86, 88 and 89 of the Constitution, and requested the Court to strike it down. Relying on the provision of Article 104.1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, the applicant requested that the Constitutional Court communicate to the Croatian Parliament any finding of unconstitutionality or illegality.

In accordance with the provision of Article 42.1 of the Constitutional Act, the applicant's proposal was delivered to the Croatian Parliament for its response. In his submission of 13 August 2003, the President of the Croatian Parliament informed the Court that its official communication of the proposal had been delivered to the Committee for the Constitution, Rules of Procedure and Political System of the Croatian Parliament. No response was ever received.

The Court rejected the proposal on the ground it lacked jurisdiction, and expressed an opinion that the consolidated wording of an Act, according to its legal nature, could not be considered an Act within the meaning of Article 128.1 of the Constitution, and that the addressees were not under an obligation to refer to the provisions of the consolidated wording of an Act.

However, bearing in mind the applicant's argument of the existence of the widespread practice of persons consulting only the consolidated texts, the Court found it necessary to observe that the applicant was right in claiming that numerical and other differences in the content of the consolidated wording of Acts may lead to certain difficulties in their practical application.

The consolidated wording of texts is as a rule prepared when major or extensive amendments have been made to an Act. The consolidated wording of an Act merely enables the addressees to find a certain legal matter in one place. The consolidated wording is the whole of the legal provisions in force, collected from several valid Acts of the same kind and compiled and arranged in a systematic order in one text. All of the original Acts are still in force, and the compilation of the consolidated wording does not influence their contents or validity.

The competent body of the Croatian Parliament should prepare the consolidated wording of an Act in such a way as to bring all the amendments together into one relevant wording. Such a text is not a new attempt to regulate the subject-matter. The amendments to the Act are not out of force. Therefore, the competent body of the Croatian Parliament has a

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special responsibility as to the authenticity of the contents and the identity of the numerical designations put into the consolidated wording.

Bearing in mind that Article 3 of the Constitution lays down that the principle of the rule of law – legal certainty of the legal system – is the highest value of the constitutional order and the basis of the interpretation of the Constitution, the Constitutional Court held that the demands that the wording of an Act must fulfil must also be taken into account when preparing the consolidated wording. The Court also considered that principle to be of the greatest importance because the Croatian legislative body often amends the consolidated wordings of Acts, which are in their contents not Acts at all.

The Court would follow the proposal of the applicant to inform the Croatian Parliament of any finding of unconstitutionality or illegality in individual Constitutional Court cases.

#### *Languages:*

Croatian, English.



#### *Identification:* CRO-2010-2-007

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 12.05.2010 / **e)** U-X-2270/2007 / **f)** / **g)** *Narodne novine* (Official Gazette), 66/10 / **h)** CODICES (Croatian, English).

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

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

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

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

Head of State / Legislator, omission / Parliament.

#### *Headnotes:*

In the process of amending the Constitution, and in the light of the unconstitutionality resulting from the protracted failure of lawful regulation of the organisation and competence of the Office of the President under the second sentence of Article 106.2 of the Constitution, the Constitutional Court indicated the

requirement that each acting part of a governmental body must be regulated by a legal norm. This requirement stems from the principle of the rule of law as a highest value of the constitutional order. The Constitutional Court reminded Parliament of the need to resolve this issue without delay.

#### *Summary:*

I. The Constitutional Court was asked to examine the conformity with the Constitution of the Decision on Amending the Decision on the Office of the President of the Republic of 12 January 2004, together with two Decisions amending the Decision on the Office of the President of the Republic of 19 April 2005 and 2 March 2010. These had been passed during several presidential terms of office. In proposals filed by the Constitutional Court, the formal unconstitutionality of these decisions was highlighted. The point was made that under Article 106 of the Constitution, the organisation and activities of the Office of the President cannot be regulated by a decision, and the President of the Republic is not competent to pass such a decision.

The President of the Republic passed the decisions noted above by invoking Article 106 of the Constitution.

The second sentence of Article 106.2 stipulates that the organisation and competence of the Office of the President shall be regulated by law and internal rules.

II. The Constitutional Court noted that Parliament had not enacted any legislation which would, in terms of the second sentence of Article 106.2, regulate the competence and organisation of the Office of the President, and that the President did not pass the internal rules in the second sentence of Article 106.2 aimed at elaborating the provision of the act on the competences and organisation of the Office of the President. The failure to regulate in a legal act the organisation and competence of the Office of the President on the grounds of the second sentence of Article 106.2 has lasted continuously for more than seven years, starting from the expiry of the two-year deadline for passing the act provided for in Article 3 of the Constitutional Act on the Implementation of the Constitution (*Narodne novine*, no. 28/01).

Within the framework of the organisation of the State laid down in the Constitution, and of the constitutional position of the President of the Republic, there is undoubtedly a need to establish the Office of the President of the Republic to carry out advisory and general activities arising from the competence of the President's work. This could include the performance of advisory, administrative, expert and other activities

connected with the preparation and implementation of the decisions and acts the President passes, and the exercise of the President's other powers and obligations under the Constitution and laws.

Under the second sentence of Article 106.2, Parliament must pass an act regulating the organisation and competence of the Office of the President of the Republic. No such legislation has been enacted to date.

In the Constitutional Court's opinion, a specific examination of the meaning of the legislative body's failure to proceed in accordance with its constitutional obligation was not needed. Because of the special constitutional conditions that had arisen due to the period of time during which the legislation had not been enacted, it was sufficient to point out that each acting component of a governmental body must be regulated by a legal norm. This requirement stems from the principle of the rule of law as a highest value of the constitutional order, laid down in Article 3 of the Constitution.

Since proceedings are presently under way for amending the Constitution, the Constitutional Court deemed it appropriate, under the powers vested in Article 128 indent 5 of the Constitution and Article 104 of the Constitutional Act on the Constitutional Court, to ascertain the existence of the above problem and highlight the need to resolve it.

The Constitutional Court noted that it did not have the authority to assess whether it would be of more use to amend Article 106 of the Constitution or to act in accordance with it, since Parliament alone can make this assessment. Whether Parliament decides to amend Article 106 of the Constitution or to act in accordance with it, it has confined itself to indicating the need to an immediate resolution to the problem.

#### *Supplementary information:*

Article 17 of the Constitutional Amendment (*Narodne novine* no. 76/10) amends the second sentence of Article 106.2 of the Constitution so that the organisation and competence of the Office of the President are now regulated by a decision passed by the President of the Republic.

#### *Languages:*

Croatian, English.



#### *Identification:* CRO-2010-2-008

a) Croatia / b) Constitutional Court / c) / d) 12.05.2010 / e) U-III-203/2007 and others / f) / g) *Narodne novine* (Official Gazette), 66/10 / h) CODICES (Croatian, English).

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

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

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

Housing, right / Property, socially owned, equal treatment / Tenancy, right / Time-limit, element of right / Constitutional Court, decision, application / Constitutional Court, decision, binding force / Constitutional Court, decision, execution / Constitutional Court, interpretation, binding effect / Constitutional protection, application.

#### *Headnotes:*

There are no legal grounds for interpreting the non-existence of a deadline for carrying out a particular activity (especially in situations where the deadline was repealed by decision of the Constitutional Court) to the detriment of the party which would have to carry it out. In this case the opposite interpretation of the competent ordinary court violated the constitutional right to a fair trial.

Failure to heed the legal views of the Constitutional Court and to respect the binding legal standards established in the constitutional case-law in relation to the protection of human rights is regarded as a breach of Articles 31 and 77 of the Constitutional Act on the Constitutional Court.

#### *Summary:*

I. The applicant, a natural person, lodged a constitutional complaint against the judgment of the Pula County Court of 11 December 2006, which upheld the appeal of the defendant (the Republic of Croatia for the Ministry of Defence) and altered the judgment of the Pula Municipal Court of 27 February 2001 in such a way as to reject the claim of the applicant (i.e. the plaintiff in civil proceedings conducted for the purchase of a state-owned flat). The applicant was of the opinion that the Pula County Court's judgment violated his constitutional rights guaranteed in Articles 14.2, 29.1 and 35 of the Constitution, because in the renewed appellate proceedings, the Pula County Court failed to comply

with the legal opinion of the Constitutional Court expressed in its decisions U-I-697/1995 of 29 January 1997 and U-III-1243/2004 of 19 October 2006. He suggested that the Court should overturn the disputed judgments.

In an earlier decision, (Decision no. U-III-1243/2004 of 19 October 2006), the Constitutional Court upheld the applicant's constitutional complaint in the same legal matter, overturned the judgment of the Pula County Court of 1 December 2003 and referred the case back to that court for new proceedings.

The issue under dispute in the court proceedings was whether the applicant had submitted a timely request to purchase the flat in which he was a specially protected tenant. Based on the fact that the provisions of Article 20.1 and 20.2 of the Act Amending the Specially Protected Tenancies (Sale to Occupier) Act (*Narodne novine*, no. 58/95 -the "AASOA") were repealed by the Decision of the Constitutional Court no. U-I-697/1995 of 29 January 1997, the Pula Municipal Court had, in its Decision of 27 February 2001, granted the applicant's request to purchase the flat, finding that the applicant was not precluded from submitting his request to purchase it. The first instance judgment accordingly accepted the applicant's claim and the defendant was obliged to conclude with the applicant a sale contract under the conditions in the Specially Protected Tenancies (Sale to Occupier) Act, and to hand the flat over to the buyer (the applicant), free of persons and other encumbrances. The judgment was, in effect, a replacement for the contract of sale. The respondent was also ordered to compensate the applicant for his litigation costs. The first instance court also found in its judgment that neither of the parties had disputed the applicant's right as a specially protected tenant to purchase the flat, neither did they argue the fact that the respondent had received the applicant's request to purchase the flat on 22 October 1999 and had not concluded a sales contract for its purchase with the applicant until the point when the civil action was submitted.

With respect to the respondent's appeal, the Pula County Court handed down a judgment of 1 December 2003 overturning the judgment of the Pula Municipal Court dated 27 February 2001 and rejecting the applicant's claim to purchase the flat, on the basis that the applicant's request was made after the expiry of the statutory deadline.

The applicant then lodged a constitutional complaint against the judgment of the Pula County Court of 1 December 2003, whereupon the Constitutional Court handed down Decision no. U-III-1243/2004 of 19 October 2006. It held that the Pula County Court

judgment had violated the applicant's constitutional right to the equality of all before the law, guaranteed in Article 14.2 of the Constitution. In its decision the Constitutional Court expressed the following legal opinion:

II. "The Constitutional Court finds that the second-instance court in its judgment placed the applicant, as a specially protected tenant in a 'state-owned' flat, at a disadvantage in comparison to other specially protected tenants in 'state-owned' flats. The applicant was denied the right to purchase the flat in which he lived due to a flaw in the legal opinion of the second-instance court, which misinterpreted a relevant regulation of substantive law. This led to a direct violation of the right to the equality of all before the law, guaranteed in Article 14.2 of the Constitution, and leads to the conclusion that the impugned judgment was arbitrarily rendered."

As a result of Constitutional Court Decision no. U-III-1243/2004 of 19 October 2006, the Pula County Court repeated the proceedings in which it passed the new judgment of 11 December 2006, which the applicant is disputing in these constitutional review proceedings. In its judgment, the Pula County Court again upheld the respondent's appeal, overturned the first-instance judgment of the Pula Municipal Court of 27 February 2001 and rejected the applicant's claim. It also noted in the judgment that the deadline for submitting a request to purchase a flat expired on 30 June 1999 (Ordinance of the Government, *Narodne novine* no. 163/98), and that the applicant had missed the deadline, as he submitted his request on 22 October 1999. The point was also made in the second-instance judgment that the fact that proceedings were pending between the parties to terminate the specially protected tenancy did not affect the applicant's obligation to submit a timely request to purchase the flat.

The Constitutional Court again referred to the legal standpoint it expressed in Decision no. U-I-697/1995 of 29 January 1997. In this Decision, it repealed the provisions of Article 20.1 and 20.2 of the AASOA because they breached the Constitution. According to this standpoint, the inequality in the position of purchasers of state-owned flats and of other flats, which is in breach of the Constitution, also exists with reference to the deadline for the submission of a request to purchase a state-owned flat. Articles 20.1, 20.2 and 21 of the Act were repealed, because they do not guarantee the equality of the individuals who must request the right to purchase a flat within 60 or 30 days from the date when the Act entered into force, and other flat purchasers who had one year to submit a request, which was subsequently extended several times.

In view of the legal standpoint mentioned above, and the finding of the Constitutional Court that no legal grounds exist to interpret the non-existence of a deadline for carrying out a particular activity (especially in situations where the deadline was repealed by decision of the Constitutional Court) to the detriment of the party that should have carried it out, the Constitutional Court found that in the disputed judgment the Pula County Court violated the applicant's right to a fair trial, guaranteed in Article 29.1 of the Constitution.

The Constitutional Court overturned the disputed judgment and referred the case back to the Pula County Court for fresh consideration, placing it under an obligation (pursuant to Articles 31.1, 32.2 and 32.4 of the Constitutional Act on the Constitutional Court) to hand down a judgment in compliance with the legal opinion of the Constitutional Court, expressed in Decision no. U-III-1243/2004 of 19 October 2006. It pointed out that by not heeding the legal views of the Constitutional Court and not respecting the binding legal standards grounded in the case-law of the Constitutional Court in relation to the protection of human rights in a specific legal issue, the Pula County Court acted contrary to Articles 31 and 77 of the Constitutional Act on the Constitutional Court.

#### *Cross-References:*

- Decision no. U-I-697/1995 of 29.01.1997, *Bulletin* 1997/1 [CRO-1997-1-002].

#### *Languages:*

Croatian, English.



#### *Identification:* CRO-2010-2-010

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 07.07.2010 / **e)** U-III-3491/2006 *et al* / **f)** / **g)** *Narodne novine* (Official Gazette), 90/10 / **h)** CODICES (Croatian, English).

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

- 3.9 General Principles – **Rule of law.**
- 3.16 General Principles – **Proportionality.**
- 3.17 General Principles – **Weighing of interests.**

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

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

Housing, procedure, privatisation / Property, private, right / Property, protection / Property, value, reduced / Ownership, right, restriction / Constitutional Court, case-law / Constitutional Court, decision, execution, method.

#### *Headnotes:*

When the Academy of Sciences and Arts was compelled to sell the flats it owned for less than the market value, its constitutional right to ownership was breached, as it had to shoulder a disproportionate burden in relation to the legitimate aim which was to have been achieved by the Sale to Occupier Act. This led to an excessive imbalance between the protection of the public interest established by the Sale to Occupier Act and its effects on the applicant. The legislator's task was to ensure that all tenants could purchase socially-owned flats under conditions more favourable than market conditions, without creating differences in the person of the seller which would make it more difficult or impossible for some of the tenants to buy the flats. However, because the legislator itself, by special legislation, reinstated the applicant's ownership over its immovable property which had been confiscated earlier, it should also have ensured that an excessive burden was not imposed on the applicant in relation to the aim that was to have been achieved by the Sale to Occupier Act. The protection of the applicant's ownership rights, in relation to other transitional regulations, should have consisted of exercising a right to compensation in the amount of the market value of the flats.

#### *Summary:*

I. The Academy of Sciences and Arts (hereinafter, the "CASA") lodged three constitutional complaints against the judgments of competent courts passed in three sets of civil proceedings conducted in order to pass judgments that would replace sale contracts for flats with specially protected tenancies. Under these judgments, the applicant (the respondent in the civil proceedings) sold flats to the plaintiffs (the specially protected tenants) under the conditions in the Specially Protected Tenancies (Sale to Occupier) Act (hereinafter, the "SOA"). Under the judgments the applicant was obliged to sell its flats at less than market value.

Since all three cases before the Constitutional Court involve the same legal matter (the relationship between the SOA and the Academy of Sciences and Arts Act – the CASA Act), and since they all deal with the same issue of constitutional law (the alleged violation of the constitutional right to ownership by judgments which replace contracts of sale for flats with specially protected tenancies), the Constitutional Court decided to join the cases and adjudicate on them by a single decision.

One of the points the applicant made in the constitutional complaints was that the flats could not be sold pursuant to the SOA, because they were not socially owned property but were entered in the land registry as the applicant's property, not as a result of ownership transformation but on the grounds of Article 27 of the CASA Act. It deemed that its constitutional rights guaranteed in Articles 48.1, 50 and 29.1 of the Constitution had been violated.

II. The Constitutional Court noted that social ownership was the essential feature of the former state and its regime. After the Republic of Croatia became independent and after the Constitution entered into force on 22 December 1990, private ownership over socially-owned real property began to be reinstated on various grounds. The Constitution guarantees the right to ownership to everyone, and it put its inviolability among the highest values of the constitutional order and as grounds for interpreting the Constitution.

The SOA entered into force on 19 June 1991, signalling the beginning of the harmonisation of the housing regulations with the Constitution. The Lease of Flats Act entered into force on 5 November 1996. These regulations allowed certain persons who were specially protected tenants under certain defined conditions to buy certain flats. Those persons who were specially protected tenants but were unable for certain reasons to buy the flat they were occupying, had their specially protected tenancy "transformed" into a lease and became protected lessees. Article 2 of the SOA states that its provisions extend to flats where the ownership has been transformed under special regulations. In earlier case-law the Constitutional Court started from the view that Article 2 of the SOA refers both to transformations effected before the entry into force of the SOA and to those that took place after it came into force, including the CASA Act (Decision no. U-III-777/1996 of 19 November 1997).

The legislator drew a distinction between the CASA and other subjects whose property had been confiscated and who were the potential beneficiaries of restitution of or compensation for property. It passed a separate act pursuant to which the

applicant, without any restrictions stipulated in this act, regained the property that the former state had taken away. Article 27 of the CASA Act provides that the applicant is the owner of immovable property, libraries, scientific and artistic collections and other movable property which it had acquired by donation, bequest or in other ways. This includes property it had acquired since its foundation in 1866, including the immovable property which was confiscated under the former regime and turned into socially-owned property which it was entitled to use.

The Constitutional Court was of the opinion that compelling the applicant to sell its flats for less than the market value in accordance with the SOA constituted interference in the applicant's property right amounting to a restriction of ownership by decreasing the value of the property.

The Constitutional Court noted that the SOA and the CASA Act are transition regulations passed within a period of one month. Both have a legitimate aim but they have created a conflict of interest, between the interest of the State in privatising socially-owned flats and enabling all its citizens to buy flats under more favourable conditions, thereby resolving their housing problems and the interest of the citizens, the specially protected tenants, in purchasing the flats they occupy under favourable conditions. This is in opposition to the applicant's interest in freely enjoying its possession of the property returned to it under Article 27 of the CASA Act.

If priority is accorded to one of these conflicting interests, this must be based on the Constitution and comply with the standards in the protection of the right to ownership developed in the case-law of the Constitutional Court and the European Court of Human Rights. In this case the civil courts gave priority to the interests of the tenants and the Supreme Court based its view on a formal-logical interpretation of the applicable legal norm according to the rule of *lex posterior*. Specifically, the SOA entered into force a month and five days before the CASA Act. The Supreme Court took the view that the flat in question was socially-owned property at the moment when the SOA entered into force, and could accordingly be sold, because the CASA Act entered into force after the SOA and "did not retroactively change the legal regime of social ownership in CASA ownership".

In the view of the Constitutional Court, this approach to weighing two conflicting interests, in the context of the transformation of social ownership into private ownership, is not acceptable under constitutional law. In passing the CASA Act the legislator expressed the will to restore to the applicant property that had

been appropriated from it without any restrictions prescribed in that act. In this sense the “transitional” character of Article 27 of the CASA Act differs from that of other special transitional legislation, and this is the light in which the position of the applicant should also be viewed, in relation to all those whose ownership was transformed under other special regulations, which also refers to the SOA.

The Constitutional Court noted that so far, the applicant has had to sell its flats, which it acquired *ex lege* under favourable conditions, in at least 30 cases (including the three under dispute). The Constitutional Court has rejected the applicant’s constitutional complaints in at least twelve of its decisions up to February 2009, taking the view that Article 2 of the SOA (which states that the act’s provisions also cover flats for which transformation of ownership was carried out under special regulations) refers to transformations carried out both before and after the SOA came into force, and this included the CASA Act. Taking this stand, the Constitutional Court did not view these cases in sufficient depth in the light of European constitutional standards, (i.e. in the light of the European Court’s view as to the extent and content of the right to the peaceful enjoyment of possessions, Article 1 Protocol 1 ECHR). The Constitutional Court has been applying these standards in its case-law since July 2009 (Decision no. U-III B-1373/2009). Applying to this case the standpoints of the Constitutional Court and the European Court of Human Rights, and bearing in mind the facts mentioned above, the Constitutional Court found that because the applicant has had to sell at least 30 of the flats it owned at less than market value, it has had to shoulder a disproportionate burden in relation to the legitimate aim that was to have been achieved by the SOA. This has led to an excessive imbalance between the protection of the public interest established by the SOA and its effects on the applicant.

The Constitutional Court pointed out that the legislator’s task was to ensure that all tenants could purchase socially-owned flats under conditions more favourable than market conditions, without creating differences in the person of the seller which would make it more difficult or impossible for some of the tenants to buy the flats. This also applies to specially protected tenants in the flats which became the applicant’s property on the grounds of Article 27 of the CASA Act. However, when the legislator enacted special legislation to reinstate the applicant’s ownership over its immovable property which had been confiscated earlier, he should have ensured that an excessive burden was not imposed on the applicant in relation to the aim that was to have been achieved by the SOA. The protection of the

ownership rights established in the CASA Act, in competition with other transitional regulations, should have consisted in making sure that the HAZU (Academy of Sciences and Arts) was compensated for the flats in the amount of the market price of the flats. Such compensation, did not, however, have to be given by the tenants – the buyers of the flats.

The Constitutional Court did not overturn the court judgments, but it identified a breach of the right to ownership and ordered the Government to redress the effects of the violation of the applicant’s constitutional right.

#### *Cross-References:*

- Decision no. U-III B-1373/2009 of 07.07.1997, *Bulletin* 2009/2 [CRO-2009-2-010].

#### *Languages:*

Croatian, English.



# Czech Republic

## Constitutional Court

### Important decisions

*Identification:* CZE-1995-1-001

**a)** Czech Republic / **b)** Constitutional Court / **c)** / **d)** 16.02.1995 / **e)** III. US 61/94 / **f)** Position of the Constitutional Court in the system of courts / **g)** *Sbírka nálezů a usnesení Ústavního soudu CR* (Official Digest), Vol. 3, no. 10 / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts**.

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions**.

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

*Keywords of the alphabetical index:*

Evidence, submission / Litigation, procedure, correctness / Court, proceedings, procedural correctness.

*Headnotes:*

The Constitutional Court is not at the top of the pyramid of ordinary courts but remains outside the system of ordinary courts. It is, however, empowered to review decisions of ordinary courts that infringe upon the principle of a fair trial.

*Summary:*

The position of the Constitutional Court is that of an organ outside the system of ordinary courts of the Czech Republic. As provided for by the Constitution, it does not represent the top level of court jurisdiction. Therefore, any intervention of the Constitutional Court in the exercise of ordinary jurisdiction can be justified only if the ordinary court steps outside the scope and limits set by the principle of a fair trial (Article 36 of the Charter of Fundamental Rights and Freedoms *et al.*). This can be interpreted in such a way that the Constitutional Court is first of all empowered to watch over the procedural correctness of court proceedings in the course of a litigation.

This interpretation was handed down by the Constitutional Court in a case raised against court proceedings by which the ordinary court abruptly violated general procedural rules on the acceptance and/or dismissal of evidence. Ordinary courts are obliged not only to decide on the submission of evidence but also to specify reasons for the dismissal of evidence proposed by a party. By not doing so, the decision of the ordinary court is tainted with defects that make it reviewable and unconstitutional at the same time.

*Supplementary information:*

The principle established in this decision had been confirmed in many subsequent decision (see also Decisions I. US 68/93, IV. US 55/94, II. US 294/95).

*Languages:*

Czech.



*Identification:* CZE-1997-C-001

**a)** Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 18.03.1997 / **e)** I.US 70/96 / **f)** / **g)** *Sbírka nálezů a usnesení Ústavního soudu CR* (Official Digest), Vol. 7, no. 29 / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts**.

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms**.

1.5 Constitutional Justice – **Decisions**.

1.6 Constitutional Justice – **Effects**.

1.6.7 Constitutional Justice – Effects – **Influence on State organs**.

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

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

4.7.8 Institutions – Judicial bodies – **Ordinary courts**.

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



5.3.17 Fundamental Rights – Civil and political rights  
– **Right to compensation for damage caused by the State.**

*Keywords of the alphabetical index:*

Constitutional Court, decision, binding nature / Effect, binding / Proceedings, defect, removable / Court, duty to instruct.

*Headnotes:*

Article 89.2 of the Constitution stipulates that enforceable decisions of the Constitutional Court are binding on all authorities and persons. The Court decides the case on its merits by a judgment which presents reasons justifying the decision and its finding. The Court's legal interpretation listed in the reasoning of a judgment is not without any significance as it is the expression or reflection of the application of the Constitution, the Charter of Fundamental Rights and Basic Freedoms or relevant international treaties concerning human rights which have an immediate binding effect and take precedence over statutes under Article 10 of the Constitution. Non-compliance with such legal interpretation raises doubts whether the ordinary court really complies with Article 90 of the Constitution, according to which the Constitutional Court is called upon above all to provide protection of rights in the legally prescribed manner.

The above-mentioned situation makes an impact on the citizens' feeling of legal certainty which is the necessary consequence of the democratic character of a constitutional state. The behaviour of a legal state, which is not only in accordance with formal legal regulations but also just, must also be in accordance with the state's democratic character.

*Summary:*

The complainants sought annulment of a court's resolutions discontinuing the proceedings in which they requested imposition of the duty to conclude an agreement on the delivery of real property. The discontinuance of the proceedings was justified by the fact that the complainants designated the defendant in the proceedings incorrectly.

The Regional Court confirmed the first instance resolution on discontinuance of the proceedings. In the constitutional complaint the complainants argued that the legal interpretations used by both judicial instances were not in accordance with the jurisprudence of the Supreme Court and the Constitutional Court.

The complainants contested the procedure of the courts as formalist and pointed out that ordinary courts accepted the decision-making practice of the Supreme and Constitutional Courts, holding thus the opinion that the incorrect determination of a party to the proceedings represents a removable defect of proceedings. Therefore the duty of the court to instruct is in place. They regard the procedure of the courts as an infringement of the Charter of Fundamental Rights and Basic Freedoms.

Under Article 83 of the Constitution, the Constitutional Court is the judicial body responsible for the protection of constitutionality. The Constitutional Court also decides, under Article 87.1 of the Constitution, constitutional complaints against final decisions or other actions by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms resulting from constitutional laws or international treaties under Article 10 of the Constitution. After reviewing the file, the Constitutional Court arrived at the conclusion that it cannot agree with the courts' conclusions, which also follows from the settled decision-making practice of the Constitutional Court. The present case concerned the Restitution Act, by means of which a democratic society tries to mitigate the results of past property and other injustice, namely the infringement of generally acknowledged human rights and freedoms on the part of the state.

In the proceedings, the state and its bodies are obliged to proceed in accordance with the legitimate interests of the persons who shall be compensated, at least partially, for violation of their fundamental rights and basic freedoms. The extent of the court's duty to instruct has to be assessed with regard to individual aspects of the given case. It is always necessary to bear in mind that individual justice within the law, including procedural regulations, is the highest value of decision-making of the courts. Petitions initiating a suit shall contain elements necessary for the hearing of the matter. The Court is certainly not obliged to instruct the plaintiff in matters relating to substantive law. Nevertheless, in its settled decision-making practice the Constitutional Court has already come to the opinion that it is necessary to instruct the plaintiff about the correct determination of the party to the proceedings, and when the defended person has no capacity to be party to the proceeding, and all the more so in the given restitution case where it is appropriate to proceed in this way to eliminate the formalistic approach of the courts (e.g. II. US 108/93, II. US 74/94). In another case the Constitutional Court directly declared that "it is not for the court to instruct the party to the proceeding about substantive law, including the issue of justiciability; which, however, does not mean that the court should not instruct the plaintiff about the correct

determination of parties to the proceeding at all, i.e. also in case somebody is sued who has no capacity to be party to the proceeding. The Constitutional Court holds this opinion because the capacity to be party to the proceeding is the procedural requirement of the proceeding which the court examines *ex officio*, the absence of which leads to the discontinuance of the proceeding. Thus the Court, before it terminates the proceeding, should give the plaintiff (i.e. party to the proceeding) the opportunity to repair the matter (IV. US 41/95). In accordance with the above-mentioned conclusion, the Constitutional Court deduced that the contested decisions of both courts breached both Article 36.1 of the Charter of Fundamental Rights and Basic Freedoms, stipulating everybody's right to assert, through a legally prescribed procedure, his/her rights before an independent and impartial court and Article 90 of the Constitution imposing on the courts the duty to provide protection of rights as stipulated by law.

At the same time, the Court had to pay attention to the opinion of the Regional Court claiming that it was not bound by the decisions of either the Constitutional or the Supreme Court, because there was no legal reason for such conclusions. Of course, it is possible to agree that – generally speaking – these are decisions in particular cases and ordinary courts are not bound by them in individual cases; nevertheless, generalisation is not appropriate. Article 89.2 of the Constitution stipulates that enforceable decisions of the Constitutional Court are binding on all authorities and persons. This includes the case of a constitutional complaint against the decisions of ordinary courts, where the annulment of the contested decision is listed in the judgment of the Constitutional Court. This certainly does not mean that the Court's legal interpretation listed in the reasoning of such a judgment is without any significance as it is not the interpretation of a particular statutory provision, but the expression or reflection of the application of the Constitution, Charter of Fundamental Rights and Basic Freedoms or relevant international treaties concerning human rights which are directly applicable and take precedence over statutes under Article 10 of the Constitution. In general, the negative attitude to such legal interpretation causes uncertainty whether the ordinary court really complies with the provision of the Constitution, according to which this Court is called upon above all to provide protection of rights in the legally prescribed manner. That is to say that the court has to be aware of the fact that if it does not take into account the opinion of the Constitutional Court in a particular case, the Constitutional Court is likely to decide on a possible constitutional complaint in the same way as before. However, it is worth remarking that different procedures of the court, i.e. general non-compliance with the decision-making

practice resulting in different decisions in the same matter, make an impact on the citizens' feeling of legal certainty which is the necessary consequence of the democratic character of a constitutional state. The behaviour of a legal state, which is not only in accordance with formal legal regulations but also just, must also be in accordance with the state's democratic character. Therefore the Constitutional Court granted the complaint and dismissed the contested decisions.

Article 89.2 of the Constitution, however, is expressed in a broad manner: "Enforceable decisions of the Constitutional Court are binding on all authorities and persons". This provision can be interpreted as meaning Constitutional Court decisions are binding precedents, but that interpretation has not prevailed in practice, rather a more restrictive interpretation has.

#### *Cross-References:*

- See also IV. US 41/95, II.US 156/95, III. US 200/2000.

#### *Languages:*

Czech.



#### *Identification: CZE-1997-3-010*

**a)** Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 13.11.1997 / **e)** III. US 337/97 / **f)** Calculating the Length of Permissible Criminal Custody / **g)** / **h)** CODICES (Czech).

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

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions.**

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

4.7.7 Institutions – Judicial bodies – **Supreme court.**

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

*Keywords of the alphabetical index:*

Jurisdiction to review court decisions / Judicial review, minimal intrusion / Custody, permissible period, calculating / Detention, maximum period, calculation.

*Headnotes:*

Pursuant to Articles 87.1.d of the Constitution and 72.1.a of the Constitutional Court Act, the Constitutional Court has jurisdiction to review any decision or other action of a public authority if a natural or legal person alleges that such a decision or action infringed her fundamental rights or basic freedoms guaranteed by a constitutional act or international human rights treaty. The Supreme Court and other ordinary courts are unquestionably also public authorities, and thus the Constitutional Court has authority to review their decisions.

The Constitutional Court follows the principle that it should minimise its intrusion upon the decision-making power of other State authorities by stepping in only to the extent necessary to protect the complainant's fundamental rights.

Decisions on the extension of custody must meet more stringent requirements than decisions on the original imposition of custody. In making decisions concerning the extension of custody of an accused or indicted person, in addition to the requirement that the statutory grounds for custody be present, it is also necessary to show serious reasons as to why it was not possible to bring the proceedings to a conclusion within the prescribed fair time period. A court decision to return the matter to the State attorney for further investigation does not cause the statutorily-defined maximum period for custody to begin running anew.

*Summary:*

In its submission, the Supreme Court asserted its view that the Constitutional Court is not authorised to review its decisions in constitutional complaint proceedings unless the complainant submits, in conjunction with the complaint, a petition to annul provisions or a statute or regulation. With regard to Article 87.1.d of the Constitution, the Supreme Court argued that it (i.e. the Supreme Court) is a body of State power, not a public authority. The Constitutional Court responded by rejecting this contention and concluded that the concept of bodies of state power, meaning legislative, executive and judicial bodies, is included within the broader concept of public authority. It made reference to one of its very first decisions, in which it asserted its jurisdiction to review

a final decision of the Supreme Court, a position which it has consistently upheld since then.

This constitutional complaint was directed both against a decision by the Supreme Court and against the decision of the Superior Court which preceded it. While the Constitutional Court found the interpretation applied by both courts to be in conflict with Article 8.5 of the Charter of Fundamental Rights and Freedoms, it quashed only the Supreme Court's decision, as that would permit sufficient opportunity for the Supreme Court to vindicate the complainant's rights. This means of proceeding is in keeping with its principle of minimal intrusion into the decision-making of other State authorities.

The Supreme Court cited many interpretative arguments for its conclusion that the statutorily-defined maximum period of custody starts to run anew if a court returns the matter to the State attorney for further investigation. In particular, it cited the State attorney's common practice of submitting the indictment less than 15 days before the expiration of the maximum period for custody, so that unless the period started running anew in cases where the matter was returned to the State attorney for further investigation, the accused would in all cases have to be released. In rejecting such arguments, the Constitutional Court stated that when an intrusion into the personal liberty of the accused is concerned, the Criminal Procedure Code must be interpreted, in cases of doubt, so as to favour the accused's rights. The Constitutional Court rejected this argument by stating that accepted practice cannot constitute grounds for the infringement of fundamental rights.

*Cross-References:*

- See Judgment I. ÚS 131/93 of 01.04.1994, reported in the *Constitutional Court Collection*, Vol. 1, no. 18, concerning jurisdiction of the Constitutional Court over ordinary court decisions.
- See Judgment III. ÚS 205/97 of 11.12.1997 concerning the minimisation of intrusion into the decision-making power of other state bodies.
- Also see Judgment III. ÚS 83/96 of 25.09.1996, reported in the *Collection*, Vol. 6, no. 87, and Judgment Pl. ÚS 4/94 of 12.10.1994, reported in the *Collection*, Vol. 2, no. 46 and in the *Bulletin* 1994/3 [CZE-1994-3-003].

*Languages:*

Czech.



*Identification:* CZE-1998-1-002

**a)** Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 11.02.1998 / **e)** I. US 283/97 / **f)** Limitation Periods not applicable due to obstruction / **g)** / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions.**

1.4.7 Constitutional Justice – Procedure – **Documents lodged by the parties.**

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

*Keywords of the alphabetical index:*

Proceedings, obstruction / Time limit observance.

*Headnotes:*

Pursuant to Article 87.1.d of the Constitution, the Constitutional Court has jurisdiction “over constitutional complaints against final decisions or other actions by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms.” Since the Supreme Court forms a part of the system of ordinary courts, which are public authorities in the sense of the cited constitutional provision, then, beyond any doubt, it is within the Constitutional Court’s jurisdiction to decide constitutional complaints against final decisions by the Supreme Court.

The three-month time limit prescribed by statute for a decision on a complaint of a violation of the law should, where a statute was violated to the defendant’s benefit, serve as a limit on the State for the effective correction of a non-lawful final decision. Since the State itself has set this time limit, logically it follows that exceeding it can only come into consideration when such delay came about for reasons over which the State had no influence. Where the cooperation of the accused in the proceeding can in no way be compelled by the State, then it is reasonable and just that the due administration of justice not be jeopardised by circumstances entirely beyond the State’s power to control, such as obstruction of the proceeding by the defendant and his counsel.

*Summary:*

The Supreme Court made a preliminary objection that the complaint was inadmissible. It stated its view that the Constitutional Court is only authorised to hear a constitutional complaint to review a Supreme Court decision where the complainant submits, in conjunction with the complaint, a petition proposing the annulment of a statutory provision. A complainant is permitted to do this pursuant to § 74 of the Act on the Constitutional Court, but only where the provision formed the basis of the Supreme Court’s decision which is claimed to have violated his fundamental rights. The Constitutional Court rejected this argument referring to the rather broad constitutional text, which makes quite clear that its jurisdiction includes the power to review ordinary court decisions for the constitutionality of their interpretation or application of a statutory provision and is not limited to abstract review of those statutory provisions.

Where the Minister of Justice considers that a decision in a criminal proceeding is contrary to the law, she is entitled, under the Criminal Procedure Code, to submit a complaint of a violation of the law to the Supreme Court, which, if it agrees with the Minister, can overturn the decision and return it for further proceedings. Where the contested decision was in favour of the accused, then in order to safeguard his legal certainty, the Criminal Procedure Code prescribes strict time limits for submitting (six months) and deciding (three months) such complaints.

In this case, the Minister of Justice submitted to the Supreme Court a complaint against a decision by the State Attorney to dismiss charges against the complainant. The Supreme Court agreed with the Minister and overturned the decision, but did so more than three months after receiving the complaint. The final decision was delayed because scheduled court dates had repeatedly to be postponed either due to the defendant’s attorney excusing his absence on account of illness or due to the defendant changing attorneys immediately before a court date, thus necessitating a delay to allow new counsel to acquaint himself with the case. As the defendant was charged with a type of criminal offence for which he was required to be represented by an attorney, the Supreme Court was powerless to hold a hearing and decide the complaint without the defendant’s attorney being present. The Supreme Court determined that it was beyond its power to decide sooner and that it had, in any case, observed the three month deadline because the limitation period does not run while the defendant and his attorneys are obstructing the proceeding.

*Cross-References:*

- See judgment III. ÚS 337/97, decided 13 November 1997 and reported in *Bulletin* 1997/3 [CZE – 1997-3-010], in which the Third Panel dealt with, and rejected, precisely the same preliminary objection made by the Supreme Court.
- See also judgment I. ÚS 131/93 of 01.04.1994, reported in the *Constitutional Court's Collection*, Vol. 1, no. 18, concerning jurisdiction of the Constitutional Court over ordinary court decisions, to which the Court made reference in this case.
- In 1996 the Constitutional Court decided a similar case (Judgment III. ÚS 83/96, reported at 293/1996 Sb. and in the *Constitutional Court's Collection* Vol. 6, no. 87), concerning the four-year maximum period of pre-trial custody. The defendant was convicted on the very last day but succeeded in his constitutional complaint in having that conviction overturned. The Constitutional Court took into consideration the fact that the defendant and his attorney had engaged in repeated obstructions, resulting in the loss of 29 days. Therefore, it decided that those 29 days could not count against the time limit and that to retain him in custody for another 29 days would not constitute a violation of the four year maximum. The Constitutional Court referred to that case in its reasoning in this case, and it stated that “the arguments made therein are of a more general validity so that it is possible to apply them as appropriate in the given case.”

*Languages:*

Czech.

*Identification:* CZE-1998-1-005

**a)** Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 02.04.1998 / **e)** III. US 425/97 / **f)** The Binding Force of Constitutional Court Judgments / **g)** / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

- 1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**
- 1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**
- 1.6.4 Constitutional Justice – Effects – **Effect inter partes.**
- 1.6.7 Constitutional Justice – Effects – **Influence on State organs.**
- 5.3.14 Fundamental Rights – Civil and political rights – **Ne bis in idem.**
- 5.3.26 Fundamental Rights – Civil and political rights – **National service.**

*Keywords of the alphabetical index:*

*Res judicata* of Constitutional Court judgments / Constitutional Court, decision, binding force / Constitutional Court, decision, disregard / Civil service, evasion, punishment.

*Headnotes:*

According to Article 89.2 of the Constitution, enforceable decisions of the Constitutional Court are binding on all authorities and persons. Thus, such a decision is binding even on the Constitutional Court itself and as a consequence, in any further proceedings before it in which the same matter must be decided upon once again (even if in a divergent manner), that decision represents, in the sense of *res iudicata*, a procedural obstacle that cannot be averted (§ 35.1 of Act no. 182/1993 Sb., on the Constitutional Court) and naturally bars any further review of the matter on the merits whatsoever. This bar extends as well to review which ensues from the Constitutional Court Plenum's adoption of a position pursuant to § 23 of Act no. 182/1993 Sb., which reads: “If in connection with its decision-making, a Panel makes a legal interpretation differing from the legal interpretation of the Court stated in an earlier judgment, it shall submit the issue to the Plenum for its consideration. The Plenum's determination is binding on the Panel in further proceedings.” Therefore, the requirements arising from § 23 (in further proceedings) do not relate to a matter in which the Constitutional Court has already once decided.

In the present state of the law, the issue of the binding force of Constitutional Court judgments presents its share of difficulties, despite the fact that it represents the *conditio sine qua non* of constitutional review. Problems relating to the interpretation of that binding force, above all in relation to the jurisdiction of ordinary courts of any level, remain without clarification, both in

theory and in practice, for a number of reasons. Reasons include the inconsistency of the procedural codes which, despite attention being drawn to this fact a number of times, do not take into consideration the jurisdiction (or the cassational authority) of the Constitutional Court. The result is that where the Constitutional Court annuls the decision of an ordinary court, the procedural codes do not prescribe the direct steps for subsequent proceedings in the same matter. Similarly, the insufficiently clear wording of the Constitution in relation to the binding force of constitutional judgments gives rise to disputes, for example, as to the consequences Constitutional Court judgments have (not those resulting from the statement of judgment, rather those which result from the reasoning contained in the opinion, etc.). The Constitutional Court is convinced, however, that all of the above-indicated controversies relate to the "absolute" binding force of Constitutional Court judgments (that is, the binding force even in unrelated matters), but by no means to the binding force of a judgment in relation to a specific matter already decided by the Constitutional Court in that judgment.

#### Summary:

The Supreme Court rejected on the merits a complaint which the Minister of Justice had submitted against a judgment convicting the complainant for the criminal offence of failing to report for civilian service (as a substitute for military service), even though he had previously been convicted of this criminal offence. The ordinary courts expressed the view that a person commits an additional criminal offence each time he fails to obey a conscription order, since his acts are not identical due to the fact that they occurred at a different time and place.

In contrast to this, the Constitutional Court has taken the position that if the Criminal Act defines the elements of the criminal offence of the failure to report for civilian service with the intention permanently to evade it, it follows from the element of "permanently" that a person can commit this criminal offence only once. Accordingly, on the first constitutional complaint in this matter, the Court annulled the Supreme Court decision and stated in its judgment that Article 4.1 Protocol 7 ECHR enshrines the principle *ne bis in idem*, which provides that "no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and the penal procedure of that State". In the Czech Republic, this provision of the European Convention of Human Rights is, in accordance with Article 10 of the Constitution, directly effective and takes precedence over statutes. Thus, it is necessary to apply it.

Nonetheless, in subsequent proceedings on referral back to the Supreme Court, it confirmed the correctness of its previously expressed conclusion of law, took the same decision as before and proposed that the Constitutional Court should change its position on the matter. In view of the generally binding force of Constitutional Court judgments, however, in the subsequent constitutional complaint against this second Supreme Court judgment, the Constitutional Court had to annul this decision as well.

#### Supplementary information:

On 9 February 1998, the Fourth Panel issued a similar judgment. On a previous occasion the Constitutional Court overturned, as a violation of the complainant's fundamental rights, a decision of the Superior Court in Prague. On referral back to the Superior Court, it rejected the binding effect of the Constitutional Court decision by "in essence merely reproducing" its earlier decision. In the judgment given on the complainant's second complaint, the Constitutional Court then annulled the Superior Court's second decision as a violation of the complainant's right to legal protection.

#### Cross-References:

The Constitutional Court has on many previous occasions dealt with the substantive question at issue and come to the conclusion that a second prosecution in such circumstances violates the constitutional principle *ne bis in idem*.

- See Judgment IV. US 81/95 of 18.09.1995, reported in the Constitutional Court's Collection at Vol. 4, no. 50 and in *Bulletin* 1995/3 [CZE-1995-3-010].
- See also the original Constitutional Court decision in this complainant's matter:
- Judgment I. US 184/96 of 20.03.1997 (reported in the *Constitutional Court's Collection* at Vol. 7, no. 32),
- Judgment IV. US 82/97 of 28.08.1997,
- Judgment I. US 322/96 of 14.10.1997 (which was reported in the *Bulletin* [CZE-1997-3-009]), and
- Judgment I. US 400/97 of 04.03.1998.

#### Languages:

Czech.



*Identification:* CZE-1999-1-005

**a)** Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 25.02.1999 / **e)** III. US 467/98 / **f)** Binding nature of proposition of law declared by the Constitutional Court / **g)** / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions.**

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

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

*Keywords of the alphabetical index:*

Constitutional Court, decision, disregard / Constitutional Court, injunction.

*Headnotes:*

The Constitutional Court has repeatedly taken the position that the reasoning in its judgments is binding in further proceedings on the same matter. Furthermore, Constitutional Court decisions are, pursuant to Article 89.2 of the Constitution binding on all authorities and persons and, in view of the fact that the Constitutional Court is the supreme body of constitutional review, ordinary courts are, by analogy to Article 226 of the Civil Procedure Code (which declares that courts are bound by the views expressed in cassation judgments of a higher ordinary court) in conjunction with Article 63 of the Constitutional Court Act (which makes the Civil Procedure Code a subsidiary source of rules for Constitutional Court proceedings), bound by the legal propositions made by the Constitutional Court.

The Constitutional Court is well aware of the deficiencies of the procedural codes, as they do not lay down any rules for the procedural steps to be taken in proceedings following a judgment of the Constitutional Court on a constitutional complaint. For this reason, the Court considers it important to emphasise the fact that the binding nature of the legal proposition contained in a judgment of the Constitutional Court on a constitutional complaint is binding in subsequent judicial proceedings in the same matter, which may be deduced not only from Article 89.2 of the Constitution but from the very concept of cassation itself. If such were not the case,

then the cassational authority of higher courts (in the given case, by analogy, the Constitutional Court) would not have any rational purpose and would have to be replaced by appellate authority.

*Summary:*

This was the second constitutional complaint the complainant had submitted in relation to the same matter. The original dispute concerned a 1997 administrative decision against which the complainant appealed to the Regional Court in Ústí nad Labem, which decided that it had no jurisdiction to review the case and therefore dismissed it. The complainant then filed the first constitutional complaint, alleging denial of judicial protection, but at the same time asking that the Constitutional Court make a provisional order suspending the enforcement of the original administrative decision. In its Judgment III ÚS 142/98 of 4 June 1998, the Constitutional Court found that the Regional Court had denied referring to its consistent case-law that it intrudes upon ordinary courts' jurisdiction to the minimum extent, it refused to grant provisional measures suspending the enforcement of the administrative decision, leaving that to the Regional Court to decide. The latter court, rather than hold further proceedings in the matter as is required following a decision in cassation, filed away the matter as having been resolved by the Constitutional Court's judgment. When the complainant made submissions seeking additional proceedings, the Regional Court dealt with it as a new action, which it dismissed because in its view, the Constitutional Court judgment presented the procedural bar of *res judicata* in the matter.

The complainant then submitted the second complaint, the present action. Citing the fact that ordinary courts are bound by its reasoning on referral, the Constitutional Court annulled the Regional Court's decision and referred the case to the Regional Court. In addition, it instructed the Regional Court to take action in the matter and make a decision. Although its authority in constitutional complaints is mostly restricted to judgments in cassation, in cases of an ongoing infringement of a fundamental right brought about by some State action other than a decision, the Constitutional Court is empowered, by 82.3.b of the Constitutional Court Act, to require the State body in question to refrain from further infringement. In this case, the action of the Regional Court had resulted in a violation of the right to have one's case heard.

*Languages:*

Czech.



*Identification:* CZE-2001-C-001

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 10.01.2001 / **e)** Pl. US 33/00 / **f)** / **g)** *Sbírka zákonů České Republiky* (Official Gazette) 78/2001 / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts**.

1.2.3 Constitutional Justice – Types of claim – **Referral by a court**.

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review**.

1.3.4.13 Constitutional Justice – Jurisdiction – Types of litigation – **Universally binding interpretation of laws**.

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law**.

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

4.7.1 Institutions – Judicial bodies – **Jurisdiction**.

*Keywords of the alphabetical index:*

Constitutional Court, jurisdiction, exclusive / Vacuum, legal, artificial / Decision, adoption, failure / Transport, contract, implicit.

*Headnotes:*

In making their decisions, judges are bound by statutes and are authorised to judge whether acts are in conformity with statutes. Should a judge come to the conclusion that a statute which should be applied in the resolution of a matter, i.e. not only a valid one but also one that is invalid at that time but still applicable, is inconsistent with a constitutional act, s/he shall submit the matter to the Constitutional Court.

The Constitutional Court has derived its duty to adjudicate the matter on the basis of the following provision. Articles 83, 95.1 and 95.2 of the Constitution provide for the concept of constitutional review which is concentrated in only one institution, namely the Constitutional Court. Therefore a district court had no other choice but to comply with its constitutional obligation and refer to the Constitutional

Court the issue of adjudicating the constitutionality of applicable provisions of the statute.

The fundamental feature of private law is the equality of persons which is in accordance with the principles of freedom of contract and of free disposition. Equality of their position means above all that there are no relations of superiority and inferiority and no party to this relation can in principle impose any obligation on another party by a unilateral act. Nevertheless, equality of parties to private legal relations does not exclude the interference of the state.

*Summary:*

The Constitutional Court received a petition from the District Court in Karviná to annul some provisions of the Law on Road Transport. After reviewing the formal requirements, the petition was sent to the Chamber of Deputies and the Senate of the Parliament with a request for a written statement on its content.

The Chamber of Deputies found the statute compatible with community law according to the Council Directive 1191/69 EEC. The Chairman further stated that the contested provision was not amended and came into effect on 1 July 2000.

The Senate and the Ministry of Transport also communicated their opinions.

First of all, the Constitutional Court had to deal with the issue whether the petition lodged by the District Court in Karviná was admissible and whether there were reasons for discontinuance of the proceeding. The contested provisions of the statute were amended, although only partially. But this amendment did not change either the content or the meaning of the contested provisions. The petition in the present case was not connected with the constitutional complaint but it was a direct submission of the ordinary court under Article 95.2 of the Constitution. Thus, it did not represent the proceeding on the annulment of the laws but a direct application of the Constitution. It is necessary to proceed from the fact that:

- the Constitution is directly applicable if it itself does not stipulate otherwise;
- under Article 83 of the Constitution, the Constitutional Court is the judicial body responsible for the protection of constitutionality and not any other judicial body, such as the Supreme Court or lower ordinary courts;



- what the Constitution entrusts to the Constitutional Court in its provisions belongs to its jurisdiction, i.e. not only the powers under Article 87 of the Constitution, but also under Article 95.2.

It is evident from the Constitution itself that ordinary courts, including the Supreme Court, are not allowed to decide on the unconstitutionality of a statute. Article 95.1 of the Constitution stipulates that judges are bound by statutes in making their decisions and are authorised to judge whether acts are in conformity with the statutes. Should a judge come to the conclusion that a statute which should be applied in the resolution of a matter, i.e. not only a valid one but also one that is invalid at that time but still applicable, is inconsistent with a constitutional act, s/he shall submit the matter to the Constitutional Court. The Constitutional Court has derived its duty to adjudicate the case on the basis of this provision.

Should the Constitutional Court refuse to provide instruction to the ordinary court by means of its decisions regarding the constitutionality of the applicable law, an artificial legal vacuum would arise, as it is not possible to ask the ordinary court in a particular case to grant the complaint of a plaintiff if s/he is convinced that the case depends on an unconstitutional provision of the law. Should the ordinary court itself decide on the basis of its conviction on the unconstitutionality of the applied provisions, it would act in contradiction to the Constitution. Articles 83, 95.1 and 95.2 of the Constitution provide for the concept of constitutional review which is concentrated in only one institution, namely the Constitutional Court.

The Constitutional Court concluded, after deliberations, that not even on the basis of the interpretation of the Act on the Constitutional Court is it possible to deny the obligation of the ordinary courts laid down by the Constitution to appeal to the Constitutional Court if they are to apply a statute which they consider to be unconstitutional. If the Constitution imposes on the court in Article 95 the obligation to submit to the Constitutional Court every case in which "it comes to the conclusion that a statute which should be applied in the resolution of a case is inconsistent with a constitutional act", then the nature of the task which should be dealt with by the Constitutional Court also derives from this provision. Article 95.2 of the Constitution implicitly contains an obligation for the Constitutional Court to provide instruction to the ordinary court by means of its decision on constitutionality, regardless of whether the statute has been later amended or not. Although the Constitutional Court is not generally entitled to provide a binding interpretation of the Constitution, whenever or whoever for, it nevertheless acts in

accordance with its competence, and its activity in terms of content is nothing other than a legally binding interpretation of the Constitution. Therefore, if it deals with the constitutionality of the statute on the motion of an ordinary court, it also deals with the interpretation of the Constitution. After reviewing the petition, the Constitutional Court arrived, on the one hand, at the conclusion that it is not possible to grant the appeal on the annulment of the statute if these provisions were amended by means of a new statute and, on the other hand, that this legal regulation is not in contradiction with the Constitution.

A contract on transportation in public transport is concluded by implication consisting of a passenger entering a particular means of transport. The particularity of this contract consists in the form of payment for transport which can be in advance or direct. By getting on the means of transport, the passenger enters into an implied contract covering a whole range of services, including adjoining agreements, namely the obligation to have a valid ticket and to present it for checking when requested. If the passenger does not pay the fare before the beginning of transportation, s/he tacitly agrees that a contractual price will be charged. Thus the citizen as passenger has public transport at his or her disposal and it is for him or her to decide whether to get on the means of transport under these circumstances and conclude the contract or not.

A penalty is by its nature a contractual one following the non-fulfilment of the obligation to pay the fare for the provided services. When the state sets the maximum limit of this contractual penalty, it protects the citizens against the arbitrariness of the contractor. The contractor has to set the penalty in its transport conditions which he is obliged to publish in places designated for contacts with passengers and a substantive part thereof also in every vehicle. Thus it is guaranteed that the passenger is acquainted with the conditions in advance. The contract is concluded by the passenger's entering the means of transport, and thus agreeing with the conditions of the contractor including the price and the way of imposing a penalty. When the passenger does not have a valid ticket, fare penalties are common abroad. They are called fines, surcharge or increased fare.

The Constitutional Court dismissed the petition. The dissenting opinion to this judgment stated among other things that it is not in the jurisdiction of the Constitutional Court to adjudicate petitions on annulment of statutes or individual provisions thereof if they lost their validity before the end of the Constitutional Court proceeding. The material adjudication of the contested provision was prevented by an obstacle to the proceedings due to the fact that

the petition for annulment was delivered to the Constitutional Court on 29 June 2000, and the provisions in question lost their validity on 1 July 2000. The Constitutional Court is obliged to terminate the proceedings in such a case. Although Article 95.2 of the Constitution obliges the ordinary court to submit a case to the Constitutional Court if it comes to the conclusion that a statute which should be applied in the resolution of a matter is inconsistent with a constitutional act, it can do so only in relation to the laws or individual provisions thereof which are a "living" part of the legal order. However, even in individual cases, the Constitutional Court, in view of possible proceedings on a constitutional complaint, has the final word in cases lodged by an ordinary court concerning the application or the interpretation of any law or its individual provision.

#### *Supplementary information:*

In addition to the grounds of inadmissibility which apply generally to all proceedings before the Constitutional Court (*res iudicata*, and *litispendens*), the Law on the Constitutional Court provides, as an additional grounds of inadmissibility, solely in relation to the abstract review of legal enactments, that the norms at issue are a valid part of the legal order (though not necessarily in force); see also Judgment II. US 87/95.

#### *Languages:*

Czech.



#### *Identification:* CZE-2006-3-012

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 12.12.2006 / **e)** Pl. US 17/06 / **f)** / **g)** *Sbírka zákonu* (Official Gazette) / **h)** CODICES (Czech).

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

1.1.2.6 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Functions of the President / Vice-President.**  
 1.2.1 Constitutional Justice – Types of claim – **Claim by a public body.**  
 1.3.4.2 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between State authorities.**

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

4.6.2 Institutions – Executive bodies – **Powers.**

4.6.6 Institutions – Executive bodies – **Relations with judicial bodies.**

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

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

Supreme Court, judge, appointment by Minister of Justice, consent, requirement / Constitutionalism, protection / Competence, conflict, non liquet, impossibility / Supreme Court, president, replacement.

#### *Headnotes:*

The Minister of Justice has the power to make a decision to assign a judge to the Supreme Court. However, when exercising this power, he must bear in mind that such decisions and their coming into force require the prior assent of the Chief Justice of the Supreme Court as a condition *sine qua non*, in the sense of satisfying the statutory requirements imposed on ministerial decisions. The Minister's act of assigning a judge to the Supreme Court can accordingly be described as a contingent act. A fundamental defect in, or the absence of, the act upon which it is contingent will constitute an incurable defect.

The exercise of the subsumed authority of the Chief Justice of the Supreme Court, which of necessity precedes the decision of the Minister of Justice, constitutes the carrying out of the Chief Justice's competences. Thus, the conflict can be considered as a positive one in the sense that the Chief Justice asserts (and the Minister of Justice calls into question), the fact that he has this exclusive competence. Where this is not respected, or the issue is evaded, the Minister's decision will lack a statutory basis.

The Chief Justice of the Supreme Court, as an organ of another organ, also has exclusive authority to lodge petitions to resolve any conflict of competence, where he is of the view that a dispute has arisen due to disregard of the authority the law has conferred upon him.

The Constitutional Court is the judicial body for the protection of constitutionalism. A situation cannot be allowed, where a serious conflict of competence between two important state organs, representing the judiciary on the one hand and the executive on the other, remains unresolved merely because nobody seems to have been authorised to make a decision. In a democratic law-based state, which the Czech

Republic has declared itself to be, it is inconceivable that such an arbitrary act could not be reviewed and overturned, even though it was quite clearly illegal or unconstitutional. The Minister of Justice may be the state organ authorised to issue a decision assigning a judge to the Supreme Court, but he must first obtain the assent of the Chief Justice of the Supreme Court.

### *Summary:*

I. The Chief Justice of the Supreme Court sought a ruling from the Constitutional Court to the effect that the Minister of Justice's decision to appoint JUDr. J.B. to the Supreme Court should have had the assent of the Chief Justice. The Chief Justice explained that, on the day the President of the Republic removed her from office, the Minister of Justice asked the Deputy Chief Justice of the Supreme Court for his assent to the above judicial appointment. After the Judicial Council had expressed its agreement, the Deputy Chief Justice informed the Minister of his assent by telephone, and subsequently in writing. In this connection, the Chief Justice drew the Minister's attention on several occasions in writing to the fact that he had not obtained, as required by statute, her assent to the assignment of an appointed judge to the Supreme Court. The Chief Justice suggested that it does not follow from the Act on Courts and Judges or from the Supreme Court Rules of Procedure, that the Deputy Chief Justice performs the duties of the Chief Justice whenever that office is not occupied. In her view, the actions taken by the Minister and Deputy Chief Justice amounted to a breach of the principle of proportionality, which is protected under the Constitution.

The Minister contended that this was not a conflict of competence, as set out in the Act on the Constitutional Court. He pointed out that, in the case of long-term non-performance of duties by the Supreme Court Chief Justice, the Deputy Chief Justice is empowered to substitute for her to the full extent. Further, the current legislation could not be interpreted as obliging the Minister to seek repeated confirmation from the competent functionary of the Supreme Court, in order as it were to update a statement of position which had already been given.

II. The Constitutional Court found that the matter before it was, essentially, a conflict between two state organs as to whether their respective powers had been exercised in conformity with their statutory definition. If certain authorities are conferred exclusively on the Chief Justice of the Supreme Court, she must also be given the scope to exercise them and to defend them in court. The Chief Justice was, therefore, within her rights to lodge this petition.

The basic question here is whether and under what circumstances the Deputy Chief Justice may assent to the assignment of a judge to the Supreme Court. In order for the Deputy Chief Justice to take on all of the Chief Justice's powers, there would have to be long-term incapacity to perform her duties, that is, the situation must come about where the authorities conferred upon the Chief Justice could not be carried out over a lengthy period. The Deputy Chief Justice is given this authority so that the Supreme Court can continue to function in situations where the Chief Justice suffers from an unusually long incapacity in the performance of her duties. The Chief Justice's powers will pass to the Deputy at the expiration of the period indicating the long-term nature of the existing condition; further factors include reasonableness and the urgency for the exercise of these powers.

The Constitutional Court established that the conditions for the Chief Justice of the Supreme Court to be substituted by a representative were not satisfied in full. The Court in this instance had delayed the coming into force of the decision by the President of the Republic to remove her from office. At the relevant time, therefore, the Chief Justice of the Supreme Court still had all her powers. It would seem that she had not given her assent at the time the Minister took his decision, although the Act on Courts and Judges requires it and the Minister was informed of the absence of such assent.

The Constitutional Court came to the conclusion that although the Minister of Justice is the state organ competent to issue a decision assigning a judge to the Supreme Court, he needs the assent of the Chief Justice. As this assent was not obtained before the decision was taken, the decision was in conflict both with the law and with the Constitution and the Charter of Fundamental Rights and Basic Freedoms. Accordingly, the Constitutional Court quashed it.

### *Languages:*

Czech.



*Identification: CZE-2007-S-001*

**a)** Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 12.09.2007 / **e)** Pl. ÚS 87/06 / **f)** President of the Republic – Power to Appoint the Vice-Chairman of the Supreme Court / **g)** *Sbírka zákonu* (Official Gazette), 139/46; *Sbírka nálezu a usnesení* (Collection of decisions and judgments of the Constitutional Court), 313 / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

4.4.3.3 Institutions – Head of State – Powers – **Relations with judicial bodies.**

4.7.1.2 Institutions – Judicial bodies – Jurisdiction – **Universal jurisdiction.**

4.7.7 Institutions – Judicial bodies – **Supreme court.**

*Keywords of the alphabetical index:*

President of the Republic / Supreme Court, president, appointment / Judge, appointment.

*Headnotes:*

The President of the Republic is a state body with power to issue a decision naming a Vice Chairman of the Supreme Court from the ranks of judges appointed to the Supreme Court by a valid decision of the Minister for Justice, with the prior consent of the Chairman of the Supreme Court.

A dispute between two state bodies as to whether the scope of their competence in order to fulfil the necessary conditions preceding the exercise of the right of appointment by the President of the Republic under Article 62.f of the Constitution is a jurisdictional dispute under Article 87.1.k of the Constitution.

*Summary:*

I. The Constitutional Court was asked to rule on a petition lodged by the Chairwoman of the Supreme Court, Iva Brozová, under Article 87.1.k of the Constitution, in proceedings on disputes on the scope of competence of state bodies and municipal authorities. The President of the Republic took the decision on 8 November 2006 to appoint JU Dr. Jaroslav Bures as Vice-Chairman of the Supreme Court, without the Chairwoman's prior consent. The Constitutional Court annulled the President's decision.

II. According to the Constitutional Court, in order to exercise the office of a judge, a candidate must not only meet the requirement for holding the judge, be appointed as such and take the judicial oath, but must

also be appointed to a particular court. This is the last phase of the process of establishing a judge. In this regard, the Constitutional Court stressed that the naming of a judge by the President of the Republic under Article 63.1.i of the Constitution only established the office of judge for a particular person. However, the legislator has discretion under Article 93 of the Constitution to regulate the scope of a judge's decision-making activity at a particular court. With respect to the Supreme Court, the legislator did so in § 70 of the Act on Courts and Judges. This provides that a judge can only be appointed to the Supreme Court with the consent of the Chairman of that court.

The purpose of Article 62.f of the Constitution is the establishment of the office of the Chairman and Vice Chairman of the Supreme Court by the President of the Republic (the establishment of an office regulating decision making activity at the Supreme Court and the administration of the Supreme Court (§ 15.2 of Act no. 6/2002 Coll., on Courts and Judges). It follows from the position and content of the office of Chairman and Vice Chairman of the Supreme Court that only the judges of that court meet the prerequisites for the exercise of these offices. Thus, the authority of the President of the Republic does not replace the appointment of a judge to the Supreme Court under the Act on Courts and Judges.

This conclusion is supported by the requirement that officials of the Supreme Court should be independent from a "personnel" perspective. This can be achieved through the President's cooperation with a body of another branch of the government or another body of the same branch at their appointment. An interpretation that would allow the President of the Republic to appoint the Chairman and Vice Chairman of the Supreme Court from judges from other courts besides the Supreme Court would represent the absence of reflection of the constitutional principle of separation of powers in authority under Article 62.f of the Constitution, (in this context the consent of the Chairman of the Supreme Court can be understood as a manifestation of the judicial power). It would also render impossible the exercise of the competence of the Minister of Justice who, as a member of the government, is responsible to the Chamber of Deputies (a component of the legislative power). In its reasoning the Constitutional Court observed that the offices of chairmen and vice chairmen of courts should be understood as career progression for judges. A prerequisite for such progression is the meeting of clearly specified professional requirements (a minimum period of practice as a judge or lawyer). This criterion would not be met if a judge appointed to any court could become Chairman or Vice Chairman of the Supreme Court.

On the question of the existence of a jurisdictional dispute the Constitutional Court stated that in this case, a dispute had arisen as to whether the scope of competences allocated by the legal order in order to fulfil the necessary conditions preceding the exercise of the power of appointment by the President of the Republic under Article 62.f of the Constitution had been exercised in accordance with the definition *de lege lata*. The chairman of the Supreme Court has authority to consent to the appointment of a judge to that court (§ 70 of the Act on Courts and Judges). This authorisation has compulsory precedence over a decision of the Minister for Justice to appoint a judge to the court. The act of appointment is, accordingly, a compulsory requirement for naming the Vice Chairman of the Supreme Court. The contested decision could, therefore, have impinged on the competence of the Chairwoman of the Supreme Court.

Regarding the question of giving consent, the Constitutional Court referred to the conclusions in Judgment Pl. ÚS 17/06 whereby when Judge Jaroslav Bures was appointed to the Supreme Court by the contested decision of the Minister of Justice, the consent of the Chairwoman of the Supreme Court was not given. In this matter the Constitutional Court annulled the decision of the Minister of Justice *ex tunc*. At the time he was named Vice Chairman of the Supreme Court, Jaroslav Bures was not a judge who had been appointed to the Supreme Court.

III. The judge *rapporteur* in the matter was Dagmar Lastovecká.

A dissenting opinion was filed by judges Pavel Rychetský, Vladimír Kurka, Jan Musil and Jirí Nykodým. In their view, as there was no negative or positive dispute regarding competence, the Constitutional Court did not have the authority to make a decision (the verdict also decided to overturn the decision of the President which the Constitutional Court, in this case, was not authorised to do in such proceedings). According to the dissenting judges, those drafting the Constitution and the legislator had intended to permit officials of the Supreme Court also to be named from the ranks of judges of lower courts (the argument that only an existing judge of the Supreme Court can hold office in the Court has no support either in the Constitution or in sub-constitutional regulations).

Judge Eliska Wagnerová filed a dissenting opinion against verdict I and against the reasoning of the Judgment, pointing out that the primary issue in the proceedings should have been the assessment of the question of the President of the Republic's authority to appoint a second Vice Chairman of the Supreme

Court when the Act on Courts and Judges only envisaged one Vice Chairman, and it had also become the constitutional custom only to have one Vice-Chairman. From this perspective, the President's appointment of a second Chairman was *ultra vires*.

*Languages:*

Czech.



# Estonia

## Supreme Court

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### Important decisions

*Identification:* EST-1995-1-001

**a)** Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 11.01.1995 / **e)** III-4/A-12/94 / **f)** Review of the Rules for the Issue and Extension of Foreigners' Residence and Work Permits / **g)** *Riigi Teataja* I (Official Gazette), 1995, 9, Article 112 / **h)** CODICES (Estonian, English).

*Keywords of the systematic thesaurus:*

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

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

1.3.4.9 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the formal validity of enactments.**

4.6.2 Institutions – Executive bodies – **Powers.**

4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

*Keywords of the alphabetical index:*

Delegation / Legislation, delegated / Revision, scope.

*Headnotes:*

The Governments' power to delegate to a minister the enactment of orders of a legislative character must be provided by statute.

The question of the constitutionality of the substance of a statute or other legal act does not arise when it appears that the constitutional procedure for its enactment was violated.

The Supreme Court's scope of review is limited to the extent of the referral even though it appears that the whole norm, and not just the single provision for which review was requested, is unconstitutional on procedural grounds.

*Summary:*

The lower court ruled unconstitutional and rendered inapplicable § 40 of the Rules for the Issue and Extension of Foreigners' Residence and Work Permits approved by order of the Minister of Internal Affairs. § 40 of the Rules provided that foreigners whose domicile under the laws of the former USSR has been registered as their employer's personnel department or some other non-residential place in Estonia would be considered on the same basis as applicants from outside Estonia, unless they had a permanent residence in Estonia before the aforementioned registration. The court held that this rule was in violation of Article 10 of the Constitution, which provides for the principle of the rule of law as a basis for the legal system of Estonia. Observance of the principle of the rule of law requires that people's confidence in the law and in the legality of government authorities be ensured and guaranteed.

Under the law, the constitutional review process in the Supreme Court is initiated when a lower court holds that a statute or other legal norm is unconstitutional.

The Supreme Court did not agree with the reasoning of the first instance court, but found nevertheless that the Rules had been approved without following the constitutionally established procedure. According to the Constitution, orders of a Minister will be issued on a statutory basis. The order of the Minister of Internal Affairs stated that the Rules were approved on the basis of § 1 of the Rules for the Issue of Foreigners' Residence and Working Permissions, approved by order of the Government. The power of the Government to give such order follows from the Foreigners Act. The Foreigners' Act, however, does not authorise the Government to delegate to a Minister the enactment of the rules which the Minister of Internal Affairs established. § 2 of the Foreigners' Act confers upon the Government an authority to determine what government agencies will execute the Foreigners' Act in specific but not in general cases.

The Supreme Court also noted that the lower court had first to determine the formal constitutionality of the Rules. The need to review the constitutionality of the substance of a statute or other legal act arises only after it has been determined that the constitutional procedure of enactment was followed. Once it had become apparent that formal or procedural requirements had not been met, there would have been no need to examine the substantive constitutionality of the Rules.

Since the Supreme Court's scope of review is limited to the extent of the referral, the Court declared only § 40 of the Rules null and void.

*Languages:*

Estonian.



## Georgia Constitutional Court

### Important decisions

*Identification:* GEO-1998-2-002

**a)** Georgia / **b)** Constitutional Court / **c)** Second Chamber / **d)** 22.05.1998 / **e)** 2/59-8 / **f)** Lutseta Tapliashvili v. the President of Georgia / **g)** *Adamiani da Konstitutsia* (Official Gazette) / **h)**.

*Keywords of the systematic thesaurus:*

1.1.4.3 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Executive bodies.**

1.3 Constitutional Justice – **Jurisdiction.**

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

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

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

*Keywords of the alphabetical index:*

Housing, privatisation / Privatisation, special instruction.

*Headnotes:*

A normative act by the executive regulating issues of privatisation in favour of tenants does not contradict the constitutional right to property enshrined in Article 21.1 of the Constitution. Privatisation of premises which were registered as public property at the time of privatisation does not constitute a ground for declaring the relevant normative act unconstitutional. The Constitutional Court is not empowered to instruct other State authority bodies to prohibit the privatisation of houses.

*Summary:*

The Cabinet of Ministers issued a decree which entitled tenants to obtain privatisation of premises owned by the State. An individual lodged a claim with the Constitutional Court and asserted a violation of her constitutional right to property ensured by Article 21.1 of the Constitution, stating that the disputed act empowered tenants to unlawfully

obtain privatisation of premises which were previously owned by her grandfather and of which he had been deprived by the Soviet authorities in 1930. The plaintiff also requested the Court to provide the responsible body with special instructions in order to prohibit the privatisation of those premises which are subject to proceedings in courts of ordinary jurisdiction.

The Court held that the disputed normative act deals with only those apartments and premises which were registered as State property at the time of privatisation. Families that paid rent and enjoyed tenancy rights were entitled to have the premises and apartments privatised under the decree. Therefore, if a court of ordinary jurisdiction held that the premises were unlawfully privatised by tenants who were moved into the house in violation of the owners' property rights, the contract of privatisation must be annulled.

Pursuant to the Constitution and organic laws, the Constitutional Court is not competent to instruct any State authority to impose prohibitions.

#### *Languages:*

Georgian, English (translation by the Court).



## Germany

### Federal Constitutional Court

#### Important decisions

*Identification:* GER-1953-S-001

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 04.03.1953 / **e)** 1 BvR 766/52 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 2, 13 / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

1.3.4.7.1 Constitutional Justice – Jurisdiction – Types of litigation – Restrictive proceedings – **Banning of political parties.**

1.6.6.1 Constitutional Justice – Effects – Execution – **Body responsible for supervising execution.**

4.5.10.4 Institutions – Legislative bodies – Political parties – **Prohibition.**

*Keywords of the alphabetical index:*

Ban, substitute organisations for a party, implementation / Political party, prohibition, implementation / Constitutional Court, decision, execution / Constitutional Court, enforcement instruction, specific.

*Headnotes:*

A person who is affected by an act undertaken by an administrative authority in enforcing a decision of the Federal Constitutional Court may only lodge a complaint against this act of enforcement directly with the Federal Constitutional Court if the authority acted under a specific enforcement order from the Federal Constitutional Court which leaves no latitude for its discretion.

If the Federal Constitutional Court has given general instructions to an authority to enforce its decision, the acts of enforcement are made at the discretion of the authority and may only be challenged by the legal remedies that are generally permissible against such acts.

*Summary:*

I. In its Judgment of 23 October 1952, the Federal Constitutional Court established that the Socialist Reich Party (*Sozialistische Reichspartei*), a successor



party to the National Socialist Party (*Nationalsozialistische Deutsche Arbeiterpartei*), was unconstitutional. This decision resulted in the dissolution of the party and the ban on creating substitute organisations for it. The judgment also instructed the ministers of the interior of the Länder to enforce the dissolution and the ban on creating substitute organisations.

The minister of the interior of the Land Lower Saxony declared on 29 October 1952 that the applicant, the National Association of Voters, Hannover, was banned as a substitute organisation of the Socialist Reich Party. The applicant challenged the minister's declaration.

II. The Federal Constitutional Court dismissed the constitutional complaint as inadmissible for the following reasons:

The constitutional complaint is directed against a measure undertaken in the course of the enforcement of the Judgment of the Federal Constitutional Court of 23 October 1952. It has therefore also been reviewed in the terms of a complaint against the manner of the enforcement (an enforcement complaint). The Federal Constitutional Court Act (*Gesetz über das Bundesverfassungsgericht*) (hereinafter, the "Act") did not expressly admit enforcement complaints. Under § 35 of the Act, the Federal Constitutional Court may determine in its decision who is to enforce it. In individual cases, it may also determine the manner of enforcement, where appropriate, even after the judgment is pronounced. There is no need for a particular occasion for this. The Federal Constitutional Court may issue not merely abstract general orders for the enforcement of its decision, but also specific concrete orders for enforcement in an individual case.

The prohibition on substitute organisations already results in a general obligation for all relevant bodies to implement this prohibition in individual cases within their competence and at their own discretion. This also follows from § 31.1 of the Act, which provides that constitutional bodies of the federal government and the Länder and of all courts and authorities are bound by the decisions of the Federal Constitutional Court.

If the Federal Constitutional Court gives a general order to a body to enforce its decision, the competence of this body may be expanded, where the acts of enforcement are not within its original area of competence. However, the carrying out of the act of enforcement is still within the body's own discretion. Such measures can therefore only be challenged by the legal remedies generally admissible against such acts.

However, if the Federal Constitutional Court provides for the enforcement of its decision by giving a specific enforcement order, the enforcing authority becomes the executing body of the Federal Constitutional Court. It no longer acts within its own discretion. In this case, a direct complaint against the measures of the executing body to the Federal Constitutional Court would be admissible and other legal remedies would be excluded.

In the present case, the ministers of the interior of the Länder have been generally instructed to enforce the judgment of the Federal Constitutional Court of 23 October 1952. The minister of the interior of the Land Lower Saxony made the declaration under challenge within his own discretion and not on the basis of a concrete order of the Federal Constitutional Court. The constitutional complaint is therefore inadmissible in accordance with the principles set out above.

#### Cross-References:

- Decision 1 BvB 1/51 of 23.10.1952, *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 2, 1.

#### Languages:

German.



#### Identification: GER-1954-C-001

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 10.02.1954 / **e)** 2 BvN 1/54 / **f)** **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **h)** CODICES (German).

#### Keywords of the systematic thesaurus:

1.1.1 Constitutional Justice – Constitutional jurisdiction – **Statute and organisation.**

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.4.3 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between central government and federal or regional entities.**

3.6.3 General Principles – Structure of the State – **Federal State.**

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

4.8.6.3 Institutions – Federalism, regionalism and local self-government – Institutional aspects – **Courts.**

4.8.8 Institutions – Federalism, regionalism and local self-government – **Distribution of powers.**

*Keywords of the alphabetical index:*

Constitutional Court, federal and regional, relation / Constitutional Court, decision, binding force / Constitutional Court, decision, departure / Constitution, interpretation, jurisdiction / Constitutional jurisdiction, subsidiarity.

*Headnotes:*

The term “decision” of the Federal Constitutional Court, as used by Article 100.3 of the Basic Law and constituting the controlling judgment from which a Constitutional Court of a *Land* proposes to deviate by way of a proposed replacement decision of the Federal Constitutional Court, does not include only the operative provisions of the respective judgment. Rather, such a decision is to be understood as the interpretation of the law upon which the Federal Constitutional Court based its judgment, i.e., the interpretation of the Basic Law, which can be inferred from the grounds, without which the operative provisions of the judgment could not have been obtained.

*Summary:*

I. In principle, the constitutional jurisdiction on the Federal and on the *Länder* level co-exist autonomously and separately. The Federal Constitutional Court is the guardian of the Basic Law; it is the task of the *Land* Constitutional Courts to review acts of state power of a *Land* in accordance with the standard that is provided by the respective *Land* constitution. The referral procedure pursuant to Articles 100.1 and 100.3 of the Basic Law guarantees that there is uniform administration of justice between the *Land* Constitutional Courts and the Federal Constitutional Court as concerns the interpretation of the Basic Law, which binds the *Land* Constitutional Courts, like every state power, pursuant to the principle of the rule of law: if the Constitutional Court of a *Land* proposes a deviation from a decision of the Federal Constitutional Court or of another *Land* Constitutional Court when interpreting the Basic Law, it is obliged to obtain the decision of the Federal Constitutional Court before doing so.

In the proceeding which was the basis of the present referral to the Federal Constitutional Court, the parliamentary group of the “*Niederdeutsche Union*” in the parliament of Lower Saxony brought an action against the parliament before the *Oberverwaltungsgericht* (Higher Administrative Court) in Lüneburg on account of a violation of a minority’s right to establish an investigative committee, a right which this parliamentary group was entitled to invoke pursuant to Article 11 of the Provisional Constitution of Lower Saxony.

All parties to the original proceedings were of the opinion that the Higher Administrative Court of Lüneburg was competent to decide this dispute. The Higher Administrative Court itself also regarded itself as competent, pursuant to § 27d of the Decree no. 165 of the British Military Government, to decide constitutional disputes within the *Land* of Lower Saxony. It, however, regarded itself as being prevented from deciding the case at issue by the fact that “the Federal Constitutional Court, in its judgment of 5 April 1952, claimed its own competence for such disputes pursuant to Article 93.1.4 of the Basic Law”.

In the referenced judgment, the Federal Constitutional Court had been of the opinion that the competence of the Higher Administrative Courts of the British occupation zone over constitutional disputes had been abolished by Article 93.1.4 of the Basic Law.

Certainly, the Lüneburg Higher Administrative Court had doubts as to whether it was bound by this interpretation; the Court was, however, of the opinion that Article 100.3 of the Basic Law obliged a *Land* Constitutional Court “to obtain a decision from the Federal Constitutional Court” even “if it is doubtful whether a judgment of the Federal Constitutional Court has a binding effect in the constitutional dispute that is to be decided.”

By way of an order dated 15 December 1953, the Lüneburg Higher Administrative Court suspended the proceedings and submitted the files pursuant to § 85.1 of the *Bundesverfassungsgerichtsgesetz* (BVerfGG, Federal Constitutional Court Act) to the Federal Constitutional Court with a statement of its divergent legal opinion.

II. The Second Panel decided that the judgment of the Federal Constitutional Court of 5 April 1952 – 2 BvH 1/52 – did not preclude the Lüneburg Higher Administrative Court, i.e., the court that had submitted the case, from deciding on the original proceedings.

The term “decision” of the Federal Constitutional Court, as used by Article 100.3 of the Basic Law and constituting the controlling judgment from which a Constitutional Court of a *Land* proposes to deviate by way of a proposed replacement decision of the Federal Constitutional Court, does not, at any rate, include only the operative provisions of the respective judgment. Rather, such a decision is to be understood as the interpretation of the law upon which the Federal Constitutional Court based its judgment, i.e., the interpretation of the Basic Law, which can be inferred from the grounds, without which the operative provisions of the judgment could not have been obtained.

It can also be inferred from the relationship that exists between Article 93.1.1 of the Basic Law and Article 100.3 of the Basic Law that Article 100.3 must be construed in this manner. Pursuant to Article 93.1.1 of the Basic Law, the Federal Constitutional Court “shall rule” on the “interpretation of the Basic Law”. § 67 of the Federal Constitutional Court Act, however, provides that the operative provisions of its judgment are to contain a pronouncement about the compatibility of the challenged measure or omission with the Basic Law. This means that the “interpretation of the Basic Law”, which Article 93.1.1 of the Basic Law regards as the real subject of the decision, is contained in the grounds. The “interpretation of the Basic Law” which is apparent from the grounds of the decision is what binds the *Land* Constitutional Courts, and it is this binding effect from which a *Land* Constitutional Court seeks to deviate when submitting a judicial referral pursuant to Article 100.3 of the Basic Law.

Article 100.3 of the Basic Law does not have the objective of binding the Constitutional Courts of the *Länder* to the decision that had been taken in a specific dispute, but to ensure that the Basic Law is interpreted in a uniform manner in the decisions of the Federal and *Land* Constitutional Courts. This aim would not be achieved if a *Land* Constitutional Court based the operative provisions of a decision on an interpretation of the Basic Law which was contrary to an interpretation upon which a decision of the Federal Constitutional Court is based. Therefore, statements that the Federal Constitutional Court makes in the grounds of its judgments will be the subject of the referral procedure pursuant to Article 100.3 of the Basic Law.

If the statements made by the Federal Constitutional Court in the judgment of 5 April 1952, about the general importance of Article 93.1.4 of the Basic Law for the *Länder* in the British zone of occupation, are seen against this background, they only concern the Federal Constitutional Court’s competence for

constitutional disputes in Schleswig-Holstein. In this judgment, the Federal Constitutional Court “decided” only, in the sense of justifying its competence for the judgment on the merits on the specific constitutional dispute, that Article 37.1 of the Constitution of the *Land* of Schleswig-Holstein refers the entire field of possible constitutional disputes within the *Land* Schleswig-Holstein to the Federal Constitutional Court. This, and this alone, was the procedural basis for the Court’s decision on the merits. As, consequently, there is no “decision” of the Federal Constitutional Court that would bind the Lüneburg Higher Administrative Court, it was not necessary for that court to obtain a decision of the Federal Constitutional Court pursuant to Article 100.3 of the Basic Law.

Moreover, the Panel was of the opinion, which was in contrast to the statements in the order for referral, that § 27d of Decree no. 165 was no longer in force and that the Federal Constitutional Court was competent for deciding constitutional disputes in the *Länder* of the British occupation zone to the extent that the *Länder* have not themselves established *Land* Constitutional Courts in their constitutions. The Panel, however, was unable to enforce its opinion on this point of law against the diverging opinion of the Lüneburg Higher Administrative Court. The referral pursuant to Article 100.3 of the Basic Law is not a procedure for settling disputes about the competencies between the Federal Constitutional Court and the *Länder* Constitutional Courts; it only provides a procedure in the case that a *Land* Constitutional Court, in the framework of competencies that it accepts, wants to deviate from an interpretation of the Basic Law that is contained in a “decision” of the Federal Constitutional Court.

#### *Languages:*

German.



*Identification:* GER-1954-S-001

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 11.08.1954 / **e)** 2 BvK 2/54 / **f)** Restrictive clause, South Schleswig Voter Federation / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 4, 31 / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

1.2.2.4 Constitutional Justice – Types of claim – Claim by a private body or individual – **Political parties.**

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

1.6.4 Constitutional Justice – Effects – **Effect inter partes.**

1.6.7 Constitutional Justice – Effects – **Influence on State organs.**

1.6.9 Constitutional Justice – Effects – **Consequences for other cases.**

3.21 General Principles – **Equality.**

4.5.3.2 Institutions – Legislative bodies – Composition – **Appointment of members.**

5.2 Fundamental Rights – **Equality.**

5.2.2.9 Fundamental Rights – Equality – Criteria of distinction – **Political opinions or affiliation.**

*Keywords of the alphabetical index:*

Constitutional Court, decision, binding effect / Constitutional Court, decision, *res judicata*, substantive / Election, restrictive clause / Election, threshold.

*Headnotes:*

1. A broadened application of the time limits provisions applying to related proceedings to the proceedings of § 13.10 of the Federal Constitutional Court Act is impermissible.

2. If the legislature does not discriminate although it is permitted to do so, this does not in itself violate the principle of equality before the law.

3. The fact that a political party represents a national minority does not constitute so essential a difference that the legislature should take it into account when drafting the rights of the political parties in the election procedure.

The substantive *res judicata* effect, which applies only to the operative part of the judgment, only binds the Federal Constitutional Court in later proceedings if they deal with the same subject matter between the same parties.

*Summary:*

I. Under the Election Act of the Federal State of Schleswig-Holstein (hereinafter, the “Act”) as amended on 27 February 1950, the only parties admitted to the *Land* (state) parliament were those for which a delegate had been elected for at least one

constituency or which had obtained a total of 5% of the valid votes cast in the *Land*. The amended version of § 3 of the Act of 22 October 1951 increased the hurdle from 5% to 7.5%. The South Schleswig Voter Federation (*Südschleswigscher Wählerverband* – SSW) sought redress from the Federal Constitutional Court at that time. One of its contentions was that the amended version violated the principle of equality of election contained in Article 3.1 of the Land Constitution for Schleswig-Holstein (*Landessatzung für Schleswig-Holstein*).

In its judgment of 5 April 1952, the Federal Constitutional Court established that § 3 of the Act was incompatible with Article 3.1 of the Land Constitution for Schleswig-Holstein. The proceedings were a constitutional dispute within a *Land*, but this was expressly allocated to the Federal Constitutional Court by Land statute in conjunction with Article 99 of the Basic Law and § 13.10 of the Federal Constitutional Court Act.

Following the decision of the Federal Constitutional Court, the hurdle in § 3 was returned to 5% in the amended version of the Act of 28 November 1952.

The SSW argued that the new § 3.1 of the Act also violates the principles of equality of the Land Constitution for Schleswig-Holstein and of the Basic Law.

II. The Federal Constitutional Court dismissed the applications of the SSW for the following reasons:

In support of its contention against permitting the introduction of a 5% hurdle, the applicant first relies on the binding effect and on the *res judicata* effect of the Federal Constitutional Court’s judgment of 5 April 1952.

The binding effect under § 31.1 of the Federal Constitutional Court Act must be clearly distinguished from the *res judicata* effect, which attaches to the decisions of the Federal Constitutional Court as it does to those of other courts.

The binding effect does not apply to the Federal Constitutional Court itself. The Court may abandon the interpretations of the law it stated in an earlier decision, despite the fact that they were pivotal to the decision at that time. A Panel must only call for the decision of the plenum if it wishes to depart from the interpretation of the law which is the basis of a decision of the other Panel.

However, the Court must observe the substantive *res judicata* effect. This relates only to the operative part of the judgment. It does not apply to the elements of

the judgment contained in the grounds of judgment, although the grounds of judgment may be consulted to determine the meaning of the operative part. In later proceedings, the *res judicata* effect only binds the Court if the subject matter and parties are the same.

The fundamental questions of law of the new constitutional-law dispute are the same as in the dispute concluded by the judgment of 5 April 1952. However, the subject matter is not the same. The “measure” perceived by the applicant at that time as a violation of its rights was the raising of the hurdle from 5% to 7.5% in § 3.1 of the Act as amended on 22 October 1951. In the present legal proceedings, the fixing of the hurdle at 5% by the Act of 5 November 1952 is challenged. They therefore have a different subject matter from the proceedings decided by the judgment of 5 April 1952. The Panel is not restricted in its decision-making in the present legal proceedings by that judgment.

#### Cross-References:

- Decision 2 BvH 1/52 of 05.04.1952, *Entscheidungen des Bundesverfassungsgerichts* (Official Digest).

#### Languages:

German.



#### Identification: GER-1957-S-001

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 21.03.1957 / **e)** 1 BvB 2/51 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 6, 300 / **h)** *Neue Juristische Wochenschrift* 1957, 785; CODICES (German).

#### Keywords of the systematic thesaurus:

- 1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**
- 1.6.6 Constitutional Justice – Effects – **Execution.**
- 1.6.7 Constitutional Justice – Effects – **Influence on State organs.**
- 1.6.9 Constitutional Justice – Effects – **Consequences for other cases.**

4.5.10.4 Institutions – Legislative bodies – Political parties – **Prohibition.**

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:

Constitutional Court, decision, execution / Constitutional Court, autonomy / Political party, dissolution.

#### Headnotes:

The Federal Constitutional Court has autonomy in enforcement and has been granted by statute all necessary competence to enforce its decisions.

#### Summary:

I. In its Judgment of 17 August 1956, the First Panel of the Federal Constitutional Court held that the Communist Party of Germany (*Kommunistische Partei Deutschlands – KPD*) was unconstitutional. This decision resulted in the dissolution of the party and the ban on creating substitute organisations for it. The judgment also instructed the Ministers of the Interior of the *Länder* (states) to carry out the dissolution and the ban on substitute organisations.

After the end of the war, the Saarland, part of the German Reich in its 1937 borders, was removed from German sovereignty. However, it was also part of Germany after 1945. Since 1 January 1957, the Saarland has been a Land (state) of the Federal Republic of Germany. Since that date, this area has again been completely subject to German sovereignty. The Basic Law applies there.

On 31 December 1956, the Communist Party, Saarland Association (*Kommunistische Partei, Landesverband Saar*) existed and was able to function as a political party there alongside other parties. After 1 January 1957, this organisation continued its political activity in the same way as before. To date, measures against it have neither been initiated nor carried out.

The change of circumstances following the incorporation of the Saarland into the Federal Republic of Germany gave rise to doubts as to whether and in what way the Communist Party, Saarland Association is affected by the Judgment of the Federal Constitutional Court of 17 August 1956. The Communist Party, Saarland Association applied to the Federal Constitutional Court on 18 January 1957 for a declaration that the Judgment of 17 August 1956 does not affect it.

II. The Federal Constitutional Court instructed the Saarland Minister of the Interior to dissolve the Communist Party, Saarland Association as a substitute organisation of the Communist Party of Germany, stating as follows:

The question of fact to be decided is whether and in what way the Judgment of 17 August 1956 affects the Communist Party, Saarland Association. This is a question of the enforcement of this judgment.

The Federal Constitutional Court Act took into account the rank of this court and its special position as one of the highest constitutional bodies within the constitutional system. It gave the Federal Constitutional Court all the competence necessary to enforce its decisions. This is the meaning and the significance of § 35 of the Federal Constitutional Court Act (hereinafter, the "Act"). On the basis of this competence, the Court of its own motion – i.e. independently of "applications" or "suggestions" – makes all orders that are necessary to ensure that substantive decisions which complete legal proceedings are enforced. In this connection, on the one hand, the nature, the degree and the content of the enforcement orders depend on the content of the substantive decision which is to be enforced. On the other hand, they depend on the specific circumstances which are to be brought into conformity with the decision, and in particular on the conduct of the persons, organisations, authorities, constitutional bodies to which or against which the decision is directed. Enforcement within the meaning of § 35 of the Act applies not only to judgments granting affirmative relief or requiring sufferance, but also declaratory judgments. In this case, enforcement is "the embodiment of all measures that are required in order to create facts such as are necessary to realise the law held by the Federal Constitutional Court". § 35 of the Act proceeds on the assumption that the orders relating to the enforcement of the decision will be made in the decision itself. However, it follows from the full content of the provision that these orders may also be made in an independent order of the Court if the need for them is only established subsequently.

The Court's own order under § 35 of the Act cannot alter, modify, supplement or extend the substantive decision whose enforcement it serves. Just like the orders relating to enforcement in the main decision itself, it remains by nature purely a decision in the process of enforcement of the substantive decision. The Act deliberately does not prescribe a particular procedure for this "enforcement decision" under § 35. The Court is to be granted complete freedom to achieve what is necessary in the most appropriate, prompt, expedient, simple and effective way in the

circumstances. Enforcement in the hands of the highest court appointed as the guardian of the Constitution offers a guarantee that the state of affairs required by this court's substantive decision is correctly achieved. Enforcement in the hands of the Federal Constitutional Court ensures that the comprehensive authorisation of § 35 of the Act is not abused, even if the decision is made of the court's own motion, that is, completely independently of the interests, the wishes, the applications or the suggestions of those involved. It follows from the nature of the order permissible under § 35 of the Act that it is usually made without hearing the persons affected by the Court's enforcement and the constitutional bodies and authorities instructed in the order. This does not prejudice the Court's authorisation to demand, in its own discretion, the declarations it finds necessary from the persons involved. Since, as set out above, the enforcement order cannot make alterations to the content of the substantive decision to be enforced, there is no scope for a "fair hearing on the matter". Such a fair hearing is granted in the principal proceedings.

The decision on the content and form of the enforcement measure which is to be pronounced under § 35 of the Act, like every decision in the course of enforcement proceedings, may make it necessary to review at the same time the content and the implications of the substantive decision to be enforced. The statute does not provide a specific procedure for this purpose ("interpretation action", "enforcement complaint", "special appeal", "enforcement action" etc.). Such an arrangement was not needed. There is sufficient judicial protection if and insofar as the Federal Constitutional Court, which decides in the principal proceedings, deals with the details of the enforcement, corrects them where necessary and influences them decisively as part of its final responsibility. This does not rule out the possibility that in particular circumstances it may be necessary for the Court to give the parties an opportunity to express their opinions in the "enforcement proceedings".

In the present case, it was not necessary to give the Communist Party, Saarland Association a special hearing.

As a substitute organisation for the Communist Party of Germany, the Communist Party, Saarland Association is covered by the ban in the Judgment of 17 August 1956. The responsible Minister of the Interior in the Saarland is therefore required to take action against it, in accordance with the operative part of the judgment. For the avoidance of all doubt, it appeared necessary to establish this expressly pursuant to § 35 of the Act. The application of the Communist Party, Saarland

Association of 18 January 1957 and its application for a temporary injunction are consequently irrelevant and rejected.

#### Cross-References:

- Decision 1 BvB 2/51 of 17.08.1957, *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 5, 86.

#### Languages:

German.



#### Identification: GER-1959-S-001

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 14.07.1959 / **e)** 2 BvE 2, 3/58 / **f)** Limitation of speaking time / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 10, 4 / **h)** CODICES (German).

#### Keywords of the systematic thesaurus:

4.5.4.1 Institutions – Legislative bodies – Organisation – **Rules of procedure**.  
4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies**.

#### Keywords of the alphabetical index:

*Bundestag*, member, right to speak / *Bundestag*, autonomy / *Bundestag*, speaking time, distribution.

#### Headnotes:

If a Member of the *Bundestag* is a party to *Organstreit* proceedings (proceedings on a dispute between supreme federal bodies), he may represent himself or be represented by another Member of the *Bundestag*.

The right of a Member to speak in the *Bundestag* belongs to his constitutional status. The exercise of this right is subject to the limits imposed by Parliament by virtue of its autonomy.

The distribution of a total speaking time decided by the *Bundestag* among the parliamentary groups according to their size does not violate their status as

Members of the *Bundestag* as guaranteed by Article 38 of the Basic Law.

The entitlement of members of the government to speak in accordance with Article 43.2.2 of the Basic Law may not be restricted by the *Bundestag*. It is restricted by the prohibition of abuse.

#### Summary:

I. The parliamentary group of the FDP in the German *Bundestag* submitted a “major interpellation regarding summit and nuclear weapon-free zone”. Somewhat later, the parliamentary group of the CDU/CSU submitted a “major interpellation regarding the German question at future international conferences”. Both major interpellations were reasoned in a sitting of the *Bundestag* by two Members and answered by the Federal Chancellor and the Federal Minister for Foreign Affairs. The general debate followed, which was continued on three sitting days. The Federal Chancellor and other members of the government made several contributions towards the debate.

At the start of the last of the four sitting days, one Member lodged a motion to limit further debate to eight hours. Once this motion had been adopted by the *Bundestag*, its Vice President distributed the speaking times among the parliamentary groups of the *Bundestag* on a percentage basis according to the size of the parliamentary groups.

Members of the various parliamentary groups spoke first. Members of the Federal Government subsequently made statements totalling almost two hours. A Member then applied for the rescission of the resolution on speaking time which had been passed in the morning, on the basis that members of the Federal Government had spoken for almost two hours, almost twice as long as the speaking time to which the leader of the opposition party would be entitled for his reply, according to the resolution on speaking time.

The motion was rejected. The debate (which was broadcast by radio) on the response to the major interpellations was then continued.

Several Members of the *Bundestag* challenged the German *Bundestag* with an action based on Article 93.1.1 of the Basic Law and § 13.5 of the Federal Constitutional Court Act by means of *Organstreit* proceedings. They applied for a finding that both resolutions by means of which the *Bundestag* had limited the speaking time were unconstitutional and null and void because of a violation of Article 38 of the Basic Law (status of a Member).

## II. Admissibility of the applications

Each individual Member of the *Bundestag* is entitled to recourse to the Federal Constitutional Court against measures which violate his status as a Member of the *Bundestag*, i.e. which impair his constitutionally-guaranteed legal position. The right of the Member to speak in the *Bundestag* is part of his constitutional status.

The fact that the violation of their legal position of which the applicants complain lies in the past and has been concluded, so that it has no present impact, does not make the applications inadmissible.

It is also of no significance whether the applicants were directly affected by the impugned resolutions in such a way that it was made impossible for them to deliver a contribution in the *Bundestag* which they had already announced their intention to make. If by means of a resolution of the *Bundestag* the entitlement of Members to speak has been limited in an unconstitutional fashion, this would be in violation of the legal position of each individual Member, regardless of whether or not he intended to request to speak in the respective case.

### Inadmissibility of the applications.

The impugned resolutions of the *Bundestag* do not violate the applicants' rights under Article 38 of the Basic Law.

The constitutional status of the individual Member of the *Bundestag* includes his entitlement to speak in the *Bundestag*. The questions of state leadership, in particular of legislation, are to be discussed by the individual Members in the body representing the people in terms of pro and contra; this is the meaning of the term "debate" in Article 42 of the Basic Law. The possibility of limiting speaking time follows from the right of Parliament to rule on the end of the debate. Such resolutions are admissible although they entail a considerable encroachment on the right of individual Members to speak. The exercise of the entitlement to speak is subject to the limits imposed by Parliament by virtue of its autonomy. Such measures find their boundaries in the essence and the fundamental task of Parliament as a forum for a "for and against" debate. It is therefore conceivable that in certain cases the use of a means which is legitimate per se, such as setting speaking time, becomes abusive and unconstitutional.

Division of the total speaking time among the parliamentary groups does not constitute a breach of the Constitution. Parliamentary groups are necessary institutions of constitutional life. The exercise of a

function by the parliamentary groups by nature includes a certain obligation incumbent on the individual Member, as well as a restriction of his freedom. If this obligation or mediatisation does not go beyond what is necessary to ensure the course of the work of Parliament, it is therefore within the bounds of what is permissible under the Constitution, provided that the necessary freedom to make decisions and the personal responsibility of the individual Member are maintained. Even if the setting of speaking times for parliamentary groups might increase the risk of abuse of the power of a parliamentary group, the leadership of the parliamentary group does not assume the exclusive right to deal with the speaking time. According to the Rules of Procedure of the *Bundestag*, the President of the *Bundestag* has to decide on each request for leave to speak of a Member, so that where necessary leave to speak is also possible against the will of the parliamentary group. Moreover, the allotment of times by the size of the parliamentary groups when setting the speaking times for the parliamentary groups ensures that each Member receives the same entitlement to speak (the same mathematical chance of an opportunity to speak), regardless of affiliation to a particular parliamentary group.

The regulation that speeches which members of the government deliver on the basis of their right under Article 43.2.2 of the Basic Law are not to be included in the set speaking time, and that an extension of the debate should only take place subject to the provisos contained in Article 48.2 of the Rules of Procedure (decisions to be taken by a simple majority), does not violate any constitutional rights of individual Members. According to Article 43.2.2 of the Basic Law, members of the Federal Government are to be heard in the *Bundestag* at any time. Consequently, their speaking time cannot be limited. The tension between Parliament as the legislative and supreme control body and the government as the pinnacle of the executive justifies a right of the government which is unlimited in terms of time, and which in principle cannot be limited, to put forward and defend its point of view in Parliament. The use of this right is however subject to an extreme limit in the shape of the prohibition of abuse (for instance to achieve alien goals by making it impossible for members of the opposition to put forward their points of view or deliberately keeping them from the rostrum during peak radio or television times). The rule that, in the case of additional ministers' speeches, speaking time should only be extended in accordance with a majority resolution also does not constitute a violation of status vis-à-vis the Members. As regards the question of the distribution of speaking time, government speeches are not to be regarded merely as an extra expanded representation of the majority standpoint for which the opposition may always demand compensation. The entitlement of the



government to speak is compared to the total of the speaking times of all Members. There are no fundamental reservations against self-imposed rules in the context of parliamentary autonomy possibly having an uneven impact provided the threshold to abuse is not crossed.

### Languages:

German.



### Identification: GER-1964-C-001

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 10.06.1964 / **e)** 1 BvR 37/63 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), Vol. 18, 85-95 / **h)** CODICES (German).

### Keywords of the systematic thesaurus:

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts**.  
 1.3.1 Constitutional Justice – Jurisdiction – **Scope of review**.  
 1.3.1.1 Constitutional Justice – Jurisdiction – Scope of review – **Extension**.  
 1.4 Constitutional Justice – **Procedure**.  
 3.17 General Principles – **Weighing of interests**.  
 3.19 General Principles – **Margin of appreciation**.  
 3.22 General Principles – **Prohibition of arbitrariness**.  
 3.25 General Principles – **Market economy**.  
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

### Keywords of the alphabetical index:

Constitutional complaint, limits of review / Constitutional complaint, admissibility / Patent Office, file, confidentiality / Invention / File, confidentiality / Norm, legal, interpretation, application.

### Headnotes:

The organisation of the proceedings, the establishment and evaluation of the facts, the interpretation of a legal norm and its application to an individual case are all matters for the courts which are generally competent. They are not subject to revision by the Federal Constitutional Court.

As part of a so-called “constitutional complaint against a judgment” the Federal Constitutional Court does not examine the decision in respect of every statutory breach, but instead in respect of “specific constitutional law”. In this respect the limits for intervention by the Federal Constitutional Court are not clearly delineated once and for all. All that can be said generally is that only those errors in applying the law or incorrect interpretations of statutes which result from a fundamentally erroneous view of the meaning of a fundamental right or, in particular, an erroneous view of the scope of its protection, will violate specific constitutional law and only such errors or incorrect interpretations will make a substantive difference to the actual case and will be of importance.

A challenge based on the violation of the right to a hearing is inadmissible if it is raised as part of another constitutional complaint dealing with the violation of a different fundamental right after the deadline for lodging a constitutional complaint has expired.

### Summary:

I. At the beginning of the 1960s, a cosmetics company applied to have a patent for a skin-browning preparation registered. The Patent Office objected to the application claiming that one of the active substances was insufficiently non-perishable for commercial exploitation. The patent applicant then restricted its application to the remaining substances. Thereafter the restricted application was published. A competitor objected to the grant of the patent and sought to inspect the documents in the application file. After the Patent Office had first removed the part of the application which had been dropped, the competitor was allowed to see the whole file by the Federal Patent Court. In the opinion of the Federal Constitutional Court the patent applicant did not have a confidentiality interest requiring protection within the meaning of § 24 of the *Patentgesetz* (Patent Act) – even with regards to the part of the application which had been dropped and, accordingly, there was nothing which should prevent the file from being inspected. It held that it was common practice to allow those parts of an application which have been dropped due to an objection to be inspected. The Federal Constitutional Court also held that objections are indications of all obstacles to the grant of a patent including an absence of commercial exploitability. A person who registers an unfinished invention runs the risk that the unfinished part will become public.

The patent applicant lodged a constitutional complaint against the order of the Federal Patent Court alleging that the disclosure of the part of the application which had been dropped violated Article 14 of the Basic Law. It was of the opinion that the inspection of the

part of an application, which has been dropped in a file is not detrimental if such part of an application will never be granted patent protection, for instance where the patent is refused because the invention is not new. However, in the present case the lack of commercial exploitability was not a final obstacle to obtaining a patent since the patent applicant wanted to improve the part in question in order to make it suitable for the grant of a patent.

In subsequent pleadings the complainant also alleged that the conduct of proceedings by the Federal Patent Court had violated Article 103.1 (hearing in accordance with law).

II. The constitutional complaint was unsuccessful. In particular, the First Panel was unable to find that the Federal Patent Court had misjudged the meaning and scope of fundamental rights.

In principle, the competent courts must take into account the values inherent in the Basic Law when they are interpreting and applying a legal norm, and in particular when they are interpreting and applying general clauses. The organisation of the proceedings, the establishment and evaluation of the facts, the interpretation of a legal norm and its application to an individual case are all matters for the courts which are generally competent. They are not subject to revision by the Federal Constitutional Court.

There will still be no violation of the Basic Law if the competent judge reaches a conclusion when applying a legal norm and the “correctness” (in the general sense of “appropriate” or “fair”) of the conclusion is debatable. This is especially true when a general clause in a law gives the judge a discretion to weigh conflicting interests and his or her exercise of the discretion appears questionable because too much importance was attached to the interests of one or other party.

If a court does not fulfil these standards then, as a holder of public office, it has violated fundamental rights by disregarding them. Its judgment must be overturned by the Federal Constitutional Court upon a complaint made to that court.

As part of a so-called “constitutional complaint against a judgment” the Federal Constitutional Court does not examine the decision in respect of every statutory breach, but instead in respect of “specific constitutional law”. In this respect the limits for intervention by the Federal Constitutional Court are not clearly delineated once and for all. All that can be said generally is that only those errors in applying the law or incorrect interpretations of statutes which result from a fundamentally erroneous view of the meaning

of a fundamental right or, in particular, an erroneous view of the scope of its protection, will violate specific constitutional law and only such errors or incorrect interpretations will make a substantive difference to the actual case and will be of importance.

Incidentally, Constitutional Court judges must be left a certain amount of freedom of discretion, which permits the special circumstances in a particular case to be taken into account.

Upon application of these standards no violation of a fundamental right can be established in the specific case at hand. This is particularly true because no failure to recognise the complainant’s fundamental right to property can be found in the way the Federal Patent Court weighed the patent applicant’s interest in confidentiality against its competitor’s interest in obtaining information from inspecting the file and in reaching its decision.

III. Pursuant to § 92 of the *Bundesverfassungsgerichtsgesetz* (BVerfGG, Federal Constitutional Court Act) the reasons for the complaint must specify the right which is claimed to have been violated and the act or omission by which the complainant claims to have been harmed. A complaint must be lodged and substantiated within the set time-limit (§ 93.1 of the Federal Constitutional Court Act). It will still be possible to later amend the reasons for the complaint by changing the factual and legal submissions made. However, this cannot lead to a new set of facts (here the Federal Patent Court’s refusal of a hearing) being made the subject of the constitutional complaint after the time-limit for lodging a complaint has expired.

Therefore, the Federal Constitutional Court dismissed the constitutional complaint as inadmissible to the extent that it alleged that the complainant’s right to a hearing had been violated.

#### *Languages:*

German.



*Identification:* GER-1975-C-001

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 10.06.1975 / **e)** 2 BvR 1018/74 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), Vol. 40, 88-95 / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.3.4.3 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between central government and federal or regional entities.**

1.6.1 Constitutional Justice – Effects – **Scope.**

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

2.1.3.1 Sources – Categories – Case-law – **Domestic case-law.**

4.7.1 Institutions – Judicial bodies – **Jurisdiction.**

5.1 Fundamental Rights – **General questions.**

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

*Keywords of the alphabetical index:*

Driving licence, use in foreign country / Time limit, application, extension / Norm, sub-constitutional, interpretation.

*Headnotes:*

The interpretation and application of legal norms are matters for the competent courts which deal more directly with a case. The Federal Constitutional Court has the task of defining which constitutional law standards or limitations are binding for the interpretation of a legal norm.

In case the Federal Constitutional Court after examining whether a rule contained in a legal norm is in “conformity with the Basic Law” pronounces that certain possible interpretations of the rule would not be in conformity with the Basic Law, no other court may hold that those interpretations are in conformity with the Basic Law.

The same applies when as the result of a constitutional complaint in respect of a court decision, there is a finding that certain interpretations of a legal norm which are tenable and possible nonetheless lead to a violation of the Basic Law.

*Summary:*

The complainant, an Austrian citizen who had lived in the Federal Republic of Germany for five years, was in possession of a valid Austrian drivers' licence. On 5 April 1974 he drove his vehicle in the Federal Republic of Germany although he did not have a German drivers' licence. As a result the competent Local Court issued an order imposing a fine of DM 1 000,00 or as an alternative 50 days' imprisonment against the complainant on 28 May 1974. The order imposing punishment was served on 19 July 1974 by deposit at the post office. The complainant's solicitor lodged an objection on his behalf against the order imposing punishment, which was filed at the Local Court on 20 August 1974. The pleadings also contained an application to have the decision regarding his failure to lodge an objection on time reversed and the case reinstated. He submitted that he was a teacher at a Waldorf school and that at the time in question he was on vacation in his home country, Austria. He further stated that he had not appointed a person to accept service on his behalf nor arranged for the post office to forward his mail because as a rule in his profession no matters subject to time limits occurred during the general vacation period.

After his application to have his case reinstated was dismissed as inadmissible, the complainant filed an appeal and justified his claim for reinstatement on the basis of the relevant case law of the Federal Constitutional Court.

The appellate court departed from the case law of the Federal Constitutional Court and dismissed the appeal. In doing so it followed the “convincing case law” of another competent court (Court of Appeal in Berlin).

The complainant lodged a constitutional complaint against the refusal of his application for reinstatement and claimed that his fundamental rights under Articles 19.4 and 103.1 of the Basic Law had been violated. He alleged that the Local Court and the Regional Court had overstretched the requirements which could be applied to the admissibility of a claim for reinstatement if the constitutional requirements were taken into account.

The Second Panel granted the constitutional complaint and referred the case to the Local Court for rehearing. Its reasoning was essentially as follows:

1. Persons who do not use their permanent home for only temporary periods during a vacation period are not obliged to take special precautions for possible service of documents during their absence even if they know there are legal proceedings pending

against them. Instead they are entitled to rely on the fact that the case will later be reinstated if they miss the deadline for filing an objection because they did not know about the service of the order for punishment. If these standards are applied, there was already a violation of the basic right of a hearing in accordance with the law.

2. To the extent that the appellate court considered itself entitled to rely on the decision of another competent court to deviate from the principles established by the Federal Constitutional Court in its case law regarding reinstatement of cases of first instance to the courts, the appellate court acted unconstitutionally and misjudged the scope and binding effect of the principles established in the case law of the Federal Constitutional Court.

§ 31 of the *Bundesverfassungsgerichtsgesetz* (BVerfGG, Federal Constitutional Court Act) makes decisions of the Federal Constitutional Court binding on all courts covered by the Act. If the Federal Constitutional Court declares a law to be valid or invalid, its decision shall have the force of law. In other cases too, the decisions of the Federal Constitutional Court pursuant to § 31.1 of the Federal Constitutional Court Act have a binding effect beyond the individual case at issue. In particular, the courts must adhere to the principles regarding the interpretation of the *Grundgesetz* (Basic Law), which are evident from the operative part of the Federal Constitutional Court's decision and its main reasons in all future cases.

The binding effect is, however, restricted to those parts of the reasons for the decision that relate to the interpretation and application of the Basic Law. It does not extend to explanations that only relate to the interpretation of legal statutes. The interpretation and application of legal statutes are matters for the competent courts which deal more directly with a case. If the Federal Constitutional Court is examining a rule contained in a legal norm to see whether it is in "conformity with the Basic Law" and pronounces that certain possible interpretations of the rule would not be in conformity, then no other court may hold that those same possible interpretations are in fact in conformity. Rather, all courts are bound, pursuant to § 31.1 of the Federal Constitutional Court Act, to the Federal Constitutional Court's decisions on unconstitutionality. The same applies when – as occurred here – as the result of a constitutional complaint in respect of a court decision, there is a finding that certain interpretations of a legal norm which are tenable and possible nonetheless lead to a violation of the Basic Law. In both cases, all courts are prevented by § 31 of the Federal Constitutional Court Act from founding a decision on an interpretation of a statute that is unconstitutional. If they still do so, then

they are in violation of Article 20.3 of the Basic Law, which decrees that the judiciary should be bound by law and justice.

3. The decisions challenged in the constitutional complaint had to be overturned and the case remitted to the court of first instance.

#### *Languages:*

German.



#### *Identification:* GER-1989-S-001

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 13.06.1989 / **e)** 2 BvE 1/88 / **f)** Independent Member of the German *Bundestag* / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 80, 188 / **h)** *Europäische Grundrechte-Zeitschrift* 1989, 288; *Deutsches Verwaltungsblatt* 1989, 820; *Die Öffentliche Verwaltung* 1989, 719; *Juristenzeitung* 1989, 1055; *Bayerische Verwaltungsblätter* 1989, 750-753; *Neue Juristische Wochenschrift* 1990, 373; *Juristische Arbeitsblätter* 1990, 93; *Neue Zeitschrift für Verwaltungsrecht* 1990, 253; CODICES (German).

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

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

4.5.4.1 Institutions – Legislative bodies – Organisation – **Rules of procedure.**

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

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

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

*Bundestag*, member, independent, legal status / *Bundestag*, member, removal from committees / *Bundestag*, member, independent, speaking time / *Bundestag*, member, independent, funds allocated to parliamentary groups / *Bundestag*, member, rules of procedure, status and autonomy.

*Headnotes:*

A provision of the Rules of Procedure may constitute an act within the meaning of § 64.1 of the Federal Constitutional Court Act; it will also be the sole matter in dispute in *Organstreit* proceedings (proceedings on a dispute between supreme federal bodies) where further decisions are taken on the basis of that provision, but these merely apply the Rules of Procedure and thus do not for their part involve any further complaint.

However, a provision of the Rules of Procedure constitutes an act only where it is capable of legally affecting the applicant at the current time.

The representative status of a Member of the German *Bundestag* as constitutionally guaranteed under Article 38.1 of the Basic Law provides the basis for the representative status of the German *Bundestag*, which, as a “specific body” (Article 20.2 of the Basic Law), exercises the state authority which emanates from the people.

It is incumbent upon the German *Bundestag* to organise its work and the performance of its tasks within the framework set by the Constitution on the basis of the principle of the participation of all (Article 40.1.2 of the Basic Law).

All Members of the *Bundestag* are called to participate in its work with the same rights and responsibilities. This stems in particular from the fact that Parliament as a whole represents the people, by the totality of its members in their capacity as representatives. This presupposes that the same right of participation applies to all Members of the *Bundestag*.

The rights accruing to individual Members of the *Bundestag* as a result of their constitutionally guaranteed status are not established by the Rules of Procedure; these rules only regulate the manner in which these rights are exercised. The Rules of Procedure may give shape to and thus also limit the rights of each individual Member of the *Bundestag* but may not in principle withdraw these rights.

The parliamentary groups are the modern political structuring principle for the work of the *Bundestag*. They are established on the basis of a decision by a Member of the *Bundestag* taken in the exercise of his independent mandate (Article 38.1.2 of the Basic Law). The *Bundestag* must therefore determine in its Rules of Procedure the powers accorded to parliamentary groups in the course of parliamentary business, thereby observing the rights of the Members of the *Bundestag*.

Parliament enjoys a wide degree of latitude in deciding on the rules it requires for its self-organisation and in order to guarantee a proper course of business; however, the question of whether the principle of the participation of all Members of the *Bundestag* in the tasks of the Parliament is being observed is subject to constitutional review.

Committees are included in the Parliament’s representation of the people by dint of the tasks assigned to them. Each committee must therefore represent a scaled down version of the Plenary.

Since the majority of the actual work of the German *Bundestag* is conducted in the committees, for each individual Member of the *Bundestag* the significance of the basic possibility of participation is comparable to that of his participation in the Plenary. A Member of the *Bundestag* may not, therefore, be excluded from participating in the work of the committees without compelling reasons connected with the ability of Parliament to function properly.

If – as is currently the case – the Members of the *Bundestag* are faced with a correspondingly large number of seats on committees, each individual Member of the *Bundestag* is entitled to participate in a committee with the right to speak and move motions; by contrast, it is not necessary under constitutional law to give an independent Member of the *Bundestag* the right to vote on a committee – which by necessity has a disproportionate effect.

When calculating the speaking time of an independent Member of the *Bundestag*, account must be taken of the significance and difficulty of the matter under debate, and of the overall duration of the debate and whether he is pursuing the same political objectives as other independent Members of the *Bundestag* and whether he also speaks for them.

Independent Members of the *Bundestag* have no right to be placed on an equal financial footing with the parliamentary groups.

As Members of the *Bundestag* who are affiliated to a party enjoy a number of advantages in the course of their work for the parliamentary groups, the German *Bundestag* must compensate its independent Members accordingly.

*Summary:*

I. The Federal Constitutional Court was called to examine, in the framework of *Organstreit* proceedings (proceedings on a dispute between supreme federal bodies), the legal status of a Member of the

*Bundestag* who had been expelled from his parliamentary group.

The action of the *Bundestag* Member against the supreme federal body concerned the provisions of the Rules of Procedure of the German *Bundestag*, the question of the participation of independent Members of the *Bundestag* in the funds allocated to the parliamentary groups, the seating position of the independent Member of the *Bundestag* in the Plenary, the applicant's removal from committees of the *Bundestag* and his withdrawal from the Joint Committee of the *Bundestag* and *Bundesrat*. The respondent was the German *Bundestag* and its President, the Green Party parliamentary group in the German *Bundestag*, and the *Bundesrat*.

II. The Federal Constitutional Court held that the application filed against the provisions of the Rules of Procedure of the German *Bundestag* was admissible only in part.

Provisions of the Rules of Procedure may also be contested in the course of *Organstreit* proceedings. However, they constitute an act within this meaning only where they are capable of legally affecting the applicant at the current time. Insofar as the challenged provisions of the Rules of Procedure already had the effect of an act at the time of their enactment, the application is not admissible since the *Organstreit* proceedings failed to observe the time-limit.

The application is admissible and well-founded insofar as the applicant challenges the exclusion of independent Members of the *Bundestag* from participation in the committees of the German *Bundestag*. In this respect the German *Bundestag* has violated the applicant's rights under Article 38.1.2 of the Basic Law (status of a Member of the *Bundestag*) on account of his not being granted the possibility of participation as a member with the right to speak and move motions. All Members of the *Bundestag* are, by virtue of the constitutional and representative status conferred by Article 38.1 of the Basic Law, called to participate in the work of the *Bundestag* with the same rights and responsibilities. The Rules of Procedure may shape the individual rights accorded to the Member of the *Bundestag* on account of their constitutional status and thus can also limit them. However, it may not in principle withdraw them. The Parliament has a great deal of freedom in terms of its self-organisation and the setting of rules concerning the conduct of its business. It is, however, subject to constitutional review in regard to whether the principle of the participation of all Members of the *Bundestag* in the tasks of Parliament is being observed. The committees are involved in the Parliament's representation of the people by dint of their tasks, and the significance of participation in the

work of the committees for each Member of the *Bundestag* is comparable to that of his participation in the Plenary. For that reason a Member of the *Bundestag* may not be excluded from participating in any of the committees without compelling reasons related to Parliament's ability to function properly. If the Members of the *Bundestag* are faced with a correspondingly large number of seats on committees, each Member of the *Bundestag* has the right to participate in a committee with the right to speak and move motions. It is, by contrast, not constitutionally necessary to grant an independent Member of the *Bundestag* the right to vote on a committee – which by necessity has a disproportionate effect. In contrast to committee members who are affiliated to a party, an independent Member of the *Bundestag* only speaks for himself. For that reason his influence on a committee recommendation for a decision to the Plenary does not carry the same weight. The right to vote to which the Member of the *Bundestag* is entitled on the basis of this constitutional status is not in itself curtailed. Rather, he may exercise his right to vote in the Plenary in his capacity as a Member of the *Bundestag*.

The application is, however, unfounded insofar as the applicant complains of the non-participation of independent Members of the *Bundestag* in the Council of Elders and the study commissions of the *Bundestag*. Since, in his capacity as an independent Member of the *Bundestag*, he only speaks for himself, he cannot demand the same speaking time as is allocated to a parliamentary group. When calculating the speaking time of independent Members of the *Bundestag*, account must be taken of the significance and difficulty of the matter under debate as well as of the overall duration of the debate. Consideration must further be given to whether he is pursuing the same political objectives as other independent Members and whether he also speaks for them.

The application concerning the non-allocation to independent Members of the *Bundestag* of a share of the funds allocated to a parliamentary group in the budget plan is unfounded. These funds are intended to be used to finance the coordination work of parliamentary groups. An independent Member of the *Bundestag* has no need for coordination and is not therefore entitled to be placed on an equal financial footing with the parliamentary groups.

The application regarding the claim being laid to a seat in the front row of the Plenary is not admissible. In this respect, there is no indication of a legally possible violation of the rights of Members of the *Bundestag*.

The applications regarding the applicant's removal from committees by his former parliamentary group

are unfounded. Having left his parliamentary group, the applicant is no longer entitled to continue to act on behalf of that group on a committee. Loss of membership of the Joint Committee does not violate any of his rights.

III. Two judges annexed a dissenting opinion.

One of them took the view that Article 38.1 of the Basic Law also guarantees the independent Member of the *Bundestag* the right to vote in a committee.

The other judge did not believe that the Constitution requires that an independent Member of the *Bundestag* participate in a committee with the right to speak and to move motions.

#### Languages:

German.



#### Identification: GER-1993-M-001

a) Germany / b) Federal Constitutional Court / c) Second Panel / d) 28.05.1993 / e) 2 BvF 2/90, 2 BvF 4/92, and 2 BvF 5/92 / f) Pregnancy termination / g) *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 88, 203-366 / h) *Niedersächsisches Ministerialblatt, Ausgabe A, Rechtsprechungsbeilage*, 1993, 586-588; *Europäische Grundrechte – Zeitschrift* 1993, 229-275; *Juristenzeitung Sonderausgabe* 1993, 1-51; *Neue Justiz Sonderheft* 1993, 1-38; *Nachrichtendienst des Deutschen Vereins für Öffentliche und Private Fürsorge* 1993, 274-277; *Neue Juristische Wochenschrift* 1993, 1751-1779; *Arztrecht* 1993, 209-220; *Familie und Recht Sonderheft* 1993, 1-44; *Zeitschrift für Sozialhilfe und Sozialgesetzbuch* 1993, 370-373; *Deutsche Medizinische Wochenschrift* 1993, 1127-1130; *Neue Zeitschrift für Sozialrecht* 1993, 353-360; *Medizinrecht* 1993, 301-322; *Entscheidungsammlung zum Arbeitsrecht*, § 1 LohnFG, no. 124; *Der Städtetag* 1993, 557-558; *Juristische Arbeitsblätter* 1993, 313-316; *Informationen zum Arbeitslosenrecht und Sozialhilferecht* 1993, 193-196; *Medizin im Sozialrecht B* 210/10; *Betrieb und Wirtschaft* 1993, 450-451; *Zeitschrift für das gesamte Familienrecht* 1993, 899-929; *Entscheidungs-sammlung zum Familienrecht*, GG Art 12, no. 18; *Arzthaftpflicht-Rechtsprechung* 0850/100; [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de) (English version); CODICES (German).

#### Keywords of the systematic thesaurus:

1.5.4.4 Constitutional Justice – Decisions – Types – **Annulment**.

3.17 General Principles – **Weighing of interests**.

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

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

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

5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.

#### Keywords of the alphabetical index:

Abortion / Prohibition on too little protection / Unborn life / Pregnancy termination.

#### Headnotes:

The Basic Law requires the state to protect human life, including that of the unborn. This obligation to protect is based on Article 1.1 of the Basic Law; its object, and following from that, its extent are more precisely defined in Article 2.2. Even unborn human life is accorded human dignity. The legal system must create the statutory prerequisites for its development by granting the unborn its independent right to life. The right to life does not commence first with the mother's acceptance of the unborn.

The obligation to protect unborn human life is related to the individual life and not human life in general.

The unborn is entitled to legal protection even *vis-à-vis* its mother. Such protection is only possible if the legislator fundamentally forbids the mother to terminate her pregnancy and thus imposes upon her the fundamental legal obligation to carry the child to term. The fundamental prohibition on pregnancy termination and the fundamental obligation to carry the child to term are two integrally connected elements of the protection mandated by the Basic Law.

Termination must be viewed as fundamentally wrong for the entire duration of the pregnancy and thus prohibited by law (reaffirmation of *BverfGE* 39, 1 <44>). The right to life of the unborn may not be surrendered to the free, legally unbound decision of a third party, not even for a limited time, not even when the third party is the mother herself.

The extent of the obligation to protect unborn human life must be determined with a view, on the one hand, to the importance and need for protection of the legal

value to be protected and, on the other hand, to competing legal values. Listed among the legal values affected by the right to life on the part of the unborn are – proceeding from the right of the pregnant woman to protection of and respect for her human dignity (Article 1.1 of the Basic Law) – above all, her right to life and physical inviolability (Article 2.2 of the Basic Law) and her right to free development of her personality (Article 2.1 of the Basic Law). However, the woman cannot claim constitutionally protected legal status under Article 4.1 of the Basic Law for the act of killing of the unborn which is involved in a pregnancy termination.

To fulfil its obligation to protect [unborn human life], the state must undertake sufficient normative and practical measures which lead – while taking the competing legal values into account – to the attainment of appropriate and, as such, effective protection (prohibition on too little protection). This necessitates a concept of protection which combines elements of preventative and repressive protection.

The woman's constitutional rights do not extend far enough to set aside, in general, her legal obligation to carry the child to term, not even for a limited time. The constitutional positions of the woman, however, do mean that not imposing such a legal obligation in exceptional situations is permissible, in some cases, perhaps even mandatory. It is up to the legislator to determine in detail, according to the criterion of non-exactability, what constitutes an exceptional situation. "Non-exactable" means that the woman must be subject to burdens which demand such a degree of sacrifice of her own existential values that one could no longer expect her to go through with the pregnancy (reaffirmation of *BverfGE* 39, 1 <48 et seq.>).

The prohibition on too little protection does not permit free disregard of the use of criminal law and the resulting protection for human life.

The state's obligation to protect human life also encompasses protection from threats to unborn human life which arise from influences in the family or from the pregnant woman's social circle, or from the present and foreseeable living conditions of the woman and the family, and counteract the woman's willingness to carry the child to term.

Moreover, the state's mandate to protect human life requires it to preserve and to revive the public's general awareness of the unborn's right to protection.

The Basic Law does not fundamentally prohibit the legislature from shifting to a concept for protecting unborn human life which, in the early phase of pregnancy, emphasises counselling the pregnant

woman to convince her to carry the child to term; it could thus dispense with the threat of criminal punishment based on indications and the ascertainment of grounds supporting the indications by third parties.

A counselling concept of this type requires guideline legislation which creates positive prerequisites for action on the part of the woman in favour of the unborn. The state bears full responsibility for implementation of the counselling procedure.

The state's obligation to protect human life requires that the involvement of the physician, which is necessary in the interests of the woman, simultaneously serve to protect the unborn.

Characterisation in law of the existence of a child as a source of injury is excluded on constitutional grounds (Article 1.1 of the Basic Law). Thus the obligation to support a child cannot be construed as an injury either.

Pregnancy terminations performed without ascertainment of the existence of an indication pursuant to the counselling regulation may not be declared to be justified (not illegal). In accordance with the inalienable principles prevalent in a state governed by the rule of law, a justifying circumstance will apply to an exceptional situation only if the existence of its conditions must be ascertained by the state.

The Basic Law does not permit the granting of a right to benefits from the statutory health insurance for the performance of a pregnancy termination whose legality has not been established. The granting of social assistance benefits in cases of economic hardship for pregnancy terminations which are not punishable by law according to the counselling regulation, on the other hand, is just as unobjectionable from a constitutional point of view as continued payment of salary or wages is.

The fundamental principle of the organisational power of the federal states applies without restriction if a federal regulation merely provides for a task of state to be fulfilled by the federal states, but does not make individual provisions that would be enforceable by government agencies or administrations.

### Summary:

At issue in these joint proceedings for abstract judicial review is above all whether various penal, social security, and organisational provisions on pregnancy termination satisfy the state's constitutional duty to protect unborn human life.



On this, the Federal Constitutional Court ruled as follows:

1. § 218a.1 of the Penal Code contravenes Article 1.1 in conjunction with Article 2.2.1 of the Basic Law inasmuch as the provision declares a pregnancy termination under the preconditions set forth in the aforementioned statute to be not illegal and, in no. 1, refers to counselling which, in turn, fails to satisfy the constitutional requirements pursuant to Article 1.1 in conjunction with Article 2.2.1 of the Basic Law.

The entire provision is invalid.

2. § 219 of the Penal Code contravenes Article 1.1 in conjunction with Article 2.2.1 of the Basic Law and is invalid.

3. In keeping with the grounds of the judgment, § 24b of the Fifth Volume of the Code of Social Security Law conforms to Article 1.1 in conjunction with Article 2.2.1 of the Basic Law.

4. In keeping with the grounds of the judgment, §§ 200f, 200g of the Reich Insurance Code were in conformity with Article 1.1 in conjunction with Article 2.2.1 of the Basic Law, inasmuch as they provided for benefits from the statutory health insurance in the event of pregnancy terminations performed pursuant to § 218a.2.3 of the Penal Code.

5. Article 15.2 of the Pregnancy and Family Assistance Act contravenes Article 1.1 in conjunction with Article 2.2.1 of the Basic Law and is invalid, in that the above Act revokes the provision regarding federal statistics on pregnancy termination previously included in Article 4 of the Fifth Penal Reform Act of 18 June 1974, as amended by Articles 3 and 4 of the Fifteenth Penal Law Amendment Act of 18 May 1976.

6. Article 4 of the Fifth Penal Reform Act contravenes the federal principle (Articles 20.1 and 28.1 of the Basic Law) and is invalid, inasmuch as the provision places obligations on the highest competent state authorities; otherwise, it conforms to the Basic Law.

Pursuant to § 35 of the Federal Constitutional Court Act, this court orders that:

1. The provisions, which have been in force since the Judgment of 4 August 1992, shall remain in force until 15 June 1993. Between that date and the coming into force of new statutory provisions, nos. 2 through 9 hereof shall apply by way of supplement to the provisions of the Pregnancy and Family Assistance Act, to the extent that the provisions of the said Act have not been declared invalid by no. 1 of this Judgment.

2. § 218 of the Penal Code is not applicable if the pregnancy termination is performed by a physician within twelve weeks from conception, the woman demands the termination and proves to the physician by production of a certificate that she has received counselling from a licensed counselling centre at least three days prior to the medical procedure. The fundamental prohibition on pregnancy termination remains unaffected even in these cases.

3.1 Counselling serves to protect the life of the unborn, and has to be guided by efforts to encourage the woman to continue the pregnancy and to open up perspectives to her for a life with the child; it should help her make a responsible and conscientious decision. In the process, the woman must be aware of the fact that, in every stage of pregnancy, the unborn has an independent right to life even vis-à-vis her, and thus, according to the legal system, pregnancy termination can only be considered in exceptional situations where bearing the child to term would place the woman under a burden which – comparable to the circumstances specified in § 218a.2 and § 218a.3 of the Penal Code – is so severe and exceptional that it exceeds the limits of exactable sacrifice.

2. Counselling offers the pregnant woman advice and assistance. It helps to resolve conflict situations and to overcome emergencies. To this end, it encompasses:

a. Dealing with conflict; it is expected that the pregnant woman will inform the counsellor of the circumstances that have led her to consider a pregnancy termination;

b. provision of whatever medical, social, and legal information is warranted by the facts and circumstances of the case, presentation of the legal rights of mother and child and the available practical assistance, in particular, assistance which facilitates continuation of the pregnancy and eases the situation of mother and child;

c. offers of assistance for the woman in asserting her legal rights, finding housing and childcare, and continuing her training/education, as well as follow-up counselling.

Counselling shall also include information on ways of avoiding unwanted pregnancy.

3. If necessary, medical, psychological, or legal experts or other persons shall be included in counselling. In all cases, it should be ascertained whether it is advisable, with the consent of the pregnant woman, to inform third parties, in particular the father of the unborn and the immediate relatives of both parents of the unborn.

4. If she so chooses, the pregnant woman may remain anonymous vis-à-vis the counsellor.

5. The counselling session shall be continued at once if, according to the content of the counselling session, it serves the goal of counselling. If the counsellor is of the opinion that the counselling session has reached its conclusion, the counselling centre shall, upon request, issue a certificate to the woman, under her name and bearing the date of the last counselling session, to certify that counselling took place according to Paragraphs 1 through 4.

6. The counsellor shall protocol, in a way which does not permit the woman's identity to be traced, her age, marital status, and nationality, the number of times she has been pregnant, how many children she has, and how many previous pregnancy terminations she has undergone. The counsellor shall also record the essential grounds stated for the pregnancy termination, the duration of the counselling session, and, if applicable, the additional persons present. The protocol must also show the information conveyed and the assistance offered to the woman.

4.1 Counselling centres pursuant to no. 3 supra must – regardless of licensing pursuant to Article 3.1 of the Pregnancy and Family Assistance Act – be licensed separately by the state. Privately funded institutions and physicians can also be licensed as counselling centres.

4.2 Counselling centres must not be organisationally or economically connected with institutions where pregnancy terminations are performed so that the possibility arises of a material interest in the performance of terminations on the part of the counselling centre. The physician who performs the termination cannot act as a counsellor, nor may he be affiliated with the counselling centre that conducted the counselling.

4.3 Only those counselling centres can be licensed which guarantee counselling in accordance with no. 3 supra, have sufficient numbers of personally and professionally qualified personnel to conduct such counselling, and cooperate with all centres that provide public and private assistance to mother and child. The counselling centres are required to render an annual written account of the standards on which their counselling work is based and the experience they have gained in the process.

4.4 Licenses may only be granted under the proviso that they must be confirmed by the responsible authority within a period to be determined by law.

4.5 The federal states shall provide a sufficient number of counselling centres near the women's places of residence.

5. The physician from whom the woman demands a pregnancy termination is subject to the duties arising from the grounds of the judgment.

6. The licensing procedure provided for in no. 4 shall also be conducted for existing counselling centres. Until completion of this procedure, or until 31 December 1994 at the latest, these centres are empowered to conduct counselling pursuant to no. 3 supra.

7. The obligation to maintain federal statistics and the obligation to report pursuant to Article 4 of the Fifth Penal Reform Act of 18 June 1974, as amended by Articles 3 and 4 of the Fifteenth Penal Law Amendment Act of 18 May 1976 also apply in the territory specified in Article 3 of the Unification Treaty.

8. The provisions of § 37a of the Federal Social Security Act also apply in the event of pregnancy terminations performed in accordance with no. 2 supra.

9. Until Parliament reaches a decision as to the possible introduction and means of ascertaining a criminological indication, women insured with statutory health insurance and those eligible for benefits pursuant to the regulations on public assistance can draw benefits upon application if the preconditions of no. 2 supra are fulfilled and the responsible public medical examiner or a medical referee of the statutory health insurance has certified that, in his opinion as a physician, the pregnant woman is the victim of a crime pursuant to §§ 176 – 179 of the Penal Code and there are compelling grounds for believing that the pregnancy is due to this crime. The physician is authorised to obtain, with the consent of the woman, information from the department of public prosecution and inspect any pertinent investigative records; any knowledge gained in this manner is subject to physician-patient privilege.

It is the legislature's task to determine the nature and extent of protection. The Basic Law identifies protection as a goal, but does not define the form it should take in detail. Nevertheless, the legislature must take into account the prohibition on too little protection so that, to this extent, it is subject to constitutional control. What is necessary – taking into account conflicting legal values – is appropriate protection, but what is essential is that such protection is effective. The measures taken by the legislature must be sufficient to ensure appropriate and effective protection and be based on a careful

analysis of facts and tenable assessments. The amount of protection required by the Basic Law does not depend on what stage the pregnancy has reached. The unborn's right to life and its protection under the Basic Law are not graded according to the expiration of certain deadlines or the development of the pregnancy. Thus the legal system also has to provide the same degree of protection in the early phase of a pregnancy as it does later on.

If the legislature decides in favour of a counselling concept, its duty to protect unborn human life imposes on it restrictions in relation to the rules for the counselling procedure. This is of central importance for the protection of life because the emphasis of the guarantee of protection is shifted to preventative protection using counselling. Therefore, the legislature must take into account the prohibition on too little protection and make rules regarding the content of counselling, rules on how the counselling regulation is to be implemented, and rules on how counselling is to be organised – including the choice of people to be involved. These rules must be effective and adequate to persuade a woman, who is considering termination, to carry the child to term. Only then is the legislature's conclusion that effective protection of life can be achieved through counselling justified.

With regard to the declaration of invalidity of the statutory provisions and of the order of execution, the Federal Constitutional Court declares:

In the proceedings for abstract judicial review, the Federal Constitutional Court declares pursuant to § 78.1 of the Federal Constitutional Court Act the statute under examination invalid, if it cannot be reconciled with the Basic Law. This gives expression to the finding that the statute can not have its intended effect. Consequently, the declaration that § 218a.1 of the Penal Code is invalid, results in the provision not developing its effect as a justification ground. § 219 of the Penal Code, which has been declared invalid, cannot be used to measure the content and implementation of counselling.

There is a close connection between the contents of § 218a.1 and § 219 of the Penal Code and the statutory definition of a crime under § 218 of the Penal Code in that the legislature when implementing Article 31.4 of the Unification Treaty wanted to base the protection of life during the first twelve weeks on the effectiveness of a counselling concept, and also wanted to exclude pregnancy termination from criminal liability (Article 103.2 of the Basic Law) subject to the conditions of § 218a.1 of the Penal Code. In the territory referred to in Article 3 of the Unification Treaty, it is necessary to ensure that the protection concept does not lose its intended effect as a result of § 218a.1

and § 219 of the Penal Code being declared invalid. It is permissible, and in fact required by the constitutional duty of protection, that the protection concept does have the effect of protecting life. Loss of the intended effect can be avoided by making a transitional order pursuant to § 35 of the Federal Constitutional Court Act for a counselling regulation, which is constitutionally adequate, and which excludes criminal liability under § 218 of the Penal Code subject to the conditions laid down by the legislature in § 218a.2 of the Penal Code, Article 103.2 and Article 104.1 of the Basic Law do not preclude this course of action. The termination cases whose facts give rise to criminal liability are outlined in the penal provisions of Article 13.1 of the Pregnancy and Family Assistance Act. Thus the conditions and boundaries of criminal liability for a termination are regulated by statute. Although the justification grounds contained in § 218a.1 of the Penal Code have been declared invalid, this does not affect criminal liability for a termination if the facts of the termination do not fall within § 218a.1 of the Penal Code (or another provision excluding criminal liability). The Senate's judgment does not extend liability beyond the boundaries drawn by the legislature. On the contrary, the order made pursuant to § 35 of the Federal Constitutional Court Act under no. II.2 of this judgment's order ensures that those pregnancy terminations whose facts fall within § 218a.1 of the Penal Code remain excluded from the threat of criminal punishment in § 218 of the Penal Code. This is so irrespective of the declaration that § 218a.1 of the Penal Code is invalid and remains the case until a new provision is enacted. From the penal law perspective, the significance of the court order is limited to the fact that the exclusion of criminal liability is no longer brought about by the existence of a justification ground, but instead by exclusion from the definition of a criminal offense. Terminations not undertaken pursuant to the counselling regulation, which are subject to the threat of criminal punishment under Article 13.1 of the Pregnancy and Family Assistance Act, will be punishable according to statute and not according to the Senate's order based on § 35 of the Federal Constitutional Court Act. This will satisfy the special constitutional requirements of Article 103.2 and Article 104.1 of the Basic Law. It will be satisfactory because the Pregnancy and Family Assistance Act, whose penal provisions will come into force, contains more far-reaching provisions than those contained in the German Democratic Republic legislation which has applied until now in the new federal states.

#### *Languages:*

German.



*Identification:* GER-1994-2-021

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 12.07.1994 / **e)** 2 BvE 3/92, 2 BvE 5/93, 2 BvE 7/93, 2 BvE 8/93 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 1994, 90, 286 / **h)** *Europäische Grundrechte Zeitschrift*, 1994, 281; *Neue Juristische Wochenschrift*, 1994, 2207; CODICES (German).

*Keywords of the systematic thesaurus:*

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

1.3.5.1 Constitutional Justice – Jurisdiction – The subject of review – **International treaties.**

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

2.3.6 Sources – Techniques of review – **Historical interpretation.**

3.1 General Principles – **Sovereignty.**

3.3 General Principles – **Democracy.**

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

4.11 Institutions – **Armed forces, police forces and secret services.**

4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces.**

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

*Keywords of the alphabetical index:*

Armed forces, use, abroad / Armed forces, use, within UN / Armed forces, use, within NATO / Parliamentarian group, interest / Parliament and foreign politics.

*Summary:*

In a dispute between the Government and the Federal Parliament (*Bundestag*), the Constitutional Court had to decide on the constitutional implications of the participation of German armed forces in international peace-keeping and enforcement operations.

As a preliminary issue, the Court decided that a parliamentary group has *locus standi* to have the constitutionality of governmental measures examined by the Constitutional Court although it had not objected to their adoption in the political arena. The

possibility to attack certain measures politically does not deprive a parliamentary group of its standing before the Constitutional Court.

The Court nonetheless rejected the applications brought by another parliamentary group which invoked its right as a “blocking minority” (*Sperminorität*) of one third of the members of the *Bundestag* which is entitled to block the adoption of constitutional amendments. The measures complained of did not constitute an amendment of the constitution. Finally, the Court reaffirmed that single deputies may only bring an application to protect the rights of Parliament in cases expressly provided for by law.

Article 24.2 of the Basic Law entitles the Federal Republic to enter a system of mutual collective security and to undertake the obligations resulting from such a system. This provision also allows German armed forces to be made available for operations of international organisations of which Germany is a member. The United Nations as well as NATO have to be qualified as systems of mutual collective security in the sense of Article 24.2 of the Basic Law, although the latter is also an alliance of collective self-defence.

The integration of the Federal Republic of Germany into a system of mutual collective security requires the consent of Parliament. This consent also covers the conclusion of agreements between Germany and the United Nations on the use of German armed forces.

Parliament participates in foreign politics by adopting the statutes authorising the ratification of treaties which regulate the political relations of the State. All other acts concerning foreign politics fall in principle within the competence of government. If the government undertakes new international obligations without Parliament’s approval, it can violate the prerogatives of the legislative body. The government is, however, entitled to give a treaty – in co-operation with the other members thereto – a new interpretation without changing the content of this treaty and without asking for Parliament’s approval. This does not exclude the creation of new rights and obligations within the framework of existing treaties, either by “authentic interpretation” or by starting a new practice which may influence the content of treaty obligations. The government is, however, prevented from internally executing those obligations which require the adoption of a statute, especially those which affect the exercise of fundamental rights or have budgetary implications.

As a consequence of these considerations, the Court decided that the use of armed forces in the

framework of NATO and WEU operations in the former Yugoslavia which had been authorised by the UN Security Council did not violate the treaty-making prerogatives of the Federal Parliament.

According to the Court, the government is, however, under an obligation to seek previous parliamentary approval for any use of German armed forces. This prerogative of Parliament derives from a long-standing constitutional tradition which dates back to the Weimar Constitution of 1918. The precise scope and modalities of parliamentary participation in this field will have to be determined by law.

#### Languages:

German.



#### Identification: GER-1995-2-026

a) Germany / b) Federal Constitutional Court / c) Second Panel / d) 17.07.1995 / e) 2 BvH 1/95 / f) / g) *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 93, 195 / h) *Europäische Grundrechte Zeitschrift*, 1996, 115; CODICES (German).

#### Keywords of the systematic thesaurus:

1.1.4 Constitutional Justice – Constitutional jurisdiction – **Relations with other institutions**.  
 1.2.2.4 Constitutional Justice – Types of claim – Claim by a private body or individual – **Political parties**.  
 1.4.9.1 Constitutional Justice – Procedure – Parties – **Locus standi**.  
 4.5.4 Institutions – Legislative bodies – **Organisation**.

#### Keywords of the alphabetical index:

Competence, subsidiary / Constitutional Court, federal and regional / Parliamentary group, rights.

#### Headnotes:

When the law on regional Constitutional Courts limits standing in conflicts between governmental bodies to a certain parliamentary sector which excludes parliamentary groups, a parliamentary group can bring the case before the Federal Constitutional Court.

A person who is a witness in a case dealt with by a parliamentary commission may be excluded from the commission when questions are discussed to which that person must bear witness. This exclusion does not violate the rights of a parliamentary group even if it appoints the person in question to the commission.

#### Summary:

The Federal Constitutional Court is competent to decide on questions concerning conflicts between regional bodies only in so far as the Constitutional Court of the region concerned lacks competence. The general admissibility of conflicts between bodies before the regional Constitutional Court does not prevent the Federal Constitutional Court from deciding a case concerning a conflict between regional bodies if certain bodies which have a standing before the Federal Constitutional Court cannot bring the case before the regional Constitutional Court. This follows from the fact that the subsidiary competence of the Federal Constitutional Court guarantees that all bodies of a region enjoy protection against the violation of their constitutional rights.

#### Supplementary information:

Further decisions concerning the relation between federal constitutional jurisdiction and the constitutional jurisdiction of the *Länder*: *Entscheidungen des Bundesverfassungsgerichts* 4, 375, 377>; 60, 319, 323, 326; 62, 194, 199.

#### Languages:

German.



#### Identification: GER-1996-2-012

a) Germany / b) Federal Constitutional Court / c) Second Panel / d) 29.04.1996 / e) 2 BvG 1/93 / f) / g) to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / h) *Europäische Grundrechtezeitschrift*, 1996, 319; CODICES (German).

*Keywords of the systematic thesaurus:*

1.3.4.3 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between central government and federal or regional entities.**

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

3.17 General Principles – **Weighing of interests.**

*Keywords of the alphabetical index:*

Expropriation, compensation / Treaty on unification, competent courts.

*Headnotes:*

The Federal Constitutional Court is competent to decide on conflicts between the federal State and a Land which arise out of the unification treaty.

It falls within the competences of the federal State to impose a solution to a conflict of interests between land owners, whose property had been expropriated in the former zone under Soviet occupation, on the one hand, and the present users of such land, on the other hand.

*Summary:*

According to the Treaty on Unification, the Federal Republic of Germany committed itself *vis-à-vis* the German Democratic Republic not to annul the expropriations which had taken place in the Soviet occupation zone between 1945 and 1949. It reserved the right to the Parliament of the unified Germany to fix compensation for the persons who lost their property during this period.

In 1992, the government of the federal State and the governments of the new *Länder* adopted a directive according to which land should be leased to persons wanting to use it as farm land. If several persons applied for such land, in the first place the person with the best economic proposal would get the land; if the applicants had proposals of the same quality, former owners of the land would be given preference over other persons.

The Land of Brandenburg complained that this privilege of former owners constituted a violation of the Treaty on Unification by the federal State.

The Federal Constitutional Court held that, according to Article 44 of the Treaty on Unification, a Land was entitled to insist upon the fulfilment of commitments undertaken by the Federal Republic of Germany *vis-à-vis* the German Democratic Republic. The Federal

Constitutional Court was competent to decide such a conflict, as the Treaty on Unification is itself part of constitutional law. However, it declared the application to be manifestly ill-founded. The obligation of the Federation to weigh the interests of the persons concerned in dealing with the question of the former expropriations allowed for a margin of appreciation to the legislator. A violation of this obligation could be established only if the goal of balancing the interests involved had clearly been missed. The Land of Brandenburg had not presented facts which could support the conclusion that the Federation had violated its obligation in this sense.

*Languages:*

German.

*Identification: GER-1996-2-017*

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 21.05.1996 / **e)** 2 BvE 1/95 / **f)** / **g)** to be published in *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) / **g)** / **h)** *Europäische Grundrechtezeitschrift*, 1996, 412; CODICES (German).

*Keywords of the systematic thesaurus:*

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

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

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

5.3.13.1.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Non-litigious administrative proceedings.**

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

*Keywords of the alphabetical index:*

Committee, fact-finding / Ministry of Counter-Intelligence / German Democratic Republic.

*Headnotes:*

The constitutional status of a deputy is affected if the legitimacy of his mandate is put into question by an inquiry of a parliamentary fact-finding commission. Such a procedure is only admissible in exceptional cases where the federal parliament wants to inquire into the comportment of a deputy before his election in order to defend its integrity and political reliability.

Taking into account the transition from a dictatorship to a democracy in the new *Länder*, the federal parliament could introduce a procedure to inquire – under certain circumstances – into the activities and responsibilities of a deputy in respect of the Ministry of Counter-Intelligence.

Such a procedure must encompass guarantees in respect of the status of the deputy. He/she must have the possibility to participate in the procedure.

*Summary:*

According to a provision of the law on the status of deputies as amended in 1992, members of Parliament can apply for an inquiry into their activities in respect of the Ministry of Counter – Intelligence of the former German Democratic Republic (GDR). Such an inquiry can take place without the deputy's consent if the parliamentary commission for electoral scrutiny has a concrete suspicion that a deputy exercised such an activity.

The deputy concerned by the inquiry has to be heard by the commission. The members of the commission have to keep their knowledge on personal data of the deputy subject to the inquiry under lock and key. A deputy whose activities had become subject to such an inquiry brought the case before the Federal Constitutional Court in the form of a conflict between organs; he alleged that his rights as a deputy were violated by the provisions concerning the possibility to initiate inquiries into the activities of a deputy. Further, he alleged that his rights had been infringed by the concrete inquiry; third, his complaint was directed against the publication of an expert opinion concerning him; fourth, he challenged the allegations of some members of the commission on scrutiny and of Parliament contained in the expertise concerning his activities for the former Ministry of Counter-Intelligence.

The Federal Constitutional Court held that the complaint was inadmissible insofar as it was directed against the provisions of the law, as the deputy was directly affected not by these provisions but by their application. The third and fourth point of the complaint

were declared inadmissible, on the grounds that the complaint did not disclose a violation of one of the deputy's rights. For the rest, the Federal Constitutional Court declared the complaint to be unfounded. It pointed out that, on one hand, the status of a deputy is affected by an attack against the legitimacy of his mandate. An inquiry into the activities of a deputy may affect legitimacy in this sense. In general, Parliament had no competence to put a deputy's legitimacy into question. The Federal Constitutional Court stated, however, that the transition from a dictatorship to a democracy, as in the new *Länder*, allowed for an exception to the rule. As the Ministry of Counter-Intelligence of the former GDR violated the fundamental rights of people in many cases, there was a public interest in investigating whether deputies of Parliament were involved in the activities of this organ, in order to protect the reputation of Parliament. In this case, each deputy who is subject to such an inquiry may actively participate in the investigation.

*Languages:*

German.

*Identification:* GER-1997-S-001

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 17.09.1997 / **e)** 2 BvE 4/95 / **f)** Parliamentary group and grouping status / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 96, 264 / **h)** *Deutsches Verwaltungsblatt* 1998, 90; *Neue Juristische Wochenschrift* 1998, 3037; CODICES (German).

*Keywords of the systematic thesaurus:*

1.2.1.2 Constitutional Justice – Types of claim – Claim by a public body – **Legislative bodies**.  
 1.2.2.4 Constitutional Justice – Types of claim – Claim by a private body or individual – **Political parties**.  
 1.3.5.9 Constitutional Justice – Jurisdiction – The subject of review – **Parliamentary rules**.  
 4.5.4.1 Institutions – Legislative bodies – Organisation – **Rules of procedure**.  
 4.5.4.4 Institutions – Legislative bodies – Organisation – **Committees**.

*Keywords of the alphabetical index:*

Parliament, groups, legal status / Parliament, parliamentary groups, rights / Parliament, ability to function, protection / Parliament, groups, speaking time / *Organstreit*, capacity to make applications / Parliament, inquiry, commission, appointment.

*Headnotes:*

This decision concerned the legal status of an association of deputies whose party has overcome the restrictive clause by application of the basic mandate clause (*Grundmandatsklausel*).

The capacity to make applications in *Organstreit* proceedings (disputes between supreme constitutional bodies) under § 64.1 of the Federal Constitutional Court Act exists only in the case of legally relevant acts or omissions.

The distinction between parliamentary groups and other associations is justified by the constitutional imperative that Parliament's ability to function must be safeguarded.

*Summary:*

I. The Party of Democratic Socialism (*Partei des Demokratischen Sozialismus* – PDS) is represented in the *Bundestag* by four direct mandates and 26 further mandates. It won the latter by virtue of the basic mandate clause. This clause enables a party which has won at least three direct mandates to enter Parliament with a number of seats in proportion to its share of the votes, even if it does not overcome the 5 % hurdle (§ 6.6, sentence 1, half-sentence 2 of the Federal Electoral Act (*Bundeswahlgesetz*)).

If the minimum parliamentary group strength of 5% of the Members of the *Bundestag* (currently 34 deputies) is not attained, recognition as a parliamentary group requires the consent of the *Bundestag* (§ 10.1.2 of the Rules of Procedure of the *Bundestag* (*Geschäftsordnung des Bundestages*), hereinafter, the "Rules of Procedure"). The *Bundestag* rejected a motion to that effect tabled by the PDS deputies in March 1995. It decided to recognise them as a group (§ 10.4 of the Rules of Procedure). The group was granted certain rights in a "status resolution" (*Statusbeschluss*).

The PDS group then applied to the Federal Constitutional Court for a declaration that the refusal of parliamentary group status violated their rights as deputies under Article 38.1.2 of the Basic Law. The group claimed in the alternative that the above

provision is also infringed by the denial of certain group rights, such as no full representation on committees.

II. The applications are inadmissible in part.

Applications made in *Organstreit* proceedings are admissible where the contested acts and omissions are legally relevant as noted in § 64.1 of the Federal Constitutional Court Act. This does not apply where an act acquires legal significance for the applicant only as a consequence of an autonomous implementing act. The omission of an act is legally relevant only if the possibility cannot be excluded that the respondent is constitutionally obliged to perform that act.

To the extent that the applications of the PDS group's deputies are directed against the provision in the status resolution on the number of debates on matters of topical interest still to be determined, the applicant is not adversely affected, since no maximum number has yet been fixed. Equally, the alleged failure of the *Bundestag* to include a provision on committee journeys in the status resolution is not legally relevant, since no need for such a provision is apparent.

The Panel considered the applications inadmissible and unfounded for the following reasons:

1. The representative status of Members of the *Bundestag*, guaranteed by Article 38.1, sentence 2 of the Basic Law, covers the right to equal participation in the parliamentary decision-making process, including the equal right to join with other deputies in a parliamentary group. Distinctions between deputies always require special justification.

A constitutionally acceptable reason for the fixing of a minimum strength for parliamentary groups lies in the self-regulatory power of the *Bundestag* to ensure, through its Rules of Procedure, the proper functioning of Parliament. The distinction between parliamentary groups and other groups is justified, as it counters the risk of parliamentary work being hampered by a large number of motions – ultimately with no prospect of success – tabled by small groups. Nor can any right to a reduction in the minimum strength for parliamentary group status be inferred from the fact that 26 members of the applicant grouping obtained their mandate as a result of the basic mandate clause. Refusal to grant parliamentary group status does not run counter to the legislative purpose of the basic mandate clause, which is to bring about an effective integration of the body politic. It is justified by the imperative constitutional rule that Parliament's ability to function properly must be assured, and the status of the PDS deputies as representatives of the



people as a whole is protected. The granting and formulation of group status allows for their sufficiently effective participation in parliamentary work.

2. The applicant has no right to be taken into consideration in the allocation of chairmanships of committees and to participate in the Council of Elders. Under the Rules of Procedure, neither the committee chairpersons nor the Council of Elders have the task of predetermining the content of the parliamentary decision-making process. Their functions are merely of an organisational nature. They are therefore not subject to the influence of the principle of equal participation in the tasks assigned to the *Bundestag* under the Basic Law.

3. Rejection of the applicant's nomination for election to the Joint Committee under Article 53a of the Basic Law (the committee assumes the main functions of the *Bundestag* and *Bundesrat* in the event of a state of defence) does not infringe its rights. Parliamentary groups are better-placed than other groups to give the Joint Committee stability and authority. The Constitution has therefore given the parliamentary group principle priority over the principle of proportional composition for the purpose of designating the members of the committee.

4. The First Committee of Inquiry, consisting of 11 deputies from the parliamentary groups, additionally includes a non-voting member representing the PDS grouping of deputies.

The rejection of its application for full membership does not infringe any of its rights. The *Bundestag* has a degree of latitude in striking a balance between the requirements of the ability to work of a committee of inquiry, which must comply with its terms of reference by the end of the electoral period, and those of the most representative possible composition of the committee. In order for the applicant to have voting membership, an increase in size of the committee from 11 to 17 members would have been necessary. The parliamentary groups rejected this, as experience shows that a small committee of inquiry with only a few members is able to comply more rapidly and effectively with its terms of reference. Those considerations are constitutionally unobjectionable.

The same applies to the applicant's request for a full membership of study commissions. In that regard, the *Bundestag* enjoyed a particularly wide discretion in fixing the number of members, because study commissions do not directly prepare *Bundestag* bills and resolutions, but are active only at the stage prior to the parliamentary decision-making process.

5. Equally, the applicant's rights are not breached by the fact that it is not represented on the Mediation Committee (Article 77 of the Basic Law).

It is not constitutionally objectionable that, in terms of the calculation of seats, the *Bundestag* opted for a specific proportional procedure which ultimately led to the applicant being disregarded. The Panel explained that application of the otherwise normal proportional procedure for the appointment of bodies would not have reflected accurately the majority in the *Bundestag*.

That is also true in so far as the applicant is not represented in the Parliamentary Assembly of the Council of Europe or on the Regulatory Council (*Regulierungsrat*) attached to the Federal Ministry of Posts and Telecommunications.

6. Finally, the speaking time provision contained in no. 2.f of the Status Resolution does not violate the constitutional speaking right of a deputy, derived from Article 38.1.2 of the Basic Law.

The applicant seeks the right to be able to aggregate speaking times. However, since the Rules of Procedure do not grant the parliamentary groups any such right, the applicant is not disadvantaged to that extent vis-à-vis the parliamentary groups. The Panel also noted that the Rules of Procedure contain no provision from which such a right could be derived.

To the extent that the Rules of Procedure confer on the parliamentary groups the right to demand specified minimum speaking times for one of their speakers, the *Bundestag* was not obliged to grant the applicant equality of status with the parliamentary groups. When speaking time is being determined for individual deputies, groupings do not have to be accorded equal treatment with the parliamentary groups in every respect. On the contrary, the *Bundestag* may make different arrangements, according to the varying relative strengths of the associations.

However, it must be recalled that a speaker who speaks on behalf of the applicant is also expressing the point of view of other deputies and so in certain cases, an extension to the speaking time may be needed beyond the 15 minutes laid down for the individual speaker in the Rules of Procedure, in order to enable the point of view of the grouping to be represented adequately for the subject under debate. For the same reasons, it may be necessary to grant the applicant additional speaking time for one of its speakers. However, it is not entitled to demand equality of status with the parliamentary groups which have more members.

*Languages:*

German.

*Identification:* GER-1997-C-001

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 15.10.1997 / **e)** 2 BvN 1/95 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), Vol. 98, 345-375 / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.2.2 Constitutional Justice – Types of claim – **Claim by a private body or individual.**

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

1.3 Constitutional Justice – **Jurisdiction.**

1.3.4.3 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between central government and federal or regional entities.**

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

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

4.7.1 Institutions – Judicial bodies – **Jurisdiction.**

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

*Keywords of the alphabetical index:*

Constitution, federal and regional / Constitutional Court, federal and regional, relation / Constitutional Court, decision, departure / Constitutional jurisdiction, subsidiarity / Constitutional complaint, admissibility / Fundamental rights / Constitutional complaint, subsidiarity / Constitutional complaint, nature.

*Headnotes:*

A *Land* fundamental right, in principle effective pursuant to Article 142 of the Basic Law, will not be superseded by ordinary federal law as provided by Article 31 of the Basic Law as long as the Federal and *Land* fundamental rights regulate a specific

subject matter in the same sense, with the same content and are identical.

A *Land* judge possesses the discretion to apply *Land* fundamental rights that are established by the *Land* constitution, rights that are parallel to the fundamental rights established by the Basic Law, even in the course of a process governed by federal law. The instance that applies the law bears an autonomous responsibility for the enforcement of the subjective constitutional rights.

The competence of a *Land* over its constitutional jurisdiction permits a regulation that provides for the filing of, and a reversal from, a constitutional complaint with the *Land* Constitutional Court in the case that a challenged *Land* court's decision, issued in the course of a process governed by federal procedural law, violated a *Land* fundamental right that addressed the same subject as a Federal fundamental right with identical content. This regulation may not go further than to the extent that is indispensable for realising the purpose of the constitutional complaint. Only to that extent is the scope of the Federal competence under Article 74.1.1 of the Basic Law limited by the competence of the *Land*.

This means that a constitutional complaint on the *Land* level filed against decisions of the courts of the same *Land*, is only admissible to the extent that:

1. the recourse to a court that is opened by the Federal procedural rules has already been duly exhausted; and
2. the complainant's remaining principal complaint is based on the exercise of state power by the *Land*, and not also by the exercise of state power at the Federal level.

The content of the *Land* fundamental right is identical to the content of the corresponding right in the Basic Law – which makes it an admissible standard for the *Land* Constitutional Court's review – if it, in the case that is to be decided, leads to the same result as the Basic Law.

When examining this preliminary question, the *Land* Constitutional Court is, pursuant to § 31 of the *Bundesverfassungsgerichtsgesetz* (BVerfGG, Federal Constitutional Court Act), bound by the jurisprudence of the Federal Constitutional Court and is subject to the obligation to obtain a decision from the Federal Constitutional Court pursuant to Article 100.3 of the Basic Law.

A legal standard from which the courts want to deviate, the scope of which is so broad that it also applies to other groups of cases that can be submitted for decision at the court that makes the referral to the Federal Constitutional Court, can also be the subject of a referral pursuant to Article 100.3 of the Basic Law.

### Summary:

I. The subject of the proceedings was a referral of the *Sächsischer Verfassungsgerichtshof* (Constitutional Court of the *Land* of Saxony) concerning the question, which has been the subject of controversy in jurisprudence and literature for decades, whether the Basic Law prevents a *Land* Constitutional Court from deciding a constitutional complaint filed against the judgment of a court of the same *Land* if the constitutional complaint challenges the application of Federal procedural law (e.g., the Code of Civil Procedure, the Code of Criminal Procedure, the Rules of the Administrative Courts).

The original proceedings were based on the following facts.

In an action for the assertion of a claim concerning payment of a cheque, the plaintiff in the original proceedings prosecuted a claim to the amount of DM 1 436,00 against the defendant (who was the complainant in the Constitutional Court proceedings). In the civil law proceedings, the competent *Amtsgericht* (Local Court), pursuant to the Code of Civil Procedure (which is a Federal procedural law), rejected, as untimely filed, the defendant's offer to present evidence during the proceedings. The Local Court ordered the defendant to pay the claim.

The defendant regarded the rejection of her offer to present evidence as an infringement of the right to a hearing in court that is guaranteed in Article 78.2 of the *Land* Constitution, which has the same wording as Article 103.1 of the Basic Law. Because an appeal against the Local Court's decision was not possible, as the amount in dispute was not high enough to justify an appeal, the defendant lodged a constitutional complaint with the Constitutional Court of Saxony and with the Federal Constitutional Court.

The First Chamber of the Second Panel of the Federal Constitutional Court did not admit the constitutional complaint for decision, without considering its prospects of success, because the complaint did not provide the conditions for admission pursuant to § 93a.2.b of the Federal Constitutional Court Act.

Because the procedural law of Saxony in constitutional matters does not specify conditions for the admission of constitutional complaints, the Constitutional Court of Saxony, contrary to the Federal Constitutional Court, had to consider the constitutional complaint's prospects of success. On this point, the Constitutional Court of Saxony was of the opinion that the Local Court, by rejecting the motions for the admission of evidence as untimely filed, had violated the right to a hearing in court.

The Constitutional Court of Saxony intended to reverse the judgment of the Local Court. The Constitutional Court of Saxony also found itself competent to review, in constitutional complaint proceedings, whether the courts of the *Land* of Saxony, when applying the Federal procedural law, had complied with the fundamental rights or rights that are equivalent to fundamental rights as guaranteed by the *Land* constitution and, with the same content, by the Basic Law.

The Constitutional Court of Hesse, however, was of the opinion that Article 31 of the Basic Law ("Federal law shall take precedence over *Land* law") precludes this approach. In light of this conflict, the Constitutional Court of Saxony referred this question of law to the Federal Constitutional Court pursuant to Article 100.3 of the Basic Law, in order to avoid diverging case law.

II. The Second Panel of the Federal Constitutional Court answered the question submitted to it as follows:

If specific preconditions are met, the Constitutional Court of a *Land* may take the fundamental rights and rights that are equivalent to fundamental rights of the *Land* constitution as a standard for assessing the application of Federal procedural law by a court of a *Land*, if the content of these rights is identical to the corresponding rights in the Basic Law.

Moreover, a *Land* has the competence to provide, in the *Land* constitutional jurisprudence, the possibility of a constitutional complaint with the *Land* Constitutional Court that can result in the reversal of the challenged decision of the *Land* court. The prerequisite for this, however, is that the complainant's main complaint under constitutional law is exclusively based on the decision of the *Land* court and not on a decision of a Federal Court. Moreover, the creator of a *Land* constitution can only grant a *Land* Constitutional Court this competence if the procedural rules of the *Land* require that the recourse to other courts must have been exhausted before a constitutional complaint is lodged with the *Land* Constitutional Court (subsidiarity of the constitutional complaint).

To explain its decision, the Panel stated the following:

1. The ruling refers only to the review of the application of Federal procedural law (e.g., the Code of Civil Procedure, the Code of Criminal Procedure, the Rules of the Administrative Courts). It does not refer to the application of substantive Federal law (e.g., the Civil Code, the Criminal Code).

2. The constitutional complaint is an extraordinary legal remedy. It is intended as a tool for the enforcement of fundamental rights and of rights that are equivalent to fundamental rights. The constitutional complaint should serve the realisation of an individual's right of recourse to a court. By its nature, a constitutional complaint creates the possibility that acts of state authority can be reversed when deciding upon the constitutional complaint if those acts are held to be unconstitutional. This also applies to court decisions that have been held to be unconstitutional. To the extent that it is indispensable for ensuring that the purpose of the constitutional complaint is achieved, the *Länder* can, as most have done, grant their *Land* Constitutional Court the authority to reverse non-appealable decisions of the courts of the respective *Land*.

Whether it is indispensable to reverse such a decision can, however, only be established after the recourse to the courts has been exhausted. As long as this is not the case, the violation of a fundamental right can, and must, be remedied by the other courts.

A constitutional complaint within a *Land*, filed against the decision of a court of the same *Land*, is precluded to the extent that such decision was entirely or partially confirmed on the merits by a Federal court. The same applies to the decision of a court of a *Land*, to the extent that this decision has been made after the case had been remanded back to the *Land* court by a Federal court, with the remand binding the *Land* court's decision to the standards outlined by the remanding Federal court. In such cases, not even the prerequisite that the main ground of complaint of the person concerned must be based on the exercise of the state power of the *Land* is met.

3. Articles 142 and 31 of the Basic Law provide for the review of the application of Federal procedural laws by a *Land* Constitutional Court only to the extent that the *Land* constitution and the Basic Law contain fundamental rights with identical content. This is the case if the fundamental rights in the *Land* constitution regulate the same subject in the same sense and with the same content as the Basic Law.

If a case is of this nature, the judge is to comply with the relevant fundamental rights that are safeguarded in a parallel manner in the Basic Law and in the *Land* constitution. No conflict can arise out of this parallel obligation because the application of the fundamental rights, which are identical in their content, in the specific case must lead to the same result.

Such a double obligation can – as in the present case – result in an enhanced protection of fundamental rights if the *Land* Constitutional Courts, contrary to the Federal Constitutional Court, are to examine a constitutional complaint's prospects of success in each case because their relevant procedural rules differ from § 93a.2.b of the Federal Constitutional Court Act in that they do not provide any specific preconditions for the admission of a constitutional complaint.

4. This means that a *Land* Constitutional Court is to examine the following:

a. Does the respective case involve the application of a fundamental right that is enshrined in the *Land* constitution?

b. To what result does the application of the Basic Law lead? (In this context, the *Land* Constitutional Court is, pursuant to § 31 of the Constitutional Court Act, bound by the jurisprudence of the Federal Constitutional Court and is also obliged, pursuant to Article 100.3 of the Basic Law, to obtain a decision from the Federal Constitutional Court if it wants to deviate from a decision of the Federal Constitutional Court or of the Constitutional Court of another *Land*).

c. Does the examination of the challenged *Land* constitutional law lead to the same result?

An affirmative answer to this question establishes that the content of the fundamental right that is provided by the *Land* constitution is identical to the content of the respective fundamental right in the Basic Law, and that therefore the fundamental right in the *Land* constitution can be the standard of review for the *Land* Constitutional Court. This, at the same time, determines the result of the review: if the challenged decision stands up to the standards of the Basic Law, it also complies with the guarantee of the respective right provided by *Land* law. If, however, the act of judicial power violates fundamental rights, or guarantees that are equivalent to fundamental rights, of the Basic Law, it also infringes the corresponding rights in the *Land* constitution and can be reversed by the *Land* Constitutional Court.

A negative answer to this question (i.e., the *Land* constitutional law leads to a different result because it is, for instance, to be interpreted in a manner that deviates from the Basic Law), is that the guarantee of the respective right provided by *Land* law is identical, as regards its content, to the respective guarantee in the Basic Law; in this case, the application of Federal procedural law cannot be assessed in accordance with this standard. The constitutional complaint before the *Land* Constitutional Court which challenges the violation of this guarantee is impermissible.

### Languages:

German.



### Identification: GER-2005-2-001

a) Germany / b) Federal Constitutional Court / c) First Panel / d) 07.06.2005 / e) 1 BvR 1508/96 / f) / g) / h) *Neue Juristische Wochenschrift* 2005, 1927; CODICES (German).

### Keywords of the systematic thesaurus:

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

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

3.20 General Principles – **Reasonableness.**

4.7.1 Institutions – Judicial bodies – **Jurisdiction.**

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

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

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

### Keywords of the alphabetical index:

Personal freedom to act / Statutory assignment / Parental support / Child, obligation to support parents, pay, ability / Credit, imposition by court / Social assistance, funding agency, credit, obligatory / Support, claim, parents, child / Support, parents, obligation to pay / Asset, realisation / Support, relative.

### Headnotes:

The interpretation of non-constitutional legal norms and their application to an individual case are matters for the courts of general jurisdiction. It is only if in the process the courts violate constitutional law that the Federal Constitutional Court may intervene in response to a constitutional complaint. This situation is not already given if a decision is objectively wrong according to non-constitutional legal norms. However, if the interpretation contrasts sharply with all applicable legal norms and leads to the establishment of claims that have no basis whatsoever in existing law, then the courts are claiming powers which the constitution has clearly granted to the legislature. In doing so, the courts are assuming the role of lawmakers instead of accepting their true role as administrators of the law; thus, they are ignoring the fact that they are bound by law and justice within the meaning of Article 20.3 of the Basic Law. This results in their imposing a limitation on the personal freedom to act protected in Article 2.1 of the Basic Law which is no longer legitimised by the constitutional order.

### Summary:

I.1. The mother of the complainant, who was in need of long-term care, lived in an old people's nursing home in the last four years prior to her death in 1995. Since the mother's income was insufficient to cover the costs of the nursing home, she received support in the form of social assistance payments from the City of Bochum. The payments made up to the time of the mother's death amounted to a total of approximately DM 123,000.

Already at the time the mother went to live in the nursing home, the social assistance funding agency informed the present complainant that it would assume the costs. At the same time, the agency notified the daughter, who was primarily liable for the mother's support, that the mother's existing claims to support had been transferred to the City of Bochum by way of statutory assignment.

2. The complainant, who was born in 1939, had worked since she was 15 years old. Up to the time she became unemployed, in the autumn of 1996, she had earned approximately DM 1,100 per month net from a part-time job. Her husband, from whom she had lived separately since 1994, had been a pensioner since 1995. The spouses had no children and were co-owners in equal shares of a piece of real estate with a block of four flats erected on it. The complainant lived in one of the four flats whilst the other three were let. The monthly mortgage repayments in relation to the property exceeded the net rental income.

After the City of Bochum had tried unsuccessfully to sue the complainant for parental support, the Regional Court (*Landgericht*) as the appellate court of last instance held that the complainant had an obligation to pay DM 23,306.88. At the same time, the Court ordered the complainant to accept the offer of an interest-free loan for the above amount from the City of Bochum, which would be repayable three months after the complainant's death. In addition, as security for the loan, the complainant was ordered to register a land charge in the amount of DM 23,000 against her co-ownership share in the real estate.

In the view of the Regional Court, the daughter had an obligation, which was assigned by statute to the social assistance funding agency, to pay support to her mother because she had the "ability to pay" within the meaning of the Federal Social Assistance Act thanks to the interest-free loan offered to her by the social assistance funding agency.

The complainant alleged a violation of her personal freedom to act (*allgemeine Handlungsfreiheit*) and the property guarantee (*Eigentumsgarantie*). The obligations to pay support and to encumber her share of the rented block of flats with a land charge, which had been imposed on her, exceeded her ability to pay. She claimed that the judgment posed a risk to her own old-age support, particularly as the purpose of buying the property was to provide for her own old age. In addition, the complainant took the view that she had no obligation to make support payments to her mother in cash because she herself did not have enough money to be able to do so.

II. In the opinion of the First Panel, the judgment compelling the complainant to pay support for one parent violates Article 2.1 of the Basic Law. It therefore set aside the underlying judgment and referred the matter to the Regional Court for rehearing. Its reasoning was essentially as follows:

1. The obligation imposed by the Court to take out an interest-free loan and to have a land charge registered on her co-ownership share in the real estate had no legal basis and was in sharp contrast to all applicable legal norms. In making such a decision, the Court ignored its duty to be bound by law and justice and had thus limited the personal freedom to act of the complainant protected in Article 2.1 of the Basic Law in a manner no longer legitimised by the constitutional order.

2. The complainant's "ability to pay" within the meaning of the Federal Social Assistance Act first arose when the social assistance funding agency offered to provide a loan, i.e. after the mother's death. In so holding, the Court allowed a support claim for a

period of time that had elapsed on the basis of the complainant's ability to pay, which itself did not come into existence until after the mother had ceased to need support. This already contradicted the wording and structure of the relevant provisions dealing with support and social assistance. A support claim pursuant to § 1601 of the German Civil Code only exists where the need for support of the person entitled to support and the ability to pay of the person obliged to pay support both exist concurrently. § 90 and § 91 of the Federal Social Assistance Act, which enable the support claims of the recipient of assistance to be assigned during the period in which assistance is being granted, also assume that there is a temporal congruence between the need for support and the ability to pay it. The reference to § 89 of the Federal Social Assistance Act in order to substantiate a support claim sharply contradicted the wording of this legal norm and its position within the framework of social assistance law.

3. The Regional Court's interpretation of the legal norms applied was also contrary to their purpose. It runs counter to the principles of social assistance law to grant a legal claim to assistance when the purpose of the grant of a loan from the social assistance funding agency is to first establish a claim under social assistance law which does not exist under private law. Such a legal construction would eventually cause social assistance claims to be extinguished completely. It would be possible to ensure with the help of a loan that a person obliged to pay support was able to pay it so that it would be ultimately up to the social assistance funding agency to decide whether it wanted a social assistance claim to take effect. The consequence of this would be that the person in need of assistance would himself or herself be unsuccessful in claiming support against a person obliged to pay support who did not have the ability to pay whereas the social assistance funding agency could establish such a claim by offering the necessary loan and thus could release itself from its obligation to grant social assistance.

4. Finally, the Regional Court's interpretation also ran counter to the intention of the legislature. It not only made parental support subordinate to child support (§ 1609 of the German Civil Code), but also clearly limited the scope of the obligation in comparison to the duty to pay child support (§ 1603.1 of the German Civil Code). The subordinate treatment of parental support corresponded to the fundamentally different circumstances in which each of the duties to pay support takes effect. The duty to pay parental support usually occurs when the children have long since started their own families and are subject to support claims from their own children and spouse as well as having to make provision for themselves and their

own old age. On top of this comes the need for support of one or both elderly parents, whose income, in particular, whose pension – especially if nursing care is needed – is not adequate to cover this need. The legislature took this accumulation of demands into account by ensuring that the child retain an amount for his or her own support that was in keeping with his or her personal circumstances.

5. The latest legislative developments further emphasise the relatively weak legal position accorded by the legislature to parental support. Through the step-by-step reduction in the benefits provided by the statutory old-age pension scheme and the promotion of private old-age provision introduced in recent legal enactments, the legislature has emphasised the responsibility each individual has to provide in time and adequately for his or her old age alongside the statutory old age pension scheme. This must be taken into account in determining the appropriate amount to be retained by a child obliged to pay support. In particular, however, the legislature has also made it clear through the introduction of other measures (e.g. the introduction of a basic protection in old age and in the case of a reduction in earning capacity) that the burden placed on adult children through the obligation to pay parental support should be kept within limits taking into account their own personal circumstances.

#### Languages:

German.



#### Identification: GER-2005-S-001

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 25.08.2005 / **e)** 2 BvE 4, 7/05 / **f)** Dissolution of the *Bundestag* 2005 / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 114, 121 / **h)** *Niedersächsisches Ministerialblatt, Ausgabe A* 2005, 733; *Neue Juristische Wochenschrift* 2005, 2669; *Europäische Grundrechte-Zeitschrift* 2005, 517; *Städte – und Gemeinderat* 2005, no. 10, 38; *Deutsches Verwaltungsblatt* 2005, 1310; *Juristenzeitung* 2005, 1049; *Die Öffentliche Verwaltung* 2005, 999; *Bayerische Verwaltungsblätter* 2006, 75; *Verwaltungsrundschau* 2005, 427-430; [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de) (German and English version); CODICES (German).

#### Keywords of the systematic thesaurus:

- 1.2.1.2 Constitutional Justice – Types of claim – Claim by a public body – **Legislative bodies.**
- 1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**
- 1.3.5.6 Constitutional Justice – Jurisdiction – The subject of review – **Decrees of the Head of State.**
- 1.3.5.14 Constitutional Justice – Jurisdiction – The subject of review – **Government acts.**
- 4.4.3.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**
- 4.5.7.2 Institutions – Legislative bodies – Relations with the executive bodies – **Questions of confidence.**

#### Keywords of the alphabetical index:

Parliament, dissolution / Elections, new, order / Government, parliamentary viability / Vote of confidence, procedure, competence.

#### Headnotes:

1. A vote of confidence aiming to dissolve the *Bundestag* is only constitutional if it not only meets the formal requirements, but also satisfies the purpose of Article 68 of the Basic Law. The Basic Law seeks to create a viable government by means of Articles 63, 67 and 68.
2. A vote of confidence aiming at dissolution is only justified if the viability of a Federal Government which is anchored in Parliament has been lost. Viability means that the Federal Chancellor exercises political will in order to determine the general guidelines of policy, and is aware of having a majority of Members of the *Bundestag* behind him as he does so.
3. The Federal Chancellor is constitutionally obliged neither to resign, nor to take measures revealing the political dissent in the majority supporting the Government in Parliament in the event of a doubtful majority in the *Bundestag*.
4. The Federal Constitutional Court only examines the expedient application of Article 68 of the Basic Law to the restricted degree provided by the Constitution.
  - a. The political viability of a government depends essentially on the aims it pursues and the resistance it must expect from the parliamentary sphere. The assessment of viability has the character of prognosis and is linked to highly individual perceptions and appraisals of the situation.

b. By their nature, an erosion of confidence and a withdrawal of confidence which is not openly displayed cannot be easily described and identified in court proceedings. Matters which are legitimately not argued openly in the political process do not require complete disclosure to other constitutional bodies under the conditions of political competition.

c. Three constitutional bodies – the Federal Chancellor, the German *Bundestag* and the Federal President – may each prevent dissolution according to their free political assessment. This helps to ensure the reliability of the presumption that the Federal Government has lost its parliamentary viability.

### Summary:

I. In June 2005, the Federal Chancellor lodged an application in the 15<sup>th</sup> German *Bundestag* for a vote of confidence according to Article 68 of the Basic Law. This application did not find a majority among the Members of the *Bundestag*. The Federal Chancellor asked the Federal President to dissolve the *Bundestag*. The Federal President complied with this request and dissolved the *Bundestag* by order of 21 July 2005, setting fresh elections for 18 September 2005 at the same time.

The applicants, Members of the 15<sup>th</sup> German *Bundestag*, are opposing the Federal President's order in order of the Federal President in *Organklage* proceedings (actions against a supreme federal body).

II. The Second Panel of the Federal Constitutional Court rejected the *Organklage* as unfounded, basing its decision on the following considerations:

The Federal President takes the decision based on Article 68 of the Basic Law to dissolve the *Bundestag* or to decline to comply with the application of the Federal Chancellor, under his own responsibility as a political leadership decision according to duty-bound discretion. The dissolution of the German *Bundestag* prior to expiry of this electoral period encroaches on the status of the applicants as Members of the *Bundestag*, and is only justified if the Basic Law so permits.

A vote of confidence aiming to dissolve the *Bundestag* is only constitutional if it not only meets the formal requirements, but also satisfies the purpose of Article 68 of the Basic Law.

The Basic Law seeks to guarantee a viable government by means of Articles 63, 67 and 68. Viability means not only that the Chancellor exercises political

will in order to determine general policy guidelines and that he bears responsibility for this, but is also aware of having a majority of Members of the German *Bundestag* behind him in so doing. Whether the Chancellor has a reliable parliamentary majority can only be partly judged from outside. It may be that due to parliamentary and political working conditions the development of the relationship between the Federal Chancellor and the parliamentary groups bearing his policy remains partly hidden from the public.

The genesis of Article 68 of the Basic Law confirms that the vote of confidence aiming at dissolution is only to be justified if the viability of a Federal Government which is anchored in Parliament has been lost. Measured against the meaning of the provision, it is not inexpedient if a Chancellor, threatened by defeat in Parliament only with future ballots, already files a vote of confidence aiming at dissolution. Viability is also lost if, in order to avoid open loss of agreement in the *Bundestag*, the Chancellor is forced to withdraw from major elements of his political concept and to pursue another policy. The Chancellor must act under the supervision and participation of the *Bundestag* and in this respect must engage in a process of everyday compromise. Nonetheless, the Federal Government is intended to be an independent constitutional body designing policy. It can only take on responsibility before the German *Bundestag* and before the citizens if it has sufficient independent political latitude in the context of the competence order.

The Federal Constitutional Court examines the expedient application of Article 68 of the Basic Law only to the restricted degree provided by the Constitution.

Evaluation of the expedient use of the vote of confidence aiming at dissolution can encounter practical difficulties. Whether a government is still politically viable depends essentially on the aims it pursues and the resistance it must expect from the parliamentary sphere. Such assessments have the character of a prognosis and are tied to highly individual perceptions and appraisals of the situation. By their nature, an erosion of confidence and a withdrawal of confidence which is not openly displayed cannot easily be described and identified in court proceedings. Matters which are legitimately not argued openly in the political process do not require complete disclosure to other constitutional bodies under the conditions of political competition. The evaluation of the Federal Chancellor that his position is no longer sufficiently viable for his future policy is an evaluation which the Federal Constitutional Court cannot clearly or completely examine in practice. It is



also not amenable to the customary means of taking evidence within proceedings without impairing the system of political action.

Under the Basic Law, the decision on the dissolution of the *Bundestag* is not just given to one constitutional body. It is shared among three constitutional bodies, each with their own areas of responsibility. Any of the three constitutional bodies (the Federal Chancellor, the German *Bundestag* and the Federal President) may prevent dissolution according to their free political assessment. This helps to ensure the reliability of the presumption that the Federal Government has lost its parliamentary viability. The chain of responsibility starts with the Federal Chancellor because without his application no path leads to the dissolution of the German *Bundestag*. The German *Bundestag* decides, in knowledge of Article 68 of the Basic Law, whether to pave the way for dissolution by refusing to profess confidence. As the third constitutional body involved, the Federal President carries out an advance legal evaluation of the preconditions of Article 68 of the Basic Law on his own responsibility. Due to the three-tier decision-making process, the possibilities of the Federal Constitutional Court to carry out a review in the context of the provision cited have been subjected to greater restriction than in the areas of legislation and implementation of provisions. The Basic Law relies in this respect primarily on the system of mutual political control and political compensation between the supreme constitutional bodies involved, as set out in Article 68 of the Basic Law. Only where standards for political conduct are set out in the Constitution can the Federal Constitutional Court counter their violation.

Even if a threat of loss of political viability can best be judged by the Federal Chancellor himself, the Federal Constitutional Court must nonetheless examine whether the limits of his latitude have been adhered to. If there are no indications that the Federal Chancellor has lost or is at risk of losing the support of the parliamentary majority for the acts of his Government and for his political concept, he cannot successfully take recourse to his prerogative of assessment. This recourse must be based on facts. The general political situation and individual circumstances need not necessarily lead to the assessment of the Chancellor but must only make it appear plausible. The Chancellor's latitude for assessment is only respected to a constitutionally required degree if the question is raised in the legal examination as to whether another assessment of the political situation is clearly preferable on the basis of facts. Facts which can support other assessments than that of the Chancellor are only suitable to refute the assessment of the Federal Chancellor if they

permit no other conclusion to be drawn than that the assessment of the loss of political viability in Parliament is wrong.

The impugned decisions of the Federal President are compatible with the Basic Law.

Inexpedient use of the vote of confidence in order to bring about the dissolution of the German *Bundestag* and early elections cannot be established. There is no clearly preferable alternative to the Federal Chancellor's assessment that, in the light of the constellation of forces existing in the German *Bundestag*, he could not continue to pursue a policy upheld by the confidence of the parliamentary majority.

The Federal Chancellor has put forward facts which support his assessment of the political constellation of forces in the German *Bundestag*.

The overall political situation does not contradict the plausibility of the Federal Chancellor's assessment.

No facts have been submitted or are recognisable to unambiguously refute his assessment.

No errors of discretion are recognisable in the orders of the Federal President.

III. The decision was ultimately passed with 7:1 votes and, with regard to the standard of the decision (see II. above) with 5:3 votes. Two dissenting opinions were added to the decision, by a judge who ultimately supported it and by a judge who did not.

The judge who did not support the decision was of the view that the applications should have been granted, pointing out that the grounds submitted by the Federal Chancellor do not allow the conclusion to be drawn that he lacked political viability and that a substantive "dissolution situation" had arisen. The Basic Law does not contain "constructed mistrust" of the Chancellor against Parliament. Finally, in his view, the stance adopted by the Panel majority weakens the German *Bundestag's* position.

The judge who ultimately supported the decision objects to the interpretation of Article 68 of the Basic Law which has been taken as a basis, with which the Court is said to have established a mere façade of control.

#### *Languages:*

German.



*Identification:* GER-2007-2-013

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 03.07.2007 / **e)** 2 BvE 2/07 / **f)** / **g)** / **h)** *Europäische Grundrechtszeitschrift* 2007, 331-340; [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de) (German and English version); CODICES (German).

*Keywords of the systematic thesaurus:*

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

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

4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces.**

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

*Keywords of the alphabetical index:*

Armed forces, reconnaissance aircraft, use, abroad / NATO, out of area operation / Afghanistan, International Security Assistance Force (ISAF), mandate / Armed forces, use, abroad.

*Headnotes:*

Participation in the expanded ISAF mandate resulting from the resolution of the Bundestag of 9 March 2007 does not infringe the rights of the German Bundestag under sentence 1 of Article 59.2 of the Basic Law.

*Summary:*

I. The *Organstreit* proceedings (proceedings on a dispute between supreme federal bodies) relate to the participation of armed German forces in the deployment of an International Security Assistance Force in Afghanistan.

After the overthrow of the Taliban regime in Afghanistan, the United Nations Security Council, on 20 December 2001, authorised the establishment of an International Security Assistance Force (ISAF), in order to support the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas.

On 21 December 2001, the German *Bundestag*, upon the Federal Government's application, gave its consent to the participation of German forces in the International Security Assistance Force. The deployment, at first restricted to six months, was later extended on the basis of applications of the Federal Government to this effect, most recently until 13 October 2007. The status and rights of the International Security Assistance Force are governed by the agreements entered into between NATO and the Government of Afghanistan.

In August 2003, NATO took over the leadership of the ISAF deployment, which was extended afterwards to include the whole of Afghanistan. The mission took over the responsibility for the north and west of the country. It later also covered the Southern and Eastern region of Afghanistan. In these parts of the country, only the states participating in Operation Enduring Freedom had previously been deployed. The Operation is a loose coalition of more than 40 states, which has formed with the purpose of fighting international terrorism and which started a military offensive against the Afghan Taliban regime in October 2001. Since its extension, ISAF operates parallel to, and in cooperation with, Operation Enduring Freedom, with the missions remaining institutionally, and as regards their objective, separate.

On 8 February 2007, the Federal Government requested the consent of the German *Bundestag* to expanded German participation in the NATO-led International Security Assistance Force in Afghanistan, with capabilities for air reconnaissance and surveillance. To justify this, the application stated, *inter alia*, that the extension of the mandate for the continuation of German participation in ISAF, resolved on 28 September 2006, was done in expectation that the deployment of ISAF would be extended to the whole of Afghanistan. In doing this, the application stated that NATO was taking on new challenges, in particular a tenuous security situation. It was therefore also necessary for NATO to have the capability of air reconnaissance. It intended to use Tornado RECCE reconnaissance aircraft for this task, which had the capacity of daytime and night-time reconnaissance imaging capability. These reconnaissance aircraft were, however, not to be used for close air support. On 9 March 2007, the German *Bundestag* approved this application by the Federal Government.

In reaction to this, the parliamentary group PDS/*Die Linke* in the *Bundestag* filed an application to institute *Organstreit* proceedings against the Federal Government, asserting that the right of the *Bundestag* to participate, under Article 59.2 of the Basic Law, has been infringed.

II. The Second Panel of the Federal Constitutional Court has found that the Federal Government did not infringe any rights of the German *Bundestag* under sentence 1 of Article 59.2 of the Basic Law in conjunction with Article 24.2 of the Basic Law with the resolution to deploy Tornado reconnaissance aircraft in Afghanistan.

The decision is essentially based on the following considerations:

1. The application is admissible. The applicant has sufficiently justified the position that the rights conferred on the German *Bundestag*, by the Basic Law, may have been infringed by the challenged measures.

Pursuant to sentence 1 of Article 59.2 of the Basic Law, treaties which regulate the political relations of the Federation require the consent or participation, in the form of a federal statute, of the bodies competent for such legislation. In approving a statute that ratifies a treaty under international law, the *Bundestag* and the *Bundesrat* (lower and upper chamber of Parliament) determine the scope of the commitments of the Federal Republic of Germany on the basis of the treaty and have an ongoing political responsibility for this towards the citizen. Material deviations from the treaty basis are therefore no longer covered by the original Consent Act. If the Federal Government pursues the further development of a system of mutual collective security beyond the authorisation that it has been granted, the *Bundestag's* right to participate in sovereign decisions relating to foreign affairs is infringed.

The further development of a treaty that forms the basis of a system of mutual collective security in the meaning of Article 24.2 of the Basic Law is subject to another limit. Pursuant to this provision, "for the maintenance of peace", the Federal Government may "join a system of mutual collective security". From a constitutional point of view, the participation of the Federal Republic of Germany in such a system and the continuing participation in this system are in this way made subject to the maintenance of peace. The transformation of a system that originally satisfied the requirements of Article 24.2 of the Basic Law into a system that no longer serves to maintain peace is also constitutionally prohibited and can therefore not be covered by the content of the Consent Act.

2. The application is unfounded. There has been no infringement of the right of the German *Bundestag* under sentence 1 of Article 59.2 of the Basic Law in conjunction with Article 24.2 of the Basic Law.

The ISAF mission in Afghanistan, under the leadership of NATO, serves the security of the Euro-Atlantic area. It is therefore within the scope of the NATO Treaty integration programme for which the German *Bundestag* is jointly responsible through of the Consent Act to this treaty.

From the outset, the regional connection, as the core element of the NATO Treaty integration programme, has from the outset not meant that NATO's military operations would be restricted to the territory of the member states. As a result of NATO's purpose as a system, by a number of states, for joint defence against outside military attacks, defensive military operations out of area, that is, including those on the territory of an attacking state, were implied from the outset. In this respect, in addition to the military defence against an attack, a complementary crisis response operation on the territory of the attacking state that is related in substance and time is still in line with the regional restriction of the NATO Treaty.

The ISAF mission in Afghanistan cannot be seen as separate from NATO's regional connections. This mission is clearly directed not only at the security of Afghanistan from future as well as present attacks but also at the security of the Euro-Atlantic area. From the beginning, the ISAF mission had the aim of enabling and securing the rebuilding of civil society in Afghanistan, in order to prevent the Taliban, al-Qaeda and other groups from endangering the peace. The security interests of the Euro-Atlantic Alliance were intended to be safeguarded because aggressive politics which disturb the peace are not expected in the future of a stable Afghan state, whether as a result of active steps taken on the part of this state or as a result of passive tolerance taken with regard to terrorist activities on its territory. Those responsible in connection with NATO were and are entitled to assume that the securing of the rebuilding of Afghanistan's civil society also contributes directly to the Euro-Atlantic area's own security.

Nor does the ISAF mission in Afghanistan provide any indication that NATO has structurally departed from its task of maintaining the peace (Article 24.2 of the Basic Law). The character of the NATO Treaty has clearly not been changed by the ISAF mission in Afghanistan and the cooperation with Operation Enduring Freedom. ISAF and Operation Enduring Freedom are guided by separate objectives, different legal bases and clearly delimited spheres of responsibility. Whereas Operation Enduring Freedom is primarily aimed at direct counterterrorism, ISAF serves the maintenance of security in Afghanistan in order to create a basis for the rebuilding of civil society in the state. The cooperation between the operations, has not removed these delimitations,

which exist in fact and law. It is already apparent from the resolution of the Federal Government on the deployment of the reconnaissance aircraft that there can be no question of integrated combat missions. This resolution provides that the Tornado aircraft are to carry out reconnaissance work and are to be armed for purposes of self-protection and self-defence only. With regard to passing on reconnaissance results to the Operation Enduring Freedom, according to the above-named resolution, this is only to occur on the basis of the ISAF operational plan of NATO if this is required for the necessary implementation of the ISAF operation or for the security of the ISAF forces.

#### Languages:

German.



#### Identification: GER-2007-2-014

**a)** Germany / **b)** Federal Constitutional Court / **c)** / **d)** 04.07.2007 / **e)** 2 BvE 1-4/06 / **f)** / **g)** / **h)** *Neue Zeitschrift für Verwaltungsrecht* 2007, 916-937; *Europäische Grundrechte Zeitschrift* 2007, 295-331; CODICES (German).

#### Keywords of the systematic thesaurus:

1.5.1.3.2 Constitutional Justice – Decisions – Deliberation – Procedure – **Vote**.  
4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies**.

#### Keywords of the alphabetical index:

Parliament, member, additional occupations / Parliament, member, additional income, disclosure / Parliament, member, freedom to exercise office (lower chamber of Parliament).

#### Headnotes:

The obligation of Members of the *Bundestag* to disclose their additional income does not constitute a violation of their constitutional status under sentence 2 of Article 38.1 and Article 48.2 of the Basic Law.

The “centre of attention arrangement” contained in § 44a.1.1 of the Members of the *Bundestag* Act is compatible with the Basic Law. The duties to report and the publication of information relating to activities in addition to the exercise of an office as well as the sanctioning of violations, are in line with the Constitution.

#### Summary:

I. The applicants are Members of the German *Bundestag* and work as lawyers, industrial engineers, medium-sized entrepreneurs and as self-employed commercial sales representatives. The legal dispute relates to the question of whether the new regulations which entered into force on 18 October 2005 on:

- the exercise of the office of a Member of the *Bundestag* (§ 44a.1 of the Members of the *Bundestag* Act, hereinafter, the “Act”), the so-called “centre of attention arrangement”;
- the notification and publication of activities carried out in addition to the office and the income earned therefrom (§§ 44a.4.1 and 44b of the Act in conjunction with §§ 1 and 3 of the Code of Conduct);
- including the implementing provisions issued by the Speaker of the *Bundestag* on 30 December 2005 (nos. 3 and 8) and the sanctions that are provided in case of non-compliance (§§ 44a.4 sentences 2 to 5 and 44b no. 5 of the Act in conjunction with § 8 of the Code of Conduct)

are compatible with the constitutional status of a Member of the *Bundestag* under sentence 2 of Article 38.1 and sentence 1 of Article 48.2 of the Basic Law.

II. The Second Panel of the Federal Constitutional Court has rejected the applications. The ruling is based in essence on the following considerations:

The “centre of attention arrangement” (§ 44a.1 of the Act) states that the exercise of the office forms the focus of the activities of a Member of the *Bundestag*. Regardless of this, activities of a professional or other nature are permissible in principle.

This arrangement is unobjectionable in the view of four Panel members.

The duties connected with the freedom to exercise the office of a Member of the *Bundestag* (Article 38.1 of the Basic Law) include participating in the parliamentary tasks such that their performance is

guaranteed. Parliamentary democracy requires the entire attention of a person, who at best may try to pursue his/her profession in addition to his/her activity as a Member of the *Bundestag*. A Member of the *Bundestag* is encumbered to such a degree that as a rule, it is impossible to also make a living elsewhere. This justifies financing his/her full livelihood from tax funds.

The presumption that a Member of the *Bundestag*, who carries out a freelance or entrepreneurial activity, corresponds in a particular manner to the constitutional model of an independent Member of the *Bundestag* has no foundation. Sentence 1 of Article 48.3 of the Basic Law already presumes that the independence of a Member of the *Bundestag* is adequately ensured by the remuneration to which he/she is entitled. Above all, however, the constitutional provision contained in sentence 2 of Article 38.1 of the Basic Law, by appointing a Member of the *Bundestag* as a representative of the people and declaring him/her not to be bound by instructions in this capacity and only subject to his/her conscience, also aims to achieve the independence from interest groups. The maintenance of the independence of a Member of the *Bundestag* in this respect is particularly significant. This is a matter of independence from influences which do not emanate from decisions made by the electorate. The liberal professions offer many different possibilities to use political influence profitably by means of a seat in the *Bundestag* for a professional activity carried out outside this context. This is a danger for the independence of the exercise of the office.

In the view of the four other Panel members, the “centre of attention arrangement” is only compatible with the Basic Law if interpreted in conformity with the Constitution. In accordance with sentence 2 of Article 38.1 of the Basic Law, a Member of the *Bundestag* represents the people together with all the Members of Parliament. The necessity of being rooted in society also includes the freedom to exercise a professional activity during the time in office. It is in fact this which gives a Member of the *Bundestag* the *de facto* freedom to exercise his/her office subject to his or her conscience without having to consider any of the expectations of his/her party, other influential interest groups, or indeed the media, in order to increase the opportunity of his/her re-election and the safeguarding of an income. Sentence 1 of Article 48.2 of the Basic Law, in accordance with which no one may be prevented from accepting and exercising the office of a Member of the *Bundestag*, also aims to provide the opportunity to combine the office with a profession.

In the interest of a well-functioning Parliament, a Member of the *Bundestag* must deal responsibly with the freedom to exercise the office. It would however be incompatible with this freedom to interpret the “centre of attention arrangement” so that a Member of the *Bundestag* owed a certain number of working hours, must document them and faces possible consequence of sanctions if he/she does not comply. If interpreted in conformity with the Constitution, the “centre of attention arrangement” is not a basis for controlling any “proper” exercise of the office and for a time-limit on additional occupations.

The applications are unfounded in the view of the four Panel members supporting the ruling regarding the applicants objection to duties to report and to the publication of information on activities in addition to their office and to the sanctioning of violations.

The transparency rules are to serve to elucidate for the electorate, any professional and other obligations of Members of the *Bundestag* in addition to their office, and the income earned from such obligations. Knowledge of this is important for the decisions made at the ballot box, and also ensures the ability of the German *Bundestag* to represent the people, independently of the hidden influence of paying interested parties. The people have a right to know from whom – and on what scale – their representatives obtain money or benefits in kind. The interest of a Member of the *Bundestag* in obtaining information on the professional activity, although dealt with confidentially, is in principle secondary to finding a possible conflict of interest.

There are no constitutional objections to the legislature having established an across the board duty to report activities carried out and income outside the office without it being a matter of determining whether there is a conflict of interest. The possibility of a danger to the detriment of the independence of the office is sufficient. The duties to report are also suitable and appropriate.

The publication of the activities which are subject to reporting, as stipulated by the law, as well as of income according to specific income grades, does not violate the applicants’ rights either. It is justified in that the electorate is entitled to form an opinion on the exercise of the office by a Member of the *Bundestag*, and that the information relevant to this must therefore be made available.

The provisions on the sanctioning of breaches of duties to report are also compatible with sentence 2 of Article 38.1 of the Basic Law. Such obligations must be legally constituted and implementable where necessary. Parliament’s functioning would be

impaired and the principle of the strict equal treatment of all Members of the *Bundestag* would be breached, were it not possible to enforce disclosure obligations for lack of effective sanctions. What is more, Parliament would appear powerless in the eyes of the public to implement its own rules, which would lead to a loss of faith.

The other four Panel members, are of the view that the applications targeting the transparency regulations should be successful. Their view is as follows:

Insofar as income earned in this respect will be disclosed to the public without sufficient protection of the rule of law, it is incompatible with sentence 2 of Article 38.1 of the Basic Law. The obligation imposed on Members of the *Bundestag* to disclose activities additional to the exercise of their office, and to specify all income earned, encroaches on the freedom to exercise their office. It may not be disregarded here that individuals may be pilloried by the media as a result of the disclosure of facts such as gross income in particular. Without further declarations, the mere information on flows of funds could lead to false conclusions being reached.

Within the impugned rules on the disclosure of activities additional to the exercise of the office and the income earned therefrom, there is no constitutional balance reached between the legislative interest in transparency and the freedom to exercise an office enriched by fundamental rights aspects.

Just as a Member of the *Bundestag* cannot defend himself/herself private against transparency requirements by invoking the protection of his/her sphere, the legislature is also not permitted to completely deny this interest in protection of a Member of the *Bundestag* by invoking transparency goals. This means that disclosure is only justified where the information reveals a potential of a conflict of interest arising.

Since the provisions on the duty to report are not compatible with the Basic Law, no sanctions may be incurred by violating these duties to report.

The applications as to the obligations to report and publish were unsuccessful, since a violation of the Basic Law cannot be established where there is a parity of votes (§ 15.3 of the Federal Constitutional Court Act).

#### *Languages:*

German.



#### *Identification:* GER-2008-2-011

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 07.05.2008 / **e)** 2 BvE 01/03 / **f)** / **g)** / **h)** *Deutsches Verwaltungsblatt*, 2008, 770-778; *Europäische Grundrechte-Zeitschrift*, 2008, 312-323; *Neue Juristische Wochenschrift*, 2008, 2018-2025; www.bundes-verfassungsgericht.de; CODICES (German, English).

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

4.5.2 Institutions – Legislative bodies – **Powers**.  
4.5.7 Institutions – Legislative bodies – **Relations with the executive bodies**.  
4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces**.

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

Armed forces, deployment, abroad, parliament, approval, requirement / Armed forces, deployment, abroad, armed conflict, expectation.

#### *Headnotes:*

There is a requirement of parliamentary approval under the provisions of the Basic Law which concern defence if the context of a specific deployment and the individual legal and factual circumstances indicate that there is a concrete expectation that German soldiers will be involved in armed conflicts. This precondition is subject to full judicial review.

#### *Summary:*

I. The *Organstreit* proceedings (proceedings on a dispute between supreme federal bodies) relate to whether the deployment of German soldiers in NATO AWACS aircraft to monitor airspace above the sovereign territory of Turkey required the approval of the German *Bundestag*.

On 19 February 2003, the NATO Defence Planning Committee authorised the military authorities of the alliance to station NATO AWACS aircraft and systems in Turkey. Thereupon, four NATO AWACS aircraft were moved to Turkey and from 26 February 2003 or 18 March 2003 until 17 April 2003 they were deployed in Turkish airspace for surveillance purposes. The AWACS aircraft constitute an airborne

warning and control system to give early warning of aircraft or other flying objects. The system has control and command functions and serves to direct fighter aircraft, without carrying weapons itself. The crews consist of members of the forces of twelve NATO member states. Approximately one-third of the crew members are soldiers of the *Bundeswehr* (German Federal Armed Forces).

In March 2003, the Chairman of the parliamentary group of the *Freie Demokratische Partei* (FDP) in the *Bundestag* informed the Federal Chancellor that in the opinion of the FDP parliamentary group the Federal Government had an obligation to apply for the approval of the German *Bundestag* of the participation of German soldiers in the AWACS deployments over Turkey. At least, he wrote, the Federal Government must, in the case of armed conflict, be prepared to pass without delay a resolution on such an application and submit it to the German *Bundestag* for votes to be taken. The Federal Government refused to obtain the approval of the German *Bundestag*. As grounds, it stated that the NATO AWACS aircraft over Turkish territory conducted only routine flights for strictly defensive aerial surveillance. It stated that they gave no support to deployments in or against Iraq.

After the armed conflict commenced in Iraq on 20 March 2003, FDP *Bundestag* members and the FDP parliamentary group submitted a motion in the German *Bundestag*. By this motion, the German *Bundestag* was to call on the Federal Government to fulfil its constitutional duty and apply without delay for the approval of the German *Bundestag*, which is essential, of the participation of German soldiers in the AWACS deployments. The motion did not obtain the necessary majority.

The FDP parliamentary group filed an application with the Federal Constitutional Court for the issue of a temporary injunction to the effect that German participation in the AWACS deployments in Turkey might be maintained only on the basis of a resolution of the *Bundestag*; the Second Panel rejected this application by an order of 25 March 2003.

In its application in the main action, the FDP parliamentary group petitioned the court to find that the Federal Government had violated the rights of the German *Bundestag* by failing to obtain its approval for the deployment of German soldiers in measures of aerial surveillance for the protection of Turkey.

II. The Second Panel of the Federal Constitutional Court held that the application was admissible and well-founded. The Federal Government should have obtained the approval of the German *Bundestag* to

the deployment of German soldiers in NATO AWACS aircraft for aerial surveillance above the sovereign territory of Turkey in spring 2003. There is a requirement of parliamentary approval under the provisions of the Basic Law which concern defence for the deployment of armed forces if the context of a specific deployment and the individual legal and factual circumstances indicate that there is a concrete expectation that German soldiers will be involved in armed conflicts. These conditions were fulfilled in the present case. By carrying out aerial surveillance of Turkey in NATO AWACS aircraft, German soldiers took part in a military deployment in which there was tangible actual evidence of imminent involvement in armed operations.

The decision is essentially based on the following considerations:

In its judgment of 12 July 1994, the Federal Constitutional Court considered the totality of provisions of the Basic Law which concern defence, and derived from the Basic Law, against the background of German constitutional tradition, a general principle that every deployment of armed forces requires the essential prior approval of the German *Bundestag*. Under this principle, the authorisation contained in Article 24.2 of the Basic Law to join a system of mutual collective security is the constitutional basis for the participation of the *Bundeswehr* in deployments outside the federal territory, insofar as these occur within and pursuant to the rules of such a system. Sentence 1 of Article 59.2 of the Basic Law provides that the German *Bundestag* must approve the treaty basis of a system of mutual collective security. In contrast, the concretisation of the treaty and filling out the details of the integration programme contained in it is the duty of the Federal Government.

But the freedom of the Federal Government to structure its alliance policy does not include the decision as to who, on the domestic level, is to determine whether soldiers of the *Bundeswehr* will take part in a specific deployment that is decided in the alliance. By reason of the political dynamics of an alliance system, it is all the more important that the increased responsibility for the deployment of armed forces should lie in the hand of the body that represents the people. The requirement of parliamentary approval under the provisions of the Basic Law which concern defence is therefore an essential corrective to the limits of parliament's assumption of responsibility in the area of foreign security policy. The German *Bundestag* is competent to make the fundamental and essential decision as to the deployment of armed forces; it bears the responsibility for the armed deployment of the

*Bundeswehr* abroad. In view of the function and importance of the requirement of parliamentary approval under the provisions of the Basic Law which concern defence, its scope may not be defined restrictively; in case of doubt, it must be interpreted in favour of parliament. If and to the extent that competence of the German *Bundestag* in the form of a right of participating in decisions under the provisions of the Basic Law which concern defence can be derived from the Basic Law, there is necessarily no freedom for the Federal Government to decide on its own authority. The requirement of parliamentary approval is part of the structural principle of the separation of powers, not a mechanism to break down the barriers between them.

If German soldiers are involved in armed operations, this is a deployment of armed forces which under the Basic Law is permissible only on the basis of the essential approval of the German *Bundestag*. It is not relevant for the requirement of parliamentary approval under the provisions of the Basic Law which concern defence whether armed conflicts in the sense of combat have already taken place, but whether, in view of the specific context of the deployment and the individual legal and factual circumstances, the involvement of German soldiers in armed conflicts is concretely to be expected. The mere possibility that there may be armed conflicts during a deployment is not sufficient for this. Instead, there must firstly be sufficient tangible actual evidence that a deployment, by reason of its purpose, the concrete political and military circumstances and the deployment powers, may lead to the use of force. Secondly, there must be particular proximity to the use of force. An indication for this exists if the soldiers are carrying arms abroad and are authorised to use them.

The question as to whether there is involvement of German soldiers in armed operations is subject to full judicial review. The Federal Government is not granted latitude for assessment or prognosis that cannot be verified, or that can be verified only to a limited extent, by the Federal Constitutional Court.

By this standard, the involvement of German soldiers in the aerial surveillance of Turkey by NATO was a deployment of armed forces which in accordance with the requirement of parliamentary approval under the provisions of the Basic Law which concern defence required the approval of the German *Bundestag*. In this way, German soldiers took part in a military deployment in which there was tangible actual evidence of imminent involvement in armed operations. The AWACS aircraft deployed were part of a system of concrete military protective measures against a feared attack on the NATO area. The monitoring of airspace from the outset had a specific

connection to a military conflict with Iraq, which was considered possible by reason of concrete circumstances. There was tangible actual evidence that the involvement of NATO in a military conflict was to be expected.

An involvement of German soldiers in armed operations was also immediately to be expected. At the latest when the rules of engagement that had been extended because of the deterioration of the situation were introduced, the involvement of German soldiers in armed operations depended only on whether and when Iraq would launch an attack on Turkey.

#### *Cross-References:*

- The proceedings which preceded the main action, for the issue of a temporary injunction, have the file number 2 BvQ 18/03; the decision is printed in the Official Digest, volume 108, pp. 34 *et seq.*
- The decision of 12.07.1994, to which reference is made (file number 2 BvE 3/92, 5/93, 7/93, 8/93) is printed in volume 20, pp. 286 *et seq.*, of the Official Digest.

#### *Languages:*

German, English version (slightly abridged) to be found in Decisions of the *Bundesverfassungsgericht*, Volume 4, 340-354 and on the homepage of the Federal Constitutional Court.



#### *Identification:* GER-2009-2-018

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 17.06.2009 / **e)** 2 BvE 3/07 / **f)** **g)** / **h)** CODICES (German).

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

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

4.5.7.1 Institutions – Legislative bodies – Relations with the executive bodies – **Questions to the government.**

4.11.3 Institutions – Armed forces, police forces and secret services – **Secret services.**



*Keywords of the alphabetical index:*

Committee of inquiry, parliamentary / Parliament, right to information / Intelligence service / Parliament, committee, inquiry.

*Headnotes:*

The limitations placed on the permissions to testify granted to civil servants who had been summoned to appear as witnesses before the committee of inquiry dedicated to the Federal Intelligence Service violated the *Bundestag's* right under Article 44 of the Basic Law to convene committees of inquiry. The same applies to the refusal to submit files. A sweeping claim that the interests of the state are in jeopardy does not substantiate why the specifically required documents are relevant to security.

*Summary:*

I. In 2004 and 2005 there were reports in the media about activities by the US and the German intelligence service (*Bundesnachrichtendienst – BND*) in connection with the processing of CIA flights with suspected terrorists on board via German airports. There were also reports about the activities of BND staff in Baghdad during the Iraq war, about the kidnapping of German nationals or of persons living in Germany by US agencies and about the observation of journalists by the BND.

Both the German *Bundestag* and the Parliamentary Control Committee addressed these issues in 2005. In 2006 the Federal Government presented its final report, which was analysed by the Parliamentary Control Committee and published in parts.

Subsequently a committee of inquiry was convened by the plenum upon the application of the parliamentary groups of the FDP, The Left Party and Alliance 90/The Greens as well as a qualified minority consisting of 3 members of parliament (the applicants). The committee of inquiry was essentially instructed to clarify on the basis of specific occurrences and questions “which political requirements were established for the activities of the BND, the Federal Office for the Protection of the Constitution (BfV), the Military Counterintelligence Service (MAD), the Federal Public Prosecutor General (GBA) and the Federal Criminal Police Office (BKA), and how the political management and supervision were structured and guaranteed.”

The committee of inquiry first devoted its attention to the kidnapping of two persons, taking witness testimony from members and civil servants of the Federal Government (respondent) and its subordinate

authorities. With reference to the limited permission they had been granted to testify, witnesses repeatedly refused to continue to testify or to respond to questions posed by members of the committee of inquiry. Furthermore, the Federal Government refused on several occasions to submit files or parts of files to the committee of inquiry.

The limitations placed on permission to testify, the refusal to surrender the documents and organisational charts requested as well as the relevant grounds stated, were objected to by the applicants in their various specific motions in the *Organstreit* proceedings (proceedings on a dispute between supreme federal bodies) before the Federal Constitutional Court.

II. The Second Panel of the Federal Constitutional Court held that the admissible motions were for the most part well-founded. This decision is based on the following considerations:

The Federal Government unlawfully restricted the claim for information based on Article 44 of the Basic Law. The restrictions contained in the permissions to testify relating to the core area of executive responsibility and state interests as well as the interpretation of such restrictions that became apparent when the witnesses testified, are in breach of the right of the *Bundestag* to take evidence. The interpretation of the permissions to testify unlawfully restricts the parliamentary right to investigate. Under the interpretation, matters deriving from the meetings of the State Secretaries of the Federal Ministries of the Interior and of Justice and of the Federal Foreign Office, the presidents of the three federal intelligence services and the BKA with the Head of the Federal Chancellery and the secret service coordinator (known as presidents' meetings (*Präsidentenrunde*)) and from the intelligence-situation meetings (*Nachrichtendienstliche Lage*), in which representatives of other ministries besides the participants outlined above take part, are not covered by the permission to testify.

The restriction on obtaining evidence is in breach of the rights of the German *Bundestag*, not simply those of the committee of inquiry. The committee of inquiry exercises its authority as an auxiliary organ of the *Bundestag*. Within the context of the investigation commissioned, the committee is entitled to obtain witness testimony from members of the government and from civil servants and employees within the Federal Government's sphere of responsibility, and to take evidence as it deems necessary. Pursuant to Article 44.2 of the Basic Law, the provisions of the Code of Criminal Procedure apply *mutatis mutandis* to the taking of evidence. If the witnesses to be heard by the committee of inquiry belong to a group of persons who are subject to a particular confidentiality

obligation, then such witnesses can only testify if they are in possession of corresponding permission.

Subject to limitations under constitutional law, the Federal Government has to grant witnesses such permission to testify. This obligation is limited by the investigation commissioned as determined in the convening resolution, which commission has to remain within the bounds of parliamentary competence to control and has to be sufficiently specific. In the present case the permissions to testify contained an excessive restriction in the sweeping exclusion of "in particular, information about the formation of intent within the Federal Government in the cabinet or about agreement processes spanning or within departments, for the preparation of cabinet or department decisions."

When interpreting the investigation commissioned, the committee of inquiry and the Federal Government have no discretionary scope and no prerogative of assessment. However, grounds on which information may be withheld from a committee of inquiry can arise under the principle of the separation of powers. Although the parliamentary competence to control extends in principle to completed matters alone, the principle of the separation of powers requires that such parliamentary control be effective. It would not be effective if the requisite information deriving from the preparation of government decisions were to remain unavailable to the parliament after completion of the relevant matters. Information from the sphere of the formation of intent within the government can therefore be accessed by the parliament in principle. A sweeping reference made to a committee of inquiry with regard to completed matters that the sphere of the formation of intent within the government is affected does not justify the withholding of information.

The fact that the core area of executive responsibility is affected can only be raised as an objection to the parliamentary right of investigation with regard to completed matters within a case-specific weighing of the parliamentary interest in obtaining information on the one hand, against the risk that the ability to function and the responsibility will be impaired, on the other hand. The necessity of weighing conflicting interests corresponds to the dual function of the principle of the separation of powers, both as a foundation for and a limitation on the rights of parliamentary control. It has to be taken into account in this respect that the deeper a parliamentary request for information penetrates the core of the government's formation of intent, the more important has to be the parliamentary request for information in order to prevail against the interest in confidentiality invoked by the government. In contrast, the preceding advisory and decision-making processes are removed from parliamentary control to a lesser

degree. The parliamentary interest in information carries particular weight where the discovery of potential violations of the law and similar grievances within the government are concerned. In order to permit verification of the weighing of interests and the interests concerned, the refusal has to be accompanied by substantiated reasoning if information is to be withheld from a committee.

Another boundary of the right of a parliamentary committee of inquiry to obtain evidence is the interest of the state, which could be jeopardised by the disclosure of classified information. The interests of the state are not entrusted to the Federal Government alone, but likewise to the *Bundestag*. The handling of information within a committee of inquiry is therefore subject to separate provisions on secrecy. Restrictions on access to information by a committee of inquiry where state interests are invoked therefore come into question only in very particular circumstances.

Communications concerning contacts with foreign intelligence services cannot be automatically withheld from a committee of inquiry on grounds of jeopardising the interests of the state. It is not obvious that the disclosure of estimations by the US intelligence services concerning the dangerousness of one of the kidnapped persons affected the secrecy interests of such services and could therefore burden necessary future cooperation. It was held that the mere fact that disclosure of such information could lead to problems for the Federal Government with regard to its own handling of the relevant knowledge did not jeopardise the interests of the state, but, rather, constituted an acceptable and constitutionally intended consequence of the exercise of the parliamentary right of investigation.

A sweeping claim that the interests of the state are in jeopardy does not substantiate why the specifically required documents are relevant to security. Where there is a risk of disclosure of classified information, the submission of documents cannot be refused for that reason without taking into account enhanced organisational precautions within the committee in the interim. It is also necessary to state reasons which indicate why the relevant information is so important that a minimal risk of disclosure cannot possibly be accepted.

Insofar as the preparation for meetings of parliamentary bodies in the individual departments belongs to the core sphere of executive responsibility, it is exempt from parliamentary access to information during this preparatory phase. However, this does not apply automatically after completion of the relevant matter. Rather, considerations are required which

take into adequate account the parliamentary interest in obtaining information.

The interest of the Federal Government in the confidentiality of information merits all the more protection the deeper a request for information penetrates the innermost sphere of the formation of intent by the government. Here again, the matter has to be considered on a case-specific basis, also taking into account the importance of the specific parliamentary interest in obtaining information.

If documents are to be withheld from a committee of inquiry on the basis of sentence 2 of Article 44.2 of the Basic Law, the requisite grounds not only have to specify the extent to which the information is based on an encroachment on Article 10 of the Basic Law (privacy of correspondence, posts and telecommunications). Reasons are also required as to why the information obtained is subject to a ban on utilisation by the committee.

A breach of Article 44 of the Basic Law was found, in that the respondent failed to comply wholly or partly with orders to take evidence, invoking a lack of relevance to the matter under investigation. Once again, the required reasons were not stated. Furthermore, the respondent claims a right to make a narrow interpretation of the investigation commissioned, a right which it does not have.

#### *Languages:*

German, English press release on the website of the Federal Constitutional Court.



#### *Identification:* GER-2009-2-020

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 01.07.2009 / **e)** 2 BvE 5/06 / **f)** / **g)** / **h)** CODICES (German).

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

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

4.5.7.1 Institutions – Legislative bodies – Relations with the executive bodies – **Questions to the government.**

4.11.3 Institutions – Armed forces, police forces and secret services – **Secret services.**

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

Parliament, right to information / Intelligence service.

#### *Headnotes:*

Insufficient substantiation of the refusal to provide information violated the German *Bundestag's* right to submit questions and to obtain information to which it is entitled under the Basic Law in respect of the Federal Government.

#### *Summary:*

I. On 13 June 2006 and 1 August 2006, four members of the German *Bundestag* and the parliamentary group Alliance 90/The Greens submitted so-called “minor interpellations” to the Federal Government. Their intention was to learn whether and, if so, what information was collected by the German Federal Intelligence Service and the intelligence services of the *Länder* (individual federal states) about members of the *Bundestag*. The Federal Government refused to respond, justifying its refusal on the grounds that as a matter of principle it only issued statements on the manner of working, on the strategy and the current knowledge of the federal intelligence services, constituting classified information, within the relevant committees of the *Bundestag*. The Federal Government also pointed out that it had reported on the matter to the Parliamentary Control Committee on 5 April 2006. It further argued that it had issued statements to the Council of Elders of the *Bundestag* regarding the legal requirements of and limitations on the observation of members of parliament by the intelligence services. The Federal Government refused to provide information in response to individual questions on the grounds that the work of the intelligence services would be jeopardised. As regards the questions concerning matters preceding the 9<sup>th</sup> electoral term of the *Bundestag*, the Federal Government referred to the statutory deletion obligations, as a result of which the corresponding data was not longer available. Any existing information on past files relating to the periods in question could not be obtained on the basis of a “minor interpellation” within the time frame available under § 104 of the Rules of Procedure of the *Bundestag*.

In *Organstreit* proceedings (proceedings on a dispute between supreme federal bodies), the four members of the *Bundestag* and the parliamentary group Alliance 90/The Greens as applicants requested a

finding that in its responses to the “minor interpellations”, the Federal Government had violated their rights and those of the *Bundestag*. They also requested that the Federal Government be compelled to provide the information requested, or alternatively to provide the information to the extent and in a form consistent with the objective secrecy interests of the Federal Republic of Germany.

II. The Second Panel of the Federal Constitutional Court held that the Federal Government had refused to provide the information requested by the applicants in the “minor interpellations” on grounds that do not stand up to scrutiny under constitutional law. The Federal Government therefore acted in breach of the applicants’ rights under sentence 2 of Article 38.1 of the Basic Law, and those of the *Bundestag* under sentence 2 of Article 20.2 of the Basic Law. In particular, it was held that reference to reporting made to other parliamentary control bodies did not release the Federal Government from its obligation to report to the *Bundestag*. In addition, the sweeping refusal to provide information on grounds of its classified nature was not consistent with the requirements of constitutional law. The applications are in part inadmissible since their grounds do not address the responses to the questions mentioned. The application to oblige the Federal Government to provide information is also inadmissible.

The decision is based on the following considerations:

It is clear from the case-law of the Federal Constitutional Court and undisputed by the parties that a right to submit questions and to obtain information accrues to the *Bundestag* against the Federal Government pursuant to sentence 2 of Article 38.1 of the Basic Law and sentence 2 of Article 20.2 of the Basic Law. Individual members of parliament and parliamentary groups as associations of members of parliament may avail themselves of the right in accordance with the rules of procedure of the *Bundestag*. Nor is there any doubt that the obligation of the Federal Government to respond is subject to limitations. However, such limitations require evaluation in each individual case. In particular, insofar as questions concern matters that are classified in the interest of the state, the question arises whether and how this interest can be aligned with the relevant parliamentary claim for information.

The question of the legislature’s right to regulate the parliamentary claims for information by reason of constitutional law so that the Federal Government would only have to provide information about the work of the federal intelligence services that it considered to be classified information to a certain

committee of the *Bundestag*, was allowed to remain unanswered. This was because no such provision exists; the Parliamentary Control Committee is an additional instrument of parliamentary control of the government, which does not supersede parliamentary claims for information. Otherwise, in establishing the Parliamentary Control Committee, the *Bundestag* would have deprived itself of essential possibilities to obtain information, and the control of the Federal Government would have deteriorated, not improved, as regards the work of the federal intelligence services.

The above considerations also apply insofar as the view taken by the respondent relates to other committees of the *Bundestag*. In particular, the parliamentary right to raise questions is not superseded by the institution of a committee of inquiry or by the fact that the Council of Elders addresses such questions (§ 6 of the Rules of Procedure of the *Bundestag*).

The refusal to provide information based solely on its classified nature also constitutes a violation. The Federal Government must place the *Bundestag* in a position to perform its duty of parliamentary control of the acts of government effectively, in view of the requirement of mutual consideration in relations between constitutional bodies. Except in cases where secrecy is clearly necessary, it is only on the basis of detailed grounds appropriate to the relevant situation that the *Bundestag* is able to judge and decide whether to accept a refusal to respond, or what further steps it will take in order to enforce its request for information in whole or in part.

Nor is it apparent that the information requested by the applicants is classified insofar as the questions concern information about the collection, storage and disclosure of data on members of the *Bundestag* by the federal intelligence services. It is not evident that the response to these questions entails the disclosure of details on the manner of work, strategies, methods and the current knowledge of the intelligence services which would jeopardise their ability to operate and perform their duties.

The respondent’s argument that a response to the questions would permit conclusions about the work of the intelligence services which would jeopardise their ability to operate and perform their duties, does not contain any specific indication to render the refusal to provide information plausible. The observation of members of parliament by the intelligence services involves considerable risks with regard to their independence (sentence 2 of Article 38.1 of the Basic Law), with regard to the participation of the relevant political parties in the formation of the political will of

the people (Article 21 of the Basic Law), and therefore for the entire process of the formation of a democratic will. The corresponding need of the *Bundestag* to obtain information is highly significant. If the protection of classified information is to prevail over that need as a conflicting interest, specific grounds must be stated.

The respondent responded to the question whether it was aware of cases in which information about members of parliament had been collected, stored or disclosed by other services, especially in *Länder*, to the effect that it would not comment on matters falling within the competence of the *Länder*. By doing so, it also violated the applicants' constitutional rights.

The Federal Government was under an obligation to provide detailed grounds because the questions evidently related also to the sphere of responsibility of the Federal Government. The interpellations concerned the work of the authorities directly subordinate to the respondent as well as the respondent's current knowledge about the activities of other intelligence services.

The reference made to the statutory deletion obligations does not suffice as grounds for the refusal to provide information. The parliamentary claim for information also extends to matters from the past with regard to their potential political significance, which concern the sphere of responsibility of previous Federal Governments. The present Federal Government could therefore be under an obligation of reconstruction insofar as is reasonable. The mere reference to statutory deletion obligations meant the respondent failed to state adequately that it was unable to procure the information requested. Nor did the respondent state that the information could only be obtained with unreasonable effort.

The reference to the impossibility of providing a response within the period set out in the Rules of Procedure of the *Bundestag* failed to take into account the fact that the 14-day period laid down in § 104.2 half-sentence 1 of such Rules of Procedure, can be extended in consultation with the party raising the question pursuant to half-sentence 2 of the provision.

#### *Languages:*

German, English press release on the website of the Federal Constitutional Court.



#### *Identification:* GER-2010-S-001

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 04.05.2010 / **e)** 2 BvE 5/07 / **f)** Deployment of the armed forces in Heiligendamm / **g)** to be published in the Official Digest / **h)** *Europäische Grundrechte-Zeitschrift* 2010, 343; CODICES (German).

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

- 1.2.1.2 Constitutional Justice – Types of claim – Claim by a public body – **Legislative bodies.**
- 1.3.4.2 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between State authorities.**
- 4.1.2 Institutions – Constituent assembly or equivalent body – **Limitations on powers.**
- 4.5.2 Institutions – Legislative bodies – **Powers.**
- 4.5.7 Institutions – Legislative bodies – **Relations with the executive bodies.**
- 4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces.**

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

G8 summit, deployment of armed forces / Armed forces, use within the country / Armed forces, use abroad / Parliamentary approval, armed forces, use / *Organstreit* proceedings, actionable rights.

#### *Headnotes:*

1. The *Organstreit* (dispute between supreme constitutional bodies) is not an objective cause of action on a complaint. The Basic Law has established the German *Bundestag* as a legislative body, but not as a “supervisory body on points of law” over the Federal Government. No individual right of the German *Bundestag* can be derived from the Basic Law to the effect that all substantively or procedurally unconstitutional acts of the Federal Government cease to occur.

2. The rights actionable in *Organstreit* proceedings, as set out in § 64.1 of the Federal Constitutional Court Act, are intended to be only those rights which are conferred on the applicant exclusively for its own exercise or for participation, or the observance of which is necessary in order to ensure the exercise of its powers and the validity of its acts. The status of the German *Bundestag* as a constitution-amending legislature does not grant it any individual rights within the meaning of § 64.1 of the Federal Constitutional Court Act.

3. The Federal Constitutional Court has derived from the Basic Law the requirement of the mandatory consent of the German *Bundestag* for armed deployments only in respect of deployments abroad of the *Bundeswehr* (Federal Armed Forces). It is not clear from that case-law the extent to which the rights of the German *Bundestag* with respect to internal deployments of the armed forces could also exist where the Basic Law itself does not provide for them, that is to say, over and above the determination of a state of defence or a state of tension taken as a basis by Article 87a.3 of the Basic Law and the right of recall provided for in Article 87a.4 sentence 2 of the Basic Law.

4. Article 87a.2 of the Basic Law does not give the German *Bundestag* any right actionable in *Organstreit* proceedings, as referred to in § 64.1 of the Federal Constitutional Court Act.

### Summary:

I. In June 2007, the 33<sup>rd</sup> meeting of the World Economic Summit of the Group of Eight (G8) took place under the German Presidency in Heiligendamm in the Federal State of Mecklenburg-Western Pomerania. The security authorities were concerned that demonstrations involving violence and attacks from the sphere of Islamist terrorism were likely to occur. In the period leading up to the summit, the Land Mecklenburg-Western Pomerania and the Federation came to the joint assessment that the task of ensuring security on the occasion of the summit would be too much for Mecklenburg-Western Pomerania without assistance from the Federation and other *Länder* (states).

By letter of May 2006, the Federal Minister of Defence had initially, in principle, promised the Minister of the Interior of Mecklenburg-Western Pomerania technical and logistical support. Subsequently, he approved a large number of specifically requested measures of support. The security authorities expected, on the basis of police predictions, that opponents of the G8 summit would try to erect blockades on the roads leading to Heiligendamm and Rostock-Laage Airport, create earth depots for tools and blockade equipment and tamper with streets by, for example, under-washing or undermining. Such activities were to be detected from the air with the aid of the reconnaissance technology on board Tornado aircraft. Shortly before the summit, a total of seven missions were flown using Tornado aircraft. During them, optical images were recorded, which, according to the Federal Government, are not suitable for identifying persons. On one flight, the aircraft flew for a short time below the minimum flight altitude of 500 feet over an inhabited demonstrators' camp. On none of the flights were the Tornados' cannons loaded with ammunition.

In addition, nine armoured reconnaissance vehicles were brought into operation for ground reconnaissance. These were used for the surveillance of premises and streets and of the flight approach routes of summit participants and had the task of observing and reporting findings to the police.

To ensure airspace security, three AWACS aircraft, as part of the NATO formation, were used, to provide information on the air situation. Before and during the G8 summit, the air force (*Luftwaffe*) also kept four Eurofighter aircraft and eight Phantom aircraft ready, which performed approximately 23 flying hours.

In order to ensure emergency medical provision during the summit, the armed forces maintained a mobile medical rescue centre in Bad Doberan and were given the right to exercise proprietary powers over certain land and buildings belonging to Bad Doberan Hospital. Military police were deployed to safeguard the activity of the medical corps soldiers and to exercise proprietary powers.

The parliamentary group *Bündnis 90/Die Grünen* in the German *Bundestag* (the applicant) sought a declaration in an application in *Organstreit* proceedings that the Federal Government (the respondent) violated the rights of the German *Bundestag* under Article 87a.1 of the Basic Law by failing, prior to the deployment of the armed forces on the occasion of the G8 summit, to bring the matter before the German *Bundestag*.

II. The Second Panel of the Federal Constitutional Court rejected the application as manifestly unfounded, basing its decision on the following considerations:

To the extent that the applicant seeks to derive the violation of a participatory right of the German *Bundestag* specifically from what it believes to be the unconstitutionality of the deployment of the armed forces, it lacks capacity to make the application. That is because, in the case of unconstitutionality, a state of affairs in conformity with the Constitution could not have been established even by the prior consent of the German *Bundestag* in the form of an ordinary resolution.

Moreover, it is not apparent to what extent participatory rights of the German *Bundestag* in relation to specific deployments of the armed forces within the country, whether they are armed or unarmed deployments, could exist even where the Basic Law itself does not provide for them.

In previous decisions, the Federal Constitutional Court has inferred from the provisions of the Basic Law concerning defence the principle of a mandatory requirement of parliamentary approval for the armed deployment of armed forces only in respect of deployments abroad.

If the armed forces are to be deployed during a state of defence or a state of tension (Article 87a.3 of the Basic Law), that is to say, insofar as they are authorised or may be empowered to protect civilian property and to perform traffic control functions, the participation of the legislative bodies results from the prior determination of the state of defence or state of tension, to be made by the *Bundestag* with the consent of the *Bundesrat*. By contrast, there is no provision for consent by the *Bundestag* for specific deployment.

Where the armed forces are to be deployed in protecting civilian property and in combating organised insurgents who are armed with military weapons, which is possible under Article 87a.4 of the Basic Law, only a right of recall exists. This means that the deployment is to be discontinued if the *Bundestag* or the *Bundesrat* so demands. There is no provision in the Basic Law for any further participation by the *Bundestag* in the internal deployment of the armed forces. No such participatory rights can be ascribed to the description of the Federal Armed Forces as a parliamentary army, which is used in the context of deployments abroad.

With regard to the applicant's request that from the point of view of the constitutional reservation in Article 87a.2 of the Basic Law, the deployment of the armed forces should be declared as lacking constitutional basis, the complaint that the rights of the German *Bundestag* have been breached cannot be upheld. Under the above provision, apart from deployment for defence purposes, the armed forces may only be deployed to the extent expressly permitted by the Basic Law. At least in the case of deployments of the armed forces within the country, a constitutional amendment would be necessary in the event of any overstepping of the limits imposed by the Basic Law. However, a condition for reliance by the German *Bundestag* on a right conferred on it by the Basic Law in *Organstreit* proceedings is that that right must be conferred on it exclusively for its own exercise or for participation. According to the Federal Constitutional Court's case-law, the status of the *Bundestag* as a constitution-amending legislature does not give it such a right. Otherwise it would simply be permitted, by way of *Organstreit* proceedings, to exercise abstract review of the constitutionality of the opposing party's conduct.

Beyond the constitutional reservation, however, Article 87a.2 of the Basic Law does not give the *Bundestag* any rights of its own. Nothing is to be inferred, either from the wording of that provision or from its drafting history and objective, to indicate a "freedom-safeguarding function", as evidence that a competence-protecting effect in favour of the *Bundestag* should be attributed to it.

Even if it were assumed (a point which could remain undecided in this case), that the measures taken had interfered with fundamental rights, the *Bundestag* would not be able to invoke any such violations of rights of individuals by means of an *Organstreit* before the Federal Constitutional Court. The same would apply in the event that the threshold for deployment of the armed forces, as referred to in Article 87a.2 of the Basic Law, was crossed. Even in those circumstances, the complaint of violations of fundamental rights in constitutional proceedings must remain reserved to the persons concerned.

#### Languages:

German.



# Hungary

## Constitutional Court

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### Important decisions

*Identification:* HUN-1991-C-001

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 08.11.1991 / **e)** 57/1991 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 1991/123 / **h)**.

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions.**

3.17 General Principles – **Weighing of interests.**

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

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

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

*Keywords of the alphabetical index:*

Paternity, right to know / Self-determination, right / Living law, concept.

*Headnotes:*

The Court established the right to self-identification. It annulled procedural rules that prevented a child from challenging the presumption of paternity. With this case, the court introduced the concept of living law into its practice. This means that the Court reviews not the normative text itself but the norm that prevails, becomes effective and is realised by the established practice of ordinary courts or administrative agencies.

The Court – overstepping the boundaries of its legal power – annulled the decision of an ordinary court based on an unconstitutional legal provision.

*Summary:*

According to the Act on the Constitutional Court, the Constitutional Court does not have jurisdiction to review the constitutionality of the judicial application of the law. On the one hand, this means that if a legal rule has several interpretations and even legal practice does not agree upon a single interpretation then the Constitutional Court cannot make a binding interpretive decision, for such a decision would encroach upon the jurisdiction of the Supreme Court. On the other hand, it also means that if a legal rule that has several possible interpretations is applied with one single content in legal practice then only that normative content may serve as the basis for constitutional review. In the event that a legal rule possessing a variety of possible interpretations gains a permanent and uniform interpretation in legal practice with an unconstitutional content, then the unconstitutionality of that content must be determined in proceedings before the Constitutional Court.

In the current case, the Court, for these reasons, examined the constitutionality of the challenged rules in the context of the meaning attributed to them by legal practice.

According to Article 43.5 of the Family Act IV of 1952 a challenge to the presumption of paternity may be brought by a child within one year of attaining majority and by other parties with standing to sue within one year of the notification of birth. Under Article 44.1 of this Act the action must be initiated personally by the party with standing to sue. A totally incapacitated person may be represented by a statutory agent, subject to the approval of the Court of Guardians. The statutory agent of a child under the legal age in a case whose subject matter is the determination of the child's family law rights may not be the father or the mother. The uniform legal practice has always been to interpret Article 44.1 of the Family Act to permit the guardian *ad litem* to have standing to sue – in practice upon the mother's initiative – in the name of the child under the legal age. As a consequence, the child and (in the interest of the child) the mother, who is legally not entitled to initiate the proceedings otherwise, have a nineteen year time frame from the birth of the child to bring suit, in contrast to other parties who only have one year from notification. In the event that the challenge to the presumption of paternity is successful and the court overturns the presumption, the part of the judgment declaring that the presumption of paternity is overturned may not be set aside on a retrial pursuant to Article 293.2 of the Code of Civil Procedure or by an appeal. This therefore means that the child has no legal possibility whatsoever upon reaching the age of majority to establish or clarify his or her family status.



The right to ascertain one's parentage, and to challenge and question the legal presumption relating to it, is a most personal right which falls within the scope of "general right of personality" found in Article 54.1 of the Constitution. According to it, everyone in Hungary has the inherent right to life and human dignity, of which no one can be arbitrarily deprived.

The Constitutional Court held that the irrevocable forfeiture of a child's right to ascertain his or her parentage by conferring upon the statutory agent an unqualified right to sue was unconstitutional.

Two Justices attached a separate opinion to the judgment. According to their opinion, if an unconstitutional interpretation of a legal rule by the courts places them in confrontation with the law, it is the courts which must be compelled by the use of appropriate legal instruments to interpret and apply the statute or some other legal rule in a constitutional manner, and it is not the legislature which is to be "punished" for the unconstitutional interpretation by the courts applying the law by declaring null a regulation which would not be unconstitutional according to a proper interpretation.

The legal rule is the text published in the Official Gazette and not the version corrected and thereby distorted by the practice of its application.

If the Constitutional Court accepts the theory of the "living law", the necessary repercussion of that will be that it can never decide on the basis of a published statutory text but will always be compelled to examine the application of the law in practice, at the very least with a view to determining whether or not such application is "permanent and uniform". The court has neither the competence nor the technical resources for this task.

#### *Languages:*

Hungarian.



**Identification:** HUN-1997-1-003

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 29.04.1997 / **e)** 29/1997 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 37/1997 / **h)**.

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

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.2.1.2 Constitutional Justice – Types of claim – Claim by a public body – **Legislative bodies.**

1.3.2.1 Constitutional Justice – Jurisdiction – Type of review – **Preliminary / ex post facto review.**

1.3.3 Constitutional Justice – Jurisdiction – **Advisory powers.**

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**

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

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

4.5.6.3 Institutions – Legislative bodies – Law-making procedure – **Majority required.**

4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**

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

Bill, preliminary review, limits / Preliminary review, procedure.

#### *Headnotes:*

According to the Standing Orders of Parliament and their interpretation, persons entitled by Article 21.1 of the Act on the Constitutional Court could initiate preliminary review of a bill which had not yet been decided on by the Parliament, without any further condition or agreement.

An Act which is decided on by Parliament without allowing the persons entitled to initiate preliminary review of the bill is unconstitutional and invalid.

The Constitutional Court declared that Parliament created an unconstitutional situation with respect to its own Standing Orders by failing to guarantee the practice of the right to initiate preliminary review of laws before their enactment.

#### *Summary:*

During the ongoing discussion on the draft of the Bill on Incompatibility of Parliamentary Representatives, fifty-two Members of Parliament proposed that the Constitutional Court review the constitutionality of some provisions of the bill. At the same time the petitioners asked the Parliament to postpone the final voting on the contested bill. The Parliament, referring to its Standing Orders, decided in favour of the final voting. The petitioners submitted that it was

unconstitutional as, according to the Standing Orders of Parliament, it is possible to postpone the final vote on the bill by a four-fifths majority of the Members of Parliament. This thus makes it impossible for fifty parliamentary representatives to practise their right to initiate preliminary review of the bill before the Constitutional Court.

The reasoning of the Court recalled a previous decision. In 16 December 1991 (IV. 20) the Constitutional Court presented its opinion on the Court's jurisdiction concerning preliminary review. The Court pointed out that it may make sense to review the constitutionality of a bill which is already disputed during the legislative procedure because preventive norm control may prevent the annulment of an already-promulgated legal rule which has come into force. However, the Hungarian regulation does not restrict the Court's jurisdiction to the final text of the bill, but makes review possible at any stage of the legislative process. The Court declared that examining the constitutionality of some provisions of a bill, the text of which is not definitive, could possibly mean involving the Constitutional Court in the everyday legislative process. The Constitutional Court is not an advisory organ of Parliament. Its task is to judge the result of the legislative work. Therefore, the current regulation of the preventive norm control of bills is incompatible with the principle of separation of powers.

According to Article 33.1 of the Act on the Constitutional Court, upon the motion of fifty Members of Parliament the Constitutional Court shall examine the constitutionality of any contested provision of a bill. In the meantime, Parliament must not vote on the final text of the law. The postponement of the final voting on the contested bill is a constitutional obligation, since this is the only way for the fifty parliamentary representatives to practise their right to initiate preliminary review. Since the decision of the Constitutional Court is binding on everyone, the law enacted by Parliament regardless of this constitutional requirement is void and unconstitutional.

The Constitutional Court declared that Parliament created an unconstitutional situation with respect to the Standing Orders of Parliament by failing to guarantee the possibility for the fifty Members of Parliament to practise the right to initiate preliminary review of laws before their enactment. The Court, therefore, called upon Parliament to meet its legislative obligation by 15 June 1997.

#### *Languages:*

Hungarian.



#### *Identification:* HUN-1998-C-001

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 09.06.1998 / **e)** 23/1998 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 49/1998 / **h)**.

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

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

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

1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation.**

1.6.1 Constitutional Justice – Effects – **Scope.**

1.6.7 Constitutional Justice – Effects – **Influence on State organs.**

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

Legislative task, performance, failure / Case, reopening / Legal remedy, essence.

#### *Headnotes:*

The Constitutional Court established unconstitutionality on the grounds of a lack of rules in the Act on Civil Procedure. In order for a constitutional complaint to be an effective legal remedy, Parliament should determine the legal consequences of a successful complaint to make it possible for petitioners to move for a new trial of their case by ordinary courts.

#### *Summary:*

The petitioner requested the Court to decide whether Parliament had created an unconstitutional situation by failing to perform its legislative tasks in order to make the constitutional complaint an effective legal remedy.

Under Article 43.2 of the Act on the Constitutional Court, the annulment of a legal rule affects neither legal relationships which developed prior to the publication of the decision nor the rights and duties which derived from them. However, Article 43.3 makes it possible for the Constitutional Court to order the revision of any criminal proceedings concluded by a final decision on the basis of an unconstitutional

legal rule, if the convicted person has not yet been relieved of the detrimental consequences, and the annulment of the provision applied in the proceedings would result in a reduction or in the setting aside of the punishment, in the convicted person's release, or in a limitation of his or her responsibility. In addition, Article 43.4 gives the Constitutional Court the discretionary power to annul an unconstitutional provision retroactively or prohibit its application in the special case under consideration if it thinks that this decision would serve the stability of the legal order or an important interest of the applicant.

Under Article 48 of the Constitutional Court Act, a constitutional complaint may be lodged with the Constitutional Court where a constitutional right has been violated due to the application of a statute contrary to the Constitution, provided that all other means of legal remedy have already been exhausted. The constitutional complaint regulated by Article 48 of the Constitutional Court Act is a legal remedy under Article 57.5 of the Constitution. This follows from the fact that such a complaint can be lodged with the Constitutional Court after the exhaustion of other legal remedies. A legal remedy should have legal consequences, which should include the possibility for reopening a case. The constitutional complaint serves as a final legal remedy for those whose constitutional rights have been violated. It is the essence of every legal remedy that it should be able to redress the grievance. Without this possibility, there is no difference between the two competencies of the Constitutional Court: the ex post facto review and the constitutional complaint. In the latter case, the Constitutional Court reviews the constitutionality of the statute applied in the given case and not whether the given decision made by judges or state authorities violates any of the petitioner's constitutional rights. The legal regulation in force was absurd, since it made the constitutional complaint almost superfluous in relation to popular action. Hence, the constitutional complaint is meaningless from the petitioner's point of view if the Constitutional Court cannot remedy the petitioner's grievance.

The Constitutional Court can prohibit the application of the statute judged unconstitutional. The Code on Civil Procedure, however, did not make it possible for petitioners to reopen their case. The constitutional complaint, in its current state, was not an effective legal remedy. Consequently, the Constitutional Court established in its decision an unconstitutional omission in connection with the Civil Procedure Code and it called upon Parliament to regulate the legal consequences of a successful constitutional complaint.

### *Supplementary information:*

The amendment in 1999 of the Act on Civil Procedure made it possible to move for a new trial of a case by ordinary courts provided that, on the basis of the complaint, the Constitutional Court establishes with retroactive effect the unconstitutionality of application in the given case of the contested statute. Thus, constitutional complaints have become an effective legal remedy.

### *Languages:*

Hungarian.



# Ireland

## Supreme Court

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### Important decisions

*Identification:* IRL-1996-2-001

**a)** Ireland / **b)** Supreme Court / **c)** / **d)** 01.03.1996 / **e)** 48/96 / **f)** Hanafin v. Minister for Environment and Others / **g)** *Irish Reports* (Official Gazette) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.3.4.8 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of jurisdictional conflict.**

2.3.7 Sources – Techniques of review – **Literal interpretation.**

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

4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**

4.7.1 Institutions – Judicial bodies – **Jurisdiction.**

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

*Keywords of the alphabetical index:*

High Court, decision, appeal, right.

*Headnotes:*

An appeal lies from the High Court to the Supreme Court in that the legislative provisions in question do not set down in a clear and unambiguous way that such jurisdiction is excepted and regulated.

*Summary:*

The issue which the Supreme Court had to determine was whether or not a right of appeal lay to it from a decision of the Divisional High Court with regard to a petition challenging the validity of the Divorce Referendum.

Under the Constitution, the Supreme Court has, with such exceptions and subject to such regulations as may be prescribed by law, appellate jurisdiction from all decisions of the High Court. The Courts have construed this literally. Accordingly, it has been open to the *Oireachtas* (legislature) to exclude certain decisions of the High Court from the appellate jurisdiction of the Supreme Court. However, in doing this, legislation must be clearly and unambiguously intended to have this effect. It is open to the Supreme Court to interpret the legislative provisions as to whether or not their appellate jurisdiction has been denied.

In the present situation it had not been set down anywhere explicitly in the statute in question that a decision of the High Court was final and unappealable. Enshrined within the statute was a power conferred on the Supreme Court to determine at any stage of the trial, a case stated from the High Court. The Supreme Court found that the existence of such a right neither clearly nor unambiguously barred an appeal.

The Referendum certificate itself was found to be final and incapable of being further questioned in any court when it has been received by the Referendum Returning Officer from the High Court. The Supreme Court found that the order of the High Court could not be construed as being final in the sense of being unappealable.

*Languages:*

English.



# Israel

## Supreme Court

### Important decisions

*Identification:* ISR-2001-1-010

**a)** Israel / **b)** Supreme Court / **c)** High Court of Justice / **d)** 03.07.2001 / **e)** H.C. 9070/00 / **f)** Livnat v. Rubinstein / **g)** *Piskei Din Shel Beit Hamishpat Ha'Elion L'Yisrael* (Official Report), 55(4), 800 / **h)**.

*Keywords of the systematic thesaurus:*

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

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

3.3 General Principles – **Democracy.**

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

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

4.5.4 Institutions – Legislative bodies – **Organisation.**

4.9.7.2 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Registration of parties and candidates.**

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

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

*Keywords of the alphabetical index:*

Parliament, committee, hearing / Parliament, action, internal / Judicial restraint.

*Headnotes:*

In a constitutional democracy, parliamentary actions are subject to the rule of law, including judicial review. Courts must be cautious in exercising review over internal parliamentary actions and can review internal parliamentary actions only if they cause actual harm to the fabric of democratic life.

Postponing a committee hearing on elections, which had the effect of making it difficult for a political candidate to make plans to run for office, did not constitute a harm to the fabric of democratic life.

*Summary:*

A member of parliament (*Knesset*) petitioned the Supreme Court, acting as the High Court of Justice, to order the chairman of parliament's Constitution, Law and Justice Committee to accelerate the date for committee hearings over different bills calling for new governmental elections. The petitioner claimed that a delay in the hearings prevented her from competing for her party's candidacy for prime minister. The petitioner would only run for prime minister if parliament approved a certain bill that had the effect of barring a rival's candidacy. The petitioner claimed that the delay in holding hearings undermined her right to run for office and the public's right to vote.

The Court ruled that in a constitutional democracy, parliamentary actions are subject to the rule of law, including judicial review. However, the status of parliament as the elected representative of the people requires the Court to apply caution and restraint in exercising judicial review of internal parliamentary actions. The scope of judicial review over parliamentary action depends on the nature of the action; courts exercise broader judicial review over final acts of parliament, like statutes, than they do over internal parliamentary activities, like the schedule for committee hearings. Internal parliamentary activities are subject to judicial review only in exceptional cases in which they cause actual harm to the fabric of democratic life.

The Court held that postponing the committee hearing would not harm the fabric of democratic life or the structural foundations of a democratic regime. The harm to the petitioner lay in the lack of coordination between the parliamentary hearings and the petitioner's party's internal elections. The Court suggested that the solution, in this case, is not judicial intervention but rather a change in the internal timetable of the petitioner's party. The Court dismissed the petition.

*Languages:*

Hebrew, English (translation by the Court).



# Italy

## Constitutional Court

### Important decisions

*Identification:* ITA-1995-2-009

**a)** Italy / **b)** Constitutional Court / **c)** / **d)** 10.05.1995 / **e)** 161/1995 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 20, 20.05.1995 / **h)** CODICES (Italian).

*Keywords of the systematic thesaurus:*

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

4.9 Institutions – **Elections and instruments of direct democracy.**

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

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

5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections.**

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

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

*Keywords of the alphabetical index:*

Referendum, campaign / Advertising.

*Headnotes:*

Although an appeal relating to disputes between public authorities and calling for the examination of rules contained in a law is generally inadmissible, the same cannot be said for an appeal concerning rules contained in a legislative decree. This is due to the provisional character of the latter, which makes constitutional review by way of an interlocutory application more or less impossible if the decree has not become a law, whereas the legislative decree may have had irreversible effects, for which it should be possible to hold the approving government liable.

It is also the responsibility of the Court to review the legitimacy of legislative decrees, their necessity and urgency, by verifying the existence of essential grounds for the measure.

No obstacle or limit on the scope of legislative decrees relating to referendums can be inferred from the Constitution; at all events, even if one wished to give equal recognition to referendums and elections – for which limits may, on the contrary, be inferred from the constitutional rules – the disputed legislative decree was intended to settle a matter (namely, the arrangements for the referendum campaign) that must be distinguished from the actual referendum campaign itself which concerns the vote and the referendum procedure.

There is no doubt that there are differences between referendum campaigns and electoral campaigns, but these do not oblige the legislator to draw up different rules in sectors with common characteristics.

As the legislative decree in question is designed to regulate the ways in which fundamental political rights are exercised, the limits to which the appellants have drawn attention must be subjected to rigorous examination, especially as the rules concerned were approved by a provisional measure (viz a legislative decree).

In electoral campaigns the existence of a time-limit on advertising can be justified by the desire to favour propaganda so as to protect voters from short, peremptory messages. In referendum campaigns messages tend, on the contrary and in view of the dual nature of the question, to be simplified, which means that there is no longer a clear distinction between propaganda and advertising. Accordingly, the limits imposed on advertising in referendum campaigns must be considered to be particularly serious and unreasonable. This reasoning applies above all to those provisions of the disputed decree which prohibit advertising in periods when there is a succession of elections and referendums, particularly as this prohibition can lead, as in the instant case, to the practical elimination of advertising as such. Consequently, these provisions must be set aside on the grounds that they are unreasonable and excessive and therefore limit the powers which the Constitution attributes to the appellants (the proponents of the referendum).

*Summary:*

The proponents of certain referendums (whom the Court has long recognised as having the status of public authorities for the purposes of the admissibility of appeals on disputes to which they are party) have

raised the problem of the attribution of powers concerning the rules contained in the legislative decree of 20 March 1995 no. 83 “Urgent measures for parity of access to information channels during electoral and referendum campaigns”. The present challenge to both the government and the controller for broadcasting and publishing concerned a measure introduced on 22 March 1993 which the Court described in one of its orders as not having the effect of restricting the powers assigned to the appellants. It thus declared the appeal inadmissible.

As regards the admissibility of appeals relating to conflicts between authorities concerning legislative rules, see the first principle mentioned in the “Headnotes”.

In substance, the appellants challenged various rules contained in the legislative decree approved by the government to regulate access to the media during electoral and referendum campaigns. The particular aspects disputed were the extension of the rules laid down for electoral campaigns to referendum campaigns and the prohibition on advertising on the assumption that there would be a succession of electoral and referendum campaigns (which turned out to be the case). It was argued that such rules would prevent those in favour of or against the referendum proposals from expressing their points of view.

#### *Supplementary information:*

This decision by the Court partially allowing the appeal by some referendum committees was widely accepted by both the public and politicians, in particular with regard to the resumption of advertising for the referendum requiring that the number of private national television channels that could be controlled by the same operator (specifically the Fininvest group owned by Mr Berlusconi) be reduced from three to one.

#### *Cross-References:*

As regards the requirement that the number of private national television channels controlled by one and the same operator be reduced to a maximum of two, in accordance with the existing number of channels, see Court Judgment no. 420/1994 of 05.12.1994 (*Bulletin* 1994/3 [ITA-1994-3-018]).

As regards the most negative aspect of the practice of renewing non-converted legislative decrees, the Court also cited Judgment no. 302/1988. As regards the possibility for the Court to review the existence of the need and urgency – as fundamental requirements in terms of their constitutionality – of legislative decrees, see its recent Judgment no. 29/1995.

With regard to the inadmissibility of appeals on disputes between public authorities with regard to legislative acts, the Advocate-General and the Constitutional Court also referred to Judgment no. 400/1989.

#### *Languages:*

Italian.



#### *Identification:* ITA-1997-3-012

**a)** Italy / **b)** Constitutional Court / **c)** / **d)** 30.12.1997 / **e)** 449/1997 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 1, 07.01.1998 / **h)** CODICES (Italian).

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

1.3.4.2 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between State authorities.**  
 4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**  
 4.5.9 Institutions – Legislative bodies – **Liability.**  
 4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies.**  
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

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

Deputy, immunity / Slander / Time limits.

#### *Headnotes:*

The specific procedure regulating conflicts of jurisdiction between state authorities stipulates two distinct phases which are open to the party initiating the proceedings. The first concerns the Constitutional Court’s preliminary and summary decision on the admissibility of the appeal: at this stage the Court issues an order, based on a *prima facie* assessment, stating whether the appeal is liable to lead to a conflict between the bodies that are competent to state definitively the wishes of their respective authorities, based on the definition of their respective spheres of competence as determined by the Constitution. The second stage, in which the Court is asked for a decision on the merits as well as the final

judgment on the admissibility of the appeal, is also under the charge of the initiating party, who is required to notify the opposing party within a specified time of the appeal as well as of the order declaring it admissible, and to lodge these documents, with proof of notification, with the Court's registry. If the requirement to lodge them with the registry within the specified time limit is not met, the appeal is declared out of time: as this kind of appeal can be withdrawn, lodgement constitutes a decisive moment in the proceedings.

### Summary:

The Milan Appeal Court raised a conflict of jurisdiction between state authorities after the Chamber of Deputies, referring to the criminal case against M.P. Umberto Bossi (convicted in the first instance by the Milan Court of aggravated slander against Ferdinando Dalla Chiesa), judged that "the events on which the proceedings are based, namely the expression of opinions by a member of parliament while exercising his duties", were unchallengeable under Article 68.1 of the Constitution. The Court of Appeal judged that the action attributed to Mr Bossi did not come within the sphere of public activities linked to the M.P.'s duties, according to the wording in legislative Decree no. 116 of 12 March 1996 (Article 2), which was in force at the time of its decision (this legislative decree has since lapsed as it was not converted into law), and considered that Article 68.1 of the Constitution was not applicable to all political activities of MPs, even those which come under the freedom to express ideas secured by Article 21 of the Constitution, which does not exclude liability vis-à-vis third parties. Even if pronounced at a Milan election meeting during the mayoral election campaign, the expressions deemed slanderous by the regional court judge could not be considered as protected by immunity, but should on the contrary be considered as though spoken in the course of an ordinary political activity unrelated to the exercise of the functions for which the Constitution provides immunity in respect of opinions expressed. In accordance with Order no. 339 of 1996 declaring it admissible (see Headnotes), proper notice of the appeal was given to the Chamber of Deputies by the Milan Appeal Court on 31 October 1996. The applicant took care to send the appeal and proof of notification by post, for lodging with the Court's registry, where it arrived on 21 November 1996. The appeal was declared inadmissible, as it had been lodged after the legal time limit of 20 days. Under Articles 25.2 and 37 of Act no. 87 of 11 March 1953, it is argued that in the second phase in cases of conflicts of jurisdiction, the appeal must be lodged, with proof of notification, within at most twenty days of the previous notification. In addition, from the

reference in Article 22 of the above-mentioned Act no. 87 of 1953 to the provisions in the rules of procedure for cases before the State Council, it is inferred that the time limits and methods stipulated in that article for notifying and lodging an appeal must be observed, failing which the appeal is out of time. In the absence of a general or special rule applicable to this procedure, entrusting the document to the postal authorities cannot be considered as equivalent to immediate lodging of the appeal. Consequently, the Court decided that it could not proceed to the second stage of the judgment.

### Languages:

Italian.



### Identification: ITA-2000-1-001

a) Italy / b) Constitutional Court / c) / d) 11.01.2000 / e) 10/2000 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 4, 26.01.2000 / h) CODICES (Italian).

### Keywords of the systematic thesaurus:

1.3.4.2 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between State authorities.**  
 4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**  
 4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies.**  
 4.7.1.3 Institutions – Judicial bodies – Jurisdiction – **Conflicts of jurisdiction.**  
 5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation.**

### Keywords of the alphabetical index:

Parliamentary duty / Immunity, scope / Defamation.

### Headnotes:

In cases concerning conflicts of powers between state authorities resulting from opposing assessments – made on the basis of Article 68.1 of the Constitution by (a) one of the chambers of the Italian parliament (Senate or Chamber of Deputies) and (b) the judicial



authorities – as to the non-reviewability by the courts of opinions expressed by members of the chambers, it is not sufficient for the Constitutional Court merely to verify the validity or the consistency of the grounds – if explicitly stated – on which the relevant chamber based its view that no proceedings could be brought against one of its members for an opinion he or she had expressed, as if the Court's judgment were simply a review procedure (similar to that of an administrative court concerning an action alleged to constitute an abuse of authority) of a discretionary decision by the political assembly. Since, as a third party to the conflict, the Court is called upon to guarantee both the independence of the member's chamber and the powers of the judicial authorities, it cannot review the merits, from a constitutional standpoint, of a decision as to non-reviewability taken by one of the two chambers without verifying – and what the Court itself has said in the past about the nature of its review requires some degree of clarification and rectification in this regard – whether in the case in question there were genuine grounds for non-reviewability. In other words, it must assess whether the opinion at issue was actually expressed in the exercise of the member's parliamentary duties, basing this assessment on the notion of the exercise of such duties as it may be inferred from the Constitution.

Opinions expressed during the work of the member's chamber and its different bodies, in the exercise of one of the chamber's functions or resulting from actions, including individual ones, carried out in the person's capacity as a member of the assembly, are opinions expressed in the exercise of parliamentary duties within the meaning of Article 68.1 of the Constitution. In contrast, political activity performed by a member outside this framework cannot in itself be considered as being part of parliamentary duties. Opinions expressed by a member during political debate outside the assembly's specific field of competence and activity represent the exercise of the freedom of expression to which everyone is entitled. It must therefore be concluded (notwithstanding the Court's previous case-law on the matter) that, for non-reviewability to be established, the functional relationship between the statements made and parliamentary activity cannot simply be a thematic link; the statements in question must be shown to be an expression of parliamentary activity.

Once it has been established, on the basis of Article 68.1 of the Constitution, that the statements made by a member of the Chamber of Deputies or the Senate – for which he or she is called to account before the judicial authorities – can be considered to be covered by parliamentary immunity only because they reflect opinions expressed in the parliament, it

cannot however be held that this immunity applies solely to the one occasion on which the opinion was expressed in that context, and that such immunity does not apply if the opinion is repeated outside parliament. The publicity normally surrounding parliamentary activities presupposes that immunity extends to all other activities and occasions where the opinion is repeated outside parliament, provided, of course, that the substance of the opinion is by and large the same, even though the words used may be different. In contrast, the mere fact that the statement considered harmful deals with the same topic as the opinions expressed by the member of the Chamber of Deputies or the Senate is not enough to warrant extending the immunity covering the latter to the former.

### *Summary:*

The Rome court had applied to the Constitutional Court to settle a case of conflict of powers arising from a resolution of the Chamber of Deputies stating that the facts in respect of which the requesting court was conducting proceedings (criminal libel via the press) against a member of the Chamber of Deputies, following statements made by the latter to a press agency, concerned opinions expressed by the member of parliament in the exercise of his parliamentary duties and that they were therefore covered by Article 68.1 of the Constitution and could not be subject to review.

The Court allowed the application, making a distinction between opinions expressed in the exercise of parliamentary duties, which could not be subject to review, and opinions expressed in the exercise of political activity, which were not covered by this prerogative (see "*Headnotes*"), and stated that it was not for the chamber to define the statements made by one of its members to the press as being non-reviewable insofar as the subject matter of those statements did not correspond substantially to that of the questions presented by the member concerned to the government. The Court therefore annulled the resolution of the chamber insofar as these statements were considered by the latter to be non-reviewable on the basis of Article 68.1 of the Constitution.

### *Cross-References:*

- The judgment is a reversal of the case-law as established in Judgment no. 265 of 1997.
- See also subsequent Judgments nos. 11 and 56 of 2000 which apply the principles set out in the decision detailed above.

*Languages:*

Italian.

*Identification:* ITA-2002-3-004

**a)** Italy / **b)** Constitutional Court / **c)** / **d)** 24.10.2002 / **e)** 455/2002 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 20.11.2002 / **h)** CODICES (Italian).

*Keywords of the systematic thesaurus:*

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

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

4.4.3.3 Institutions – Head of State – Powers – **Relations with judicial bodies.**

4.4.6.1.1.1 Institutions – Head of State – Status – Liability – Legal liability – **Immunity.**

*Keywords of the alphabetical index:*

Head of State, declarations, liability / President, declaration, spontaneous.

*Headnotes:*

The dispute between the former national President and the judicial authorities over the President's actions to uphold the presidential prerogatives in respect of declarations which he made while in office and on which successive rulings were made at the expiry thereof, has a constitutional character in that it raises the issue of determining the respective functions, set forth in the Constitution, of the national President and of the judiciary.

The Court of Cassation, as a State power, has the capacity to hear the proceedings brought in order to rule on this dispute.

*Summary:*

The former President of the Republic, Mr Francesco Cossiga, brought before the Constitutional Court a dispute over the distribution of powers between State authorities, requesting the setting aside two Court of

Cassation judgments delivered in two civil actions originating in claims for damages brought against him by Senators Flamigni and Onorato. The claimants asserted that certain declarations by Mr Cossiga while in presidential office had been insulting and defamatory to them, and had brought judicial proceedings before the Rome District Court, which found against Mr Cossiga. The judgments were subsequently reviewed on appeal and set aside by the Court of Cassation, with referral back to the courts below.

In the two relevant decisions, the Court of Cassation made the following statements regarding the characteristics of the office and status of the President of the Republic in the Italian institutional system:

a. the President of the Republic, aside from the functions set out in Article 87 of the Constitution, has a power of “spontaneous declaration” (*esternazione*), that is to make statements related to his office;

b. the freedom from liability (whether criminal, civil or administrative) enjoyed by the President of the Republic for acts carried out in the discharge of his office (apart from acts of high treason and attack on the Constitution) prescribed in Article 90 of the Constitution, can only be relied on where an operative link exists between the alleged offence and the President's powers: spontaneous declaration is thus authorised and does not carry any criminal, civil or administrative liability if strictly associated with the presidential functions (it is consequently an immunity *ratione materiae*, not *ratione personae*);

c. it is for the ordinary court to determine the existence of the “operative link”, subject to the right of the President of the Republic, where he considers himself to have been wrongfully accused, to bring the dispute with the judiciary before the Constitutional Court.

Mr Cossiga considered to have the necessary capacity, as a “State power”, to bring before the Constitutional Court a dispute on the basis of Article 134 of the Constitution since, though no longer President of the Republic, he had been tried while in office for acts committed during the time he had been office. As he further pointed out, former Presidents are appointed life Senators and therefore retain a position of prime importance from an institutional standpoint. Regarding the subject-matter of the dispute, Mr Cossiga considered that there was matter for litigation: the judiciary had exceeded its powers by prosecuting him for his “spontaneous declarations” which, being strictly associated with his official functions, could not carry any liability and must be covered by the immunity granted to the Head of State by Article 90 of the Constitution.

The applicant argued that the President of the Republic must be able to “express spontaneously” his point of view wherever he considered this vital to the performance of his functions, first and foremost that of ensuring fulfilment of the constitutional principles, without incurring legal prosecution for doing so. It is moreover increasingly difficult today, since “spontaneous declarations” are usually in oral form, to distinguish between statements made personally and declarations pertaining to one’s office. In the case of the President of the Republic, any attempt to distinguish between the public and the private sphere is futile, as the President is vested with that office permanently and not at set dates and times.

In the instant case, the statements made by Mr Cossiga about Senators Flamigni and Onorato were not of a private nature but constituted reactions by the holder of the Republic’s highest office to the attacks made upon the Republic in areas of great institutional importance, such as Italy’s position in the system of international relations at the time of the Gulf War and Mr Cossiga’s links with freemasonry. In these instances, the guarantee set out in Article 90 of the Constitution ought to cover the President’s statements, as does Article 68 of the Constitution for parliamentarians in the exercise of their mandate.

In the applicant’s contention, presidential immunity shields the holder of this office from any court proceedings that might interfere with the office-bearer’s freedom of action or subjugate him to another State power such as the judicial authority. Liability in ordinary law, which continues to apply (and is of a lesser degree, having regard to the difficulty of singling out from the President’s acts as a whole those completely unconnected with his office) may be put forward after expiry of the term of office.

The Constitutional Court was thus called upon to rule on the admissibility of the case, determining the presence of the subjective and objective conditions that must be fulfilled for admissibility. The Court held that in the instant case both types of condition were met and concluded that as the question of the admissibility of such a case had arisen for the first time, it was desirable to allow the proceedings on the merits of the case to take their course so that the question of admissibility could be re-discussed once the *inter partes* proceedings have begun.

#### *Languages:*

Italian.



#### *Identification:* ITA-2004-2-003

**a)** Italy / **b)** Constitutional Court / **c)** / **d)** 24.05.2004 / **e)** 154/2004 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 03.06.2004 / **h)**.

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

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

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

4.4.3.3 Institutions – Head of State – Powers – **Relations with judicial bodies.**

4.4.6.1.1.1 Institutions – Head of State – Status – Liability – Legal liability – **Immunity.**

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:*

Head of State, declaration, liability / President, spontaneous declaration / Authority, conflict, parties to proceedings.

#### *Headnotes:*

The ordinary courts at each successive level of jurisdiction up to the Court of Cassation has full competence to determine whether liability of the President of the Republic arises in the instant case or whether it must be excluded because the President’s act was performed “in the discharge of his office”, as provided by Article 90 of the Constitution.

#### *Summary:*

Although as a general rule the sole parties to proceedings concerning conflict of authority are the State powers competent to raise a conflict of authority before the Constitutional Court and to defend the proceedings (in this instance the President of the Republic and the Court of Cassation), in the present case the conflict concerned the assertion (or denial) of the right to take legal action to redress the consequences of an act of the President of the Republic in respect of which the applicability or inapplicability of the immunity prescribed in Article 90 of the Constitution had to be determined. Assuming that those who were parties to the proceedings on the

issue of whether the President of the Republic could be called to account in civil law for his statements were excluded from the constitutional proceedings which might result in them being excluded from any court action whatsoever (if the statements of the President of the Republic were found to be covered by immunity), then their right to a defence was sure to be prejudiced, contrary to Articles 24 and 111 of the Constitution and Article 6 ECHR. In this connection the Court referred to the judgments of 30 January 2003, *Cordova v. Italy I*, *Reports of Judgments and Decisions* 2003-I, Application no. 40877/98, and *Cordova v. Italy II*, *Reports of Judgments and Decisions* 2003-I (extracts), Application no. 45649/99 of the European Court of Human Rights.

While the right of the Court of Cassation to defend legal proceedings could not be disputed, the right to bring an application must be recognised not only to the present incumbent of the office of President of the Republic but exceptionally also to a former president (in this case, Mr Cossiga), even though he had ceased to be President at the time when the acts which occasioned the conflict were adopted (Mr Cossiga's term of office ended on 28 April 1992 and the judgments of the Court of Cassation are dated 27 June 2000). The conflict (of a constitutional nature) over the President's prerogatives and a possible breach of them had in fact arisen as a result of a dispute over the application to a specific case of a constitutional rule in effect excluding or limiting the liability of a natural person (Mr Cossiga) holding office under the Constitution for acts which he had performed. The person whose liability was substantively at issue in the proceedings held that office at the time when the act in respect of which immunity was claimed had occurred.

It would indeed be unreasonable to rule out the possibility of raising a conflict on the sole ground that the liability of the person who formerly held office as President of the Republic was only brought into question after he had completed his term of office. The subsequent office-bearer would indeed be able bring considerations of political expediency to bear on any legal action for asserting the immunity of the President of the Republic.

As to the merits, Mr Cossiga's appeal was deemed partly unfounded and partly inadmissible. Contrary to Mr Cossiga's assertions, the Constitutional Court held that the Court of Cassation had not encroached on the prerogatives of the Presidency and found as set out in the headnotes above. The Constitutional Court also dismissed the argument that the Court of Cassation should have invoked conflict of powers forthwith instead of referring the case to the ordinary courts. The conflict of powers procedure would

always be available later to remedy any breaches of the constitutional rules that might have been committed by the courts and interfered with the prerogatives of the Head of State. The Court also rejected the applicant's contention that, regarding acts in the category of "spontaneous declarations" by the President of the Republic, it was impossible to distinguish those made "in the discharge of the presidential office" from the rest. The Court, while conceding the inherent practical difficulties, took the contrary view that since this distinction was drawn by the letter of the Constitution, it must be maintained.

The applicant submitted that the declarations for which he had been held liable were bound by a "functional nexus" (*nesso funzionale*) to the presidential duties, so that they were covered by immunity under Article 90 of the Constitution. Here the Constitutional Court observed that the Court of Cassation, in setting aside the two Court of Appeal decisions against Mr Cossiga, had merely fixed the "points of law" to be upheld by the court of referral. Thus any censure was untimely at that stage and moreover inadmissible, although it might if appropriate be raised against the decisions subsequently adopted by the courts. Likewise, the applicant's arguments that his statements had never exceeded the bounds of legitimate exercise of the right of political criticism could not be admitted in the present judgment but would be assessed by the court of referral and any courts hearing the case.

#### *Supplementary information:*

Whereas in Order no. 455 of 2002 [ITA-2002-3-004] the Constitutional Court made an initial positive determination as to the admissibility of the application, in the present judgment it gave a final ruling on admissibility after an adversarial hearing, and on the merits of the case.

#### *Cross-References:*

For the sequence of material events, see the summary of Order no. 455 of 2002 [ITA-2002-3-004].

The application was declared admissible by Order no. 455 of 2002 [ITA-2002-3-004].

The Court declared admissible the applications for joinder to the constitutional proceedings lodged by the parties (MM Flamigni and Onorato) who had filed the damages suits against Mr Cossiga (see summary of decision [ITA-2002-3-004]) in which the present application to the Constitutional Court originated.

*Languages:*

Italian.

*Identification:* ITA-2006-2-002

**a)** Italy / **b)** Constitutional Court / **c)** / **d)** 03.05.2006 / **e)** 200/2006 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 24.05.2006 / **h)**.

*Keywords of the systematic thesaurus:*

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

4.4.3.2 Institutions – Head of State – Powers – **Relations with the executive bodies.**

4.4.3.3 Institutions – Head of State – Powers – **Relations with judicial bodies.**

4.6.2 Institutions – Executive bodies – **Powers.**

*Keywords of the alphabetical index:*

President, pardon / Ministry of Justice, pardon, counter-signature.

*Headnotes:*

The judgment solves the conflict of allocation of power raised by the President of the Republic against the Minister of Justice because the latter refused to implement the President's decision to grant pardon to Ovidio Bompressi.

In particular, the claim specified that the Minister of Justice refused to draw up the pardon proposal and the relevant granting decree, although the President had expressed his own wish to grant pardon: hence the violation of Articles 87 and 89 of the Constitution, since the refusal of the Minister implies, *de facto*, the claiming of a power assigned to the Head of State by the Constitution.

The Court declared the claim founded, ruling that the Minister of Justice had no right to hinder the procedure aimed at granting pardon to Ovidio Bompressi.

*Summary:*

After recalling the origin and historic evolution of the legal institute in question, the Court judgment clarified the type of relation existing between the role of the Head of State, entitled to grant pardon, and the Minister of Justice, who is responsible for the collection of all the necessary elements to make a decision. If the aim of the pardon is to mitigate or to annul punishment for exceptional humanitarian reasons, it is clear that, in this case, it is necessary to recognise the decision-making power of the Head of State as a *super partes* organ, representing national unity, and not belonging to the political and government circuit.

This conclusion also meets the additional need to prevent the evaluation of the prerequisites to adopt a measure capable of annulling a criminal sentence from being influenced by the decisions of organs belonging to the executive power. In this regard, the Court recalled its previous judgments, in particular Judgment no. 274 of 1990, showing a consolidated orientation that – with the implicit reference to the principle of separation of powers – excludes any participation of members of the Government during the phase of enforcement of criminal sentences.

Finally, the Court specifies the tasks of the Minister in relation to the activity for the adoption of the pardon.

The pardon decree is the result of a procedure started by the convicted person who asks for a pardon (or by a close relative, the cohabitant, the guardian, the lawyer of the convicted person). The petition for pardon is addressed to the President and submitted to the Minister. Pardon can also be granted where there is no petition or proposal and, in any case, the initiative can be taken directly by the President of the Republic.

The start of the procedure is followed by the procedural activity carried out by the Ministry. After collecting all the necessary elements, the Minister decides whether to present a grounded pardon proposal to the President or to dismiss the case: in the first instance, if the Head of State thinks that humanitarian reasons exist to grant the pardon, the relevant decree shall be countersigned by the Minister of Justice (whose countersignature has a purely formal value); in the second instance, if the Head of State, after being informed of the decision to dismiss the case, asks for the continuation of the procedure, the Minister has no power to hinder it.

When the initiative is taken by the President, he can ask the Minister to start the procedure and the Minister is obliged to start and complete it, presenting

the relevant proposal: any refusal by the Minister, in fact, would in substance bar/preclude the exercise of the power to grant pardon, thus impairing a capacity – as to the final decision – granted by the Constitution to the Head of State.

Therefore, when the President asks for the continuation of the procedure or directly takes the initiative, the Minister cannot refuse to carry out that task or to complete it. He can only inform the Head of State of the legitimate reasons that, in his opinion, prejudice the granting of the pardon. Otherwise, he would be recognised as having an inhibitory power – a sort of veto power – with respect to the conclusion of the procedure to grant pardon. However, if the President of the Republic does not agree with the evaluation of the Minister, he may directly issue the pardon decree setting out the reasons for which the pardon must be granted, notwithstanding the Minister's dissent.

Consequently, when the President is in favour of granting a pardon, the countersignature of the decree by the Minister of Justice is the act by which the Minister merely testifies the completeness and regularity of the procedure.

Judge Rapporteur: Judge Alfonso Quaranta.

#### *Languages:*

Italian.



#### *Identification:* ITA-2008-3-003

**a)** Italy / **b)** Constitutional Court / **c)** / **d)** 08.10.2008 / **e)** 334/2008 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 15.10.2008 / **h)** CODICES (Italian).

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

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

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions.**

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

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

4.7.1 Institutions – Judicial bodies – **Jurisdiction.**

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

Vegetative coma / Euthanasia / Human life, intrinsic value.

#### *Headnotes:*

The Chamber of Deputies and the Senate lodged a complaint of “conflict of the attribution of functions between state powers”, within the meaning of Article 134.2 of the Constitution, against the Court of Cassation and the Court of Appeal of Milan, claiming that these authorities of the judiciary had “exercised functions vested in the legislature” and, at the very least, interfered with Parliament's prerogatives by their action.

In their judgments, the courts in question determined the conditions rendering it permissible to interrupt the artificial feeding and hydration treatment to which a patient in a vegetative coma is subjected.

Considering that judicial power had been exercised with the aim of modifying the legislative system in force and had thus encroached on the purview of the legislature, the Chamber of Deputies and the Senate appealed to the Constitutional Court.

#### *Summary:*

Before all else, the Court needed to ascertain the presence of the “subjective and objective conditions” for a “conflict of the attribution of functions between state powers” to exist. This examination would determine the admissibility of the appeals by the two houses of parliament. In the case before it, the “subjective and objective conditions” determining a “conflict of the attribution of powers” were present: it was clear that both the Chamber of Deputies and the Senate possessed legitimacy to defend the powers conferred on them by the Constitution; likewise, the Court of Cassation and the Court of Appeal of Milan possess legitimacy to oppose appeals as competent bodies so as to express in definitive terms, in the context of the proceedings held before them, the will of the judiciary.

In the judgment challenged by the two appeals alleging conflict of the attribution of functions between state powers which was adopted under a “volontaria giurisdizione” (non-contentious) procedure, the Court of Cassation stated a principle of law which binds the court of referral (here, the Court of Appeal of Milan) and which that court had applied in the case on which it was to rule. It had thus authorised, on predetermined conditions and terms, the interruption of the artificial feeding and hydration of Eluana Englaro, a woman aged 37 years in a coma since 1992.

The Constitutional Court recalled the requirement of its case-law that, for an appeal against an act of the judiciary to be declared admissible, there must be contestation of the judicial nature of the act in question or complaint that it oversteps the limits imposed on the judicial function in order to safeguard the functions of the other state powers.

As the Court had repeatedly pointed out in this regard, contestation of the legal arguments employed in a court's decision and suggestion of a different solution to the legal question submitted to it does not suffice to substantiate a "conflict of the attribution of functions between state powers", for such conflict cannot be transformed into a further means of challenging a judicial decision.

The case disclosed no indications that, through the decisions which it had adopted (which displayed all the characteristics of judicial acts and were thus effective only in respect of the case to be determined), the ordinary court had performed a legislative function and consequently impinged on the preserve of parliament, the latter at all events remaining the holder of legislative power.

The Court noted that the two houses of parliament, while stating that they did not desire a formal investigation of the *errores in iudicando* allegedly committed by the two courts (Court of Appeal of Milan and Court of Cassation), nevertheless raised numerous criticisms of the way in which the Court of Cassation selected and used, or interpreted, the relevant statutory material.

In conclusion, the Court recalled that at any time parliament could adopt provisions governing "end-of-life" situations while trying to strike a balance between the various constitutional principles involved.

Finally, the Court declared inadmissible the appeals of the Chamber of Deputies and Senate on the ground that the "objective conditions" of a "conflict of powers" were absent.

Supplementary information:

The case of Eluana Englaro unleashed a veritable political battle in Italy. Following the judgment of the Court of Appeal of Milan, Beppino Englaro, father and guardian of Eluana Englaro, moved his daughter to a private clinic in Udine (Region of Friuli) in order to have all artificial feeding and hydration suspended. On 6 February 2009 Mr Berlusconi's Government, seeking to prevent what it considered an outright act of euthanasia, took the decision to adopt an emergency decree law prohibiting the termination of the patient's feeding. The President of the Republic

informed the government, convened as the Council of Ministers, of his refusal to sign such a decree which he viewed as contrary to the principle of separation of powers and to the principle that a final judgment has binding effect. The government therefore converted the decree law into a bill which it forthwith transmitted to the Senate upon authorisation by the Head of State. On 9 February the Senate began debating the bill, which would have compelled the physicians in attendance to resume Eluana Englaro's feeding had she not died the same evening after cardiac arrest due to dehydration, as the autopsy established. The bill on "end-of-life situations" is currently before the Senate.

*Languages:*

Italian.



# Latvia

## Constitutional Court

### Important decisions

*Identification:* LAT-2007-3-006

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 21.12.2007 / **e)** 2007-12-03 / **f)** On the compliance of the Part of Adazi Land Use Plan Providing for Construction in the Flooding Area of The Big Baltezers Lake with Article 115 of the Constitution of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), no. 207(3783), 28.12.2007 / **h)** CODICES (Latvian, English).

*Keywords of the systematic thesaurus:*

1.3.5.8 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by federal or regional entities.**

1.6.1 Constitutional Justice – Effects – **Scope.**

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

1.6.6.1 Constitutional Justice – Effects – Execution – **Body responsible for supervising execution.**

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

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

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

*Keywords of the alphabetical index:*

Land-use plan / Environment, protected zone / Economy, procedural, principle / Environment, protection.

*Headnotes:*

Public institutions are under a duty to create and secure an effective system of environmental protection. This implies a duty to take the protection of the environment into account at the stage of drafting and adopting the objectives of a policy or legislation, and when the time the adopted laws are applied or the political objectives are implemented.

The right to live in a benevolent environment is of direct and immediate application. This means that, under Article 115 of the Constitution, a person has

the right to apply to the court about action or inactivity by a body governed by public law, which has violated the rights and legitimate interests of this person.

Land use planning is one of the measures for achieving the aims of the state environmental policy, including the sector connected with the environment. Article 115 of the Constitution bestows extensive rights upon society in this regard.

The margin of appreciation in the sector of territorial planning is not unlimited. General legal principles, principles for state administration and principles of territorial planning shall serve as guidelines for accurate and adequate use of the margin of appreciation in this sector.

The territory of the validity or applicability of the respective law or regulation becomes highly significant in cases when the Constitutional Court recognises any provision as unconstitutional. If it is a provision of a law or a Cabinet regulation, it becomes invalid across the entire State territory, unless the Court has established otherwise. If the Court has recognised any provision of regulations issued by a local government as being non-compliant with a legal norm of a higher legal force, it does not automatically lead to the invalidity of provisions of the same content of regulations issued by another local government body.

If the Constitutional Court were to repeatedly assess a regulation that had already been pronounced non-compliant with a norm of higher force in another case but was still valid as it was included in regulations issued by other local government authorities, this would be in conflict with the procedural economy principle.

*Summary:*

I. The applicants in this constitutional complaint contended that the Land use plan providing for construction in the flooding area was in conflict with Article 115 of the Constitution. Under this article, the State shall protect the universal right to live in a benevolent environment by providing information about environmental conditions and by promoting the preservation and improvement of the environment. They suggested that the plan was out of line with Section 37.1.4 of the Protective Belt Law, under which local authorities are prevented from allowing construction in territories that are recognised as flooding areas.



II. The Constitutional Court, in assessing the compliance of the contested provision with the Constitution, considered other legal provisions relating to environmental rights. The Constitutional Court reiterated that according to the interpretation of Section 7.2.2 and 37.1.4 of the Protective Belt Law provided by the court in previous judgments, one cannot allow areas with probability of flooding at least once in a hundred years to be designated as territories for construction. This interpretation plays a great role in the adjudication of the case.

In the judgment, the conclusion was reached that raising the ground level in areas with the probability of flooding at least once in a hundred years in order to carry out construction is considered as construction in the sense of the Construction Law. Such activities are *expressis verbis* prohibited by Section 37.1.4 of the Protective Belt Law.

The Constitutional Court pointed out that the rationale behind norms regulating environmental protection, as well as land use planning, is to ensure the uniform observance of the requirements of environmental protection across all local government authorities.

In view of the interpretation provided in the judgment and because the laws regulating environmental protection provide that those performing certain activities must adhere to the highest possible standards of environmental protection, the Constitutional Court ruled the contested provision to be in conflict with Article 115 of the Constitution.

The Constitutional Court established that it is possible to reach the aims of public administration, as well as those of environmental protection most efficiently through collaboration between public administration institutions.

The Constitutional Court drew attention to the fact that it is the duty of the Cabinet of Ministers to ensure the execution of judgments by the Constitutional Court.

#### *Cross-References:*

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 2006-09-03 of 08.02.2007;
- Judgment no. 2005-12-0103 of 16.12.2005;
- Judgment no. 2003-16-05 of 09.03.2004; *Bulletin* 2004/1 [LAT-2004-1-003];
- Judgment no. 2002-14-04 of 14.02.2003; *Bulletin* 2003/1 [LAT-2003-1-002];
- Judgment no. 2001-07-0103 of 05.12.2001. #

#### *Languages:*

Latvian, English (translation by the Court).



# Liechtenstein

## State Council

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### Important decisions

*Identification:* LIE-2006-3-005

**a)** Liechtenstein / **b)** State Council / **c)** / **d)** 01.09.2006 / **e)** StGH 2005/97 / **f)** / **g)** / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.3.5 Constitutional Justice – Jurisdiction – **The subject of review.**

1.3.5.13 Constitutional Justice – Jurisdiction – The subject of review – **Administrative acts.**

4.5.4.1 Institutions – Legislative bodies – Organisation – **Rules of procedure.**

4.13 Institutions – **Independent administrative authorities.**

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

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:*

Parliament, act, administrative, individual, judicial review / Parliament, dismissal procedure / Media, broadcasting, Commission, member, dismissal, appeal / Parliament, procedure, minimum guarantees.

*Headnotes:*

All of parliament's formal individual acts, including dismissal proceedings, are subject to the right to individual appeal under Section 15.1 of the Constitutional Court Act and there is no restriction as to the power of review. The guarantees ensuring a fair trial under Article 43 of the Constitution and Article 6 ECHR are of particular relevance here.

Exceptions to the above include acts by the Sovereign, acts by the government, and political acts by supreme organs of state. These are exempted from judicial review by the separation of powers and

by the State Council's lack of jurisdiction over political decisions.

Parliament can also comply with the minimum procedural guarantees when taking individual administrative decisions, such as dismissal proceedings. Examples of minimum procedural guarantees include proper convocation and the inclusion of the case in the agenda, together with preparation of the administrative decision in accordance with the procedure. If parliament did not conduct lawful dismissal proceedings in accordance with its rules of procedure, it was because essential procedural guarantees prescribed by the Constitution and the law were not observed during the proceedings.

*Summary:*

At its session on 23 November 2005, parliament decided upon the extraordinary dismissal of the president and a member of the administrative council of the Liechtenstein broadcasting commission. The case had only been placed on the agenda that day, which meant that it had not been prepared in accordance with procedural guarantees. A dismissal of this kind is prescribed by law only in the event of serious breach of an obligation. The State Council allowed the constitutional appeal brought against parliament's decisions on the basis of failure to uphold the guarantee of a fair trial. The decisions were overturned.

In so doing, the State Council settled a matter which had been the subject of dispute: henceforth, under certain conditions, acts by parliament are also subject to a constitutional appeal.

*Languages:*

German.



# Lithuania

## Constitutional Court

### Important decisions

*Identification:* LTU-1998-1-001

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 10.01.1998 / **e)** 19/97 / **f)** On the Programme of the Government / **g)** *Valstybes Žinios* (Official Gazette), 5-99, 14.01.1998 / **h)** CODICES (Lithuanian, English).

*Keywords of the systematic thesaurus:*

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

4.4.3 Institutions – Head of State – **Powers.**

4.4.3.2 Institutions – Head of State – Powers – **Relations with the executive bodies.**

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

4.5.7.2 Institutions – Legislative bodies – Relations with the executive bodies – **Questions of confidence.**

4.6.4.1 Institutions – Executive bodies – Composition – **Appointment of members.**

4.6.4.3 Institutions – Executive bodies – Composition – **End of office of members.**

*Keywords of the alphabetical index:*

Government, resignation / Government, returning powers / Government, programme / Government, confidence / Governance, parliamentary model.

*Headnotes:*

Under the parliamentary model of government formation the Head of State appoints as head of government the person whose candidature is approved by the parliament, thereby taking into account the results of parliamentary elections. The activity of the government is based on the confidence of the parliament and the government is responsible to the parliament for the policies it implements.

According to the Lithuanian Constitution, parliamentary approval conferring on the government the power to act is given by the *Seimas*' vote approving the government's programme. By expressing its confidence in the government's programme, the *Seimas* takes on an obligation to supervise the government's implementation of that programme,

which serves as the basis for the government's responsibility to the *Seimas* for their common activities. The *Seimas* may remove the powers conferred on the government by a vote of no confidence in the government or in the prime minister, the consequence of which is the resignation of the government.

The programme of the government can thus be assessed as a legal document setting forth the main landmarks of State activities for a certain period. It is equally important in determining the actions of the institutions forming the government and ensuring reciprocity between the government and these institutions.

The programme of the government is binding on it for the whole period of its powers. New governments submit their programmes to the *Seimas* in order to obtain the powers to act. The *Seimas*' approval of the government's programme expresses its confidence in the government in principle for the period until the *Seimas*' powers expire. Following the resignation of the government, the same programme will not necessarily be approved.

*Summary:*

On 10 December 1996 the *Seimas* approved the programme of the government presented by the Prime Minister covering the activities of the government for the period from 1997 to 2000, i.e. the whole period of power of the present *Seimas*. During this period presidential elections occurred. Under the Constitution, the government was then obliged to return its powers. The government (the petitioner in the case) therefore requested a decision as to whether the disputed resolution of the *Seimas* on the approval of the programme is in compliance with the Constitution.

The Constitutional Court underlined that the governance model of the State of Lithuania as established by the Constitution of the Republic of Lithuania is a parliamentary model in which particular emphasis is placed on the government's responsibility to the *Seimas*. The government, composed of the Prime Minister and ministers, is a joint institution of the executive power having general competence. It is formed by the President and the *Seimas*; however, their role and tasks are different. The President participates in the process of government as the Head of State accomplishing the function provided for in the Constitution, while the *Seimas*, to which the government is responsible, acts as representatives of the people.

After examining the notions contained in Articles 101 and 92.4 of the Constitution (resignation of the government and the returning of its powers respectively), the petitioner raised doubts as to whether, upon the election of the President of the Republic, the President is empowered to submit to the *Seimas* for consideration a new candidate to be Prime Minister and a new government for approval.

The Court held that the grounds for the resignation of the government are exhaustively listed in Article 101 of the Constitution. The essence of these grounds is the *Seimas'* loss of or failure to acquire confidence in the government. As regards the returning of government powers, this is provided for in two cases: first, after *Seimas* elections, and second, upon the election of the President of the Republic.

Thus it can be concluded that the expiration of the powers of one of the subjects who has participated in forming the government entails the necessity of the government returning its powers. Constitutional norms, however, attribute different meanings to the expiration of the powers of the President and the *Seimas*. In the first case, the government must simply return its powers. In the second, it must not only return its powers but also resign. This is because after *Seimas* elections, the subject from which the government had received confidence and powers to act has been replaced, whereas in the first case, after a change in the Head of State, the confidence of the *Seimas* in the government remains intact. Therefore, in the case of the returning of powers after the election of a new President, the same government must be charged by the new Head of State to continue exercising its powers. Should the government resign, the President may then charge another member of the government to exercise the functions of the Prime Minister.

The Court stressed that there are no grounds for treating the notions of the government's resignation and the returning of its powers as identical. They relate to different legal situations and determine different legal consequences. The Court further held that the *Seimas'* Resolution of 10 December 1996 on the Programme of the Government of the Republic of Lithuania is in conformity with the Constitution.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2005-2-004

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 02.06.2005 / **e)** 10/05 / **f)** On the appointment of R. K. Urbaitis as a justice of the Constitutional Court / **g)** *Valstybes Zinios* (Official Gazette), 71-2561, 07.06.2005 / **h)** CODICES (English, Lithuanian).

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

- 1.1.2.3 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointing authority.**
- 1.1.2.4 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointment of members.**
- 1.1.3.4 Constitutional Justice – Constitutional jurisdiction – Status of the members of the court – **Professional incompatibilities.**
- 1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**
- 4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**
- 4.7.7 Institutions – Judicial bodies – **Supreme court.**

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

Constitutional Court, judge, appointment / Constitutional Court, organisation.

#### *Headnotes:*

In the Constitution, the legal regulation is established under which an appointed justice of the Constitutional Court must remove incompatibilities with the office of a justice of the Constitutional Court (Articles 104.3 and 113 of the Constitution) until the oath in the parliament (*Seimas*). If the removal of the said incompatibilities depends upon decisions of certain institutions (officials), these institutions (officials) have a duty to adopt respective decisions until the oath of the justice of the Constitutional Court in the parliament. Otherwise, the appointed justice of the Constitutional Court would be impeded from taking office as a justice of the Constitutional Court and thus the reconstitution of the Constitutional Court – one of the institutions of state power consolidated in the Constitution – under procedures established in the Constitution would be impeded.

It needs to be stressed that the Constitution does not contain any provisions requiring that a person whose candidature has been presented to justices of the Constitutional Court, should, prior to the voting on his candidature in the parliament, refuse his job, or the office that he is holding, or remove other

incompatibilities with the office of a justice of the Constitution which are specified in the Constitution.

The special institution of judges provided for by law (the Council of Courts, under the Law on Courts) which are provided for in Article 112.5 of the Constitution does not enjoy, under the Constitution, any powers to adopt any decisions related to the appointment of justices of the Constitutional Court.

### *Summary:*

I. The petitioner, a group of members of the parliament (Seimas), had applied to the Constitutional Court with a petition requesting to investigate as to whether:

1. Decree of the President of the Republic no. 237 "On Presentation to the Parliament of the Republic of Lithuania concerning Dismissal of R. K. Urbaitis from the Office of Justice of the Supreme Court of Lithuania" of 17 March 2005, according to its content and procedure of adoption, was in compliance with the principles of a state under the rule of law and responsible governance entrenched in the Constitution, as well as Articles 5.1, 5.2, 6.1, 7.1, 77, 84.11, 112.5 and 115.4 thereof;

2. Article 2 of Resolution of the parliament no. X-131 "On the Appointment of Justices of the Constitutional Court of the Republic of Lithuania" of 15 March 2005 and Resolution of the parliament no. X-138 "On the Dismissal of R. K. Urbaitis from the Office of a Justice of the Supreme Court of Lithuania" of 17 March 2005, according to the procedure and succession of their adoption, were in compliance with the principles of a state under the rule of law and responsible governance entrenched in the Constitution, Articles 103, 104, 112.5, 113 and 115.4 thereof;

3. Article 2 of Resolution of the parliament no. X-131 "On the Appointment of Justices of the Constitutional Court of the Republic of Lithuania" of 15 March 2005 and Resolution of the parliament no. X-138 "On the Dismissal of R. K. Urbaitis from the Office of a Justice of the Supreme Court of Lithuania" of 17 March 2005, according to their content, were in compliance with the principles of a state under the rule of law and responsible governance entrenched in the Constitution, Articles 5.1, 5.2, 6.1, 7.1, 67.10, 112.5 and 115.4 thereof.

In the opinion of the petitioner, Article 112.5 of the Constitution is applicable to justices and the President of the Supreme Court, whereby a special institution of judges provided for by law shall advise the President of the Republic concerning the appointment of judges, as well as their promotion,

transferral, or dismissal from office. The petitioner believed that the absence of advice of a special institution of judges (the Council of Courts) provided for in Article 112.5 of the Constitution was a constitutional obstacle to the President of the Republic to issue Decree of the President of the Republic of Lithuania no. 237 "On Presentation to the Parliament of the Republic of Lithuania Concerning Dismissal of R. K. Urbaitis from the Office of a Justice of the Supreme Court of Lithuania" of 17 March 2005 and to submit this decree to the parliament for consideration.

According to the petitioner, by adopting Resolution no. X-131 of 15 March 2005 and Resolution no. X-138 of 17 March 2005, the parliament violated the procedure of the appointment of justices of the Constitutional Court and that of dismissal of judges from office, which is entrenched in the Constitution. The petitioner noted that the norms of Articles 103, 104, 112.5, 113 and 115 of the Constitution are designed for ensuring the guarantees of independence of judges, including justices of the Constitutional Court. Beside other limitations, they also include a prohibition for the same person to be a justice both of the Supreme Court and the Constitutional Court at the same time. In the opinion of the petitioner, by the disputed legal acts the President of the Republic initiated dismissal of Justice of the Supreme Court R. K. Urbaitis from office too late and improperly, while the parliament appointed R. K. Urbaitis as a justice of the Constitutional Court without dismissing him from the office of a justice of the Supreme Court.

According to the petitioner, Article 115.4 of the Constitution does not provide for either the election of a justice of the Constitutional Court, nor the transfer of a judge of a court of general jurisdiction to the office of a justice of the Constitutional Court, who executes specific competence – constitutional justice. Meanwhile, in his Decree no. 237 "On Presentation to the Parliament of the Republic of Lithuania Concerning Dismissal of R. K. Urbaitis from the Office of a Justice of the Supreme Court of Lithuania" of 17 March 2005, the President of the Republic indicated Article 115.4 of the Constitution as the grounds of dismissal of R. K. Urbaitis from the office of a justice of the Supreme Court, but he did not specify upon which grounds – "upon election to another office" or "upon transferral to another place of work with his consent", which are set forth in the said item – R. K. Urbaitis must be dismissed from the office of a justice of the Supreme Court.

II. The Constitutional Court emphasised that Article 104.3 of the Constitution provides that the restrictions on work and political activities, which are established for court judges, shall apply also to

justices of the Constitutional Court. The said limitations are applied to a justice of the Constitutional Court from the day when he takes office. Under Article 104.2 of the Constitution, before entering office, justices of the Constitutional Court shall take an oath in the parliament to be faithful to the Republic of Lithuania and the Constitution. In the Constitution, the legal regulation is established under which an appointed justice of the Constitutional Court must remove incompatibilities with the office of a justice of the Constitutional Court (Articles 104.3 and 113 of the Constitution) until the oath in the parliament. If the removal of the said incompatibilities depends upon decisions of certain institutions (officials), these institutions (officials) have a duty to adopt respective decisions until the oath of the justice of the Constitutional Court in the parliament. Otherwise, the appointed justice of the Constitutional Court would be impeded from taking the office of a justice of the Constitutional Court and thus the reconstitution of the Constitutional Court – one of the institutions of state power consolidated in the Constitution – under procedures established in the Constitution would be impeded.

The Constitution does not contain any provisions requiring that a person, whose candidature has been presented to justices of the Constitutional Court, should, prior to the voting on his candidature in the parliament, refuse his job, or the office that he is holding, or remove other incompatibilities with the office of a justice of the Constitution which are specified in the Constitution. It also needs to be emphasised that the appointed justice of the Constitutional Court, until he has taken an oath in the parliament under established procedure, does not hold the office of a justice of the Constitutional Court. At that time the office of the justice of the Constitutional Court is held by the justice of the Constitutional Court whose term of office is about to expire.

The Constitutional Court emphasised that while deciding whether Article 2 of Resolution of the parliament no. X-131 “On the Appointment of Justices of the Constitutional Court of the Republic of Lithuania” of 15 March 2005 in the aspect that by this Article R. K. Urbaitis was appointed as a justice of the Constitutional Court without his prior dismissal from the office of a justice of the Supreme Court is not in conflict, according to the procedure of adoption, with Articles 112.5 and 115.4 of the Constitution which were indicated by the petitioner, it must be noted that Articles 112.5 and 115.4 of the Constitution do not regulate the relations linked with appointment of justices of the Constitutional Court: Article 112.5 of the Constitution provides that a special institution of judges provided for by law shall advise the President of the Republic concerning the appointment of

judges, as well as their promotion, transference, or dismissal from office, while under Article 115.4 of the Constitution, judges of courts of the Republic of Lithuania shall be dismissed from office in accordance with the procedure established by law upon election to another office or upon transference to another place of work upon their consent. Meanwhile, Article 2 of Resolution of the parliament no. X-131 “On the Appointment of Justices of the Constitutional Court of the Republic of Lithuania” of 15 March 2005 was designated to appointment of R. K. Urbaitis as a justice of the Constitutional Court. Thus, Article 2 of Resolution of the parliament no. X-131 “On the Appointment of Justices of the Constitutional Court of the Republic of Lithuania” of 15 March 2005 regulated relations of different nature than Articles 112.5 and 115.4 of the Constitution.

The Constitutional Court also emphasised that the special institution of judges provided for by law (the Council of Courts, under the Law on Courts) which is provided for in Article 112.5 of the Constitution does not enjoy, under the Constitution, any powers to adopt any decisions related with appointment of justices of the Constitutional Court. Thus, this institution, under the Constitution, does not enjoy powers to advise on dismissal from office of any judge of the Republic of Lithuania in the case where this judge has been appointed as a justice of the Constitutional Court by the parliament.

Based on the aforementioned arguments, the Constitutional Court concluded that Resolution of the parliament no. X-131 “On the Appointment of Justices of the Constitutional Court of the Republic of Lithuania” of 15 March 2005, the Decree of the President of the Republic of Lithuania no. 237 “On Presentation to the Parliament of the Republic of Lithuania Concerning Dismissal of R. K. Urbaitis from the Office of a Justice of the Supreme Court of Lithuania” of 17 March 2005 and the Resolution of the Parliament of the Republic of Lithuania no. X-138 “On the Dismissal of R. K. Urbaitis from the Office of a Justice of the Supreme Court of Lithuania” of 17 March 2005 was not contrary to constitutional provisions or principles.

#### *Languages:*

Lithuanian, English (translation by the Court).



*Identification:* LTU-2006-S-001

a) Lithuania / b) Constitutional Court / c) / d) 28.03.2006 / e) 33/03 / f) On the powers of the Constitutional Court to review its own decisions and dismiss the instituted legal proceedings as well as on reviewing the financing of the courts / g) *Valstybes Žinios* (Official Gazette), 36-1292, 31.03.2006 / h) CODICES (English, Lithuanian).

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**

1.5.2 Constitutional Justice – Decisions – **Reasoning.**

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

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

1.6.5.4 Constitutional Justice – Effects – Temporal effect – **Ex nunc effect.**

1.6.7 Constitutional Justice – Effects – **Influence on State organs.**

4.7.8 Institutions – Judicial bodies – **Ordinary courts.**

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

*Keywords of the alphabetical index:*

Repeated adoption / Binding effect, constitutional doctrine, *erga omnes* effect / Final decision, not subject to appeal.

*Headnotes:*

The right of each person to defend his rights on the basis of the Constitution and the right to apply to court of a person whose constitutional rights or freedoms have been violated also imply that each party to a case being considered by a court who has doubts on the compatibility of a law or another legal act that may be applicable and the examination of that compatibility falls under the jurisdiction of the Constitutional Court has the right to make an application – to the court of general jurisdiction or the corresponding specialised court considering the case – requesting that it stay the consideration of the case and that it address a petition to the Constitutional Court for the consideration and determination of the compatibility of that legal act with a legal act of greater power [rank], *inter alia* (and, first and

foremost) with the Constitution. The Constitution prohibits the establishing of any legal rule requiring a legal act which is no longer valid – that is to say, one which has been repealed or amended or whose validity has expired – to be applied in a case being considered by a court. Where a legal act is no longer valid at the time a petition is made, the Constitutional Court may refuse to consider and determine whether that legal act is compatible with the Constitution. Where a legal act becomes invalid after a petition has been received at the Constitutional Court and the preparation of the constitutional law case has begun or the case has already been examined at a Constitutional Court hearing, the Constitutional Court may dismiss the instituted legal proceedings (that is to say, the constitutional proceedings instituted by the petitioner).

*Summary:*

I. The case was brought before the Constitutional Court by the Vilnius Regional Administrative Court for an examination of, *inter alia*, the provisions of the Law on the Constitutional Court regarding the dismissal of constitutional proceedings on the ground that the legal regulation under consideration is no longer valid.

The Court stated that as the Constitution set out that a law or another legal act may not be applied from the day of official promulgation [official publication] of a decision of the Constitutional Court declaring that that law or act (or part thereof) is incompatible with the Constitution, this means that the *erga omnes* model of concentrated constitutional control is consolidated in the Constitution. Every legal act (or part thereof) of the *Seimas* (Parliament), the President of the Republic or the Government, as well as one passed by referendum, which is declared incompatible with a legal act of greater power [rank], *inter alia*, (and, first and foremost) with the Constitution, is permanently struck from the Lithuanian legal system and cannot ever be applied again. It should also be noted that the power (or force) of a ruling by the Constitutional Court declaring a legal act or part thereof unconstitutional is such that it may not be overruled by readopting the same or equivalent legal act or part thereof. After the promulgation of a Constitutional Court ruling that a certain act is incompatible with the Constitution, the body or person which adopted that legal act is under a duty to recognise that the legal act is no longer valid or to change it so that it is not incompatible with the corresponding legal act of greater power, *inter alia*, (and, first and foremost) with the Constitution. However, as long as this constitutional duty has not been fulfilled, the legal act in question (or part thereof) may no longer be applied under any circumstances.

In considering the impact of the Constitutional Court on the legal system, the Court found significant links between the system of courts of general jurisdiction and the Constitutional Court, an institution of constitutional justice: *inter alia*, any court (or judge thereof) of general jurisdiction, acting as a petitioner, has the power to initiate cases raising issues of constitutional law in the Constitutional Court. All courts of general jurisdiction – the Supreme Court of Lithuania, the Court of Appeal of Lithuania, the regional courts and the local courts – are bound by the fact that the decisions of the Constitutional Court on issues attributed to its competence by the Constitution are final and not subject to appeal. All courts of general jurisdiction are bound by the official constitutional doctrine, developed in the case-law of the Constitutional Court. Constitutional Court rulings, conclusions and decisions by which constitutional law cases are terminated, i.e. final acts of the Constitutional Court, are final and not subject to appeal irrespective of whether the Constitutional Court adopted these acts in a corresponding constitutional law case after examining the merits of the issue of the compatibility of the legal act with the Constitution, or refused to consider the petition or dismissed the legal proceedings instituted [constitutional law proceedings initiated by the petitioner] by a properly reasoned decision without examining the merits of the issue of the compatibility of the legal act with the Constitution. Constitutional Court rulings, conclusions and decisions by which a constitutional law case is terminated, i.e. final acts of the Constitutional Court, are binding on all State institutions, courts, all enterprises, establishments and organisations, as well as officials and citizens, including the Constitutional Court itself. Final acts of the Constitutional Court are binding on the Constitutional Court itself – they restrict the Constitutional Court in that it may not change them or review them if there are no constitutional grounds for doing so.

Although the Constitution does not specify *expressis verbis* that the Constitutional Court has the powers to review its rulings, conclusions and decisions, or set out *expressis verbis* grounds giving rise to such powers, this does not mean that the above-mentioned powers and grounds are not established in the Constitution. The powers of the Constitutional Court to review its rulings, conclusions and decisions arise from the constitutional purpose of the Constitutional Court to administer constitutional justice, guarantee the supremacy of the Constitution in the legal system and constitutional legality; such powers of the Constitutional Court are also implied by the constitutional principle of a state governed by the rule of law, according to which the judicial institutions (thus, also the Constitutional Court) are required to seek to establish the objective truth and adopt decisions only on the basis of law.

### *Languages:*

Lithuanian, English (translation by the Court).





# Mexico

## Supreme Court

### Important decisions

*Identification:* MEX-2010-1-008

**a)** Mexico / **b)** Supreme Court / **c)** Plenary / **d)** 23.05.2002 / **e)** 164 / **f)** Contradicting resolutions 2/2000-PL Between the Upper Chamber of the Federal Judiciary Electoral Court and the Mexican Supreme Court / **g)** *Semanario Judicial de la Federación*, Tome XV, June 2002, 5, 81 and 82; IUS 186, 765; 186, 705; 186, 798; *Relevant Decisions of the Mexican Supreme Court*, 481-483 / **h)**.

*Keywords of the systematic thesaurus:*

1.3 Constitutional Justice – **Jurisdiction.**

2.1.3.1 Sources – Categories – Case-law – **Domestic case-law.**

4.9.1 Institutions – Elections and instruments of direct democracy – **Competent body for the organisation and control of voting.**

*Keywords of the alphabetical index:*

Constitutional Court / Court, competence, exclusive / Law, unconstitutionality, declaration, competence.

*Headnotes:*

The Federal Judiciary Electoral Court is not competent to rule on the constitutionality of a general regulation.

*Summary:*

On deciding on the electoral constitutional review proceedings 209/99, the Federal Judiciary Electoral Court issued a criterion that clashed with that issued by the Mexican Supreme Court when ruling on the action of unconstitutionality 6/98. The Supreme Court was therefore required to decide whether or not there was a contradiction between the decisions of the Supreme Court and the Electoral Court. Conflicting decisions were registered with the number 2/2000-PL and were decided on 23 May 2002. The ruling of the Supreme Court played a key role in clearing up any doubts on the existing jurisdiction of the Federal Judiciary's jurisdictional bodies. The Supreme Court argued that it was not possible to have valid conflicting rulings issued by both the Supreme Court

and the Electoral Court, given that the latter has no power whatsoever to issue decisions on the constitutionality of general regulations, even with the pretext of determining that it only does not to apply them. This situation arises, first of all, from the fact that one essential requirement for the existence of conflicting decisions is the existence of conflicting criteria issued by two or more courts that are equally competent to solve matters of a certain type. This condition does not exist in the case of the aforementioned courts. While the Supreme Court has exclusive power to interpret the Federal Constitution and to declare that any general regulations in conflict with the content thereof are unconstitutional or invalid – in view of the fact that the action of unconstitutionality is the only way the unconstitutionality of this type of regulation may be tackled – the Electoral Court is competent to resolve only the constitutionality of electoral acts or resolutions and even interpret a constitutional precept, provided there is no applicable jurisprudence of the Supreme Court in this regard and that such interpretation is not intended to verify the compliance of an electoral law with the Constitution. Moreover, the Electoral Court should also be obliged to comply with any decisions issued by the Supreme Court on this matter.

In this case, the Electoral Court interpreted Article 54.IV of the Federal Constitution, because it did not share the view of the Supreme Court in ruling on the action of unconstitutionality 6/98, enabling the scope of the aforementioned precept – and that of Article 116 of the Constitution – to be set by way of the thesis P/J 69/98, P/J 70/98, P/J 71/98, P/J 72/98 and P/J 73/98. Thus, the Electoral Court exceeded its jurisdiction and failed to comply with the case-law of the Supreme Court. It therefore infringed Articles 94.8 and 235 of the Federal Judiciary Act, obliging it to comply with the precedents of the Court even if it might not share them.

In conclusion, the Court established that it is not possible to have conflicting decisions issued by the Supreme Court and the Electoral Court as, otherwise, far from safeguarding legal security – which is the purpose of conflicting decisions – this would render it void by implying that opposing decisions issued by bodies that have different jurisdiction according to the Constitution are admissible.

*Languages:*

Spanish.



# The Netherlands

## Council of State

### Important decisions

*Identification:* NED-2007-2-004

**a)** The Netherlands / **b)** Council of State / **c)** Third Chamber / **d)** 06.06.2007 / **e)** 200608642/1 / **f)** / **g)** / **h)** CODICES (Dutch).

*Keywords of the systematic thesaurus:*

1.1.2.6 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Functions of the President / Vice-President.**

1.1.4.1 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Head of State.**

1.3.4.8 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of jurisdictional conflict.**

2.3.3 Sources – Techniques of review – **Intention of the author of the enactment under review.**

4.4.3.3 Institutions – Head of State – Powers – **Relations with judicial bodies.**

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

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

*Keywords of the alphabetical index:*

Document, disclosure / Court, president.

*Headnotes:*

The Queen's presidency over the Council of State does not affect the court's impartiality. Besides, neither the Queen's Office, nor the Queen herself is an administrative authority in the sense of the General Administrative Law Act or the Regulations governing public access to government information.

*Summary:*

I. The Minister of General Affairs (hereinafter, the "minister") had turned down an application made by the Dutch Broadcasting Foundation (referred to here as the "Foundation") for disclosure of documents. The

minister had also refused to forward the Foundation's request to the Queen's Office. The Foundation had contested the decision, but the minister dismissed its objections. The Foundation then launched proceedings in an administrative law court. The District Court upheld the minister's decision in part, but overturned that part of the decision relating to his initial refusal to forward the application to the Queen's Office. The Administrative Jurisdiction Division of the Council of State overturned this part of the District Court's judgment.

The Foundation appealed to the Administrative Jurisdiction Division of the Council of State, beginning by challenging the jurisdiction of the court, as the case concerned the position of both the Queen's Office and the Queen, who is President of the Council of State.

II. The Administrative Jurisdiction Division of the Council of State held it did have jurisdiction to hear the present appeal, notwithstanding the Queen's presidency of the Council of State, for there was no connection between the presidency and the administration of justice. Therefore, the Foundation could not reasonably doubt the independence and impartiality of the Administrative Jurisdiction Division of the Council of State.

The Administrative Jurisdiction Division of the Council of State further observed that the Queen's Office was neither an administrative authority in the sense of the General Administrative Law Act (referred to here as the GALA) nor in the sense of the regulations governing public access to government information. Therefore, the minister was not obliged to forward the Foundation's application to the Queen's Office. The minister had refused to forward it on the ground that the Queen's Office was not an administrative authority in the sense of the Regulations governing public access to government information (an Act of Parliament, hereinafter, the "Regulations").

Under Article 42.2 of the Constitution, Ministers, rather than the King, are responsible for acts of government. The General Administrative Law Act defines 'administrative authority' as:

- a. an organ of a legal entity established under public law, or
- b. another person or body that is vested with public authority (Section 1:1.1).

The Regulations apply to the following administrative authorities:

- a. ministers;

- b. the administrative authorities of provinces, municipalities, water boards and regulatory industrial organisations;
- c. administrative authorities whose activities are subject to the responsibility of the authorities referred to in Subsection 1.a and 1.b;
- d. other administrative authorities not excluded by order in council (Section 1a.1).

The Regulations also provide that anyone may apply to an administrative authority or to an agency, service or company carrying out work for which it is accountable to an administrative authority for information contained in documents concerning an administrative matter (Section 3.1). If the application concerns documents held by an administrative authority other than that to which the application has been submitted, the applicant shall, if necessary, be referred to that authority. If the application was made in writing, it shall be forwarded and the applicant shall be notified accordingly (Section 4). The Queen's Office provides support to the Queen in the performance of her constitutional duties under Section 1 of the Royal Decree of 18 December 2003 (Queen's Office Decree) read in conjunction with Section 1 of the Act of 22 June 1891 (Act in connection with the devolvement of the Crown to a Queen).

The District Court had held that the Queen's Office, in terms of its duties, was an organ of the State and therefore an administrative authority (in the sense of the Section 1:1.1 opening words and under a, of the GALA). Moreover, the Queen's inviolability did not preclude the Queen's Office being considered an administrative authority with regard to the applicability of the Regulations. On appeal to the Administrative Jurisdiction Division of the Council of State, the minister argued that the District Court had failed to recognise the effect the Queen's inviolability had upon the status of the Queen's Office as an administrative authority, whether in the sense of the GALA or of the Regulations governing public access to government information. The Administrative Jurisdiction Division of the Council of State interpreted Section 1 of the Queen's Office Decree as meaning that the Office afforded exclusive support to the Queen in the performance of her constitutional duties. The Office had not been assigned duties of its own; it lacked independent authority. Therefore, the Queen's Office was neither an administrative authority in the sense of the opening words of Section 1:1.1 and "a" of the GALA or a body invested with any public authority in the sense of Section 1:1.1 opening words and under b, of the GALA.

Finally, the Administrative Jurisdiction Division of the Council of State took the view that the minister was not obliged to forward the Foundation's application to the Queen, since the Queen herself was not to be considered as an administrative authority. The Queen fitted the description of an 'administrative authority' within the opening lines of Section 1:1.1 and under a, of the GALA. The Queen was not among the authorities, persons and bodies which were not deemed administrative authorities under Section 1:1.2 of the GALA. However, parliamentary history demonstrated that an administrative authority (in the sense of the GALA) could only act as such, if it was accountable. The preamble to and parliamentary history of the Regulations governing public access to government information made it clear that the Regulations served effective and democratic administration. Article 42 of the Constitution precluded the Queen from taking responsibility or accounting for her acts, and, therefore, from being an 'administrative authority'.

#### *Languages:*

Dutch.



# Norway

## Supreme Court

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### Important decisions

*Identification:* NOR-1952-S-002

**a)** Norway / **b)** Supreme Court / **c)** Plenary / **d)** 29.11.1952 / **e)** Inr 124/1952 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 1952, 1089 / **h)**.

*Keywords of the systematic thesaurus:*

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

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

4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

4.10.7.1 Institutions – Public finances – Taxation – **Principles.**

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

*Keywords of the alphabetical index:*

Adjustment, price, charge / Charge, refunding.

*Headnotes:*

A price adjustment charge stipulated by the Price Directorate was not defined as a tax under the provisions of Article 75.a of the Constitution. The Supreme Court had no basis for overruling the discretionary decision of the legislative authorities concerning the necessity of applying this charge in connection with price regulation.

The question of whether it was in violation of the Constitution, that the authority to stipulate this charge was delegated to the Price Directorate, had to be decided according to the actual policy considerations. There was a greater reason for the courts to exercise caution in overruling the legislator's decision in this case than in the case of whether the provisions of an act contravene the regulation in the Constitution aimed at protecting the interests of citizens, e.g. Articles 97 and 105 of the Constitution.

*Summary:*

During the Second World War, the Norwegian government requisitioned all Norwegian whale factory ships and whalers that were outside the occupied areas of Norway.

After the war, an agreement was concluded between the government and the whaling companies concerning the return of the remaining part of the whaling fleet to the owners and concerning the restoration of the whaling industry on the basis that the companies were to take over the government contract for new factory ships and carry out whaling during the initial three seasons on the basis of a joint account.

By decisions of the Price Directorate dated 30 July 1946 and 29 March 1947, a price regulation charge was introduced on the whale oil production for 1945-46. The Association of Whaling Companies brought an action before the City Court claiming repayment of the charge and claiming damages for lower earnings due to the fact that certain quantities of the production for 1946-47 and 1947-48 had to be sold on the domestic market at a price which was lower than the price on the world market. The City Court judgment was in favour of both the government and the Price Directorate. The whaling companies appealed and permission was given for the appeal to be heard directly before the Supreme Court. The appeal was limited to that part of the judgment in which it was found that the government was not liable for refunding the charge.

The whaling companies argued that the charge was in violation of the agreement concluded with the government and the undertakings given in that connection. Moreover, it was pleaded that the charge was not authorised in law. As a result, it was asserted that the decisions were invalid as there was no access in the Constitution to delegate authority to the Price Directorate or the King as the charge was a tax pursuant to the provisions of Article 75 of the Constitution and could not be delegated by the Storting. It was further held that the charge was in violation of Article 97 of the Constitution disallowing retroactive legislation.

The Supreme Court was of the opinion that the decisions of the Price Directorate in 1946 and 1947 were not in violation of the agreement that was concluded. The undertaking concerning tax relief on the part of the government had been met and the objective of the agreement had been reached, i.e. the restoration of the whaling industry. Moreover the Supreme Court found that the decisions concerning charges were authorised in law by the provisions of Section 2.2, no. 4, in the provisional ordinance of

8 May 1945 and of Section 2.2, no. 4, of the intermediary Act dated 14 December 1946.

Moreover the charge was not defined as a tax in relation to Article 75.a of the Constitution. In this connection, particular emphasis was paid to the fact that the Act (the ordinance) specifies limits both with regard to the conditions for introducing the charge and with regard to the application of the funds and that the price adjustment charge was intended to act (and did in fact act) as a tool in the price regulation mechanism. The Supreme Court stated that it had no basis for overruling the decision of the legislative authorities concerning the necessity of applying this measure in price regulation.

The constitutional issue concerning the authority to apply the charge (the delegation) had to be decided pursuant to the actual policy considerations. It was stressed that the charge, by its nature as a price regulating measure, could be applied by the administrative authorities dealing with price regulation. Delegation of authority to apply the charge in this case was taken much further than in any similar cases in peacetime. Despite this, there was no basis for the courts to set aside the discretionary decisions of the legislative power as to how far it is necessary and constitutionally justifiable to go. The first voting justice remarked that there was greater reason for the court to exercise caution in setting aside the legislator's discretionary decision in a case such as this than there was in the case of deciding whether an Act was in violation of a regulation in the Constitution aimed at protecting the interests of the country's citizens, e.g. Articles 97 and 105 of the Constitution.

The Supreme Court found that the decisions concerning charges were not in violation of Article 97 of the Constitution. The Supreme Court emphasised that the whaling companies did not at any time have the right to assume that they were exempted from price regulation and that the fixing of the charge implied a price fixing of the domestic oil. Moreover it was remarked that the decision concerning the charge dated 30 July 1946 was taken prior to the sale of the domestic oil.

Judgment was pronounced with two dissenting votes out of the fifteen justices.

#### *Languages:*

Norwegian.



#### *Identification:* NOR-1976-S-001

**a)** Norway / **b)** Supreme Court / **c)** Plenary / **d)** 27.01.1976 / **e)** Inr 18/1976 / **f)** Kløfta / **g)** *Norsk Retstidende* (Official Gazette), 1976, 1 / **h)**

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

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

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

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

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

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

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

Expropriation, compensation / Compensation, amount, calculation / Land, market value / Trading, voluntary, value.

#### *Headnotes:*

When the courts are asked to decide on the constitutionality of a statute, the Parliament's (*Storting's*) view of the matter inevitably plays an important role. If there is any doubt as to how a statutory provision should be understood, the courts have a right and duty to apply the statute in the manner which best accords with the Constitution.

#### *Summary:*

The case concerned the understanding of Sections 4 and 5 of a now-defunct Act of 26 January 1973 regarding compensation for expropriation of property, especially in light of Article 105 of the Constitution regarding "full compensation" for expropriation. The valuation of land areas under this Act was to be based on the actual use of the area, pursuant to Section 4 of the Act. The Act permits in Section 5 higher compensation in "certain circumstances". The importance of the zoning plan to the valuation of the land was dealt with in Section 5.3 (cf. Section 5.2 and Section 4.3). According to Section 5.3 of the Act, a higher value could not be taken into account if it depended on a use of the area which conflicted with approved zoning plans for the expropriated property.

A municipality demanded the calculation, under the Building Act, of the amount of compensation payable for expropriation of a stretch of highway E6, approximately 2 km long, east of Kløfta town centre.

In a first valuation concerning 31 valuation items, some of the landowners were awarded compensation for the land at the price of NOK 10 per square metre. The superior valuation which comprised 18 valuation items awarded compensation for some properties according to an agricultural value pursuant to Section 4 of the Act, for other properties an additional compensation was fixed in accordance with Section 5 of the Act at the rate of NOK 6 per square metre.

The superior valuation was appealed to the Supreme Court by nine landowners. They claimed principally that the Superior Valuation Court had established, in conflict with Article 105 of the Constitution, a lower compensation for land than the lawful market value. Alternatively they claimed that the Superior Valuation Court had misapplied the law, partly in respect of the interpretation of Sections 4 and 5 of the Expropriation Compensation Act, partly by applying non-statutory expropriation rules. Finally they maintained that the grounds for the valuation were unclear and/or defective.

Partly on account of misapplication of the law and partly on account of insufficient grounds for the valuation, the Supreme Court, acting in plenary session, declared the superior valuation void. Seven of the seventeen justices dissented, and one of the majority had a different reasoning from his colleagues.

The first voting justice started with some remarks about the Court's competence to test the constitutionality of statutes. In the case of provisions intended to safeguard the personal liberty or safety of individuals, the first voting justice presumed that the constitution's overriding force should be substantial. If on the other hand the constitutional provision governs the mode of operation or mutual competence of the other powers of the state, the first voting justice agreed with his counterpart in the plenary case in *Norsk Retstidende*, 1952, p. 1089 (the whale tax case) that the courts had largely to accept the Storting's view. Constitutional provisions for the protection of financial rights would be in an intermediate position.

The Storting's understanding of the position of the Act relative to such constitutional provisions had to play an important part when the courts were to decide the issue of constitutionality, and the courts should be reluctant to set their views above those of the legislators.

Since the Storting had adopted the Expropriation Act of 26 January 1973, the issue before the courts was whether the rules of the Act lead to results that are compatible with Article 105 of the Constitution, not whether the results would have been the same without the statutory rules. Moreover the first voting justice made it clear that the courts had in any case to accept the legislators' political evaluations.

The question in this case was whether the Act cut back the compensation to the landowners to a greater extent than provided by Article 105 of the Constitution which requires full compensation. Any considerations of reasonable compensation in the specific case would not be decisive.

Subject to certain reservations the first voting justice declared that a landowner would not actually be paid full compensation if the government refused to pay the market value where this was demonstrably the highest value. In the present case it was unanimously held that compensation could not be awarded for land on the basis of Section 4 of the 1973 Act to the effect that the valuation should be based on the use of the property, even if sections of it had been parcelled off and some of the properties were subject to additional parcelling plans.

The provisions of Section 4 and Section 5 of the Act should be viewed in context as regards their position with regard to the Constitution. Section 5 permitted the payment of compensation in excess of the use value in cases where the valuation under Section 4 would lead to a substantially lower value than the value generally applying to similar properties in the district according to their normal use.

The majority of the justices pointed out that according to its wording, Section 5.1 authorised the Valuation Court to undertake a specific consideration of the fairness of the compensation, but that such a free position would not be compatible with the Constitution's requirement of full compensation. The majority held that in principle the Valuation Court was obliged to provide for additional compensation up to the lawful value in voluntary trading (subject to Section 5.2) in cases of discrepancy between valuation under Section 4 and the higher value under Section 5.1.

The landowners had maintained that the Superior Valuation Court had misapplied the law when failing to award additional compensation for land that had been zoned as a free area. The majority held that the zoning for a free area was a consequence of the highway plan which was at the origin of the expropriation. One should therefore disregard the value reduction which was due to the zoning as a free

area. It was the natural and foreseeable regulation before the highway plan existed, which would have to be applied.

The minority of the justices agreed that additional compensation should be paid, but not necessarily to the full value in voluntary trading.

*Languages:*

Norwegian.



*Identification:* NOR-2010-2-002

**a)** Norway / **b)** Supreme Court / **c)** Plenary / **d)** 12.02.2010 / **e)** 2010-00258P / **f)** / **g)** *Norsk retstidende* (Official Gazette), 2010, 143 / **h)** CODICES (Norwegian).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Public policy reason.

*Headnotes:*

Unless there are strong public policy reasons legislation should not be given retroactive effect.

*Summary:*

I. Under the tonnage tax scheme introduced in 1996, shipping income was “exempt from tax”, but untaxed profits were taxed upon distribution to shareholders or exit of the company from the special tax system.

II. A majority of the Supreme Court (by 6 votes to 5) held that the tax assessment of the shipping companies must be set aside because the transitional rules in the Act of 14 December 2007 no. 107 Part X

violated the prohibition against retroactive legislation in Article 97 of the Constitution. The majority emphasised that there were no strong public policy reasons why the legislation should be given retroactive effect and it was therefore unnecessary to consider the provisions on protection of private property in Article 1 Protocol 1 ECHR.

*Cross-References:*

- HR-2010-258-P, Cases nos. 2009/1575 and 2009/1663, civil appeal against judgment.

*Languages:*

Norwegian, English (translation by the Court).



*Identification:* NOR-2010-S-001

**a)** Norway / **b)** Supreme Court / **c)** Plenary / **d)** 12.05.2010 / **e)** 2010-00807P / **f)** / **g)** *Norsk retstidende* (Official Gazette), 2010, 535 / **h)** CODICES (Norwegian).

*Keywords of the systematic thesaurus:*

1.1.4.3 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Executive bodies.**

4.13 Institutions – **Independent administrative authorities.**

*Keywords of the alphabetical index:*

Church, property / Constitution, interpretation.

*Headnotes:*

The rent in leases of property for residential purposes owned by the state or state governed businesses shall be subject to regulation and the leases can be redeemed on conditions that are more advantageous for the lessee than would otherwise be the case pursuant to the lease and the Ground Rent Act.

*Summary:*

I. The case considered whether an instruction laid down by Royal Decree was in violation of Article 106

of the Constitution in so far as the instruction applies to the Administration of Ecclesiastical Property Fund (hereinafter, "OVF"). The provisions of Article 106 of the Constitution are relevant to the administration and application of OVF.

II. The instructions in the Royal Decree provide that the rent in leases of property for residential purposes owned by the state or state governed businesses shall be subject to regulation and that the leases can be redeemed on conditions that are more advantageous for the lessee than would otherwise be the case pursuant to the lease and the Ground Rent Act. Nine of the justices of the Supreme Court (sitting in plenary) affirmed the judgment of the District Court and held that the instructions given in the Royal Decree violated Article 106 of the Constitution, and that it was invalid in so far as it applied to OVF.

#### *Cross-References:*

- HR-2010-807-P, Case no. 2010/44, civil appeal against judgment.

#### *Languages:*

Norwegian, English (translation by the Court).



## Poland

### Constitutional Tribunal

#### Important decisions

*Identification:* POL-1993-1-002

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 26.01.1993 / **e)** U 10/92 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1993, I, 19 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

1.2.2.4 Constitutional Justice – Types of claim – Claim by a private body or individual – **Political parties.**

1.3.5.9 Constitutional Justice – Jurisdiction – The subject of review – **Parliamentary rules.**

2.2.2.2 Sources – Hierarchy – Hierarchy as between national sources – **The Constitution and other sources of domestic law.**

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

4.5.4.1 Institutions – Legislative bodies – Organisation – **Rules of procedure.**

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

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

*Keywords of the alphabetical index:*

Parliamentary group, establishment / Political party, freedom / Rules of procedure, parliament, interpretation.

*Headnotes:*

The provision of the Rules of the Sejm specifying the minimum number of parliamentary members for a group at 15 is an aspect of the Parliament's autonomy, granted by the Constitution to the Houses in the field of defining their own structures and procedures. The provision is consistent with the constitutional principle of the rule of law and with the freedom of political parties.

Limitations on the creation of a group are a consequence of the provisions of the Constitution, which operate to ensure the effective performance of



constitutional duties by the Parliament. Differentiation as between the legal status of internal parliamentary groups does not result in an interference with the individual rights of members of Parliament as representatives. The provision in question does not infringe on the freedom of political parties, as the role of a Sejm member – as emphasised by the Tribunal – may be reinforced through the exercise of a free mandate as well as by freedom of political action.

On a point of form, this interpretation of the provision does not indicate that it is contrary to the provisions of the law on the duties and rights of members of the Sejm and of the Senate, which include the right of the members of Parliament to form and join groups. Moreover, the Rules of the Sejm, being a law based directly on the Constitution and serving to supplement its provisions, may determine the arrangement of the groups in the Sejm in a manner consistent with that envisaged in the Constitution, providing always that such Rules do not exceed the limits of Parliament's powers.

#### *Languages:*

Polish.



#### *Identification:* POL-1994-3-020

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 30.11.1994 / **e)** W 10/94 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), no. 132, item 684; *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1994, II / **h)** CODICES (Polish).

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

1.1.4.1 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Head of State**.

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law**.

2.2.1.2 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and legislative acts**.

4.4.3.5 Institutions – Head of State – Powers – **International relations**.

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

Treaty, international, ratification.

#### *Headnotes:*

A statute authorising the President to ratify an international treaty is a normative act being subject to the Tribunal's control.

#### *Summary:*

According to Article 33 of the Small Constitution (the Constitutional Act of 17 October 1992), the ratification and denunciation of international treaties is reserved for the President. The ratification and denunciation of international treaties relating to the State borders and defensive alliances, as well as of treaties imposing upon the State financial obligations or requiring legislative changes should previously be authorised by Parliament in a statute.

Neither the Constitution nor the Constitutional Tribunal Act explicitly authorise the Tribunal to review the constitutionality of an international treaty. According to the Constitutional Tribunal Act, however, the Tribunal is empowered to decide upon the constitutionality of any "legislative act" (statute or act having the force of a statute). Accordingly, a statute authorising the President to ratify an international treaty is subject to the Tribunal's control.

The Tribunal is also competent to declare a statute authorising the President to ratify an international treaty unconstitutional when the treaty contains self-executing provisions inconsistent with the Constitution.

The Tribunal may not declare such a statute unconstitutional having regard only to the fact that it entitles the President to ratify a treaty that is inconsistent with previous international obligations of the State. Neither may such a statute be declared contrary to the Constitution solely on the ground that it entitles the President to ratify a treaty imposing upon the State a duty to implement legislation, or might affect the coherence of the Polish legal system.

#### *Cross-References:*

- See also the decision of 6 December 1994 (Case no. U 5/94).

#### *Languages:*

Polish.



*Identification:* POL-1995-3-011

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 05.09.1995 / **e)** W 1/95 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), no. 111, item 539; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), no. 1, item 5 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

1.1.4.1 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Head of State.**

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.3.2.1 Constitutional Justice – Jurisdiction – Type of review – **Preliminary / ex post facto review.**

1.3.4.13 Constitutional Justice – Jurisdiction – Types of litigation – **Universally binding interpretation of laws.**

1.4.5.2 Constitutional Justice – Procedure – Originating document – **Signature.**

1.4.9 Constitutional Justice – Procedure – **Parties.**

1.4.9.4 Constitutional Justice – Procedure – Parties – **Persons or entities authorised to intervene in proceedings.**

2.3.6 Sources – Techniques of review – **Historical interpretation.**

2.3.8 Sources – Techniques of review – **Systematic interpretation.**

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

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

4.4.3.2 Institutions – Head of State – Powers – **Relations with the executive bodies.**

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

*Keywords of the alphabetical index:*

Constitutional Tribunal, jurisdiction / Presidential acts, counter-signature.

*Headnotes:*

The provisions of the Constitutional Tribunal Act providing for the subjection of decisions on the unconstitutionality of laws or other acts having the force of law to *Sejm* control, apply only to decisions taken as a result of *ex post facto* review (review executed after the law is signed by the President and

properly published). They do not apply to laws which have been found to be unconstitutional by means of preliminary review before they were signed by the President.

The President must decline to sign any law which is not consistent with the Constitution.

*Summary:*

An application for a universally binding interpretation of Article 7 of the Constitutional Tribunal Act had been filed by the President to affirm that the Tribunal's decision on the unconstitutionality of a statute not yet signed by the President was final, and that the statute in question could not be promulgated.

After completing a historical and systematic analysis of the relevant constitutional and other provisions on procedures for the review of decisions of the Tribunal by the *Sejm*, the Tribunal concluded that:

- the constitutional principle of the rule of law (Article 1 of constitutional provisions continued in force) and the constitutional principle of the separation of powers (Article 1 of the Small Constitution – the Constitutional Act of 17 October 1992) clearly define the Tribunal's position in the hierarchy of State authorities. It follows that the *Sejm* may intervene in procedures of constitutional review only when the law expressly provides for competences in this regard and in forms expressly provided by law;
- according to the Constitution, only the Tribunal's decisions regarding "laws" may be reviewed by the *Sejm*: "law" is understood in this sense as a legal act enacted by Parliament, signed by the President and properly published. Therefore, the *Sejm* may only decide upon the Tribunal's decisions issued as a result of an *ex post facto* review, and has no power to scrutinise decisions regarding acts not yet signed by the President;
- the President may not sign any law which has been found by the Tribunal to be contrary to the Constitution. This also follows from Article 28 of the Small Constitution, which compels the President to "ensure observance of the Constitution".

Before deciding the case on its merits, the Tribunal had to answer a preliminary question, namely whether the President's application for a universally binding interpretation of the law was subject to countersignature by an appropriate member of the Council of Ministers. The majority of the Tribunal

concluded that since the application itself was not a “legal act”, as understood by Article 46 of the Small Constitution, it did not require the countersignature of the Prime Minister or an appropriate minister.

*Supplementary information:*

Three dissenting opinions were delivered, by judges Z. Czeszejko – Sochacki, L. Garlicki and W. Sokolewicz. In their opinion, the President’s application should not have been decided on its merits since it had not been countersigned by a member of the Government. Furthermore, there were no constitutional provisions expressly excluding the President’s application for the universally binding interpretation of the law from the requirement of countersignature. Moreover, Judge Sokolewicz was of the view that under the Constitution a “law” means a statute passed by the *Sejm*, despite the fact that it is yet to be signed by the President. Therefore the Tribunal’s decisions on the unconstitutionality of a statute issued in preliminary review are subject to the *Sejm*’s control, and the Constitutional Tribunal Act provisions related to the procedure on *ex post facto* review should be applied accordingly.

*Cross-References:*

- Resolution of 22 August 1990 (K 7/90), ruling of 7 March 1995 (K 3/95).

*Languages:*

Polish.



*Identification:* POL-1997-1-005

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 24.02.1997 / **e)** K 19/96 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1997, no. 1, item 6; *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest) 1997, item 6 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.2.2.5 Constitutional Justice – Types of claim – Claim by a private body or individual – **Trade unions.**

1.3.4.10 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the constitutionality of enactments.**

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

*Keywords of the alphabetical index:*

Agreement, collective / Dispute, labour, collective.

*Headnotes:*

The Constitutional Tribunal is not empowered to verify the political decisions of the legislature provided they were transformed into law with no breach of the norms, principles or values of the Constitution.

*Summary:*

The applicants challenged one of the provisions of the 1991 law on the settlement of collective labour disputes according to which the manager of a relevant public sector unit, instead of the relevant governmental minister or municipal executive, is a party to a dispute initiated by a public sector trade union.

According to the Tribunal, under the Labour Code the “direct” employer of persons hired by units which are part of governmental or municipal administration is the relevant unit represented by its manager. It has been clearly intended by the legislator not to involve ministers or municipal executives as parties to collective labour disputes carried on in the public sector.

The above rule does not contradict the constitutional provision according to which the trade unions play an “important public function” representing the interests and rights of working people. In the Tribunal’s opinion the collective labour disputes legal regulations do not annul the constitutionally determined role of trade unions and do not put this role below the constitutionally indicated level of “importance”.

*Supplementary information:*

The Tribunal recalls that it is not entitled to examine the accuracy of the legislature’s decisions. A law may be only exceptionally found unconstitutional because it lacks certain specific provisions. Unless the political decisions of the legislature infringe the norms, principles or values of the Constitution, they are beyond the scope of the Tribunal’s control.

*Languages:*

Polish.

*Identification:* POL-2010-1-001

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 20.05.2009 / **e)** Kpt 2/08 / **f)** / **g)** *Monitor Polski* (Official Gazette), 2009, no. 32, item 478; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2009, no. 5A, item 78 / **h)** CODICES (Polish).

*Keywords of the systematic thesaurus:*

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.2.2.5 Constitutional Justice – Types of claim – Claim by a private body or individual – **Trade unions.**

1.3.4.10 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the constitutionality of enactments.**

4.4.3.2 Institutions – Head of State – Powers – **Relations with the executive bodies.**

4.4.3.5 Institutions – Head of State – Powers – **International relations.**

4.4.6.1.2 Institutions – Head of State – Status – Liability – **Political responsibility.**

4.6.10.2 Institutions – Executive bodies – Liability – **Political responsibility.**

4.17.1 Institutions – European Union – **Institutional structure.**

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

*Keywords of the alphabetical index:*

European Council.

*Headnotes:*

The Polish Council of Ministers, under Articles 146.1, 146.2 and 4.9 of the Constitution, determines the standpoint of the Republic of Poland to be presented at a session of the European Council. The Prime Minister (who presides over the Council of Ministers) represents the Republic of Poland at the sessions of the European Council and presents the agreed standpoint.

The President of the Republic of Poland, as the supreme representative of the Republic, may decide under Article 126.1 of the Constitution to participate in a session of the European Council, if he finds it useful for the realisation of the tasks of the President of the Republic specified in Article 126.2 of the Constitution.

The participation of the President in a session of the European Council requires the co-operation of the President with the Prime Minister and the minister competent in this regard, according to the principles set out in Article 133.3 of the Constitution. The goal of the co-operation is to ensure uniformity of actions taken on behalf of the Republic of Poland and in relations with the European Union.

The co-operation of the President with the Prime Minister and the competent minister enables the President to make reference – in matters related to the realisation of his tasks specified in Article 126.2 of the Constitution – to the standpoint of the Republic of Poland determined by the Council of Ministers. The co-operation also makes it possible to determine the extent and form of the intended participation of the President in a session of the European Council.

In performing their constitutional tasks and exercising their competence, the President, the Prime Minister and the Council of Ministers should follow the principle of co-operation between powers enshrined in Article 133.3 of the Constitution.

*Summary:*

I. The dispute over authority between the President of the Republic and the Prime Minister emerged in connection with the European Council session which took place in Brussels on 15-16 October 2008. The President and the Prime Minister claimed they were the Head of State or of Government mentioned in Article 4 of the Treaty on European Union. A motion to settle the dispute over authority between the President and the Prime Minister under Article 189 of the Constitution, has been lodged by the Prime Minister in order to determine the central constitutional authority of the state, which is entitled to represent the Republic of Poland at the European Council sessions and present the standpoint of the state.

II. A dispute over authority to be settled by the Constitutional Tribunal must be real. The authority initiating proceedings in this matter should substantiate the real character of the dispute and its legal interest in settling the dispute. Furthermore, the Tribunal settles disputes over authority regardless of the rank of the provision establishing the authority.

The Tribunal has stated that both the subjective and objective premises to settle the dispute over authority have been met. Both the President and the Prime Minister are central constitutional authorities of the state. The discrepancies in the understanding of competence to represent the Republic of Poland at the European Council sessions presented by the parties during hearings before the Constitutional Tribunal prove that the dispute is real.

According to Article 146.1 of the Constitution, the Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland. This legal provision expresses the presumption of exclusive authority of the Council of Ministers within the substantially understood “conducting of foreign policy”. However, this does not mean the Council of Ministers enjoys exclusive authority as regards the foreign representation of the Republic of Poland. Particular attention should be paid to Article 133.1 of the Constitution, determining that the President of the Republic is the “representative of the state in foreign affairs”. Thus, according to Article 146.2 of the Constitution, all matters related to the representation of the state belong to the Council of Ministers, except for those clearly reserved for the President of the Republic, and requiring the co-operation with the Prime Minister and the minister competent in this regard.

Article 126.2 of the Constitution, according to which “the President of the Republic of Poland shall be the supreme representative of the Republic of Poland” regulates the constitutional tasks, but not the competence of the President. Those tasks should be performed together and in co-operation with other state organs. The President does not enjoy exclusive competence to perform those tasks and he may not perform them freely.

Assigning the constitutional role of the supreme representative of the Republic to the President does not imply providing him with the power to conduct foreign policy. The Constitution differentiates between the President’s standing as the supreme representative of the Republic, and the President’s function as the representative of the state in foreign relations; the latter being a manifestation of an obvious attribute of every republican head of state.

The Constitution does not provide general competence of the President to participate in the sessions of the European Council. However, the President may decide to participate in a particular session of the European Council, under Article 126.1 of the Constitution, if he finds it useful for the realisation of his tasks under Article 126.2 of the Constitution. Nevertheless, the standpoint of the Republic of Poland is determined by

the Council of Ministers pursuant to Article 146.1, 146.2 and 4.9 of the Constitution. The Republic of Poland is represented at the sessions of the Council of Europe by the Prime Minister, who also presents the standpoint of the Republic of Poland. The President may comment on the standpoint of the Republic of Poland in matters regulated in Article 126.2 of the Constitution. The co-operation between the President and the Prime Minister should include determining the extent and form of the intended participation of the President in a particular session of the European Council.

The participation of the President in a session of the European Council has certain political and constitutional consequences. The presence of the President, because of the diplomatic hierarchy, makes him the head of the national delegation. Furthermore, there is no rule according to which the fact alone of being the supreme representative of a state (without participating in the current ruling process) would give the right to participate in a session of the European Council.

The relations between the Republic of Poland and the European Union do not have a uniform character, but as a whole, they fit within the “internal affairs and foreign policy” mentioned in Article 146.1 and within the “affairs of the state” mentioned in Article 146.2 of the Constitution. The more a particular session of the European Council is devoted to matters of traditional internal policy, the more difficult it becomes to find a reason for a state authority other than the Council of Ministers to participate in that session.

The European Council may not decide on matters which might constitute a threat to the inviolability and integrity of the territory of the Member States, including the Republic of Poland. However, the sessions of the European Council on possible changes to the treaties, which constitute the foundation of the EU, might concern the sovereignty of the Republic of Poland, which would justify the participation of the President.

The duty of state organs to co-operate is a legal obligation to try to achieve uniformity of actions taken with regard to foreign and EU policies. It includes a prohibition of forming two parallel and independent centres of foreign policy. Co-operation under Article 133.3 implies that the President may not conduct a competitive policy to the government policy. This would be contrary to the Polish *raison d'état*.

In the case of a session of the European Council, co-operation implies, in particular, informing the President through the Prime Minister or through the minister competent in foreign affairs about the subject of the session. Should the President show interest in the subject (and should the subject be covered by

Article 126.2 of the Constitution), the Council of Ministers should provide full information on the standpoint of the government in this regard.

The Tribunal has settled the dispute over authority between the President of the Republic and the Prime Minister *en banc* (15 judges) with three dissenting opinions.

#### Cross-References:

Decisions of the Constitutional Tribunal:

- Judgment K 15/04 of 31.05.2004, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2004, no. 5A, item 47; *Bulletin* 2004/2 [POL-2004-2-017];
- Judgment K 24/04 of 12.01.2005, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2005, no. 1A, item 3; *Bulletin* 2005/1 [POL-2005-1-002];
- Judgment K 18/04 of 11.05.2005, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2005, no. 5A, item 49; *Bulletin* 2005/1 [POL-2005-1-006];
- Judgment K 40/05 of 20.07.2006, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2006, no. 7A, item 82; *Bulletin* 2006/3 [POL-2006-3-013];
- Judgment Kpt 1/08 of 23.06.2008, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2008, no. 5A, item 97.

#### Languages:

Polish.



#### Identification: POL-2009-3-003

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 23.06.2009 / **e)** K 54/07 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2009, no. 105, item 880; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2009, no. 6A, item 86 / **h)** CODICES (Polish).

#### Keywords of the systematic thesaurus:

2.2.2.1.1 Sources – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – **Hierarchy attributed to rights and freedoms.**

3.6 General Principles – **Structure of the State .**

3.16 General Principles – **Proportionality.**

4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

4.11.3 Institutions – Armed forces, police forces and secret services – **Secret services.**

5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right of access to the file.**

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

5.3.36.1 Fundamental Rights – Civil and political rights – Inviolability of communications – **Correspondence.**

5.3.36.2 Fundamental Rights – Civil and political rights – Inviolability of communications – **Telephonic communications.**

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

#### Keywords of the alphabetical index:

Corruption prevention / Data, personal, protection / Data, personal, collecting, processing.

#### Headnotes:

The definition of corruption lacks the notion of “socially harmful reciprocity.” This could result in difficulties in establishing when corruption actually takes place.

When gathering personal data, the secret services should observe the criteria of necessity, subsidiarity and purposefulness. However, in the case of the Central Anti-corruption Bureau (hereinafter, the “CAB”), the process of gathering personal data does not even fulfil the criterion of necessity.

Inspections performed by the CAB are akin to a search under the Code of criminal procedure. However, there are no procedural guarantees covering inspections under the Act comparable to those included in the Code of criminal procedure relating to a search.

There is no statutory basis for establishing a special procedure for handing over information in a decree.

### Summary:

I. A group of Members of Parliament initiated an abstract review, challenging the constitutional compliance of the Act of 9 June 2006 on the CAB (hereinafter, the “Act”), Journal of Laws 2006, no. 104, item 708, or alternatively, of Articles 1.3, 2.1, 5.2-3, 22.1-3, 22.4-7, 22.8-10, 31.3 and 40 of the Act, as well as that of Article 43.2 of the Personal Data Protection Act as amended by Article 178 of the Act, and of Paragraphs 3 and 6 of the Decree of the President of the Council of Ministers, issued under Article 22.9 of the Act.

The constitutional provisions at issue here were Article 2 of the Constitution (democratic state ruled by law), Article 7 of the Constitution (rule of law), Article 10 (separation of powers), Article 20 of the Constitution (social market economy), Article 22 of the Constitution (economic activity freedom limitations), Article 30 of the Constitution (human dignity), Article 31.3 of the Constitution (limitations of constitutional rights), Article 32.1 of the Constitution (equality before the law), Article 42.1 of the Constitution (*nullum crimen sine lege*), Article 47 of the Constitution (legal protection of private life), Article 50 of the Constitution (inviolability of the home), Article 51 of the Constitution (personal data protection), Article 92.1 of the Constitution (delegations to issue ministerial decrees) and Article 202.1 of the Constitution (Supreme Chamber of Control). Also at issue were Articles 7.1, 8 and 18 ECHR, Article 20 of the Criminal Law Convention on Corruption, the preamble and Articles 5, 6 and 7 of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

The Act gives the CAB competences which are reminiscent of the police and prosecution. It stipulates that the CAB is competent to act, in terms of certain crimes regulated in other criminal legislation, if there is a link between the crime and corruption.

The Act contains a legal definition of corruption. It differs from the definition contained in the Criminal Law Convention of Corruption in that it defines several types of corruption in the same redaction unit of the Act, using multiple subordinate clauses.

The competences of the CAB are shared in part by the Supreme Chamber of Control. The head of the CAB is subordinate to the President of the Council of Ministers.

The Act empowers the CAB to gather, process and store personal data, including sensitive personal data on for example ethnic and racial origins and sexual history. The Act also excludes certain competences

of the General Inspector of Personal Data Protection relating to the activity of the CAB.

It also empowers the CAB to carry out controls and inspections.

The Act provides a delegation for the President of the Council of Ministers to issue a decree concerning the transfer of personal data and its surveillance by the CAB.

II. The provisions regulating tasks of the CAB, and the provisions on “links with corruption” do not expand the scope of criminal prosecution by comparison to the situation prior to the entry into force of the Act. The only goal of those provisions was a systematic distinction of the competence of the CAB within the pre-existing legal order.

The definition of corruption within the Act applies both to public and private law entities. It lacks a concept of “socially harmful reciprocity” of corruption, which might lead to difficulties in establishing when corruption actually takes place. This is especially difficult in the case of private law entities, where many actions, such as concluding agreements, are not socially harmful, but might be viewed as corruption, according to the definition. The Tribunal was of the view that the definition was too-long and grammatically inconsistent. It also contained vague notions such as “property, personal or other benefit”, as well as logical errors.

The mere fact that the competences of the CAB are shared in part with the Supreme Chamber of Control is not enough to render the provisions regulating the structure of the CAB unconstitutional. The subordination of the head of the CAB to the President of the Council of Ministers is a solution applied in several other countries and may enhance the effectiveness of the CAB by eliminating other channels of influence on the head.

According to the jurisprudence of the Tribunal, when gathering personal data, the secret service must observe the criteria of necessity, subsidiarity and purposefulness. However, in the case of the Act, the process of gathering personal data by the CAB does not even fulfil the criterion of necessity, and the obligatory verification of the data by the Bureau is much too long (ten years). The Act does not provide a mechanism to stop the data being used by unauthorised personnel or for purposes contrary to the law.

The differentiation of controlled entities into two groups (public finance sector and entrepreneurs) does not infringe the constitutional rule of equality before the law. All entities, whether public finance or entrepreneurial, share the same relevant characteristics.

The claimants had not proved sufficiently the infringement of the constitutional freedom of economic activity by the provisions of the Act concerning controls performed by the CAB.

It was noted that inspections performed by the CAB bear a resemblance to a search under the Code of criminal procedure (the limitation of constitutional freedoms and rights occurs in both cases to a similar extent). However, there are no procedural guarantees relating to an inspection in the Act comparable to those included in the Code of criminal procedure for searches. In particular, there is no statutory guarantee ensuring the appropriate use of data gathered during an inspection and to safeguard against access by unauthorised personnel.

The exclusion of certain competences of the General Inspector of Personal Data Protection is not unconstitutional. Similar exclusions exist in relation to other secret services, and the claimants did not provide proof of unconstitutionality of the exclusion with regard to the CAB only.

The decree of the President of the Council of Ministers issued under Article 22.9 of the Act provides a special procedure whereby state organs hand over information to the CAB, based upon an agreement between the organ and the CBA, without the necessity to file a relevant request in writing. The Tribunal declared Paragraphs 3 and 6 of the decree unconstitutional, due to a lack of a statutory basis for establishing a special procedure of handing over information in a decree. Such a procedure might lead to unlimited access to the information by unauthorised personnel.

The Tribunal pronounced the provisions of Article 1.3 (definition of corruption), Article 22.4-7 (collection of personal data, including sensitive personal data), Article 22.8-10 (statutory delegation to issue decrees on personal data protection) and Article 40 (inspections carried out by the CAB) of the Act, as well as Paragraphs 3 and 6 of the respective ministerial decree unconstitutional. They will lose their legal effect twelve months from the publication of the judgment in the Journal of Laws. It pronounced the provisions of Article 2.1 (tasks of the CAB), Article 5.2-3 (organisation of the CAB), Article 22.1-3 (personal data collection in general), Article 31.3 (controls carried out by the CAB) of the Act, as well as Article 43.2 of the Personal Data Protection Act as amended by Article 178 of the Act (challenge to the General Inspector of Personal Data Protection over certain matters) to be constitutionally compliant. The judgment was issued by the Tribunal sitting in a panel of 5 judges. One dissenting opinion was made.

### Cross-References:

#### Decisions of the Constitutional Tribunal:

- Judgment S 7/91 of 25.09.1991, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1991, item 34;
- Judgment U 6/92 of 19.06.1992, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1992, item 13; CODICES [POL-1992-X-002];
- Judgment S 1/94 of 13.06.1994, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1994, item 28;
- Judgment K 12/94 of 12.01.1995, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1995, item 2; *Bulletin* 1995/1 [POL-1995-1-003];
- Judgment K 11/94 of 26.04.1995, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1995, item 12;
- Judgment K 8/95 of 04.10.1995, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1995, item 28;
- Judgment K 9/95 of 31.01.1996, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1996, no. 1, item 2; [POL-1996-1-002];
- Judgment U 7/96 of 19.02.1997, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1997, no. 1, item 11;
- Judgment K 19/96 of 24.02.1997, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1997, no. 1, item 6; *Bulletin* 1997/1 [POL-1997-1-005];
- Judgment K 21/96 of 24.06.1997, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1997, no. 2, item 23; *Bulletin* 1997/2 [POL-1997-2-016];
- Judgment K 10/97 of 08.04.1998, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1998, no. 3, item 29;
- Judgment K 24/98 of 21.10.1998, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1998, no. 6, item 97; CODICES [POL-1998-X-003];
- Judgment P 2/98 of 12.01.1999, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1999, no. 1, item 2; *Bulletin* 1999/1 [POL-1999-1-002];
- Judgment P 11/98 of 12.01.2000, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2000, no. 1, item 3; *Bulletin* 2000/1 [POL-2000-1-005];
- Judgment K 33/99 of 03.10.2000, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2000, no. 6, item 188;
- Judgment P 2/00 of 20.02.2001, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2001, no. 2, item 32;
- Judgment K 22/01 of 23.10.2001, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2001, no. 7, item 215;



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- Judgment K 33/00 of 30.10.2001, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2001, no. 7, item 217; *Bulletin* 2001/1 [POL-2001-1-005];
  - Judgment P 9/01 of 12.03.2002, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2002, no. 2A, item 14; *Bulletin* 2002/3 [POL-2002-3-022];
  - Judgment K 26/00 of 10.04.2002, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2002, no. 2A, item 18; [POL-2002-3-025];
  - Judgment P 10/01 of 28.05.2002, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2002, no. 3A, item 35;
  - Judgment K 41/02 of 20.11.2002, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2002, no. 6A, item 83; *Bulletin* 2003/1 [POL-2003-1-006];
  - Judgment P 10/02 of 08.07.2003, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2003, no. 6A, item 62;
  - Judgment SK 22/02 of 26.11.2003, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2003, no. 9A, item 97; *Bulletin* 2004/1 [POL-2004-1-004];
  - Judgment K 45/02 of 20.04.2004, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2004, no. 4A, item 30;
  - Judgment P 2/03 of 05.05.2004, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2004, no. 5A, item 39; *Bulletin* 2004/2 [POL-2004-2-015];
  - Judgment K 4/04 of 20.06.2005, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2005, no. 6A, item 64;
  - Judgment Kp 1/05 of 22.09.2005, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2005, no. 8A, item 93;
  - Judgment K 32/04 of 12.12.2005, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2005, no. 11A, item 132; *Bulletin* 2006/1 [POL-2006-1-001];
  - Judgment SK 30/05 of 16.01.2006, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2006, no. 1A, item 2; *Bulletin* 2006/1 [POL-2006-1-002];
  - Judgment K 21/05 of 18.01.2006, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2006, no. 1A, item 4; *Bulletin* 2006/1 [POL-2006-1-003];
  - Judgment S 2/06 of 25.01.2006, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2006, no. 1A, item 13;
  - Judgment K 4/06 of 23.03.2006, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2006, no. 3A, item 32; *Bulletin* 2006/1 [POL-2006-1-006];
  - Judgment U 4/06 of 22.09.2006, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2006, no. 8A, item 109;
  - Judgment K 8/07 of 13.03.2007, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2007, no. 3A, item 26; *Bulletin* 2008/1 [POL-2008-1-001];
  - Judgment P 13/06 of 15.05.2007, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2007, no. 6A, item 57;
  - Judgment Kpt 2/08 of 20.05.2009, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 2009, no. 5A, item 78; *Bulletin* 2009/2 [POL-2009-2-003].
- Decisions of the European Court of Human Rights:
- Judgment no. 5029/71 of 06.09.1978 (*Klass et al. v. Germany*); *Special Bulletin Leading Cases – ECHR* [ECH-1978-S-004];
  - Judgment no. 8691/79 of 02.08.1984 (*Malone v. the United Kingdom*); *Special Bulletin Leading Cases – ECHR* [ECH-1984-S-007];
  - Judgment no. 9248/81 of 26.03.1987 (*Leander v. Sweden*); *Special Bulletin Leading Cases – ECHR* [ECH-1987-S-002];
  - Judgment no. 20605/92 of 25.06.1997 (*Halford v. the United Kingdom*); Judgment no. 23224/94 of 25.03.1998 (*Kopp v. Switzerland*); *Bulletin* 1998/1 [ECH-1998-1-005];
  - Judgment no. 27798/95 of 16.02.2000 (*Amann v. Switzerland*);
  - Judgment no. 28341/95 of 04.05.2000 (*Rotaru v. Romania*);
  - Judgment no. 62332/00 of 06.06.2006 (*Segerstedt-Wilberg et al. v. Sweden*);
  - Judgment no. 64772/01 of 09.11.2006 (*Leempoel & S.A. Ed. Ciné Revue v. Belgium*);
  - Judgment no. 3896/04 of 31.01.2008 (*Ryabov v. Russia*);
  - Judgment no. 65775/01 of 22.05.2008 (*Ilija Stefanov v. Bulgaria*);
  - Judgment no. 5182/02 of 22.05.2008 (*Kirov v. Bulgaria*);
  - Judgment no. 58243/00 of 01.07.2008 (*Liberty et al. v. the United Kingdom*).
- Decisions of other Constitutional Courts:
- *Bundesverfassungsgericht*. Judgment no. 1 BvR 2378/98, 1084/99 of 03.03.2003, *Bulletin* 2004/1 [GER-2004-1-002].
- Decision of the European Commission:
- Decision of 04.03.1988 (*A.O. v. the Netherlands*).
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*Languages:*

Polish.



## Portugal Constitutional Court

### Important decisions

*Identification:* POR-1996-2-004

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 27.07.1996 / **e)** 976/96 / **f)** / **g)** *Diário da República* (Official Gazette), not published / **h)**.

*Keywords of the systematic thesaurus:*

1.1.4.1 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Head of State**.

4.4.5.3 Institutions – Head of State – Term of office – **Incapacity**.

*Keywords of the alphabetical index:*

Incapacity, temporary / President.

*Headnotes:*

Where a declaration of temporary incapacity to exercise duties has been requested by the President of the Republic himself, there is no need for the Constitutional Court to solicit a hearing nor for the medical verification provided for in section 88 of Law no. 28/82.

In the case under consideration, the circumstances described in the medical report accompanying the request could reasonably be held to amount to a temporary incapacity to exercise presidential duties, as the President himself had judged.

*Summary:*

Under Article 135.1 of the Constitution, temporary incapacity of the President of the Republic shall entail his replacement by the President of the Assembly of the Republic.

Article 225.2.a of the Constitution provides that it shall be for the Constitutional Court to note and declare any temporary incapacity of the President of the Republic to exercise his duties.

The President of the Republic, Dr Jorge Sampaio, requested the Constitutional Court to declare his temporary incapacity as from 27 July 1996, when he was due to undergo a surgical operation. The President appended a medical report to his request, which described the condition making surgery necessary, the circumstances of the operation and the likely post-operative period, and went on to conclude, from a strictly medical point of view, that the operation would entail the President's temporary incapacity to exercise his duties.

On the basis of that information, the Constitutional Court, after considering that additional clinical examinations could be dispensed with, confirmed and declared the temporary incapacity of the President of the Republic, Dr Jorge Sampaio, as from 27 July 1996. The duties of the President of the Republic would be assumed during his incapacity by the President of the Assembly of the Republic, Dr António de Almeida Santos.

#### *Supplementary information:*

In its judgment no. 980/96 the Constitutional Court declared that the President's temporary incapacity had ceased.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2002-1-002

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 08.02.2002 / **e)** 65/02 / **f)** / **g)** *Diário da República* (Official Gazette), 51 (Serie II), 01.03.2002, 3997-4004 / **h)** CODICES (Portuguese).

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

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.2.1 Constitutional Justice – Jurisdiction – Type of review – **Preliminary / ex post facto review.**

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

1.3.5.10 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by the executive.**

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

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

3.18 General Principles – **General interest.**

4.4.3.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**

4.6.2 Institutions – Executive bodies – **Powers.**

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

Necessity, strict, measure / Public affairs, management / Government, resignation, powers / Government, legislative measure, strict necessity.

#### *Headnotes:*

Measures taken by the Government after its resignation are naturally subject to scrutiny by the competent authorities. One of the steps in such scrutiny will be to verify whether the constitutional criterion of strict necessity is satisfied, whether it be political scrutiny effected by the President of the Republic, who may use his veto, or legal scrutiny involving the Constitutional Court.

The government must show the strict necessity of the legislative measures it approves, failing which it cannot demonstrate compliance with the condition for exercising the corresponding power. Both the explanatory memorandum and subsequent scrutiny must deal with two aspects: firstly, the objective claimed by the government, in relation to which the question of urgency will be of considerable importance; secondly, the actual measure approved for the purpose of achieving that objective. In this context, the explanatory memorandum and scrutiny thereof must concentrate on the question of appropriateness (which is now the material reference).

Since the scrutiny exercised by the Constitutional Court – in this instance preventive scrutiny of provisions approved by the government – is of a legal nature, it is necessary to specify what it consists of. In other words, it must be determined, in relation to the very vague concept of strict necessity, where the Constitutional Court's jurisdiction lies. The diminishment of the government's legislative powers does not entail transfer of the Constitutional Court's powers to the sphere of political options.

This observation applies to scrutiny both of the objective and of the choice of measure for achieving it.

Where scrutiny of the objective is concerned, the Constitutional Court must confine itself to ascertaining any incongruity or clear lack of foundation in the reasons given for the urgency of the measure –

considering them from an objective point of view, and not simply that of the policies and programme defined by the government which is no longer in office. In relation to that objective, it must consider whether there is any manifest discrepancy between the aim pursued and the measure proposed. It cannot, for example, save in the event of an obvious error, reject the legislator's judgment as to the probability of attaining the objective, particularly when that judgment involves mainly technical assessments. Otherwise, the Constitutional Court would be encroaching on the legislator's (in this case, the government's) preserve by venturing into the sphere of criticism of political options.

Lastly, in cases where there is a legal connection between an objective and a means, the reasons put forward by the government can be scrutinised by the Court as subjects falling within its jurisdiction.

### *Summary:*

The President of the Republic asked the Constitutional Court for a preliminary examination of the constitutionality of the provisions of various articles of a government decree which were possibly contrary to the Constitution with regard to the government's departure from office, as laid down in Article 186.5 of the Constitution ("... after its resignation, the government shall confine itself to measures strictly necessary for the management of public affairs"). This decree was passed to the President's office on 16 January 2002 for promulgation in the form of a legislative decree.

The President of the Republic wished to know whether the adoption of changes, whatever their merit, which the government considers important, concerning "the manner of appointment of technical management boards of hospitals and health establishments", "the membership of hospitals' technical boards" and the rules governing "hospitals' acquisition of goods and services" falls within the constitutionally recognised powers of a government after its resignation. He also affirms that it is not a question of appraising the "weighty political reasons" adduced by the government in support of the measure, but only of determining whether it must be regarded as a "measure strictly necessary for the management of public affairs".

The Prime Minister contended that none of the government proposals exceeded the powers of a government no longer in office. Firstly, because they do not constitute fundamental innovations, including only measures "to streamline hospital management (...) utilising rules already tested in the past or in current experiments". Secondly, because they "did

not restrict the policy-making powers of the incoming government". Thirdly, they should be regarded as "strictly necessary for the management of public affairs" (...) because without them, in the health field the government cannot complete either the State budget, or that of the Stability and Growth Pact for 2002-2005 (...) submitted to the European Union in December 2001". Also, to explain the strict necessity of the changes, the government refers to the importance of hospital funding in the national health service and the length of time likely to elapse before the incoming government takes office.

The question of unconstitutionality arises from the "government's resignation in consequence of the acceptance of the resignation tendered by the Prime Minister" by virtue of the presidential decree of 17 December 2001. It is naturally related to the question of the constitutional definition of the powers of a government after its resignation.

The Constitutional Court had frequently pronounced on the constitutional definition of a government's powers after its resignation, holding that that definition entailed no restriction as to the nature of the measures, but that the decisive criterion was the strict necessity of carrying them out. There is no doubt that the issue is one of the form and substance of a legislative measure. The measure in question makes a considerable change in the legal rules currently applicable to the management of hospitals and health establishments. It is accordingly necessary to determine whether the legislative measures introducing important changes in the Portuguese legal system fall within the powers of governments which have ceased to be in office.

The nature of the measure is not important for circumscribing the powers of a government after its resignation; the decisive criterion that has to be analysed is that of strict necessity. For the Constitutional Court, this concept corresponds basically to that of urgency or the impossibility of deferment. The Constitutional Court has previously stated in its case-law that the concept of strict necessity includes a margin of relative uncertainty. It follows that its definition may be inferred from two indicators: firstly, the great importance of the interests at stake, such that failure to take the measure could seriously impair the management of public affairs; secondly, the impossibility of deferment, i.e. the impossibility, without causing grave damage, of leaving it to the incoming government to resolve the problem, or of resolving it after appraisal of the same government's programme.

In conclusion, the Court decided that the provisions in question are not unconstitutional because they are not contrary to the constitutional condition whereby they must be strictly necessary in accordance with Article 186.5 of the Constitution.

The Constitutional Court held that regarding the objective which the government sought to achieve by means of the decree – the reduction of expenditure by hospitals and health establishments, having regard to their importance in public expenditure as a whole – the constitutional requirement of strict necessity was satisfied. Similarly, it held that the urgency or impossibility of deferring the measure were also demonstrated.

Lastly, it had to be determined whether the strict necessity revealed by the measure's objective, considered in the abstract, could also be used to justify adoption of the provisions contained in the decree. In other words, it had to be determined whether the provisions were appropriate to the achievement of the stated objectives. Within the limits of the Constitutional Court's powers of appraisal in scrutinising the reasons for governments' acts after their resignation, it may be reliably concluded that the explanation provided by the government is neither incongruous nor obscure, and does not justify a finding that the measures adopted were manifestly inappropriate to the objective pursued. The Court must verify only whether they comply with the minimum parameters imposed by a general requirement of appropriateness and proportionality; no grounds were found for doubting that the measures in question complied with those parameters.

#### *Supplementary information:*

The Constitutional Court has frequently given rulings on the restriction of governments' powers after their resignation, in respect of various measures adopted in identical circumstances. The sphere of competence of an outgoing government is not defined in the original text of the Constitution, but it is dealt with in Article 186.5 of the Constitution of the 1982 revised version, which stipulates that "(...) the government shall confine itself to measures strictly necessary for the management of public affairs".

Judgment 56/84 concludes that it "was clear that the government, after its resignation, is not restricted as to the nature, form or substance of measures (it may, in the political, legislative and administrative fields, take any measures except those which are in essence incompatible with the institutionally irregular situation)". The line followed in Judgments nos. 142/85, 427/87, 2/88 and 111/88 is the same.

#### *Languages:*

Portuguese.



# Romania

## Constitutional Court

### Important decisions

*Identification:* ROM-1995-C-001

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 15.02.1995 / **e)** II/1995 / **f)** Decision on the meaning of the term “courts of law” when examining an objection challenging constitutionality / **g)** *Monitorul Oficial al României* (Official Gazette), 47/1995 / **h)** CODICES (Romanian).

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

1.6.9.2 Constitutional Justice – Effects – Consequences for other cases – **Decided cases.**

4.7.1 Institutions – Judicial bodies – **Jurisdiction.**

4.7.10 Institutions – Judicial bodies – **Financial courts.**

*Keywords of the alphabetical index:*

Preliminary question / Judicial authority, concept.

*Headnotes:*

The meaning of the term “courts of law” when examining an objection challenging constitutionality derives from the provisions of Article 125.1 of the Constitution, Law no. 92/1992 on the Administration of Justice and Law no. 54/1993 on the organisation of the military courts and prosecutors’ offices.

By an interlocutory ruling, the judicial authority before which the objection challenging constitutionality had been made referred the case to the Court, in accordance with Article 23 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court.

The bodies of the Court of Audit are not entitled to submit objections challenging constitutionality to the Constitutional Court.

Constitutional Court decisions which remain final by virtue of failure to enter an appeal are binding and are enforceable on the merits.

The result of this decision shall be applied to future referrals from the Court of Audit to the Constitutional Court.

*Summary:*

After examining Decisions nos. 90/1994, 91/1994 and 92/1994, delivered on the merits benches composed of three judges of the Constitutional Court, the appeal entered by the Public Prosecutor’s Office against Decision no. 90/1994 and the interlocutory ruling of 24 January 1995, the Constitutional Court, meeting in plenary session, held that:

Article 144.c of the Constitution establishes the Constitutional Court’s jurisdiction to rule on objections entered before courts of law challenging the constitutionality of laws and orders.

In applying this constitutional provision, Article 23.1 and 23.4 of Law no. 47/1992 define those courts of law that may refer objections challenging constitutionality to the Constitutional Court by means of interlocutory rulings.

At the same time, consideration must be given to the provisions of Article 125.1 of the Constitution, entitled “Courts of Law”, whereby “Justice shall be administered by the Supreme Court of Justice and other courts established by law”, and of Law no. 92/1992 on the Administration of Justice, Article 10 of which states that the judicial authorities shall be:

- a. the civil courts of first instance;
- b. the courts;
- c. the appeal courts;
- d. the Supreme Court of Justice; as well as the military courts, the territorial military court and the military appeals court. In accordance with Law no. 54/1993, the Court of Audit is not a judicial authority, because Article 139 of the Constitution is not part of the chapter of the Constitution entitled “Judicial authority” and these bodies do not administer justice.

Further, the Constitutional Court held that Article 144.c of the Constitution rules on the Constitutional Court’s jurisdiction to deal with objections

challenging the constitutionality of laws and orders, but that according to this article such objections are to be made before the judicial authorities. Likewise, Article 23 of Law no. 47/1992 establishes the manner in which judicial authorities are to refer cases to the Constitutional Court, so that the question of referral to the Court must be resolved before examining the issue of jurisdiction.

In order to ensure that the constitutional and legal provisions are rigorously adhered to, in future, the Constitutional Court's benches must apply the interpretation in this decision when dealing with referrals by the Court of Audit.

Previous decisions delivered following referral by the bodies of the Court of Audit remain final in the absence of appeals against them, are binding, in accordance with Article 145.2 of the Constitution, and are enforceable on the merits.

#### *Supplementary information:*

The decision was adopted by a majority vote.

Law no. 47/1992 on the organisation and functioning of the Constitutional Court has since been amended.

Under the provisions of the Law prior to re-issue, Constitutional Court decisions delivered by three judges could be appealed against. The appeal was examined by a bench of five judges. The appeal bench's decision was final and published in the Official Gazette.

In accordance with these legal provisions and under the terms of the pre-1997 Law, Article 26.2, last sentence, of the Rules on the organisation and functioning of the Constitutional Court stated that "The Plenary Assembly's interpretation, delivered by a majority of judges' votes, shall be binding on the Court".

Law no. 47/1992, as amended in 1997, no longer sets out two levels of jurisdiction for ruling on objections challenging constitutionality.

#### *Languages:*

Romanian.



#### *Identification:* ROM-1995-C-002

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 23.03.1995 / **e)** 33/1995 / **f)** Decision on an objection challenging the constitutionality of the provisions of Article 229 of the Criminal Code / **g)** *Monitorul Oficial al României* (Official Gazette), 105/30.05.1995 / **h)** CODICES (Romanian).

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

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

1.6.1 Constitutional Justice – Effects – **Scope.**

1.6.7 Constitutional Justice – Effects – **Influence on State organs.**

1.6.9 Constitutional Justice – Effects – **Consequences for other cases.**

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

Similar cases, solution / Judicial authority.

#### *Headnotes:*

Under Article 145.2 of the Constitution, Constitutional Court decisions are binding and the judicial authorities have a constitutional duty to implement them when dealing with similar cases.

#### *Summary:*

The Petrosani Court asked the Constitutional Court to rule on an objection challenging the constitutionality of Article 229 of the Criminal Code.

In examining the objection challenging constitutionality, the Court noted that it had already delivered a final judgment on the constitutionality of Article 229 of the Criminal Code, and had found that these provisions were partially repealed, in accordance with Article 150.1 of the Constitution.

The grounds and interpretation given in that case remain valid, so that the objection is unfounded and should be rejected.

#### *Languages:*

Romanian.



*Identification:* ROM-2000-1-009

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 29.11.1999 / **e)** 203/1999 / **f)** Decision on an objection of unconstitutionality concerning the provisions of Section 2.f of the Access to Personal Records and Disclosure of Membership of the Securitate as a Political Police Force Act / **g)** *Monitorul Oficial al României*(Official Gazette), 603/09.12.1999; *Curtea Constitutionala, Culegere de decizii si hotarâri 1999* (Official Digest), 89, 1999 / **h)**.

*Keywords of the systematic thesaurus:*

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.3 Constitutional Justice – **Jurisdiction.**

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

2.1.3.3 Sources – Categories – Case-law – **Foreign case-law.**

2.2.1.1 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and constitutions.**

2.2.1.4 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and constitutions.**

3.16 General Principles – **Proportionality.**

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

4.7.7 Institutions – Judicial bodies – **Supreme court.**

4.11.3 Institutions – Armed forces, police forces and secret services – **Secret services.**

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

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

*Keywords of the alphabetical index:*

Disclosure, files, access.

*Headnotes:*

The fact that secret service operatives are exempt from application of the provisions of Article 2.f of the Access to Personal Records and Disclosure of Membership of the Securitate as a Political Police Force Act does not conflict with the provisions of Article 31 of the Constitution, on the right to information, or those of Article 49.1 of the Constitution, on the exercise of certain rights and freedoms.

*Summary:*

The Supreme Court of Justice referred to the Constitutional Court an objection of unconstitutionality concerning the Access to Personal Records and Disclosure of Membership of the Securitate as a Political Police Force Act. The grounds included the argument that the provisions of the Act in question, which imposed restrictions concerning persons in respect of whom it was possible to request information relating to their capacity as Securitate agents, was in breach of the provisions of Article 31.1 of the Constitution on the non-restriction of a person's right of access to any information of public interest. The alleged breach lay in the listing of high-ranking positions and offices to which the provisions of the Act were applicable, namely, the office of President of Romania, member of parliament, senator or government member and senior ranks, directorships and executive posts in all public authorities, government departments, courts, non-governmental organisations, unions, professional associations and the like. Operational posts in the intelligence services were excluded. This omission was seen as restricting the body of persons in respect of whom it was possible to obtain information, since it excluded secret service operatives, some of whom had been members of the political police responsible for infringements of citizens' rights and freedoms. This was therefore contrary to Article 31 of the Constitution, on the right to information.

It was argued in substance that the Act was unconstitutional with the exception of the provision whereby information could only be requested concerning directors and their deputies in the Romanian foreign intelligence, defence and security and special telecommunications departments who had worked as agents or informants for the Securitate. Implicitly, therefore, an exception was made for "other persons working in the operational divisions of these departments".

Unconstitutionality was alleged in respect of the provisions of Article 2.f of the Act, which provided that the right of access to information of public interest was guaranteed by entitling every Romanian citizen domiciled in the country or abroad, as well as the print and audiovisual media, political parties, legally established NGOs and public authorities and institutions to seek and obtain information concerning the membership as agents or informants of the Securitate political police of persons holding or standing for election or appointment to the following senior positions and offices: directorships and deputy directorships in the Romanian foreign intelligence, defence and security and special telecommunications departments. It was for this reason



that the Court dealt only with the constitutionality of these statutory provisions.

The Court held that Article 2.f of the Act did not conflict with the provisions of Article 31.1 of the Constitution, since it was not the provision of information concerning the capacity of agents and informants of the former Securitate that must be considered a potential threat to national security, but the disclosure of the identities of officers in the present intelligence services.

Accordingly, the provisions of Article 31.1 of the Constitution must be interpreted by reference to Article 31.3 of the Constitution.

The Court held that, in the light of the provisions of Article 20.1 of the Constitution, Article 31.3 of the Constitution conformed to Article 10.2 ECHR on freedom of expression and freedom to hold opinions and to receive and impart information.

It noted that, in accordance with Article 49.1 of the Constitution, the exercise of certain rights or freedoms could be restricted only by law and only if this was necessary, among other things, to "defend national security". Under Article 49.1, the restriction must be in proportion to the situation which caused it and could not impinge upon the existence of the right or freedom concerned.

With regard to these constitutional provisions, the Act in question did not impinge on the existence of the right of access to information of public interest but merely restricted the exercise of this right, and in a way that was proportional to the situation which caused it. This proportionality was a consequence of the fact that obtaining information on employees of the present intelligence services was excluded only in situations in which this might be damaging. Other clauses of the Act, such as Article 1.2 and 1.3 and Article 17.2, did however raise the possibility, in other circumstances, of publicly disclosing what position, if any, employees of the present intelligence services had previously held as Securitate agents or informants.

The Court was not competent to decide whether the Act was of such a nature as to achieve the purpose for which it had been proposed and adopted. Decisions on the substance of legislation and its suitability for adoption were the sole preserve of parliament, within its constitutional limits.

In order to hand down this decision, the Court also studied other legislation relating to similar matters, including the Act on secret documents from the former German Democratic Republic, which was adopted in Germany on 20 December 1991, Act

no. XXIII of 1994 on the investigation of persons holding certain senior positions and on the "Historical Office" (*Történeti Hivatal*), adopted by the Republic of Hungary, and the Act on access to documents of the former security services, which was published in the Official Gazette of the Republic of Bulgaria no. 63 of 6 August 1997 (together with Bulgarian Constitutional Court Judgment no. 10 of 22 September 1997). None of these laws regulates the provision of information, as matters of public interest, concerning agents or informants of the former secret service or political police bodies. What is more, they contain provisions to safeguard the confidentiality of data which could be damaging to national security.

#### *Supplementary information:*

Article 31.1 of the Constitution states: "A person's right of access to any information of public interest cannot be restricted".

Article 20.1 of the Constitution, on international human rights treaties, states that constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights and with other treaties and covenants to which Romania is a party.

Article 10.2 ECHR states: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

Article 1.2 of the Act on access to files and disclosure of membership of the Securitate as a political police force specifies that persons who are the subject of a file which reveals that they were pursued by the Securitate have the right on request to be told the identities of the Securitate agents and informants who provided information in the file. According to Article 1.3, where these persons are deceased their surviving relatives, up to and including their cousins twice removed, enjoy the same rights unless the deceased disposed otherwise.

Article 17.2 of the same Act provides that the National Council for the Study of the Securitate Archives shall publish in Part III of the *Monitorul Oficial al României* (Official Gazette) details of the identities, including

code names and roles, of Securitate officers and junior officers, whether active or covert, who were involved in political police activities.

#### Languages:

Romanian.



#### Identification: ROM-2001-2-004

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 05.04.2001 / **e)** 98/2001 / **f)** Decision on the constitutionality of legislation rejecting Government Emergency Order no. 23/1999 for the repeal of Act no. 31/1996 on the state monopoly system / **g)** *Monitorul Oficial al României* (Official Gazette), 265/18.05.2001 / **h)** CODICES (French).

#### Keywords of the systematic thesaurus:

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

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

1.6.7 Constitutional Justice – Effects – **Influence on State organs.**

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

#### Keywords of the alphabetical index:

Emergency order, repeal / Decision, Court, publication.

#### Headnotes:

Constitutional Court decisions delivered in connection with the settlement of issues of unconstitutionality are binding and effective *erga omnes*. Thereafter, the statutory provision whose unconstitutionality has been determined by a Constitutional Court ruling is no longer applicable and ceases to operate for the future.

The legislation rejecting Government Emergency Order no. 23/1999 for the repeal of Act no. 31/1996 on the State Monopoly System is unconstitutional. Indeed, under the first sentence of Article 145.2 of the Constitution, Government Emergency Order

no. 23/1999 ceased to operate on 14 June 2000 when Constitutional Court Decision no. 15/2000 declaring this order unconstitutional was published in the Official Gazette of Romania (*Monitorul Oficial al României*).

#### Summary:

In accordance with Article 144.a of the Constitution and Section 17 of Act no. 47/1992, the President of Romania asked the Constitutional Court to rule on the constitutionality of legislation rejecting Government Emergency Order no. 23/1999 for the repeal of Act no. 31/1996 on the State Monopoly System.

This legislation was regarded by the President of Romania as contrary to Article 145.2 of the Constitution, according to which decisions of the Constitutional Court are binding for the future without retroactive effect. These decisions are published in the Official Gazette.

In examining this objection of unconstitutionality, the Court recalled its finding in Decision no. 15 of 25 January 2000, published in the Official Gazette, Part I, no. 267 of 14 June 2000, that the provisions of the emergency order were unconstitutional. Consequently, on 14 June 2000, the date when the Court's decision was published in the Official Gazette, application of the order ceased. Act no. 31/1996 on the State Monopoly System took effect in accordance with the first sentence of Article 145.2 of the Constitution.

The universally binding character of the Court's findings of unconstitutionality follows from the provisions of Articles 145.2, 16.1 and 51 of the Constitution, as well as from the Constitutional Court's status as sole authority with constitutional jurisdiction, independent of any other public authority, which serves the purpose of guaranteeing the supremacy of the Constitution in accordance with the principle of rule of law laid down in Article 1.3 of the Constitution.

The Court observed that the *erga omnes* binding force of decisions delivered in proceedings on constitutional issues arose from the very essence of constitutional review and moreover was also stipulated in the constitutions of other European states, for instance the Constitution of the Kingdom of Spain (Article 164) and the Constitution of Portugal (Article 282).

The Court therefore held that once ruled unconstitutional by a decision, a law or an order could no longer be applied by any public authority or other legal entity, it being henceforth devoid of prescriptive effect. Although the Court is not empowered to repeal

a statute, the parliament being vested with sole competence in this respect, decisions declaring a law or an order unconstitutional are similar in effect to their repeal.

There is no suggestion that where the measure of repeal does not eventuate or is delayed, the Constitutional Court decision fails to take effect.

In the case in point, the Court held that Decision no. 15/2000, which was final and binding, had established the unconstitutionality of the provisions of Government Emergency Order no. 23/1999 repealing Act no. 31/1996 on the State Monopoly System. Upon publication of the decision in the Official Gazette, the order had ceased to be applicable.

Nonetheless, the parliament enacted a law to reject the emergency order without acknowledging its inapplicability upon publication of the Court's decision in the Official Gazette, Part I. The fact that it had ceased to apply was not even alluded to in the final clause of that law, referring to observance of Article 74 of the Constitution though without mention of Article 145 of the Constitution.

In accordance with the provisions of Article 78 of the Constitution, Government Emergency Order no. 23/1999 should have ceased to be applicable as soon as the law rejecting it was published in the Official Gazette, and not as from the date of publication of the Court's decision, which would be contrary to the first sentence of Article 145.2 of the Constitution.

#### *Cross-References:*

- Decision no. 15 of 25.01.2000, *Bulletin* 2000/3 [ROM-2000-3-013].

#### *Languages:*

Romanian, French (translation by the Court).



#### *Identification:* ROM-2002-M-001

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 07.11.2002 / **e)** 296/2002 / **f)** Decision relating to an objection alleging unconstitutionality of the provisions of Article 385<sup>9</sup> of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 881/06.12.2002 / **h)** CODICES (French).

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

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**  
 1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation.**  
 1.6.1 Constitutional Justice – Effects – **Scope.**  
 4.5.2 Institutions – Legislative bodies – **Powers.**  
 4.7.2 Institutions – Judicial bodies – **Procedure.**

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

Legal lacunae, unconstitutional.

#### *Headnotes:*

Parliament is the sole authority empowered to establish the jurisdiction and procedure of courts and the remedies available against judgments handed down by the criminal courts. The Constitutional Court cannot therefore supplant parliament and add new provisions to those already prescribed.

#### *Summary:*

An objection alleging unconstitutionality of Article 385<sup>9</sup> of the Code of Criminal Procedure, which explicitly restricts the cases in which appeals can be made against judgments handed down by the criminal courts, was lodged with the Constitutional Court.

These provisions were considered unconstitutional because they do not include as grounds for appeal “failure by the appeal court to hear the accused”, which is a violation of the right to due process and the right to a fair trial.

The Court found that the objections made to the legal provisions were that they did not provide for one specific ground for appeal, i.e. that there was a legal lacunae.

The Court's case-law stipulates that the Constitutional Court cannot supplant parliament and add new provisions to those already prescribed; hence the objection alleging unconstitutionality on the grounds of a legal lacunae was inadmissible. Otherwise, such a review would be tantamount to interference in the powers of parliament, which, pursuant to the second part of Article 58.1 of the Constitution, is the country's sole legislative authority.

The Constitutional Court has laid down consistent case-law concerning the inadmissibility of criticism of legal lacunae. For example, in Decision no. 212 of 7 November 2000, published in the Romanian Official Gazette, Part I, no. 1 of 5 January 2001, and Decision no. 43 of 7 February 2001, published in the Romanian Official Gazette, Part I, no. 75, of 14 February 2001.

The Court found that the objection was also unfounded with regard to its merits, as parliament is the sole authority empowered to establish the jurisdiction and procedure of courts (Article 125.3 of the Constitution), and the remedies available against judgments handed down by the criminal courts (Article 128 of the Constitution).

The Court therefore held that the objection alleging unconstitutionality of the provisions of Article 385<sup>9</sup> of the Code of Criminal Procedure was inadmissible.

#### *Languages:*

Romanian.



## Russia Constitutional Court

### Important decisions

*Identification:* RUS-1998-2-006

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 17.07.1998 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 30.07.1998 / **h)**.

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**

1.3.5.5.1 Constitutional Justice – Jurisdiction – The subject of review – Laws and other rules having the force of law – **Laws and other rules in force before the entry into force of the Constitution.**

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

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

4.7.2 Institutions – Judicial bodies – **Procedure.**

4.7.4 Institutions – Judicial bodies – **Organisation.**

*Keywords of the alphabetical index:*

Court, verification of the constitutionality of laws / Court, powers, delimitation / Constitutional court, exclusive jurisdiction.

*Headnotes:*

Ordinary courts do not have a right, but rather an obligation, to request the Constitutional Court to verify the constitutionality of a law applied or to be applied in a specific case if they find that law to be unconstitutional. Only in such cases will an unconstitutional provision be denied the force of law in accordance with the constitutionally established procedure, thereby ruling out its future application. This also ensures compliance with the constitutional principle that laws must be applied in a uniform manner throughout the territory of the Russian Federation, as well as the primacy of the Constitution, which

cannot be guaranteed if different courts are allowed to interpret constitutional provisions in divergent ways.

### Summary:

In this case, the Constitutional Court interpreted several articles of the Constitution at the request of the legislative assembly of the Republic of Karelia and the State Council of the Republic of Komi.

The subject of the interpretation in this case are the provisions of Article 125 of the Russian Constitution, pursuant to which the Constitutional Court is required to verify the constitutionality of the normative legal acts enumerated in this article and which, if they are found unconstitutional, cease to have force of law in respect of the provisions of Articles 126 and 127 of the Constitution; the latter provisions set out the powers of the Supreme Court as the supreme judicial authority in civil, criminal, administrative and other matters, and the Supreme Court of Arbitration as the supreme judicial authority ruling on economic disputes and other matters, and thus determine in general the relevant powers of the ordinary courts and the arbitration courts. The Constitutional Court was required to consider whether the powers of the ordinary courts and arbitration courts to verify the constitutionality of normative legal acts and to declare them null and void, i.e. as being no longer in force, flow from the above-mentioned provisions.

Of fundamental importance for this interpretation are the provisions of the Constitution laying down the superior legal force of constitutional provisions and the direct force of the Constitution (Article 15 of the Constitution), *inter alia* in the area of the rights and freedoms guaranteed by law (Article 18 of the Constitution), in which their legal protection is guaranteed (Article 46 of the Constitution). It follows that the requirement of the direct application of the Constitution applies to all courts.

At the same time, Article 125 of the Constitution contains special provisions giving a special judicial body, the Constitutional Court, power to verify the constitutionality of normative legal acts with the result that such acts may lose the force of law. The Constitution does not attribute such powers to the other courts.

In defining the powers of the Constitutional Court, the Constitution takes as a basis the obligation to exercise this power in a particular way, namely via constitutional judicial procedure. For this reason, it determines the main aspects of this procedure, i.e. what decisions may be challenged and who may appeal, as well as the types of procedures applicable

and the legal effects of decisions rendered. For the other courts, there are no such regulations at constitutional level. Consequently, the Constitution does not contemplate verification by these courts of the constitutionality of normative acts.

This is also in conformity with the general legal principle that a court which was established and functions on a lawful basis (Article 6 ECHR) is considered to be competent to hear the case, which presupposes that the powers of the various courts are set forth in the Constitution and in the law adopted in keeping with the Constitution. This principle is expressed in Articles 47, 118, 120 and 128 of the Constitution of the Russian Federation and is at the basis of the definition of absolute territorial power and of the jurisdiction of the court hearing the case as well as the categorising of types of court jurisdiction. With regard to the exercise of the power to verify the constitutionality of acts, provision is made for the relevant court only in the Constitution; such provision may not be made by another law.

Articles 125, 126 and 127 of the Constitution develop the logic of Article 118, according to which judicial authority is exercised through constitutional, civil, administrative and criminal proceedings. It is precisely because the constitutional proceedings are the responsibility of the Constitutional Court, in accordance with Article 125, that Articles 126 and 127 give other courts jurisdiction in civil, criminal, administrative matters and economic disputes.

The decisions of the Constitutional Court pursuant to which unconstitutional normative legal acts lose the force of law produce the same general effects in respect of time, of territory and of the number of persons concerned as do normative legal acts that are decisions of the body creating the rules. Consequently, they also have the same general effects as these acts. Those effects are not unique to the decisions of ordinary courts and arbitration courts, which by nature are acts in application of the law designed to apply legal rules. The Constitutional Court alone takes official decisions of general application. Hence, its decisions are final and cannot be reviewed by other bodies or overruled by the adoption for a second time of an act which has been found unconstitutional, and require all those who apply the law, including other courts, to act in conformity with the legal positions of the Constitutional Court.

The decisions of the ordinary courts and the arbitration courts do not have such force of law. They are not binding on other courts in other cases, because the courts interpret independently the normative provisions which must be applied. The

decisions of the ordinary courts and the arbitration courts may be challenged in accordance with established procedures. Moreover, no provision is made for the mandatory official publication of these decisions, which, by virtue of Article 15.3 of the Constitution stipulating that only officially published laws are applicable, also excludes other bodies applying the law from the obligation to follow suit when settling other cases. In view of the above, the decisions of courts of ordinary law and arbitration courts are not recognised as an appropriate way of depriving of the force of law normative legal acts which have been found unconstitutional.

The fact that courts of ordinary law and arbitration courts do not have the power to find the above-mentioned normative legal acts unconstitutional and thus without direct effect also flows from Article 125.2 of the Constitution, pursuant to which the Supreme Court and the Supreme Court of Arbitration are both bodies which may request the Constitutional Court to verify the constitutionality of normative legal acts (unrelated to the consideration of a specific case, i.e. verification of rules *in abstracto*). Upon the request of courts, the Constitutional Court also verifies the constitutionality of the law applied or applicable in a specific case.

Hence, it has been established at constitutional level that rulings of other courts on the unconstitutionality of a law cannot in themselves serve as a basis for officially finding that law unconstitutional and depriving it of legal effect. From the point of view of the interaction of courts with different types of jurisdiction and the definition of their power to find laws unconstitutional, the exclusion of such laws from a number of acts in force is the joint result of the obligation on the ordinary courts to question the constitutionality of the law before the Constitutional Court and the obligation of the latter to render a final ruling on the question.

Appeals by other courts, provided for in Article 125 of the Constitution relating to verification of the constitutionality of the law applied or applicable in a specific case if the court finds the law to be unconstitutional, cannot be regarded as a right only: the court must lodge an appeal requesting that the unconstitutional act lose its force of law according to the constitutionally established procedure, which may rule out its future application.

Refusal to apply in a specific case a law found unconstitutional by the court, without an appeal having been lodged on this occasion before the Constitutional Court, would be at variance with the constitutional provisions according to which laws apply uniformly throughout the entire territory of the Russian Federation (Articles 4, 15 and 76), and would probably also cast

doubt on the primacy of the Constitution, because it cannot be applied if conflicting interpretations of constitutional rules by different courts are allowed. This is precisely why an appeal to the Constitutional Court is also obligatory in cases in which the court, when examining a specific case, finds unconstitutional a law which was adopted prior to the entry into force of the Constitution and whose application must be ruled out in conformity with paragraph 2 of its Concluding and Interim Provisions.

In cases in which they find a law to be unconstitutional, the obligation on the courts to apply to the Constitutional Court for official confirmation of unconstitutionality does not restrict their direct application of the Constitution, whose purpose is to ensure the application of constitutional rules above all when they have not been given specific legislative form. If, in the view of the court, the law which should be applied in a specific case is unconstitutional and its provisions therefore cannot be applied, that law may cease to have statutory force in accordance with constitutional procedure, so that the Constitution has direct effect in all cases in which the court rules on the basis of a specific constitutional rule.

Article 125 of the Constitution does not limit the powers of other courts to decide which law is applicable in a given case, where laws contradict each other or gaps are revealed in the legal regulations, or rules which have actually lost their effect have not been abrogated in accordance with the established procedure. However, the court may refrain from applying the federal law or the law of a constituent entity of the Russian Federation; but it does not have the power to find them null and void.

Nor does the power of the federal courts to declare the normative legal acts of the constituent entities of the Russian Federation to be inconsistent with their constitutions (statutes) follow from Article 76 of the Constitution, which lays down the principles for settling conflicts between normative legal acts at various levels. Only the bodies of the Constitutional Court system, if such is provided for by the constitutions (statutes) of the constituent entities of the Russian Federation, may perform the above-mentioned function, which leads to the loss of force of law of those entities' normative legal acts.

The Constitutional Court has decided that it alone shall rule on the constitutionality of the laws of the Federation and its constituent entities. The ordinary courts of law are bound to appeal to the Constitutional Court if they believe such a rule to be unconstitutional. A federal constitutional law may require the ordinary courts to rule on the legality of normative legal acts below the level of statute law.

*Languages:*

Russian.

*Identification:* RUS-2001-1-001

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 11.04.2000 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 27.04.2000 / **h)**.

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.3.4.3 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between central government and federal or regional entities.**

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**

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

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

3.6.3 General Principles – Structure of the State – **Federal State.**

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

4.7.1.3 Institutions – Judicial bodies – Jurisdiction – **Conflicts of jurisdiction.**

4.7.2 Institutions – Judicial bodies – **Procedure.**

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

4.7.4.3.1 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Powers.**

4.8.8.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods.**

*Keywords of the alphabetical index:*

Law, federal / Law, regional / Law, inapplicable.

*Headnotes:*

An ordinary court can, upon application by the prosecutor, rule that the law of a subject (constituent entity) of the Federation is contrary to federal law and therefore inapplicable, thereby requiring that it be made to comply with federal law by the legislature of

the constituent entity of the Federation. This does not affect the right to apply to the Constitutional Court for verification of the constitutionality of the law of the constituent entity of the Federation. If the latter is ruled unconstitutional, it becomes null and void and must be regarded as having been repealed.

*Summary:*

Under the 1992 Federal Law on the *Prokuratura*, the latter was responsible for supervising compliance with the law by measures enacted by the legislatures of the constituent entities of the Federation and for applying to the court to have them declared null and void where appropriate.

In its application to the Constitutional Court, the Civil Division of the Supreme Court asked the following question: Is the prosecutor entitled to ask an ordinary court to declare a law of a constituent entity of the Federation null and void because it contradicts federal law and does the ordinary court have jurisdiction in such cases?

First, the Constitutional Court noted that the federal legislature could grant the prosecutor power to make application to the court and in particular to ask it to verify the conformity with federal law of a law of a constituent entity of the Federation. However, in granting this power to the prosecutor, thereby confirming the corresponding power of the court, the federal law on the *Prokuratura* did not define the manner of its exercise.

The Constitution did not specifically empower the ordinary courts to deal with cases involving verification of the conformity with federal law of laws of constituent entities of the Federation and to take decisions concerning the annulment of laws of constituent entities of the Federation.

The primacy of the Constitution and the supremacy of federal laws as components of a single principle were one of the foundations of the constitutional regime and must be guaranteed by the judicial system, not only through constitutional proceedings, but also by means of other judicial proceedings.

According to Article 125 of the Constitution, verification of the constitutionality of legislative measures and their annulment if they are contrary to the Constitution were effected through Constitutional Court proceedings. However, the compliance with federal law of the laws of constituent entities of the Federation, where their constitutionality was not at issue, was verified by the ordinary courts, which were responsible for guaranteeing the primacy of federal laws in carrying out their function of applying the law.

The federal legislature could provide for the verification by the ordinary courts of the compliance with federal law or with other major legislation other than the Constitution, of lesser legislative measures (including the laws of constituent entities of the Federation). This doctrine had been stated previously in the Constitutional Court's decisions of 16 June 1998 and 30 April 1997. However, as the Constitutional Court had stated, the ordinary courts could not declare laws of constituent entities of the Federation unconstitutional and hence without legal force. According to Article 125 of the Constitution, this was the exclusive prerogative of the Constitutional Court. An ordinary court, having reached the conclusion that a law of a constituent entity of the Federation did not comply with the Constitution, must not apply it in an actual case but must apply to the Constitutional Court for verification of the law's constitutionality.

Article 22.3.3 of the federal law on the *Prokuratura*, both literally and as interpreted in practice, enabled republic, territorial and regional courts, after examining a case at the request of the prosecutor, to declare a legislative measure, including a law of a constituent entity of the Federation, null and void, having no legal effect as from its enactment and hence not needing to be repealed by its enacting body.

However, that went beyond the bounds set by the Code of Civil Procedure. According to the code, once the court's decision finding all or part of the legislative measure illegal had acquired legal force, that measure or part of a measure must be regarded as inapplicable.

A law could lose its legal force, as followed from Article 125.6 of the Constitution and from the Federal Constitutional Law on the Constitutional Court of the Russian Federation, only after it had been declared unconstitutional. Such a declaration, pronounced in Constitutional Court proceedings, had direct effect; for that reason repeal of the unconstitutional law by its enacting body was not necessary since it was considered repealed, i.e. null and void, as from the pronouncement of the Constitutional Court's decision.

The difference in legal consequences between declaring a law of a constituent entity of the Federation null and void or inapplicable occurred due to the difference between its being contrary to the Constitution and contrary to federal law.

The ordinary court's examination of a case concerning the conformity of a law of a constituent entity of the Federation, as a result of which it could be declared contrary to federal law, did not preclude subsequent consideration of its constitutionality in Constitutional Court proceedings. Consequently, the

ordinary court's decision declaring the law of a constituent entity of the Federation contrary to federal law did not in itself constitute confirmation of the law's nullity or its repeal by the court, still less its loss of legal force from the very moment of its promulgation, but simply recognition of its inapplicability. The law could be deprived of its legal force only by a decision of its enacting body or through Constitutional Court proceedings.

Most of the examined provisions of the federal law on the *Prokuratura* were not contrary to the Constitution.

Article 22.3.3 provided that, if a law of a constituent entity of the Federation contradicted federal law, the ordinary court, at the prosecutor's request, had to declare the law null and void; this was not in accordance with the constitutional principles of the exercise of the power of the people through the legislature, the separation of powers and the guaranteeing of the primacy of the law and Constitution by the judicial system.

Articles 5.3, 66.1 and 66.2 of the Constitution, which defined the federal structure, justified the hierarchy of laws which was the basis for determining the cases in which a law of a constituent entity of the Federation was contrary to federal law and the federal law was applicable, or in which the contradiction could not serve as a basis for declaring the law of a constituent entity of the Federation inapplicable.

According to Article 72.1 of the Constitution, ensuring conformity between the laws of constituent entities of the Federation and federal laws was the joint responsibility of the federation and its constituent entities. The settlement of public law disputes between the federal organs of state power and those of the constituent entities of the Federation had to be based primarily on the interpretation of the rules of competence contained in the Constitution though Constitutional Court proceedings.

An ordinary court's declaration that a law of a constituent entity of the Federation was null and void was at variance with its constitutional function of asking the Constitutional Court to verify the constitutionality of a law. However, a decision by an ordinary court declaring a law of a constituent entity of the Federation inapplicable did not rule out the possibility of verification by the Constitutional Court of the constitutionality of the federal law and the law of a constituent entity of the Federation.

The Constitutional Court had jurisdiction to examine such cases referred to it by the relevant authorities of constituent entities of the Federation, by the courts or, where the public law dispute over the division of



powers between different levels of state authority affected constitutional rights and freedoms, by ordinary citizens. The Constitutional Court acted in such cases as a judicial body making final rulings on such public law disputes.

At the same time, alongside the above-mentioned constitutional jurisdiction of the Constitutional Court, the legislature could make additional provisions in the federal constitutional law to regulate the prerogatives not only of the ordinary courts, but also of the (statutory) Constitutional Courts of the constituent entities of the Federation in matters relating to verification of conformity between the laws of constituent entities of the Federation and federal law.

#### *Languages:*

Russian.



#### *Identification:* RUS-2003-3-005

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 18.07.2003 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 29.07.2003 / **h)** CODICES (Russian).

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

1.2.1.7 Constitutional Justice – Types of claim – Claim by a public body – **Public Prosecutor or Attorney-General.**

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.4.3 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between central government and federal or regional entities.**

1.3.5.8 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by federal or regional entities.**

4.7.1.3 Institutions – Judicial bodies – Jurisdiction – **Conflicts of jurisdiction.**

4.8.1 Institutions – Federalism, regionalism and local self-government – **Federal entities.**

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

4.8.8.3 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Supervision.**

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

Federation, entity, constitution / Federation, entity, constitution, review.

#### *Headnotes:*

The constituent nature and the constitutional and special legal status of the constitutions (statutes) of the subjects of the Federation require that their control is carried out only within the framework of the constitutional procedure by the Federal Constitutional Court.

#### *Summary:*

Upon application by the parliaments of the Republic of Bashkortostan and the Republic of Tatarstan, subjects of the Federation, and also by the Supreme Court of the Republic of Tatarstan, the Constitutional Court reviewed the constitutionality of the provisions of the legislation on civil procedure and of the law 'on the prokuratura', which confer on the ordinary courts the power to review the conformity with the federal laws of the legal measures adopted by the subjects of the Federation.

The applicants maintained that those provisions allow the ordinary courts to review the Constitutions of the subjects of the Federation, which are amenable to review only within the framework of constitutional proceedings before the Federal Constitutional Court.

The Court noted that, unlike the other legal normative measures which the subjects of the Federation adopt, their Constitutions have a special relationship with the Federal Constitution. They cannot be regarded as a type of act, subject to review in civil or administrative proceedings.

For the purposes of the Federal Constitution, the Constitutions of the subjects of the Federation are of a constituent nature; they define the organisation of the subjects of the Federation and form the basis of the legislation and other regulations relating to matters within their exclusive competence. The constitutional principles of the federal structure, the constituent nature of the Constitution of the Federation and the Constitutions of its subjects ensure the organic unity of the federal and regional constitutional regulations and also the unity of the constitutional and legal area of the Federative State.

The complicated procedure for the adoption and revision of the Constitutions of the subjects of the Federation also has a special legal nature by comparison with ordinary laws. Apart from that, the

subjects of the Federation may themselves make provision for review of the conformity of their legal acts with their Constitutions and for the establishment for those purposes of (statutory) Constitutional Courts in the subjects of the Federation. In turn, the Federal Constitutional Court is entitled to review the Constitutions of the subjects of the Federation exclusively in plenary sessions, while most other acts are examined in sessions before chambers.

Likewise, it follows from the Federal Constitution that unlawful interference by the federal legislature in the area in which the subjects of the Federation have exclusive competence is not permissible, particularly as regards the adoption and revision of their Constitutions.

The federal legislature must take account of these considerations when granting the courts the power to review the acts of the subjects of the Federation, including their Constitutions. The provisions of the law reviewed in the present case do not contain a list of the normative acts of the subjects of the Federation which may be examined by an ordinary court. Furthermore, the practice of the application of legal acts does not preclude those courts from examining the Constitutions of the subjects of the Federation.

However, the fundamental criterion in any examination of the Constitutions of the subjects of the Federation, having regard to their direct normative connection with the Federal Constitution, is their conformity with that Constitution. That also concerns the examination of those Constitutions' conformity with the federal law, since in that case it may prove necessary to examine the constitutionality of the federal law itself. Questions of that type can be resolved only within the framework of constitutional proceedings before the Federal Constitutional Court.

Nor is review of the Constitutions of the subjects of the Federation by the ordinary courts consistent with the constitutional principles of justice, in particular with the need for the law to determine a competent court for each case.

The Court held that the contested provisions were contrary to the constitution in so far as they allow the Constitutions of the subjects of the Federation to be reviewed by the ordinary courts.

At the same time, the Court concluded that the corresponding provision of the law 'On the prokuratura' does not preclude the possibility for the State Attorney to petition the Federal Constitutional Court, even though the law 'On the Constitutional Court' makes no provision for such a right of petition.

*Languages:*

Russian.



# Slovakia

## Constitutional Court

### Important decisions

*Identification:* SVK-1995-C-001

**a)** Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 10.01.1995 / **e)** II. ÚS 1/95 / **f)** / **g)** *Zbierka náleзов a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), 24/95 / **h)**.

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

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

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions.**

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

*Keywords of the alphabetical index:*

Administration of justice, definition / Administration of justice, non-interference / Principle, Evidence, free evaluation, / Judicial authority, exclusive jurisdiction, principle.

*Headnotes:*

The Constitutional Court lacks the authority to annul decisions of the ordinary courts or to suspend their enforceability.

Since constitutional and ordinary courts are separate and equal modes of administration of justice, there is no hierarchical relationship between them, and the Constitutional Court is neither an alternative nor an extraordinary instance designed to adjudicate in matters that fall within the competence of ordinary courts.

*Summary:*

The petitioner alleged that various constitutional rights related to judicial protection had been violated by the failure of respective ordinary courts to properly assess the available evidence and to draw properly

legal conclusions from it. The matter concerned claims related to restitution for the protection of which she had applied to the competent ordinary courts.

The Constitutional Court rejected the petitioner's claims by pointing out the lack of competence to review the merits of the petition. The Constitutional Court held that to furnish a legal opinion on the matter it would have to review whether the ordinary courts had assessed all available evidence and whether they had drawn proper legal conclusions from it. However, the Constitutional Court does not have jurisdiction to review the facts of a case and its legal essence in those matters in which evidence was gathered and assessed by the ordinary courts. Most importantly, the Constitutional Court held that it lacked the authority to annul any decisions of the ordinary courts even if it had doubts about the correctness of the ordinary courts' factual assertions and, by extension, of their decisions *per se*.

According to the Constitutional Court, it would be at odds with the autonomous and procedurally self-contained administration of justice through ordinary adjudication to appropriate for itself the authority to annul decisions of the ordinary courts. The performance of any such power by the Constitutional Court would have to be based on a constitutional and statutory regulation, which would have to make sure that constitutional review would not become an additional appellate or cassation instance.

*Languages:*

Slovak.



*Identification:* SVK-1996-C-001

**a)** Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 18.12.1996 / **e)** Pl. ÚS 14/96 / **f)** / **g)** *Zbierka náleзов a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), 20/96 / **h)**.

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

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

1.4.9.1 Constitutional Justice – Procedure – Parties – **Locus standi**.

1.4.10.4 Constitutional Justice – Procedure – Interlocutory proceedings – **Discontinuance of proceedings**.

*Keywords of the alphabetical index:*

Preliminary question, discontinuance of proceedings in the originating case.

*Headnotes:*

Any referral by a court of general jurisdiction to the Constitutional Court of a question of law is to be deemed a motion for review of compatibility of legal acts.

The discontinuance of proceedings in connection with which a court of general jurisdiction referred to the Constitutional Court a question of law deprives such court of standing in proceedings before the Constitutional Court and constitutes grounds for rejecting the referral as inadmissible.

*Summary:*

The petitioner, a district court, applied to the Constitutional Court for a binding statement on the conformity to the Constitution of a provision of the Civil Procedure Code, concerning the distribution of the burden of proof between litigants in civil proceedings. After the referral but before the Constitutional Court issued a decision on whether to admit the referral for further proceedings, the applicant in the original civil proceedings withdrew his claim and the proceedings were discontinued.

The Constitutional Court dismissed the referral. It pointed out that any referral by an ordinary court of a question of law was to be deemed a motion for abstract review of compatibility of legal acts, regardless of the description by the referring authority. Any such referral must also be connected with the decision-making activity of the ordinary court. The Constitutional Court held that since the original proceedings had been discontinued in response to a motion by the competent party, there ceased to be the requisite link between the referral and the ordinary court's decision-making activity. Accordingly, the petitioner lost its standing in the proceedings before the Constitutional Court and the referral therefore had to be dismissed.

*Languages:*

Slovak.



*Identification: SVK-1997-C-001*

**a)** Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 23.01.1997 / **e)** I. ÚS 6/97 / **f)** / **g)** Zbierka náleзов a uznesení Ústavného súdu Slovenskej republiky (Official Digest), 39/97 / **h)**.

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts**.

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

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions**.

3.13 General Principles – **Legality**.

5.1.1 Fundamental Rights – General questions – **Entitlement to rights**.

*Keywords of the alphabetical index:*

Administration of justice, non-interference / Remedy, exhaustion / Judicial authority, exclusive jurisdiction, principle.

*Headnotes:*

The Constitutional Court lacks the authority to proceed with a petition regarding the constitutionality of a decision of an ordinary court if a review of the legality of either the procedure or the decision of the ordinary court would have to precede such finding.

*Summary:*

The petitioner filed with the Constitutional Court a petition in which he alleged that various constitutional rights, including the right to personal integrity, the protection of privacy, the right to choose and exercise a profession and the right of access to a court, had been violated by the Slovak Supreme Court in a dispute over the validity of a business contract.

The Constitutional Court dismissed the petition, in part because of a *prima facie* lack of merits of the claim, in part because of a lack of competence to review it. The Constitutional Court held that it was authorised to adjudicate upon petitions filed under Article 130.3 of the Constitution even if they concerned a review of the procedure or decisions of ordinary courts if such procedure or decisions resulted in the violation of constitutionally guaranteed rights of natural and legal persons. Given the independence and institutional separation of constitutional and ordinary courts, however, the Constitutional Court does not have the authority to review the observance of statutory law by the ordinary courts in matters which fall within the exclusive competence of the ordinary courts. It could do so only if the alleged infringement concerned rights for which there was no other means of protection available under the law in force.

#### *Supplementary information:*

The Constitutional Court has relied on the same reasoning in a vast number of other decisions, and in the Decision registered as I. ÚS 36/97 it enriched the attending qualification by holding that it also lacked the authority to decide which provision of substantive law the competent court should take to be determinant, to annul or affirm the affected decision, or to set a particular date by which an ordinary court is obliged to issue a final ruling.

#### *Languages:*

Slovak.



#### *Identification:* SVK-2007-1-001

**a)** Slovakia / **b)** Constitutional Court / **c)** Senate / **d)** 14.09.2006 / **e)** I. ÚS 80/06 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

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

1.6.6.2 Constitutional Justice – Effects – Execution – **Penalty payment.**

1.6.9.1 Constitutional Justice – Effects – Consequences for other cases – **Ongoing cases.**

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

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

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

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

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

Criminal proceedings / Compensation for damage / Length of proceedings, delay, excessive / Judicial protection, right, essence, endangered / Denial of justice, compensation.

#### *Headnotes:*

Proceedings for compensation for damage to an aggrieved person (*adhézne konanie*) within criminal proceedings which have been subject to delays of several years in the renewed proceedings, and which have lasted in total for more than 30 years, are incompatible with the right stipulated in the European Convention on Human Rights and in the Constitution of the Slovak Republic to have one's case tried within a reasonable time, or without unreasonable delay. The above-mentioned length of proceedings before the ordinary courts affects the state of legal certainty of an aggrieved person to such an extent that his/her right to judicial protection becomes illusory and is endangered in its essence.

#### *Summary:*

I. The Constitutional Court of the Slovak Republic heard the complaint of a natural person claiming the violation of her right to have her case heard without unreasonable delay (pursuant to Article 48.2 of the Constitution) and her right to have her case heard within a reasonable time (pursuant to Article 6.1 ECHR), as a result of the manner in which the Regional Court and the Supreme Court of the Slovak Republic proceeded (the former in two separate proceedings, the latter in criminal proceedings within which the applicant has the status of the aggrieved person). The aggrieved person is the mother of a student murdered in 1976. The proceedings in this case were commenced in 1981 and they have not as yet been finally adjudicated. The Regional Court rendered in the case a judgment of conviction in 1982 which was affirmed by a ruling of the Supreme Court of the Slovak Socialist Republic. The Supreme Court of the Czech and Slovak Federative Republic

(deciding while the Czech and Slovak Federative Republic was still in existence) quashed the ruling of the Supreme Court of the Slovak Socialist Republic as it came to the conclusion that the ruling and proceedings prior to it constituted a violation of the law to the detriment of the accused persons. In December 1990 the case was remanded to the Regional Court to be heard and decided. From that date up to the day of the decision made by the Constitutional Court, the proceedings have not been finally adjudicated.

II. In its case-law, when deciding whether in a specific case there was a violation of the right to have one's case heard without unreasonable delay, as guaranteed under Article 48.2 of the Constitution, the Constitutional Court has established that it reviews, with regard to the specific circumstances of each case, three basic criteria: the complexity of the case, the behaviour of the party to the proceedings and the manner in which the Court conducted the case. In accordance with the case-law of the European Court of Human Rights, the Court also takes into account the subject of the dispute (nature of the case) in the reviewed proceedings and its importance for the complainant.

In the opinion of the Constitutional Court, an ordinary court is obliged to organise its procedure in such a way as to hear and decide the case as soon as possible and eliminate the state of legal uncertainty of parties to the proceedings, including the position of the aggrieved person.

The Constitutional Court acknowledged the complexity of the given case. It stated that rendering decisions on criminal matters are a complex matter, especially in the given case in connection with the scope of the necessary evidence (including expert evidence) and due to the interval of more than 30 years since the commission of the crime. The Constitutional Court, however, did not accept the unusually long procedure of the challenged proceedings even in the light of the complexity of the case under adjudication.

Regarding the conduct of the applicant, the Constitutional Court did not ascertain any relevant circumstances which could have an impact on the length of the challenged proceedings.

The Constitutional Court dealt with the manner in which the Regional Court and the Supreme Court proceeded in the case at issue. The Constitutional Court considered the issue of unreasonable delays as a whole in view of the total length of the proceedings and all the circumstances of the case concerned. It took into account the fact that the crime upon which

the indictment was brought was committed in 1976, but also that the challenged proceedings were commenced before the Constitutional Court began to provide individual protection of fundamental rights and freedoms of natural and legal persons (15 February 1993) and before the European Court of Human Rights became binding for the Slovak Republic (18 March 1992), when the Czech and Slovak Federative Republic ratified the European Convention on Human Rights and acknowledged individual applications pursuant to Article 25 ECHR (the Slovak Republic as a successor assumed this obligation with effect from 1 January 1993).

The Constitutional Court emphasised that the proceedings, which, in consequence of the manner in which the Regional Court proceeded, have lasted more than 30 years (with a period of total inactivity within the first proceedings of at least six years and six months without the existence of any legal obstacles whatsoever, and a period within the second proceedings when it was suspended for nearly 14 years), can be considered, upon reviewing the proceedings as a whole, as a state of legal uncertainty for the aggrieved person resulting exclusively from the manner in which the Court proceeded, to such an extent that her right to judicial protection has become illusory and endangered in its essence, and could be considered a denial of justice (*denegatio iustitiae*). The Constitutional Court found that the Regional Court in both proceedings violated the right of the applicant pursuant to Article 48.2 of the Constitution and Article 6.1 ECHR. The Constitutional Court took into consideration that in its Decision no. II. ÚS 32/03, in which it decided on the complaints of the accused persons in criminal proceedings in the first case, it ordered the Regional Court to hear and decide the case. Even despite that fact, subsequent proceedings in the given case were not organised in such a way that the case could be heard and decided as soon as possible.

The Constitutional Court mentioned that the fact that the Supreme Court took two years to order the case to be heard, in such factually complex proceedings, would not in itself entail a violation of the fundamental right of the applicant, but it considered the delay to be inappropriate in the context of the overall length of these proceedings, lasting almost 16 years after the quashing of the judgment on the merits of the case. It therefore declared that the Supreme Court had violated the right guaranteed under Article 48.2 of the Constitution and Article 6.1 ECHR. The Constitutional Court ordered the Regional Court to take action in the case without unreasonable delay.

The Constitutional Court awarded the applicant appropriate financial satisfaction amounting to 650,000 SKK (approximately 19,000 EUR) and ordered the Regional Court to pay the fees of her legal representatives.

*Supplementary information:*

It should be stated that the compensation awarded in this case is the highest that has ever been awarded by the Constitutional Court in its decision-making activity to date.

It is necessary to add, in this case, that the Constitutional Court had never before this case reviewed any proceedings in which the applicants claimed a violation of their fundamental right pursuant to Article 48.2 of the Constitution and Article 6.1 ECHR when the same applicants were in the position of aggrieved persons, a circumstance for which it has also been criticised by the European Court of Human Rights. In this instance it also reacted to that court's decision in the case of *Krumpel and Krumpelová v. Slovakia* (Application no. 56195/00).

*Languages:*

Slovak.



## Slovenia Constitutional Court

### Important decisions

*Identification:* SLO-1999-3-005

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 23.09.1999 / **e)** U-I-163/99 / **f)** / **g)** *Uradni list RS* (Official Gazette), 59/99 and 80/99; *Odločbe in sklepi ustavne sodišča* (Official Digest), VIII, 1999 / **h)** *Pravna Praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

*Keywords of the systematic thesaurus:*

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

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

1.6.1 Constitutional Justice – Effects – **Scope.**

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

1.6.7 Constitutional Justice – Effects – **Influence on State organs.**

1.6.9.2 Constitutional Justice – Effects – Consequences for other cases – **Decided cases.**

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

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

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

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

4.8.6 Institutions – Federalism, regionalism and local self-government – **Institutional aspects.**

5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections.**

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

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

*Keywords of the alphabetical index:*

Municipality, establishment, criteria / Local self-government, right.

### Headnotes:

A decision by the Constitutional Court is binding on the legislature, which means that the latter is obliged to implement the Court's decision; otherwise, the principles of a state governed by the rule of law and of the separation of powers would be breached. Where the Court makes an order on the basis of its authority under the Constitutional Court Act as to the manner of implementing its decision, the legislature may nevertheless change by statute the manner of implementing this decision. The adoption of such a statute is not unconstitutional in itself. Only the manner of implementation embodied in such a statute can be unconstitutional, and this is subject to constitutional review if this is requested of the Court.

The holding of elections to the bodies of a municipality whose territory has not yet been adjusted to meet the constitutional and statutory criteria does not violate the constitutional right to local self-government. Changes to the status of a local community should not be directly connected with elections. Local elections would be unconstitutional if they were carried out in a manner that made it impossible for qualified voters to exercise freely their will and their equality with respect to the exercise of their right to vote. Local elections are not, however, unconstitutional only because of the fact that during a certain period of time local community bodies have been elected on municipal territory that is not completely in conformity with constitutional provisions.

The constitutional right of voters to vote for representatives of local self-government at certain time intervals does not require that elections be carried out at precise four-year intervals. The legislature could also set a longer term of office for local self-government bodies. Nevertheless, due to the general constitutional principle of equality, the Court cannot extend the term of office of municipal bodies for an unlimited time. A longer postponement of local elections could seriously jeopardise citizens' exercise – by periodically choosing their representatives in local self-government bodies – of their right to local self-government. The periodic carrying out of elections must therefore be made possible, even if these are carried out in a municipality established in a manner that does not meet all constitutional criteria. The challenged Act, which was intended to establish the legal basis for calling local elections in Koper Urban Municipality, did not violate the principle of a State governed by the rule of law.

### Summary:

The Constitutional Court ruled in Decision no. U-I-301/98 that Article 3.2 of the Establishment of Municipalities and of their Geographical Boundaries

Act (hereinafter, the "ZUODNO") was unconstitutional and set a one-year time-limit for the National Assembly to remedy this defect. Furthermore, on the basis of Article 40.2 of the Constitutional Court Act, Official Gazette RS, no. 15/94 ("ZustS"), the Court ordered the extension of the term of office of the Koper Urban Municipality bodies until the assumption of office of the new municipality bodies to be established in accordance with the Constitution. Following this decision the regular local elections in this municipality were not held. The National Assembly then legislated to make possible local elections even before the amendment of ZUODNO to comply with the Constitution. It was this Act that was subject to challenge before the Court. The petitioners alleged *inter alia* that the legislature, by modifying the Court's orders, had violated the principle of the separation of powers.

Article 3.3 of the Constitution defines the principle of the separation of powers as being Government divided into legislative, executive and judicial branches. The Constitutional Court has often defined the contents of this principle in its decisions (see Cross-references). The Constitutional Court belongs to the judicial branch of power but has special powers compared with other courts (Articles 160 and 161 of the Constitution). It is the State body which reviews the constitutionality of the regulations of the legislative branch as well as the constitutionality and legality of the regulations of the executive branch. Thus, in the framework of its powers, in the most direct way possible, it enters into relations with these bodies. The legislature is bound by the interpretations of the Constitutional Court, under the principle of the separation of powers. Therefore, the legislature must implement Constitutional Court decisions; otherwise, it is in violation of Articles 2 and 3 of the Constitution (the principle of a state governed by the rule of law and the separation of powers).

Article 40.2 ZustS empowers the Constitutional Court to determine when necessary which body must implement a decision and in what manner. On the basis of this provision the Court may temporarily regulate a transitional state of affairs until the legislature remedies the state of affairs to conform with the Court's decision. Article 40.2 ZUstS does not lay down the conditions which must be fulfilled for it to be applied, its application being left to a case-by-case judgment by the Court. The Court may decide on the manner in which its decision must be implemented irrespective of the proposals of the participants in the proceedings. What is most important is that by a decision reached on such a basis the Court does not necessarily interpret the Constitution and hence, in this part, does not explicitly exercise its power of constitutional review under Articles 160 and 161 of the Constitution. The legal character of a



decision reached by the Constitutional Court pursuant to Article 40.2 ZUstS is thus different from the legal character of a decision relating to the constitutional review of regulations. Thus, the legislature may change by statute the manner of implementing a decision determined on the basis of Article 40.2 ZUstS. The adoption of such a statute is not in itself unconstitutional. Only the manner of implementation included in such a statute may be unconstitutional; this, however, is subject to constitutional review if it is requested of the Constitutional Court. Thus, the Court had to evaluate in this case whether the provisions of the challenged statute were in conformity with the Constitution.

The challenged statute would not comply with the Constitution if by it the National Assembly regulated a particular question in a manner conflicting with the constitutional interpretation given by the Court. The Court itself is also bound by the doctrine of precedent to decide substantially similar cases in a substantially similar way, unless changed circumstances and developments in legal theory require different reasoning. In such cases the Court should take these circumstances or arguments into account and if different reasoning is applied, leading to a different result, the reasons should be given in the decision.

The reasoning behind the Court's extension of the term of office of Koper Urban Municipality bodies is not developed at length in Decision no. U-I-301/98. In Decision no. U-I-183/94, however, the Court explicitly stated that the formation of municipalities is an on-going process that does not end with the establishment of the municipality but continues as the municipality develops into as natural and functional an entity as possible. The Court further reasoned that it is the particular duty of the legislature to determine within the framework of its powers and of the constitutional scheme relating to municipalities the statutory criteria to be applied in establishing municipalities. The Court limited itself in this decision to finding the Act in question (ZUODNO) to be unconstitutional, but decided not to annul the Act as this would have prevented the holding of elections to new bodies in the disputed territories. This would in turn have prevented the transformation of the old municipality system into the new system of local self-government across the entire territory of the country, a result which could not be tolerated, as postponing the formation of new municipalities would have created an even greater conflict with the Constitution than the immediate election of a new municipal council, "because even municipalities which do not entirely conform with the constitutional concept of local self-government do conform more than the old municipalities which originate from the system of considering municipalities to be communes".

The question of the constitutionality of these elections must be considered in the context existing at the time. The right to local self-government is the right of inhabitants who live in a certain area and who are connected with each other by common needs and interests to regulate local affairs by themselves. The right to local self-government is defined in the Constitution not as a fundamental human right but as a constitutional right based on Article 9 of the Constitution. Elections would be unconstitutional if they were held in such a manner that the free exercise of the will of persons entitled to vote and equality in exercising the right to vote were made impossible. However, they would not be unconstitutional only by reason of the fact that during a certain time period local community bodies are formed on the territory of a municipality that is not entirely in conformity with constitutional provisions. Thus the petitioners' assertions that the carrying out of elections to the bodies of a municipality which has not yet been adjusted to meet the constitutional and statutory criteria entails a violation of the right to local self-government are not well founded.

The Court ruled that the challenged Act did not violate the principle of the rule of law (Article 2 of the Constitution), nor was there a violation of Article 87 of the Constitution, which provides that the rights and obligations of persons are to be regulated only by statute. Accordingly, the challenged Act did not violate the Constitution.

#### *Supplementary information:*

Legal norms referred to:

- Articles 2, 3.3, 9, 14, 87, 160, 161 of the Constitution;
- Article 14 of the Local Self-Government Act (ZLS);
- Articles 24, 26 of the Local Elections Act (ZLV);
- Articles 21, 40.2 of the Constitutional Court Act (ZUstS).

Concurring opinion of a Constitutional Court judge.

Dissenting opinion of a Constitutional Court judge.

#### *Cross-References:*

On the principle of the separation of powers:

- Decision no. U-I-83/94, dated 14.07.1994, Official Gazette RS, no. 84/94 and DecCC III, 89, full text in English in CODICES [SLO-1994-X-048];
- Decision no. U-I-158/94, dated 09.03.1995, Official Gazette RS, no. 18/95 and DecCC IV, 20, *Bulletin* 1995/1 [SLO-1995-1-005];

- Decision no. U-I-224/96, dated 22.05.1997, Official Gazette RS, no. 36/97 and DecCC VI, 65.

The following cases were also referred to in this decision:

- Ruling no. U-190/95 and Decision no. U-I-114/98, dated 15.07.1999, Official Gazette RS, no. 61/99;
- Decision no. U-I-301/98, dated 17.09.1998 (DecCC, 157);
- Decision no. U-I-158/94, dated 09.03.1995 (DecCC IV, 20);
- Decision no. U-I-114/95, dated 07.12.1995 (DecCC IV, 120); and
- Decision no. U-I-183/94, dated 09.11.1994 (DecCC III, 122), full text in English in CODICES [SLO-1994-X-055].

#### Languages:

Slovene, English (translation by the Court).



#### Identification: SLO-2004-M-001

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 12.02.2004 / **e)** U-I-297/02 / **f)** / **g)** / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

#### Keywords of the systematic thesaurus:

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts**.

1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation**.

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

3.13 General Principles – **Legality**.

4.7.1 Institutions – Judicial bodies – **Jurisdiction**.

#### Keywords of the alphabetical index:

Gap, legal, filling through interpretation / Statute, application / *Exceptio illegalis*.

#### Headnotes:

The Constitutional Court cannot determine whether courts have applied the law correctly only due to the fact that administrative authorities have already done so. Judges are allowed not to apply executive regulations if they deem them to be inconsistent with the Constitution or laws. The Constitution authorises and imposes the obligation on judges to exclude executive regulations themselves (i.e. *exceptio illegalis*) when deciding on rights and obligations. However, if a judge, when deciding on some matter, deems that regarding the manner of determining which share of the value of a nationalised property amounts to the valorised value of paid damages, there exists a gap in the law which cannot be filled by methods of interpretation, he or she must stay the proceedings and initiate proceedings before the Constitutional Court (Article 156 of the Constitution). Gaps in the law are unconstitutional if they cannot be filled by methods of interpretation.

The application of statutory provisions in individual cases when courts decide alone and outside the scope of constitutional complaint proceedings, cannot be the subject of a review of the constitutionality of a particular regulation. Affected persons may claim that there has been a possible erroneous application of the law in individual proceedings, in legal remedies, and, in cases involving violations of human rights, also in constitutional complaints.

#### Cross-References:

Legal norms referred to:

- Article 26.2 of the Constitutional Court Act (ZUstS).

#### Languages:

Slovene, English (translation by the Court).



# South Africa

## Constitutional Court

### Important decisions

*Identification:* RSA-1998-3-010

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 27.11.1998 / **e)** CCT 15/98 / **f)** Jooste v. Score Supermarket Trading (Pty) Ltd (The Minister of Labour Intervening) / **g)** 1999 (2) *South African Law Reports* (Official Gazette), 1 (CC) / **h)** 1999 (2) *Butterworths Constitutional Law Reports* 139 (CC); CODICES (English).

*Keywords of the systematic thesaurus:*

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.3 Constitutional Justice – **Jurisdiction.**

1.6.1 Constitutional Justice – Effects – **Scope.**

3.20 General Principles – **Reasonableness.**

5.2.1.2.1 Fundamental Rights – Equality – Scope of application – Employment – **In private law.**

*Keywords of the alphabetical index:*

Contract, employment / Legitimate purpose / Insurance, health, statutory / Employee, compensation for workplace injuries.

*Headnotes:*

The South African Constitution guarantees everyone the right to equality before the law and the right to equal protection and benefit of the laws. Compulsory participation in statutory health insurance schemes does not, however, violate the right to equality of those employees subject to the statute.

The South African Constitutional Court is the highest court with respect to constitutional matters. Although it now shares jurisdiction with respect to constitutional matters with the Supreme Court of Appeals, all orders invalidating an act of Parliament on the grounds of unconstitutionality must be confirmed by the Constitutional Court.

*Summary:*

In South Africa, workers subject to Section 35.1 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (hereinafter, the “Act”) are barred from asserting claims directly against their employers for injuries or death caused by accidents or disease in the workplace. Under the statutory workers’ compensation scheme embodied in the Act, employees are required to submit a claim to the statutory insurance agency, which establishes in advance a prescribed payment depending on the type of injury sustained. Non – employees or employees of certain small-scale employers are not subject to the Act and are thus entitled to assert general damages claims where the resulting workplace injury or death is caused by the negligence of their co-workers or employers.

The case was brought to the Constitutional Court for confirmation of an order of the High Court of the Eastern Cape which had declared that the relevant provision of the Act was unconstitutional on the grounds that it violated the right to equality and the right to equal protection and benefits of laws, as contained in Sections 9.1 and 9.3 of the Constitution, respectively.

The complainant alleged that the Act unfairly discriminated against employees covered by the Act in that it denied them the right to claim damages directly from their employers. The Act thus puts covered employees at a disadvantage as compared to non-employees and workers not covered by the Act who are free to assert their common law right to claim damages when they sustain injuries in the place of employment.

The question before the Court was whether the impugned provision was rationally connected to a legitimate government purpose. If so, then the complainant would have failed to establish that she was unfairly discriminated against. If the Act was found to have no rational connection to a legitimate government purpose, the burden would then rest upon the State to justify the Act as a permissible infringement on the fundamental right to equality, as required by Section 36 of the Constitution.

In a unanimous judgement written by Justice Yacoob, the Constitutional Court found that the legitimate purpose of the Act is to provide a system of compensation for employees for disability or death caused by injuries or diseases in the workplace. The Act bars covered employees from asserting damages claims based on negligence. The trade-off is that employees may claim for workplace injuries from a limited compensation fund supported by employers,

even where the employer has not been found negligent. The Court found that, when viewed as a whole, the Act was not arbitrary or irrational. The decision of the High Court invalidating the impugned provision was thus not confirmed.

#### Languages:

English.



#### Identification: RSA-2000-1-003

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 25.02.2000 / **e)** CCT 31/99 / **f)** The Pharmaceutical Manufacturers Association of South Africa and Another *In Re: the Ex parte Application of the President of the Republic of South Africa and Others* / **g)** 2000 (2) *South African Law Reports* (Official Gazette), 674 (CC) / **h)** 2000 (3) *Butterworths Constitutional Law Reports* 241 (CC); CODICES (English).

#### Keywords of the systematic thesaurus:

1.1.4.1 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Head of State.**

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**

1.3.5.6 Constitutional Justice – Jurisdiction – The subject of review – **Decrees of the Head of State.**

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

3.20 General Principles – **Reasonableness.**

4.4.3.4 Institutions – Head of State – Powers – **Promulgation of laws.**

#### Keywords of the alphabetical index:

Common Law, application, constitutional / Enactment, presidential, date / Public power, review / *Ultra vires*, constitutional application.

#### Headnotes:

The President's decision bringing an Act of parliament into force is subject to review under the Constitution.

All exercise of public power must be rationally related to the purpose for which the power was conferred.

#### Summary:

The matter arose when the Transvaal High Court was requested to review and set aside the President's proclamation bringing the South African Medicines and Medical Devices Regulatory Authority Act no. 132 of 1998 (hereinafter, the "Act") into operation on 30 April 1999. The effect of the proclamation, which was authorised by the Act, was to bring the Act into force and repeal the previous regulatory structure for the control of medicines and other substances. The applicants alleged that, through an error made in good faith, the Act was brought into force before the necessary replacement regulatory infrastructure under the Act had been put in place. The entire regulatory structure for medicines and other substances was thereby rendered unworkable with serious consequences.

Two issues had to be decided by the Constitutional Court. The first was whether the High Court's order setting aside the President's decision as *ultra vires* his authority under the common law was a finding of "constitutional invalidity" that required confirmation by the Constitutional Court under Section 172.2 of the Constitution. If so, the second issue was whether the President's decision to bring the Act into force was constitutionally valid.

In a unanimous decision by Chaskalson P, the court held that the High Court's order was a finding of "constitutional invalidity" emphasising that the control of public power by the courts through judicial review is and always has been a constitutional matter. This is so irrespective of whether the principles are set out in a written constitution or contained in the common law. Since the adoption of the interim Constitution, public power is controlled by the written Constitution, which is the supreme law. The court stated that there is only one system of law in the country and all law controlling public power, including the common law, draws its force from and is subject to the Constitution.

In deciding the second question, the court noted the reluctance of courts in other countries to review decisions of this kind because of the political nature of the judgment and its close proximity to legislative powers. However, the judgment stated all exercise of

public power is subject to the Constitution and no discretion conferred on a public functionary can be unlimited.

The court held that the rule of law, which is a foundational value of the Constitution, requires that all exercise of public power, at a minimum, be exercised in a manner rationally related to the purpose for which the power was given. On the facts, the court held that the decision to bring the Act into force before the necessary regulations were in place was objectively irrational and therefore unconstitutional.

The court set aside the President's proclamation with the effect that the previous regulatory structure repealed by it was brought back into force.

#### Cross-References:

- Fedsure Life Assurance Ltd and Others v. Greater Johannesburg Transitional Metropolitan Council and Others<IT-> 1999 (1) *South African Law Reports* 374 (CC), 1998 (12) *Butterworths Constitutional Law Reports* 1458 (CC), *Bulletin* 1999/1 [RSA-1999-1-001];
- *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others* 1999 (2) *South African Law Reports* 14 (CC), 1999 (2) *Butterworths Constitutional Law Reports* 175 (CC);
- *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others* 2000 (1) *South African Law Reports* 1 (CC), 1999 (10) *Butterworths Constitutional Law Reports* 1059 (CC), *Bulletin* 1999/3 [RSA-1999-3-008];
- *Premier, Mpumalanga v. Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) *South African Law Reports* 91 (CC), 1999 (2) *Butterworths Constitutional Law Reports* 151 (CC);
- *S v. Makwanyane and Another* 1995 (3) *South African Law Reports* 391 (CC), 1995 (6) *Butterworths Constitutional Law Reports* 665 (CC), *Bulletin* 1995/3 [RSA-1995-3-002].

#### Languages:

English.



#### Identification: RSA-2001-1-001

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 01.12.2000 / **e)** CCT 25/2000 / **f)** Allan Aubrey Boesak v. The State / **g)** 2001 (1) *South African Law Reports* (Official Gazette) 912 (CC) / **h)** 2001 (1) *Butterworths Constitutional Law Reports* 36 (CC); 2001 (1) *South African Criminal Law Reports* 1 (CC); CODICES (English).

#### Keywords of the systematic thesaurus:

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**

1.3.4.8 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of jurisdictional conflict.**

2.2.2.1.1 Sources – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – **Hierarchy attributed to rights and freedoms.**

4.7.1 Institutions – Judicial bodies – **Jurisdiction.**

4.7.1.1 Institutions – Judicial bodies – Jurisdiction – **Exclusive jurisdiction.**

4.7.7 Institutions – Judicial bodies – **Supreme court.**

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

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

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

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

5.3.13.23.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to incriminate oneself.**

#### Keywords of the alphabetical index:

Appeal, jurisdiction / Constitutional matter / Right to silence, negative inference / Evidence, circumstantial.

#### Headnotes:

The Constitutional Court is the highest court in “constitutional matters”, while the Supreme Court of Appeal (SCA) is the highest court in all other matters. Though not decisive, a “constitutional matter” is a

threshold requirement for leave to appeal to the Constitutional Court to be granted. An assertion that the SCA was merely incorrect on the facts does not raise a “constitutional matter”.

### Summary:

The applicant was convicted on one count of fraud and three counts of theft in the High Court and sentenced to six years’ imprisonment. On appeal, the SCA set aside one count of theft, altered the amount involved in another count of theft and reduced the sentence to three years’ imprisonment. The applicant then applied for special leave to appeal to the Constitutional Court, alleging that his conviction violated his constitutional rights not to be deprived of freedom and security without just cause (Section 12.1.a of the Constitution) and to be presumed innocent, to remain silent and not to testify (Section 35.3.h of the Constitution).

In terms of Sections 167.3.a and 168.3 of the Constitution, the Constitutional Court is the highest court in “constitutional matters”, while the SCA is the highest court of appeal in all other matters. Therefore, in deciding whether leave to appeal should be granted from the SCA to the Constitutional Court, a threshold question was whether the case raised “constitutional matters”. Section 167.3.c of the Constitution leaves it to the Court to determine whether a matter is a “constitutional matter”.

Deputy President Langa, writing for a unanimous Court, drew some guidelines in this regard. If the SCA develops, or fails to develop, or applies a common-law rule inconsistently with rights or principles in the Constitution, that may raise a “constitutional matter”. But a challenge to a decision of the SCA solely on the basis that it is wrong on the facts is not a “constitutional matter”. To hold otherwise would be to make all criminal cases “constitutional matters”, making the constitutional differentiation between the Constitutional Court and the SCA illusory.

The Court applied these principles to the case. On two of the counts, the SCA had relied on the contents of a letter (purportedly written and signed by the applicant) to the donor.

Applicant’s counsel first argued that the authenticity of the letter had not been proved and therefore the SCA ought to have had a reasonable doubt as to his guilt. Accordingly, it was contended that the applicant’s conviction violated his constitutional right to be presumed innocent (Section 35.3.h of the Constitution). The Court noted that it was not argued that the SCA had applied some standard other than the usual criminal *onus*. The question whether a court

ought to have had reasonable doubt is a factual matter and, as such, does not raise a “constitutional matter”.

Applicant’s counsel further noted that the SCA had given significant weight to their failure to challenge the authenticity of the letter and, moreover, drawn inferences from the applicant’s failure to testify on the matter. This, counsel argued, violated the applicant’s right to silence (Section 35.3.h of the Constitution). The Court held that in the absence of other evidence a court may rely upon circumstantial evidence. This is precisely what the SCA did in this case. Whether the evidence as a whole (including the negative inference) is sufficient, is a factual question and not a “constitutional matter”.

With regard to the negative inference drawn from applicant’s silence, the Court held that the fact that an accused is under no obligation to testify does not mean that no consequences attach to the decision to remain silent. If there is evidence calling for an answer which the accused chooses not to explain, a court is entitled to conclude that the unchallenged evidence is sufficient. Whether such a conclusion is justified depends on the facts of the case and is not a “constitutional matter”.

In relation to the further charge of theft, it was first argued that as the evidence did not support the SCA’s conclusion, the applicant’s constitutional right to be presumed innocent was violated. The argument was not that the SCA had misapplied or misinterpreted the criminal *onus*, but only that it had erred in its assessment of the evidence. The Court dismissed this as an attempt to clothe a non-constitutional challenge in constitutional garb. A final argument was that the applicant’s conviction deprived him of freedom without just cause (Section 12.1.a of the Constitution). The Court held that this right contains both a substantive and a procedural element. On a substantive level, it was universally accepted that theft of a serious nature was a sufficient reason to deprive accused of their liberty. On a procedural level, no unfairness in the trial had been established. Accordingly, the Court concluded that there was substantive and procedural just cause for the applicant’s imprisonment.

The application for leave to appeal was refused.

### Cross-References:

Leave to appeal:

- *Brummer v. Gorfil Brothers Investments (Pty) Ltd and Others*, 2000 (2) *South African Law Reports* 837 (CC), 2000 (5) *Butterworths Constitutional Law Reports* 465 (CC).

## Presumption of innocence:

- *S v. Manamela and Another (Director-General of Justice Intervening)*, 2000 (3) *South African Law Reports* 1 (CC), 2000 (5) *Butterworths Constitutional Law Reports* 491 (CC), *Bulletin* 2000/1 [RSA-2000-1-005];
- *S v. Baloyi (Minister of Justice and Another Intervening)*, 2000 (2) *South African Law Reports* 425 (CC), 2000 (1) *Butterworths Constitutional Law Reports* 86 (CC), *Bulletin* 1999/3 [RSA-1999-3-011];
- *Scagell and Others v. Attorney General, Western Cape and Others*, 1997 (2) *South African Law Reports* 368 (CC), 1996 (11) *Butterworths Constitutional Law Reports* 1446 (CC), *Bulletin* 1996/3 [RSA-1996-3-017];
- *S v. Bhulwana; S v. Gwadiso*, 1996 (1) *South African Law Reports* 388 (CC), 1995 (12) *Butterworths Constitutional Law Reports* 1579 (CC), *Bulletin* 1995/3 [RSA-1995-3-008].

## Right to silence:

- *Osman and Another v. Attorney-General, Transvaal*, 1998 (4) *South African Law Reports* 1224 (CC), 1998 (11) *BCLR* 1362 (CC), *Bulletin* 1998/3 [RSA-1998-3-008].

## Deprivation of Freedom:

- *S v. Coetzee and Others*, 1997 (3) *South African Law Reports* 527 (CC), 1997 (4) *Butterworths Constitutional Law Reports* 437 (CC), *Bulletin* 1997/1 [RSA-1997-1-002];
- *Bernstein and Others v. Bester and Others NNO*, 1996 (2) *South African Law Reports* 751 (CC), 1996 (4) *Butterworths Constitutional Law Reports* 449 (CC), *Bulletin* 1996/1 [RSA-1996-1-002];
- *De Lange v. Smuts NO and Others*, 1998 (3) *South African Law Reports* 785 (CC), 1998 (7) *Butterworths Constitutional Law Reports* 779 (CC), *Bulletin* 1998/2 [RSA-1998-2-004].

## Languages:

English.

*Identification: RSA-2002-2-013*

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 05.07.2002 / **e)** CCT 8/02 / **f)** Minister of Health and Others v. Treatment Action Campaign and Others / **g)** / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

1.1.4.3 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Executive bodies.**  
 1.3 Constitutional Justice – **Jurisdiction.**  
 1.6.7 Constitutional Justice – Effects – **Influence on State organs.**  
 3.4 General Principles – **Separation of powers.**  
 3.5 General Principles – **Social State.**  
 3.18 General Principles – **General interest.**  
 3.20 General Principles – **Reasonableness.**  
 3.23 General Principles – **Equity.**  
 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**  
 5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health.**

*Keywords of the alphabetical index:*

Constitutional jurisdiction, declaratory power / Constitutional jurisdiction, mandatory order / Government, policy, constitutionality / HIV (AIDS), treatment / HIV (AIDS), newborn child, transmission / Health, public, / World Health Organisation.

*Headnotes:*

A government policy concerning the prevention of mother to child transmission of HIV-AIDS that provides for the distribution of antiretroviral drugs only to selected state hospitals around the country is unreasonable and infringes the right to health care of HIV-positive women and their babies born in the public health sector outside these pilot sites. Limiting the programme for the prevention of mother-to-child transmission of HIV to pilot sites for a research period before deciding whether to expand the programme nationally is, in the circumstances of the epidemic in South Africa, also unreasonable and in breach of this right.

Where state policy is challenged as being unconstitutional, a court is constitutionally obliged to consider whether the state has met its constitutional obligations. If the state has failed to do so, the court is obliged by the Constitution to declare such policy unconstitutional. Insofar as this constitutes an intrusion into the executive domain, that intrusion is mandated by the Constitution itself and does not amount to a breach of the separation of powers.

Although the Constitutional Court can supplement a declaratory order against the state with mandatory or supervisory injunctive orders, the use of such orders depends on the circumstances of each case and should only be used where necessary.

### Summary:

The factual backdrop to the case was the HIV/AIDS crisis facing the country. A major method of transmitting the virus is by mothers to their babies at birth. The case concerned the government programme for reducing the risk of such transmission by using nevirapine, a powerful antiretroviral drug. Use of the drug for this purpose has been recommended by the World Health Organisation and approved by the South African Medicines Control Council.

Two aspects of the government's HIV/AIDS policy were initially challenged in the High Court by the Treatment Action Campaign, a non-governmental organisation, as unreasonable and thus an infringement of the constitutional rights of HIV-positive pregnant women and their babies. The High Court upheld the applicants' challenge and ordered government to make nevirapine available in the public health sector.

On appeal to the Constitutional Court, government argued that the High Court had infringed the doctrine of separation of powers. It was further argued that the government decision to limit the supply of nevirapine to pilot sites for a research period and to defer expansion of the supply programme until the research period had expired was consistent with its obligations under the Constitution. The applicants supported the reasoning and order of the judge in the High Court. Three *amici curiae* also argued in support of the High Court judgment.

The joint judgment by all the members of the Constitutional Court dealt with the public health care rights afforded to the individual by Section 27 of the Constitution and with the corresponding obligations imposed on the state progressively to realise these rights within available resources. The judgment analysed the nature and content of such socio-economic rights and obligations and reaffirmed the duty and power of the courts under the Constitution to consider whether the state's conduct in this regard had been reasonable. The Court also reaffirmed that, in exercising such power, courts do not trespass on the separation of powers or government's prerogative to formulate and implement policy, but perform the duty entrusted to them by the Constitution of giving effect to the Bill of Rights.

The main issues in question were the government's decisions

- a. not to make nevirapine available outside the test sites during the research period and
- b. to defer devising and implementing a programme for nationwide expansion of such supply until the research period had expired.

The Court concluded that, notwithstanding disputed questions of fact and conflicting medical and related expert opinions, it was clear on the government's own showing that its policy was indeed deficient in these two respects. Government's programme was unreasonable in not enabling nevirapine to be made available outside its 18 test sites to try to save the lives of newborn babies of HIV-positive mothers who live out of reach of the sites and who cannot afford to obtain the drug in the private sector. On the one hand, the drug was available to government at no charge and its administration simple, efficacious, cost-effective and potentially life-saving. On the other, babies infected with the virus at birth are likely to die a lingering and painful death before their fifth birthdays. The policy restricted the supply of nevirapine irrespective of whether the requisite HIV-testing and counselling facilities were available or the medical personnel in charge called for its use, and thus infringed the right of HIV-positive mothers and their babies to the health care guaranteed by the Constitution. Secondly the Court considered the decision to adhere to this approach during the whole of the research period and only thereafter to consider expanding the programme for the supply of nevirapine and the accompanying package of public health services to the country at large. It found that this approach was unreasonable and infringed the rights of all those who would otherwise have had access to this form of health care. The Court therefore made a declaratory order concerning these two infringements.

The Court also discussed the importance of children's rights (in Section 28) and the relative roles of the state and parents in providing indigent children in particular with urgent medical care.

In deciding whether to supplement the declaratory order by means of a mandatory or supervisory injunctive order, the Court held that there is judicial precedent for both components of such order. Although it was both appropriate and necessary to spell out in a mandatory order what government had to do to meet its constitutional obligations, an order requiring a report-back was not called for in this case. At the stage when the High Court made such an order, government was still relatively inflexible in its



attitude to the supply of nevirapine and the formulation of a general programme. That position had changed materially during the course of the litigation. In any event, government had in the past been scrupulous in its compliance with orders of the Court and there was no reason to anticipate non-compliance in this instance.

#### Cross-References:

- *Soobramoney v. Minister of Health, KwaZulu-Natal*, 1998 (1) *South African Law Reports* 765 (CC), 1997 (12) *Butterworths Constitutional Law Reports* 1696 (CC);
- *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2001 (1) *South African Law Reports* 46 (CC), 2000 (11) *Butterworths Constitutional Law Reports* 1169 (CC), *Bulletin* 2000/3 [RSA-2000-3-015].

#### Languages:

English.



#### Identification: RSA-2005-3-010

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 07.10.2005 / **e)** CCT 45/04 / **f)** Sibiya and Others v. Director of Public Prosecutions (Johannesburg High Court) and Others / **g)** [www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT45-04A](http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT45-04A) / **h)** 2006 (2) *Butterworths Constitutional Law Reports* 293 (CC); CODICES (English).

#### Keywords of the systematic thesaurus:

1.4.7.1 Constitutional Justice – Procedure – Documents lodged by the parties – **Time-limits**.  
 1.6.6 Constitutional Justice – Effects – **Execution**.  
 3.10 General Principles – **Certainty of the law**.  
 3.18 General Principles – **General interest**.  
 5.1.1.4.3 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Detainees**.  
 5.3.2 Fundamental Rights – Civil and political rights – **Right to life**.

#### Keywords of the alphabetical index:

Constitutional Court, decision, binding force / Constitutional Court, decision, disregard / Order, final,

Constitutional Court's power to vary / Time limit, extension.

#### Headnotes:

Where the court makes an order requiring a report to be filed with it before a certain date, it can grant an extension of time to allow the parties to comply with the terms of the order on good cause shown.

#### Summary:

The Constitutional Court declared the death penalty unconstitutional in the case of *State v. Makwanyane and Another* in June 1995. On 25 May 2005 the Constitutional Court gave judgment in the Sibiya matter upholding the constitutional validity of the legislation enacted to govern the process of substituting the sentences of those who had been sentenced to death before the Makwanyane judgment.

The Sibiya case raised concerns that the death sentences of 62 people of about 400 who were on death row at the time of the Makwanyane judgment had still not had their sentences set aside in terms of the applicable legislation. The Court ordered the respondents to the case to provide detailed information about the process by which death sentences had been substituted and explain fully why the death sentences of certain people had not yet been substituted. The information was to be furnished to the Court by 15 August 2005.

The Minister of Justice and Constitutional Development and the President, both respondents in the case, filed an application before 15 August seeking an extension of time to enable them to comply with the order. In granting the application for an extension, Yacoob J, for a unanimous Court, held that an extension was in the interest of justice. The explanation given for the failure to provide the information was on the whole satisfactory and the government had demonstrated its clear intention to comply with the order, and had already done much of the necessary work in this respect. In addition, the Court concluded that those people who had not yet had their death sentences replaced would not experience any prejudice as a result of any delay occasioned by the extension.

#### Cross-References:

- *Brummer v. Gorfil Brothers Investments (Pty) Ltd and Others*, <IT->2000 (2) *South African Law Reports* 837 (CC), 2000 (5) *Butterworths Constitutional Law Reports* 465 (CC);

- *Khosa and Others v. Minister of Social Development and Others*;
- *Mahlaule and Others v. Minister of Social Development and Others*, 2004 (6) *South African Law Reports* 505 (CC), 2004 (6) *Butterworths Constitutional Law Reports* 569 (CC), *Bulletin* 2004/1 [RSA-2004-1-002];
- *Minister of Justice v. Ntuli*, 1997 (3) *South African Law Reports* 772 (CC), 1997 (6) *Butterworths Constitutional Law Reports* 677 (CC), *Bulletin* 1997/2 [RSA-1997-2-006];
- *National Police Service Union and Others v. Minister of Safety & Security and Others*, 2000 (4) *South African Law Reports* 1110 (CC); 2001 (8) *Butterworths Constitutional Law Reports* 775 (CC);
- *State v. Makwanyane and Another*, 1995 (3) *South African Law Reports* 391 (CC), 1995 (6) *Butterworths Constitutional Law Reports* 665 (CC), *Bulletin* 1995/3 [RSA-1995-3-002];
- *Sibiya and Others v. DPP: Johannesburg High Court and Others*, 2005 (8) *Butterworths Constitutional Law Reports* 812 (CC), *Bulletin* 2005/1 [RSA-2005-1-004].

#### Languages:

English.



## Spain Constitutional Court

### Important decisions

*Identification:* ESP-2000-3-027

**a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 03.10.2000 / **e)** 234/2000 / **f)** Government urgency / **g)** *Boletín oficial del Estado* (Official Gazette), 267, 07.11.2000, 47-60 / **h)** CODICES (Spanish).

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

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

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

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

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

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

Urgency, parliamentary procedure / Senate.

#### *Headnotes:*

The government is empowered to decree the urgency of a Bill at any time and so to reduce the time allotted for its consideration by the Senate, even after its receipt by the Senate.

The possibility of appealing to the Constitutional Court in disputes based on a conflict between the constitutional bodies of the state enables each of the institutions empowered to refer cases to the Constitutional Court to preserve its powers against other bodies' decisions infringing its prerogatives.

The purpose of allowing appeals based on conflicts between constitutional bodies is to safeguard the constitutional structure, which is a system of relations between constitutional bodies which each have their own powers.

#### *Summary:*

In this judgment, the Constitutional Court ruled on a conflict between the government and the State. The

Bureau of the Senate had declared inadmissible the emergency procedure invoked by the Government concerning the draft organic law on voluntary termination of pregnancy, thus making it impossible to examine the bill before the dissolution of parliament for the 1996 general elections.

The Senate contended that the government could not decree the urgency of a bill after it had been received by the Upper House. The Executive maintained that the power conferred upon it by Article 90.3 of the Constitution was not subject to any time limitation.

The Court first analysed the purpose of the Government's power in order to determine whether or not it may be in any way limited in time. There is no denying that the full force of this power becomes apparent in the overall context of the government's powers in relation to legislative proceedings. The emergency procedure, which is intended to ease and speed up the passage of legislation, reflects a certain view of relations between parliament and government in the shape of a mechanism whereby the latter can act on the legislative proceedings and exert influence over their chronological conduct when it considers that the circumstances of the moment so require. Regarding the limitation in time claimed by the Senate, the Constitutional Court first re-stated the literal content of the constitutional provision and the purpose of the mechanism placed at the government's disposal to reduce the time normally taken by the consideration of bills in the Senate for bills declared urgent. Their urgency may be perceived by the government when the bill is laid before the Congress of Deputies or later, even after parliamentary proceedings have started. Lastly, the Court points out that there have been many previous instances in all parliaments of the emergency procedure being invoked by the government after receipt of the bills concerned in the Senate, without the Upper House having claimed a limitation in time as in this case.

#### *Supplementary information:*

The notion of conflicts between constitutional bodies of the state serving as a basis for applications to the Constitutional Court was instituted by the Organic Law on the Constitutional Court (Title IV, Chapter III, Articles 73-75) under Article 161.1.d of the Constitution.

#### *Languages:*

Spanish.



#### *Identification: ESP-2008-1-005*

**a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 09.04.2008 / **e)** 49/2008 / **f)** Extension of the President's term of office / **g)** no. 117, 14.05.2008 / **h)** CODICES (Spanish).

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

1.1.1.1.2 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Sources – **Institutional Acts.**

1.1.2.3 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointing authority.**

1.1.3.2 Constitutional Justice – Constitutional jurisdiction – Status of the members of the court – **Term of office of the President.**

1.3.1.1 Constitutional Justice – Jurisdiction – Scope of review – **Extension.**

1.3.5.4 Constitutional Justice – Jurisdiction – The subject of review – **Quasi-constitutional legislation.**

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

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

4.4.3.3 Institutions – Head of State – Powers – **Relations with judicial bodies.**

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

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

4.8.6.3 Institutions – Federalism, regionalism and local self-government – Institutional aspects – **Courts.**

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

Constitutional Court, composition, region, participation / Constitutional Court, law regulating activity, review, restraint.

#### *Headnotes:*

The participation of the Parliaments of the Autonomous Communities in the election of four Constitutional Court judges for which the Senate is responsible in no way violates the principles of the Constitution.

The constitutional bodies which participate in the appointment of judges to the Constitutional Court elect them and do not confine themselves to merely making proposals. Responsibility for appointing the judges lies with the King.

The extension of the term of office of the President of the Constitutional Court, which should coincide with the partial replacement of the Court every three years, is fully in keeping with the Constitution.

The legislature is not required by the Constitution to justify its legislative choices in the preamble to laws.

The Organic Law provided for in Article 165 of the Constitution is the only law able to regulate the institution of the Constitutional Court.

The law regulating the Constitutional Court is subject to review of its constitutionality; however, this review must be carried out very carefully and must be subject to scrutiny by the democratic legislature.

### *Summary:*

The judgment gives a ruling on the application made by over fifty MPs of the main opposition party for a finding of unconstitutionality against Organic Law no. 6/2007 of 24 May 2007 introducing a significant reform of the Organic Law regulating the Constitutional Court (LOTC). Two points are discussed in the judgment: the election of judges by the Senate and the extension of the President's term of office.

The 2007 Law amended Article 16.1 LOTC to allow the Autonomous Communities to participate in the election of four judges by the upper chamber of the Spanish Parliament. Specifically, the law requires the Senate to choose from among "the candidates put forward by the legislative assemblies of the Autonomous Communities under the terms established by the chamber's rules of procedure".

The judgment notes that this provision does not violate the Constitution both from the standpoint of legal sources and from the standpoint of the Senate's constitutional position, its members' prerogatives and the principles governing the territorial structure of the state. It does not infringe the rule whereby the chambers of parliament establish their own regulations (Article 72.1 of the Constitution) because the participation of the Autonomous Communities goes beyond the internal sphere of the Senate and, in addition, the broad reference in the law to the rules of the chamber guarantees that the Senate is able to specify the legal rules governing that participation by virtue of its institutional autonomy. Furthermore, only the Organic Law regulating the Constitutional Court (Article 165 of the Constitution), and no other, can serve as the basis for decisions relating to the status of that Court.

The Senate does not lose its power to select judges under Article 159 of the Constitution, although the exercise of that power is subject to a procedure shared with the Autonomous Communities. The Senate is the chamber of territorial representation (Article 69 of the Constitution) and the senators by no means consider that their powers have been infringed by the mere fact of exercising that power at the end of the legislative procedure. Moreover, the power-sharing system between the state and the Autonomous Communities remains unchanged. The aim is to establish a kind of principle of co-operation between them and one cannot overlook the fact that the power to elect a certain number of judges has the added dimension of a constitutional and institutional duty, combined with loyalty to the Constitution.

The judgment states that the Spanish Constitution, unlike that of neighbouring countries, contains detailed rules on the election of the members of the Constitutional Court. However, Article 159.1 of the Constitution by no means excludes the possibility of other rules expanding on constitutional provisions which, among other things, say nothing about the procedure to be followed with regard to this election. The legislature enjoys great latitude in this regard. But the Court's mission entails formal and substantive limits which are provided for not only in the rules arising from Title IX of the Constitution, but also in the model of the Constitutional Court deriving from a joint interpretation of the Constitution.

Regarding the appointment of judges, the judgment stresses that the option chosen by the drafters of the Constitution is based on the participation of different constitutional bodies (two judges put forward by the government, two by the General Council of the Judiciary, four by the Chamber of Deputies and another four by the Senate). The outstanding feature in this is the role played by the parliament, insofar as both chambers hold the same position, although this does not apply to the way their powers are exercised. Furthermore, the constitutional choice of a parliamentary monarchy as the political form of the state (Article 1.3 of the Constitution) involves the Senate and the other constitutional bodies mentioned in Article 159.1 of the Constitution, which are responsible for electing the judges – and not just putting forward proposals – and the King, who is responsible for appointing them by a formal ratified decision (Articles 159.1 and 64.1 of the Constitution).

The judgment is concerned secondly with the presidency of the Court. The 2007 reform states that if the President's three-year term of office does not coincide with the replacement of the Constitutional Court, it shall be extended up to the date on which the replacement is completed and the new judges take office.

The judgment considers that this provision does not violate the Constitution either. First of all, it dismisses the application relating to the extension of the Vice-President's term of office, given that this position is not provided for in the Constitution, which regulates only that of the President in Article 160 of the Constitution. Then the judgment notes that the rules governing this constitutional principle are not complete and do not preclude intervention by the Organic Law regulating the Constitutional Court with the aim of further developing them and adding to them. It is not considered to be of decisive importance that the subject is not expressly mentioned in Article 165 of the Constitution. The doctrine relating to the strict nature of reserved matters in organic laws should not be applied to this type of organic law as, in this case, the rules offer no other means (ordinary law) of regulating the reserved matters.

The aim of ensuring that the partial replacement of the Court coincides with the internal election of its President cannot be regarded as arbitrary and under no circumstances violates any other constitutional principle because what is sought here is harmonisation of different aspects of the organisational model of the Constitutional Court stemming from Articles 159.3 and 160 of the Constitution, namely that it should be partially replaced every three years, that its members should participate in the election of the President and that the President's term of office should also be three years. It is not a question of granting a new three-year term of office while disregarding the powers of the Court sitting in full bench, but simply of extending the term of office up to the date on which the four judges who leave office every three years are replaced. Furthermore, the fact that the President is always a member elected by all the judges making up the Court and that he retains that position up to the date on which judges are replaced can facilitate the exercise of the President's representation and management functions.

In addition, although experience cannot be established as a guiding principle, it is nevertheless important to stress that, regarding the repercussions of delays in the renewal of the President's term of office, the Court has always taken the view that the term of office should be extended.

Lastly, Judgment no. 49/2008 asserts that there is a certain rational explanation for the disputed legal

rules, which therefore cannot be said to be arbitrary within the meaning of Article 9.3 of the Constitution, which prohibits arbitrary action by public authorities. The prohibition of all arbitrary action, particularly as regards the democratic legislature, must under no circumstances be confused with a legitimate political dispute, the aim pursued by the law or the means employed by the law to do so. The democratic legislature is under no obligation to state the reasons why it took one decision or another in exercising its freedom of decision. It is the Council of Ministers which must accompany its draft laws with an explanatory memorandum and the necessary background material to enable the chambers to reach a decision (Article 88 of the Constitution).

The Court had previously stated that it had full scope to review the constitutionality of the organic law by which it is regulated. However, in so doing it must take due account of the institutional and functional considerations which always accompany any review by the democratic legislature, insofar as the Court is subject to the Constitution and its own organic law (Article 1 LOTC). The legislature must under no circumstances confine itself to executing the Constitution, but is empowered under the Constitution to take any measures which, in a context of political pluralism, do not overstep the limits deriving from the basic law. In addition, when it regulates the status of the Constitutional Court itself, its rules must not be declared unconstitutional unless there is an obvious and unavoidable conflict with the text of the Constitution.

#### *Supplementary information:*

The judgment was approved by the full Court consisting of eight judges. The President and Vice-President refrained from taking part in the process (ATC no. 387/207, 16 October 2007) and two judges were challenged by the government (ATC no. 81/2008, 12 March 2008). Three of the other judges had been challenged by the applicant MPs in an application which was declared inadmissible (ATC no. 443/2007, 27 November 2007).

The four judges appointed on a proposal from the Senate should have been replaced in December 2007.

#### *Languages:*

Spanish.



*Identification:* ESP-2008-2-009

**a)** Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 24.06.2008 / **e)** 101/2008 / **f)** Election by the Senate of judges to the Constitutional Court / **g)** *Boletín oficial del Estado* (Official Gazette), no. 200, 19.09.2008 / **h)**.

*Keywords of the systematic thesaurus:*

1.1.2.3 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointing authority.**

1.1.2.4 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointment of members.**

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

2.3.8 Sources – Techniques of review – **Systematic interpretation.**

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

4.5.4 Institutions – Legislative bodies – **Organisation.**

4.5.4.1 Institutions – Legislative bodies – Organisation – **Rules of procedure.**

4.8.2 Institutions – Federalism, regionalism and local self-government – **Regions and provinces.**

*Keywords of the alphabetical index:*

Constitutional Court, judge, appointment / Constitutional Court, interpretation, binding effect / Constitutional Court, jurisdiction.

*Headnotes:*

The Rules of Procedure of the Senate confer on this Chamber the power to supervise the election of candidates to posts of judges of the Constitutional Court, which candidates are nominated by the Parliaments of the 17 Autonomous Communities, in accordance with the requirements imposed by Article 159 of the Constitution.

The right of the Assemblies of the Autonomous Communities to put forward candidates as judges of the Constitutional Court in no way prevents the Senate from fulfilling its functions or its constitutional obligation to nominate judges to the said posts (Article 159 of the Constitution), which is an exclusive duty of the Senate.

The procedural provision to the effect that the Senate Nominations Board must submit a list of candidates to the plenary Senate in no way forces the Plenary to adopt this list, given that such adoption requires a three-fifths majority of the plenary Senate.

The plenary assembly of the Senate has a specific will overriding that of the other Senate bodies, which express their views by means of secret, individual voting by their members.

The Constitutional Court is in no way bound by any interpretation emerging from parliamentary debate, especially where this interpretation would lead to an understanding of the provision that was incompatible with the Constitution, comprehensively and systematically.

The interpretation of the principle set out in the Rules of Procedure to the effect that it is compatible with the Constitution guarantees that the Senate can elect potential candidates from its own membership, in the event of not all the posts of judges of the Constitutional Court being filled by candidates put forward by the Assemblies of the Autonomous Communities.

*Summary:*

The judgment complements STC no. 49/2008. It analyses an unconstitutionality appeal submitted by over fifty Senators from the main opposition party against the amendment to the Rules of Procedure of the Senate governing the method and procedure for the election of the four judges of the Constitutional Court from among the candidates nominated by the Parliaments of the Autonomous Communities, which reform was ratified by the Organic Law on the Court adopted in 2007. The judgment states that the Rules of Procedure are not unconstitutional if they are interpreted in the manner indicated in its legal foundations. It was adopted with three votes against.

The judgment deals with three separate questions. The first concerns nominations by the Parliaments of the Autonomous Communities. The fact that the Rules of Procedure provide that such nominations are a matter for the said Parliaments does not prevent the Senate from discharging the duty exclusively assigned to it by the Constitution, namely to submit to the Crown its nominations of four recognised “jurists” with over fifteen years’ experience as members of the national legal service. The Assemblies of the Autonomous Communities are required to prove that the two candidates they put forward fulfil the constitutional criteria for exercising the duties in question. The Bureau of the Senate may decide that the candidatures submitted are inadmissible if they do not comply with the requisite criteria; in this case the Parliaments of the Autonomous Communities can nominate fresh candidates. Furthermore, the admissibility of the formalities for nominating the candidates during this first phase does not guarantee election in the second phase, which is an exclusive matter for a final vote taken by the plenary assembly of the Senate.

The second question concerns the presentation of the candidatures in the Senate. There is nothing in the contested provision to prevent the Appointments Board from submitting to the plenary Senate a list comprising the same number of candidates as of posts to be filled (i.e. four). However, the plenary does not necessarily have to accept the Board's proposal as it is free to express its own opinion by voting on the candidates nominated by the Nominations Board.

The third question considered in the judgment is the Senate Appointments Board's power to put forward candidates other than those originally nominated by the Parliaments of the Autonomous Communities. In practical terms, where one or more of the candidates nominated fails to secure the qualified majority required for appointment, the Senate itself has discretionary powers to exercise its constitutional function, in respect of which it cannot decline jurisdiction. In principle, as stipulated in its Rules of Procedures, the Upper Chamber must confine itself to electing one or more of the candidates previously nominated by the Assemblies of the Autonomous Communities. However, an interpretation of the principle established in the Rules of Procedure in line with the Constitution suggests that the Chamber can elect other possible candidates, from among its own members, should it prove impossible to fill all the judges' posts in the Constitutional Court or if the candidates nominated by the Assemblies of the Autonomous Communities fail to obtain the three-fifths majority required under Article 159.1 of the Constitution.

#### *Supplementary information:*

The judgment is directly linked to an earlier Judgment (STC no. 49/2008), which confirmed the constitutionality of Article 16.1 LOTC as drafted under Organic Law no. 6/2007 of 24 May 2007; this judgment stipulates that the Parliaments of the Autonomous Communities must participate in the election by the Senate of the four judges of the Constitutional Court.

The renewal of the judges was scheduled for December 2007.

#### *Languages:*

Spanish.



## Sweden Supreme Court

### Important decisions

*Identification:* SWE-1996-3-003

**a)** Sweden / **b)** Supreme Court / **c)** / **d)** 13.06.1996 / **e)** 118/96 / **f)** / **g)** *Nytt Juridiskt Arkiv* (Official Gazette), 1996, 370 / **h)**.

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

1.1.4 Constitutional Justice – Constitutional jurisdiction – **Relations with other institutions.**  
 4.5.2 Institutions – Legislative bodies – **Powers.**  
 4.5.2.1 Institutions – Legislative bodies – Powers – **Competences with respect to international agreements.**  
 4.5.6 Institutions – Legislative bodies – **Law-making procedure.**  
 4.16.1 Institutions – International relations – **Transfer of powers to international institutions.**

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

River, border / Fishing, right / Incompatibility with superior law, manifest.

#### *Headnotes:*

According to Article 10/5 of the Instrument of Government Act, transfer of powers to international bodies must, with some exceptions, be decided upon by Parliament.

#### *Summary:*

The Swedish-Finnish Commission on Border Rivers was created by a treaty between Sweden and Finland in 1971. In Sweden, this treaty has been approved by the Parliament and has the validity of a Law.

In 1987 the Swedish Government delegated to the Commission the power to decide on limitations of the right to fish with stationary fishing-tackle in Torne River, which is a border-river between Sweden and Finland. The Commission decided that during certain periods the use of stationary fishing-tackle in Torne River should be forbidden. This decision was transformed into Swedish Governmental statutes, the violation of which was punishable.

A Swedish landowner was prosecuted for having fished in the river with stationary fishing-tackle during a period when such fishing was forbidden. The Supreme Court held that transfer of the power to forbid stationary fishing-tackle had not been decided by Parliament.

According to Article 11/14 of the Instrument of Government, a provision adopted by Parliament or by the Government may be set aside by a court or any other public organ if there is a conflict with a provision of the Constitution or with a provision of any other superior statute and the inaccuracy is obvious and apparent. The Supreme court held that, in this case, there was such an inaccuracy. Thus, the landowner could not be punished.

*Languages:*

Swedish.



## Switzerland

### Federal Court

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#### Important decisions

*Identification:* SUI-1992-M-001

**a)** Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 14.04.1992 / **e)** 1P.832/1991 / **f)** National Radioactive Waste Storage Co-operative (NAGRA) v. Canton and Constitutional Court of Nidwald / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 118 la 124 / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

1.3.1.1 Constitutional Justice – Jurisdiction – Scope of review – **Extension**.

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

1.3.5.3 Constitutional Justice – Jurisdiction – The subject of review – **Constitution**.

*Keywords of the alphabetical index:*

Constitution, cantonal, amendment.

*Headnotes:*

Article 6 (obligation of the cantons to have their constitutions guaranteed), Article 85.7 (competence of the Federal Assembly) and Article 113 of the Federal Constitution (obligation for the Federal Court to enforce the federal laws); admissibility of a public law appeal; examination of cantonal constitutional provisions?

Amendments to cantonal constitutions cannot be challenged by a public law appeal involving abstract review of provisions. They are subject exclusively to the guarantee procedure by the Federal Assembly (recital 3).

*Languages:*

German.





*Identification:* SUI-1999-2-006

**a)** Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 26.07.1999 / **e)** 1A.178/1998, 1A.208/1998 / **f)** A. v. Federal Prosecutor, Federal Department of Justice and Police and Federal Council / **g)** Arrêts du Tribunal fédéral (Official Digest), 125 II 147 / **h)** *Pratique juridique actuelle* 1999 1491; *La Semaine judiciaire* 2000 I 202; *Europäische Grundrechte-Zeitschrift* 1999 475; *Revue de droit administratif et de droit fiscal* 2000 1 589; CODICES (German).

*Keywords of the systematic thesaurus:*

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**

1.4.1 Constitutional Justice – Procedure – **General characteristics.**

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

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

2.1.1.4.10 Sources – Categories – Written rules – International instruments – **Vienna Convention on the Law of Treaties of 1969.**

2.2.1.2 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and legislative acts.**

2.2.1.5 Sources – Hierarchy – Hierarchy as between national and non-national sources – **European Convention on Human Rights and non-constitutional domestic legal instruments.**

3.13 General Principles – **Legality.**

3.16 General Principles – **Proportionality.**

3.18 General Principles – **General interest.**

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

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

5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**

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

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

*Keywords of the alphabetical index:*

International law, pre-eminence / Propaganda, material, confiscation / Security, external and internal / Security, national.

*Headnotes:*

Article 98a and Article 100.1a of the Federal Judicature Act (OJ); Article 6.1 ECHR; admissibility of an administrative-law appeal against confiscation of propaganda material belonging to the Kurdistan Workers Party.

Once a confiscation order has been made, there ceases to be any interest in contesting a seizure which preceded the order (recital 2).

Confiscation of propaganda material for reasons of external or internal security affects civil rights and obligations within the meaning of Article 6.1 ECHR (recital 4b).

In conflicts of law, international law in principle takes precedence over national law, in particular where the international rules seek to protect human rights. Thus, despite the letter of Article 98a and 100.1.a OJ and by virtue of Article 6.1 ECHR, an administrative-law appeal to the Federal Court against a confiscation order of the Federal Council is admissible (recital 4c-e).

Article 55 of the Federal Constitution (freedom of the press) and Article 10 ECHR; Article 102.8, 102.9 and 102.10 of the Federal Constitution; Article 1.2 of the Federal Council decree on subversive propaganda; confiscation of propaganda material for reasons of internal or external security.

The Federal Council decree on subversive propaganda constitutes, when taken together with Article 102.8, 102.9 and 102.10 of the Federal Constitution, a sufficient legal basis for a serious interference with freedom of expression and freedom of the press (recital 6).

In the circumstances of the case, the confiscation of written material belonging to the Kurdistan Workers Party (PKK) was consistent with the proportionality principle in that, in furtherance of the PKK's cause, the material incited violence and exerted pressure on emigrants living in Switzerland (recital 7).

*Summary:*

In 1997, the customs authorities intercepted 88 kg of propaganda material which the PKK had sent to A., who was resident in Switzerland. The federal prosecutor seized the material on grounds of internal and external security. A. appealed to the Federal Department of Justice and Police, which treated the appeal as a report to the surveillance authority and dismissed it. Under the 1948 decree on subversive

propaganda the Federal Council then ordered the confiscation and destruction of the material.

A. lodged administrative-law appeals with the Federal Court to have the seizure decision and confiscation order set aside. He also requested that the material be returned to him. He relied, in particular, on Article 6.1 ECHR.

As the seizure decision had become devoid of purpose, the Federal Court decided not to go into the first appeal. It did, however, consider the appeal against the confiscation order, dismissing it on substantive grounds.

Under the Federal Judicature Act, decisions of the Federal Council cannot, in principle, be referred to the Federal Court, with one exception which did not apply in the present case.

The issue was whether the confiscation order fell under Article 6.1 ECHR. Confiscation is a serious interference with the appellant's property rights. According to legal theory, government measures taken on grounds of internal or external security do not fall within the ambit of the Convention. The European Court of Human Rights has never taken a clear position on the subject. In view of the seriousness of the interference, there could be no denial that Article 6.1 ECHR was applicable. The appellant's further reliance on Articles 10 and 13 ECHR did not have a decisive bearing.

In the present case, the provisions of the Federal Judicature Act could not be interpreted in a manner consistent with the European Convention on Human Rights. Swiss law here clashed with the Convention's requirements, and Articles 114bis.3 and 113.3 of the Federal Constitution did not resolve the matter. General principles of international law and the Vienna Convention on the Law of Treaties require that states honour their international undertakings. The federal authorities thus had a duty to set up judicial authorities that met the requirements of Article 6 ECHR, and the Federal Court was required to deal with A.'s appeal against the Federal Council decision.

The 1948 decree on subversive propaganda was an independent decree of the Federal Council directly based on Article 102.8, 102.9 and 102.10 of the Federal Constitution. It was thus a sufficient legal basis to justify interfering with freedom of expression and freedom of the press, notwithstanding that the international situation had altered appreciably in recent years, and that, with the entry into force of a new federal law introducing internal security measures, the decree had been repealed.

The confiscated material contained PKK propaganda openly calling for armed resistance to the Turkish state; it went well beyond mere propaganda for the Kurdish movement. The material inciting violence was capable of endangering the peaceful co-existence of different groups living in Switzerland and seriously interfering with Switzerland's neutrality and external relations. These dangers justified confiscating the propaganda material.

#### *Languages:*

German.



#### *Identification: SUI-2005-M-002*

**a)** Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 26.10.2005 / **e)** 2A.471/2004 / **f)** Saint Gall Tax Office v. Ms A. and Administrative Court of the canton of Saint Gall / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 131 II 697 / **h)** CODICES (German).

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

1.3.1.1 Constitutional Justice – Jurisdiction – Scope of review – **Extension**.

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law**.

4.5.10.3 Institutions – Legislative bodies – Political parties – **Role**.

5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status**.

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

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

Tax, contributory capacity / Tax, unequal treatment / Law, unconstitutional, application.

#### *Summary:*

Article 191 of the Federal Constitution (access to the Federal Court), Federal Law of 14 December 1990 on harmonisation of direct taxes of the cantons and municipalities (LHID); equal treatment in respect of tax rates between single-parent and two-parent

families; limitations to interpretation in accordance with the Constitution.

Constitutionality and applicability of Section 11.1 LHID: the stipulation that single-parent families and taxpayers responsible for the maintenance of dependants be granted the same reduction in rates as married couples infringed the principle of taxation according to contributory capacity, and encroached on the cantons' power to set rates (recital 4). The situation could not be rectified through an interpretation in accordance with the Constitution, having regard to the clear wording of the provision and to the historical legislator's unequivocal intention. Despite its unconstitutionality, the provision must be applied (recital 5).

*Languages:*

German.



## "The former Yugoslav Republic of Macedonia" Constitutional Court

### Important decisions

*Identification:* MKD-2002-2-004

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 10.07.2002 / e) U.br. 91/2002 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 59/2000 / h) CODICES (Macedonian).

*Keywords of the systematic thesaurus:*

1.1.4.3 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Executive bodies.**

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

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

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

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

3.17 General Principles – **Weighing of interests.**

4.6.2 Institutions – Executive bodies – **Powers.**

*Keywords of the alphabetical index:*

Government, action, constitutionality / Government, prerogative.

*Headnotes:*

The Government is entitled to annul or repeal regulations or other acts of ministries, state administrative agencies and administrative organisations that are not in conformity with the Constitution, laws or other regulations made by the Assembly or the government. This competence is not considered to be an infringement of the competences of the Constitutional Court.

*Summary:*

An individual from Skopje lodged a petition to commence proceedings to review the constitutionality of an article of the Law on the Government. The petitioner challenged the constitutionality of this Law

on the grounds that only the Constitutional Court has a right and duty to annul or repeal regulations that are not in conformity with the Constitution, laws or other regulations enacted or issued by the Assembly or the government. In the petitioner's opinion, the impugned article violated Articles 8.1.3, 51, 91.1.5, 96, 110.2, 112.1 and 112.2 of the Constitution.

An analysis of the contents of the disputed article showed that the government competences it enumerates are different from those of the Constitutional Court.

In the Court's opinion, the government, as an executive body in the system of separated powers, has a right and duty to annul or repeal regulations or other acts of ministries, state administrative agencies and administrative organisations, in cases where those regulations are not in conformity with the Constitution or with laws or other regulations enacted or issued by the Assembly or the government. This authority derives from the constitutional power of the government to supervise and control the activities and work of administrative bodies (Article 91 of the Constitution). It remains within the context of the exercise of executive power, and by no means prevents the Constitutional Court from exercising its competences.

Accordingly, the Court dismissed the petition.

#### *Languages:*

Macedonian.



#### *Identification:* MKD-2005-1-001

**a)** "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 21.12.2005 / **e)** U.br.195/2005 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 3/2006, 12.01.2006 / **h)** CODICES (Macedonian, English).

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

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

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

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**

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

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

Constitutional Court, competence.

#### *Headnotes:*

The Constitutional Court's powers are determined solely by the Constitution and the legislator may not, therefore, introduce new competences allowing the Constitutional Court to decide upon the constitutionality and legality of people's initiative as a form of direct democracy.

#### *Summary:*

I. The Constitutional Court initiated proceedings *ex officio* in order to assess the constitutionality of the provisions of Article 67.3 and 67.4 of the Law on Referendum and Other Forms of Direct Democracy of Citizens ("Official Gazette of the Republic of Macedonia", no. 81/2005)

Article 67.3 allows the Speaker of the Assembly, upon receipt of a proposal for a civil initiative, to ask the Constitutional Court to assess, within fifteen days, the compatibility of the civil initiative with the Constitution and law. Under Article 67.3 and 67.4 the person proposing the civil initiative is to be informed, if the Speaker of the Assembly receives written notification from the Constitutional Court within fifteen days.

The Constitutional Court took as its starting premise the constitutional principle of the separation of state powers. Under this principle, the Assembly is the legislative and representative body of the citizens, ensuring parliamentarianism; the President of the Republic of Macedonia represents the Republic; the Government is the holder of the executive power, and the Constitution establishes an autonomous judiciary with the Supreme Court as the highest court. Under Article 108 of the Constitution, the Constitutional Court is a body of the Republic protecting constitutionality and legality.

The competences of these institutions are defined by and originate from the Constitution, and the Constitutional Court's powers are defined in detail by the Constitution. Its structure and functions are stipulated directly in the Constitution.

Specifically, under the Constitution, modes of work and procedures before the Constitutional Court are to be regulated by an act of the Court. Such issues are accordingly regulated by the Book of Procedures of the Constitutional Court of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia", no. 70/1992).

The Court noted that when drafting the Constitution, the Assembly outlined the powers of the Constitutional Court in a clear and precise fashion, thus creating a constitutional guarantee for exemption from any form of interference into and regulation of the competences of the Constitutional Court by holders of authority. As a result, the Constitutional Court's powers may only be altered by the Constitution.

II. In view of the above, the Court found that the stipulation of the types of obligations, actions and competences of the Constitutional Court by laws or other regulations adopted by the bodies of the Republic could not be construed as being constitutionally based. It therefore found Article 67.3 and 67.4 of the Law on Referendum and Other Forms of Direct Democracy of Citizens to be out of line with the Constitution, as through these provisions, the legislator has assumed authority in the absence of grounds from the Constitution and has defined new obligations and competences for the Court. In so doing, the legislator has regulated a constitutional matter which may not be the subject of regulation beyond the Constitution itself.

The Court found the challenged provisions to be particularly at odds with Article 8.1.3, which refers to the rule of law as a fundamental value of the national constitutional order, as well as with Article 51, which stipulates that in the Republic of Macedonia laws must be in accordance with the Constitution and all other regulations with the Constitution and law and that everyone is obliged to respect the Constitution and laws. The provisions were also at variance with Article 108, which provides that the Constitutional Court is a body of the Republic protecting constitutionality and legality, and with Article 110 which defines the competences of the Constitutional Court and does not contain those prescribed by Article 67.3 and 67.4. The Court therefore repealed this article.

#### Languages:

Macedonian.



#### Identification: MKD-2007-S-001

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 16.04.2008 / e) U.br.256/2007 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 61/2008, 14.05.2008 / h) CODICES (Macedonian, English).

#### Keywords of the systematic thesaurus:

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

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

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**

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

4.7.9 Institutions – Judicial bodies – **Administrative courts.**

#### Keywords of the alphabetical index:

Constitutional Court, exclusive jurisdiction / Administrative court, jurisdiction.

#### Headnotes:

The Administrative Court may not be competent to assess the lawfulness of regulations (or normative acts). Under the Constitution, this falls within the remit of the Constitutional Court.

#### Summary:

I. The Constitutional Court, acting *ex officio*, and also upon a petition submitted by an individual, instigated proceedings for the constitutional review of Article 34.2 of the Law on Courts, under which the Administrative Court was empowered to decide on the lawfulness of acts of state bodies, the Government and holders of public mandates, adopted in the form of a regulation, where these regulated individual relations.

The applicant argued that the Administrative Court did not have authority to review the legality of normative acts that regulate certain relations in a general manner, but could decide on the rights and obligations of natural and legal persons which were violated by acts on the part of administrative bodies and holders of public offices passed when deciding upon individual administrative matters.

II. The Constitutional Court took as its starting point the principle of the rule of law guaranteed by Article 8.1.3 of the Constitution as one of the fundamental values of the national constitutional order, Article 50.2 of the Constitution on judicial control of administrative acts, as well as Articles 108-113 on the position and powers of the Constitutional Court.

It noted that a normative act regulates individual relations in a general manner (i.e. it contains legal rules for the conduct of natural and legal persons on the basis of which decisions are taken in specific cases, and that Article 34.2 of the Law on Courts bestows on the Administrative Court the competence to appraise the lawfulness of regulations governing individual relations). This gives rise to potential for interference in the competence of the Constitutional Court, defined in Article 110 of the Constitution. Such a conclusion may be drawn in the light of the content of Article 34.2, which allows the Administrative Court to appraise the regulations governing individual relations in a general manner, instead of only assessing those acts which decide on concrete rights and obligations.

For the above reasons, the Court found that the Administrative Court may not be competent to appraise the lawfulness of regulations governing relations, which, under the constitutional determination in fact fall within the Constitutional Court's remit. It also found that the provisions under dispute were not sufficiently clear, giving rise to potential for an incorrect interpretation of the Administrative Court's competence. They were not therefore in accordance with the principle of the rule of law, as one of the fundamental values of the national constitutional order, as defined in Articles 8.1.3 of the Constitution and 110 of the Constitution. The Court consequently repealed the above provision of the Law on the Courts.

#### *Languages:*

Macedonian.



## Turkey Constitutional Court

### Important decisions

*Identification:* TUR-1994-3-007

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 20.09.1994 / **e)** 1994/68 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 19.10.1994 / **h)**.

*Keywords of the systematic thesaurus:*

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

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

*Keywords of the alphabetical index:*

Application for annulment.

*Headnotes:*

The Constitutional Court examines the constitutionality in respect of both form and substance of laws, decrees having force of law, and the Rules of Procedure of the Grand National Assembly. In addition to these functions and powers of the Constitutional Court, the waiver of the parliamentary immunity of a member or his/her disqualification is examined by the Court if the member concerned or any number of the Grand National Assembly appeals to the Constitutional Court within one week seeking the annulment of the decision on the grounds that is contrary to the Constitution or to the Rules of Procedure of the Assembly.

*Summary:*

The case was brought as a result of an appeal by one of the members of Parliament against the decision of the Bureau of the Assembly of the Turkish Grand National Assembly concerning the automatic loss of membership of Melih Gökçek. It was argued that according to Article 84 of the Constitution and the Rules of the Assembly, the loss of membership and the removing of the parliamentary immunity of a member must be decided by an absolute majority of the total members of the Grand National Assembly.

The Constitutional Court held that the decisions of the Turkish Grand National Assembly could be examined if it could be qualified as an amendment of the Rules of Procedure of the Assembly. In order to examine the loss of the membership, the Turkish Grand National Assembly must give a decision on the issue. According to the Court, there was no such decision and the decision of the Bureau of the Assembly could not be accepted as a decision of the Assembly. For that reason, the request of annulment was dismissed.

The decision was given unanimously. However, three members of the Court wrote separate concurring opinions.

#### *Supplementary information:*

When Melih Gökçek was elected to the mayorship of the Ankara Metropolitan Municipality, he was a member of the Assembly. According to Article 84 of the Constitution it is not possible to assume a function incompatible with membership or to exercise activities incompatible with membership as stipulated in Article 82 of the Constitution. According to this provision, members of the Turkish Grand National Assembly cannot hold office in state departments or other public corporate bodies.

The Law no. 3959, which amended Section 17 of the Law no. 2972, gives an option to elected mayors. If they prefer mayorship, their memberships of the Assembly automatically end on the date when they express their preference. For that reason, the decision of the Bureau of the Assembly stipulated that there was no need to have a decision from the Assembly in this situation.

#### *Languages:*

Turkish.



#### *Identification:* TUR-1995-1-001

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 29.11.1994 / **e)** 1994/80 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 10.02.1995 / **h)**.

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

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.3.5.10 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by the executive.**

1.6 Constitutional Justice – **Effects.**

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

4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

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

Decree having force of law / Legislation, delegated.

#### *Headnotes:*

Decisions of the Constitutional Court are binding on legislative, executive and judicial organs, on administrative authorities, and on individuals and corporate bodies. According to the above rule, the legislative organ must take into consideration the decisions of the Constitutional Court and must not enact laws in a way that would to render the judgments of the Court ineffective. Not only the judgment but also the written statement of reasons are binding for the legislative organ.

An empowering law must define the purpose, scope, principles and operative period of decrees having the force of law, and whether more than one decree may be issued within the same period. The above elements must be made concrete in the empowering law which should provide for a framework for the Council of Ministers by limiting the powers conferred.

Legislative power itself cannot be delegated. Admittedly, the Council of Ministers can be authorised to issue decrees having force of law on certain matters. However, where the limits set for the issuing of the decrees having force of law are exceeded, this amounts to an unauthorised delegation of legislative power.

#### *Summary:*

The case was brought by the main opposition party in the Grand National Assembly demanding annulment of the Empowering law no. 3991, dated 7 June 1994. This empowering law authorised the Council of Ministers to issue decrees for amending some articles of the Turkish Commercial Code, the Act on Banks and the Act on the Inspection of Insurances.

The Court found Articles 1, 2 and 3 of the empowering law unconstitutional. According to the Court, these articles were in violation of Article 91 of the Constitution because the purpose, scope and principles which regulate the issuing of decrees were indefinite. In addition to the above observation, the Court held that the above articles of the empowering law resulted in the delegation of legislative power to an executive body and for this reason those articles were incompatible with Article 7 of the Constitution.

Articles 4, 5 and 6 of the empowering law were not in violation of the Constitution. However, after the annulment of Articles 1, 2 and 3 the application of those articles became impossible and, for this reason, they were also annulled in accordance with Article 29 of the Law of the Organisation and Trial Procedures of the Constitutional Court.

The decision was unanimous.

#### *Supplementary information:*

Settled case law.

#### *Languages:*

Turkish.



#### *Identification:* TUR-1996-3-009

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 02.01.1996 / **e)** 1996/35 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 27.12.1996 / **h)**.

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

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**  
 1.6 Constitutional Justice – **Effects.**  
 3.4 General Principles – **Separation of powers.**  
 4.5.7 Institutions – Legislative bodies – **Relations with the executive bodies.**  
 4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

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

Decree law / Legislation, delegated / Constitutional Court, decision, binding force.

#### *Headnotes:*

In order to annul a rule of any act which is contrary to the decisions of the Constitutional Court, the provisions of this Act should be “identical” or “similar” to the provisions which were annulled before.

#### *Summary:*

According to the Constitution, the Turkish Grand National Assembly may authorise the Council of Ministers to issue decrees having force of law on “certain matters”. In the Constitution it is stated that the empowering law should define the purpose, scope, principles, and operative period of the decree having force of law, and whether more than one decree will be issued within the same period. Laws of empowering and decrees having force of law must be discussed in the committees and in the plenary session of the Turkish Grand National Assembly with “priority” and “urgency”. This means that resort to the institution of decrees having force of law should only be in “urgent situations”. It can be understood that in the Turkish constitutional system legislative power is an original power and cannot be delegated; but authorisation to enact decrees having force of law is an exceptional and subordinate power. Decrees having force of law can only be enacted on the basis of the empowering law which must have a short operative period for the decrees for solving the urgent matters with efficient and indispensable regulations and measures.

The Turkish Grand National Assembly may authorise the Council of Ministers to issue decrees having force of law only on “certain matters”. This means that the Council of Ministers can be authorised only for limited subjects with certain powers. Fundamental rights, individual rights and political rights cannot be regulated by decrees having force of law. In addition to this, the Council of Ministers cannot be empowered to amend the budget by a decree having force of law.

The subject of the power given to the Council of Ministers must be very clear and in the empowering law the purpose, scope and principles must be shown clearly. The empowering law must define the operative period of the decree having force law.

According to the Constitution, decisions of the Constitutional Court are binding on the legislative, executive and judicial organs, on the administrative



authorities, and on persons and corporate bodies. This means that the legislative organ must be careful in enacting new laws and must take into account the decisions and written statements of reasons of the Constitutional Court.

The present case was brought by the President of the Republic demanding annulment of the Empowering law no. 4183, dated 31.08.1996. The Law empowers the Council of Ministers to make regulations concerning financial, social and other rights of public employees and retired public employees.

The Constitutional Court pointed out that the laws nos. 3479, 3481, 3755, 3911 and 3390 were annulled. All these empowering laws tried to give powers to the Council of Ministers to issue decrees having force of law for the regulation of social rights of public employees and organisations of public administrations. According to the Constitutional Court, the provisions of empowering Law no. 4183 were "similar" to other annulled empowering laws. And this law was contrary also to the decisions of the Constitutional Court concerning decrees having force of law.

The Court held that because the above empowering Law was "similar" or "identical" it should also be invalidated. The law was found contrary to the last provision of Article 153 of the Constitution.

The decision was unanimous.

#### *Supplementary information:*

Settled case law.

#### *Languages:*

Turkish.



#### *Identification:* TUR-2001-2-008

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 25.11.1999 / **e)** 1999/45 / **f)** / **g)** *Resmi Gazete* (Official Gazette) / **h)** CODICES (Turkish).

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

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.5.4.4.1 Constitutional Justice – Decisions – Types – Annulment – **Consequential annulment.**

1.6.7 Constitutional Justice – Effects – **Influence on State organs.**

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

4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

4.10.8.1 Institutions – Public finances – Public assets – **Privatisation.**

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

Privatisation, evaluation methods / Privatisation, pricing / Privatisation, procedure / Annulment, effects.

#### *Headnotes:*

Only those provisions of laws which are applicable in a particular case before an ordinary court may be brought to the Constitutional Court for review. Inapplicable provisions may not be brought to the Court for review. If provisions of a given law are annulled by the Constitutional Court, the replacement provisions should be in conformity with the reasoning of the Court. The power to legislate within this framework is vested in the Turkish Grand National Assembly.

#### *Summary:*

The Erzincan Administrative Court made an application to the Constitutional Court for it to annul certain provisions of Law 4046 on Privatisation. The disputed provisions regulated the valuation of the establishments to be privatised, the structure of adjudication commissions and their procedures. According to Article 152 of the Constitution and Article 28 of Law 2949 (the Law of the Organisation and Procedures of the Constitutional Court), only those provisions of laws or of decrees having the force of law, which are applicable to the particular case, may be referred to the Constitutional Court for annulment due to their unconstitutionality. Since some of the provisions referred to the Constitutional Court did not apply to a particular case, objection to them should be dismissed. The court which referred the case to the Constitutional Court objected that certain similar regulations had been annulled by the Constitutional Court. Because of the binding effect of the judgments of the Constitutional Court, the disputed provisions should also be annulled. According to the Court, in order to determine whether any provision is

the same as the annulled provision, the Court should examine whether there is a similarity in the “identity” of the provisions, i.e. if their concept, characteristics, technique, content and scope are similar. After the Judgment of the Constitutional Court E.1997/35, K.1997/45, Law 4232 regulated Article 18/B-C in a different way. In the disputed provisions, the structures of the valuation commissions, of the adjudication commissions, and the working procedures of each, were set out. Moreover, the new law regulated which kind of adjudication shall be applied to a certain privatisation method. Therefore, the aim was that legislation should be in line with the Constitutional Court judgment. Under the Constitution, legislative power is vested in the Turkish Grand National Assembly. In the disputed provisions, the structure of the valuation commissions, their working procedures, and that of the adjudication commissions and their actions, were regulated in detail. Within this framework, giving some authorities to administrative bodies did not mean that the power to legislate was delegated to those bodies. Therefore, the objection was rejected by majority vote.

#### *Supplementary information:*

- Case no. E.1999/38, K.1999/45, Official Gazette, 03.07.2001 – 24451.

#### *Languages:*

Turkish.



## Ukraine Constitutional Court

### Important decisions

*Identification:* UKR-1998-S-001

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 09.06.1998 / **e)** 8-rp/1998 / **f)** On the official interpretation of the provisions of Articles 158.2 and 159 of the Constitution (case on introducing amendments to the Constitution) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 23/1998 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

1.3.5.3 Constitutional Justice – Jurisdiction – The subject of review – **Constitution.**

4.1.1 Institutions – Constituent assembly or equivalent body – **Procedure.**

4.1.2 Institutions – Constituent assembly or equivalent body – **Limitations on powers.**

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

4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**

*Keywords of the alphabetical index:*

Review, constitutional, previous, jurisdiction, Constitutional Court / Court, opinion, previous, draft law, amendments to the Constitution.

*Headnotes:*

Under the Constitution, the parliament (*Verkhovna Rada*) of the thirteenth convocation, which adopted the Constitution on 28 June 1996, was competent to amend the Constitution during the term of its authority within the limits of and by the procedure set out in the Constitution.

In conducting preventive constitutional review of draft laws introducing amendments to the Constitution with respect to their conformity with Articles 157 and 158 of the Constitution, the Constitutional Court does not restrict the authority of the parliament to introduce changes to the Fundamental Law, it only ensures that the parliament carries them out in a constitutional manner – this is seen as the principal guarantee of the stability of the Constitution.

The parliament must not consider those draft laws where the Constitutional Court has not delivered an opinion. This suggests that the opinion is to be delivered after the draft law has been submitted to – but before it has been considered by – the parliament. It also means that the consideration of draft laws takes place only at the plenary sessions of the parliament.

### *Summary:*

An examination of Article 158.2 of the Constitution gives grounds for concluding that the right of the parliament to amend provisions of the Constitution is not dependent upon whether the Constitution was adopted by the parliament of the thirteenth convocation or before a new composition of the parliament was formed. According to Article 158.2 of the Constitution, the parliament may not amend the same provisions of the Constitution twice during the term of its authority. That is to say, where the parliament of a given convocation has introduced an amendment to a certain provision of the Constitution, it may not amend that same provision a second time during the term of its authority.

In this way, under Articles 158.2, 85, 154 to 157, 159 and item 2 of the Chapter XV “Transitional Provisions” of the Constitution, the parliament of the thirteenth convocation had the right to amend the Constitution as of 28 June 1996.

The scope of jurisdiction of the Constitutional Court is limited to deciding on the issues set out in Article 150 of the Constitution (that is to say, the conformity of laws and other legal acts of the parliament, acts of the President, Cabinet of Ministers and the parliament of the Autonomous Republic of Crimea with the Constitution, and official interpretation of the Constitution and laws) and in other Articles of the Constitution, in particular, Article 159 (the conformity of a draft law introducing amendments to the Constitution with the requirements of Articles 157 and 158 of the Constitution). The former case exemplifies what is known as consecutive (subsequent) constitutional review during which the acts in force are examined; the latter – preliminary (preventive) constitutional review.

The distinction between the above-mentioned types of constitutional review lies in the different kinds of acts adopted by the Constitutional Court at the end of the constitutional proceedings. Whereas the consecutive constitutional review provided for in Article 150 of the Constitution ends in a decision, the preventive review envisaged by Article 159 of the Constitution ends in an opinion of the Constitutional Court. However, notwithstanding the differences in form, the decisions and opinions of the Constitutional

Court are binding. This is based on Article 124.3 of the Constitution, whereby justice is administered by the Constitutional Court and courts of general jurisdiction, and Article 124.5 of the Constitution, whereby all court decisions, regardless of form, adopted in the name of Ukraine are binding throughout the territory. Thus, a court decision rendered in the form of opinion of the Constitutional Court is binding.

The parliament is under an obligation to submit a draft law introducing amendments to the Constitution in order for its conformity with Articles 157 and 158 of the Constitution to be examined (Articles 147.1 and 159 of the Constitution). The provisions of Articles 157 and 158 of the Constitution prohibit amending the Constitution in contravention of the conditions set out in those provisions.

In conducting preventive constitutional review of draft laws introducing amendments to the Constitution with respect to their conformity with Articles 157 and 158 of the Constitution, the Constitutional Court does not restrict the authority of the parliament to introduce changes to the Fundamental Law, it only ensures that the parliament carries them out in a constitutional manner – this is seen as the principal guarantee of the stability of the Constitution.

The Constitutional Court’s opinion amounts to a guarantee that the established system for introducing amendments to the Constitution has been observed, and it implies the stability of the Constitution only if it is binding on the parliament. Non-compliance with this condition by the Parliament would constitute a violation of the principle of the exercise of state power in Ukraine on the basis of its division into legislative, executive and judicial power (Article 6 of the Constitution).

It should be noted that it is not the submission of draft laws amending the Constitution to the parliament that preconditions the need for an opinion of the Constitutional Court but their consideration. The parliament must not consider those draft laws where the Constitutional Court has not delivered an opinion. This suggests that the opinion is to be delivered after the draft law has been submitted to – but before it has been considered by – parliament. It also means that the consideration of draft laws takes place only at the plenary sessions of the parliament. (Article 84.2 of the Constitution).

The purpose of including Article 159 into Chapter XIII of the Constitution is to preclude changing the Constitution contrary to the requirements of Articles 157 and 158 of the Constitution. In this way, it follows that not only a draft law submitted to the

parliament under Articles 154, 155 and 156 is subject to the mandatory test for conformity with Articles 157 and 158 of the Constitution but also any amendments made to it in the process of its consideration at the plenary session.

As the parliament alone resolves the issue of introducing amendments to the Constitution, and the defined subjects – the President, not less than one-third or not less than two-thirds of the parliament's constitutional composition (Articles 154 and 156 of the Constitution) – may submit legislative proposals on amending the Fundamental Law, the parliament shall be the only subject entitled to apply for and to be provided with an opinion of the Constitutional Court on the conformity of a draft law introducing amendments to the Constitution with the requirements of Articles 157 and 158 of the Constitution.

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2000-S-001

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 14.12.2000 / **e)** 15-rp/2000 / **f)** Constitutionality of the Resolution of the Supreme Council on the Validity of the Law on the Accounting Chamber and formal interpretation of provisions 150.2 of the Constitution and 70.2 of the Law on the Constitutional Court concerning procedures of execution of decisions of the Constitutional Court (case of procedures of execution of decisions of the Constitutional Court) / **g)** / **h)** CODICES (Ukrainian).

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

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**

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

1.6.6.1 Constitutional Justice – Effects – Execution – **Body responsible for supervising execution.**

4.6.6 Institutions – Executive bodies – **Relations with judicial bodies.**

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

Constitutional Court / Decision, final, binding, appeal / Implementation, decision.

#### *Headnotes:*

The laws, other legal acts or their individual provisions that have been declared unconstitutional may not be applied as, according to Article 152.2 of the Constitution, they are invalid from the day on which the Constitutional Court approves the decision on their constitutional invalidity.

Article 70.2 of the Law on the Constitutional Court covering the implementation of decisions and opinions of the Constitutional Court should be understood as a right of the Constitutional Court to set out, if necessary, in its decisions and opinions, the procedures and timeframes – and charge the appropriate governmental bodies with responsibility – for their implementation. In doing so, and regardless of whether the procedures of execution are specified in a decision or an opinion of the Constitutional Court, the appropriate governmental bodies must act only in accordance with and within the scope of their powers and in the manner envisaged by the Constitution and laws.

#### *Summary:*

In settling this dispute, the Constitutional Court acts on the assumption that decisions of the Constitutional Court are, in accordance with Constitution, binding in the territory, final and may not be appealed (Article 150.2 of the Constitution). Therefore, the implementation of the decision of the Constitutional Court in the case of the constitutional petition by the President concerning the compliance (constitutionality) of the Law on the Accounting Chamber of the Supreme Council (hereinafter, the "Law") with the Constitution must be deemed to be binding.

In this case, the invalidity of certain provisions of the Law is directly linked to the approval of the Decision of the Constitutional Court rather than to the adoption of a legal act confirming the Decision or supporting its implementation. Accordingly, on the date of the Decision of the Constitutional Court (here, 23 December 1997), the provisions of the Law declared invalid lost their validity while the Law itself remained valid except for the provisions declared constitutionally invalid. The declaration of invalidity on grounds of unconstitutionality of a significant number of provisions of this Law led to a violation of the integrity of its logic and structure and the appearance of gaps – those were reasons for considering the need for taking additional measures to ensure the implementation of the Decision.

Under clause 6 of the operative part of the above-mentioned Decision, the obligation to ensure the implementation of the Decision falls to the Supreme Council and the President. According to the Law on the Constitutional Court (Article 70.2), the body of the executive power which is under an obligation to implement decisions or opinions of the Constitutional Court must discharge this obligation in accordance with, within the limits of its powers and in the manner envisaged by the Constitution and laws (Article 19.2 of the Constitution). In accordance with Article 85.1 of the Constitution, the powers of the Supreme Council include passing laws, including those introducing changes and amendments to the laws in force. Passing laws is to be done according to the procedures established by the Constitution and the Regulation of the Supreme Council.

As follows from the above, the obligation of the Supreme Council concerning the implementation of the Decision of the Constitutional Court of 23 December 1997 in the case of the Accounting Chamber is to introduce appropriate changes and amendments to the relevant law; this obligation arises from the declaration of the constitutional invalidity of certain provisions in this Law. Such introduction of changes and amendments should be done in accordance with the legislative procedures established by the Constitution to ensure proper enforcement of the Law.

The Supreme Council is the only body of the legislative power in Ukraine (Article 75 of the Constitution). This means that the right to pass laws and to introduce changes in cases where the introduction of changes is not done directly by the people (Articles 5, 38, 69 and 72 of the Constitution) belongs exclusively to the Supreme Council (Article 85.1 of the Constitution) and may not be delegated to other bodies or officials. Laws and other normative legal acts are passed in accordance with the Constitution and should be in compliance with it (Article 8.2 of the Constitution). As follows from the above, the Supreme Council may choose to replace a law by another law instead of passing a normative legal act.

In this case, the introduction of changes in the Law in accordance with the Decision of the Supreme Council and the actions of the Head of the Supreme Council with respect to the clarification and adjustment of wording and the publication of the Law conflicted with the fundamental provisions of the Constitution setting out the status of law in Ukraine as an act of the higher legal force within the system of normative legal acts of the state, and the provisions requiring that the procedures set out by the Constitution (Articles 8, 19 and 94 and others) be followed when passing laws and, in particular, when introducing changes to them.

Additional determinations within the decisions or opinions of the Constitutional Court and the inclusion of procedures to be followed for their execution do not cancel or replace the general mandatory nature of the requirement of their execution. Regardless of whether the decisions or opinions of the Constitutional Court set out specific procedures for their execution, any laws, legal acts or individual provisions which have been declared constitutionally invalid are not to be applied (because they are invalid) as of the date of the decision concerning their constitutional invalidity by the Constitutional Court.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2003-1-006*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 11.03.2003 / **e)** 6-rp/2003 / **f)** Compliance with the Constitution of Ukraine of exercising by the President of Ukraine of his right to veto enacted by the *Verkhovna Rada* of Ukraine Law of Ukraine “On making amendments to Article 98 of the Constitution of Ukraine” and suggestions thereto (case on the right to veto the Law on making amendments to the Constitution of Ukraine) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 2003 / **h)** CODICES (Ukrainian).

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

1.1.4.1 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Head of State.**

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

4.4.3.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**

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

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

Veto, presidential / Constitutional Court, jurisdiction, limit.

*Headnotes:*

The Constitution contains no reservations as to the impossibility of the President of Ukraine to exercise his right to veto any Law enacted by the Parliament (*Verkhovna Rada*), including the Laws amending the Constitution.

The Constitution specifies no grounds or reasons on the basis of which the President of Ukraine may send back Laws to the Parliament for re-consideration, or requirements as to the contents of the suggestions of the Head of State to the Law. Reviewing the contents of the President's suggestions as to the Law upon his sending it to the Parliament back for re-consideration does not fall within the competences and jurisdiction of the Constitutional Court.

*Summary:*

The procedure for enactment by the Parliament (*Verkhovna Rada*) of Laws amending the Constitution of Ukraine, set out in Chapter XIII of the Fundamental Law of Ukraine, does not provide for a special procedure for the signing and the publication of such Laws.

At the same time, the Constitution contains no reservations as to the impossibility of the President's exercise of his right to veto any Law enacted by the Parliament, including those amending the Constitution, i.e. the President has a right to veto all those Laws. Those are the legal views stated in the Opinion of the Constitutional Court no. 1-v/2001 on 14 March 2001 (a case on the amendment of Articles 84 and 85 of the Constitution and others).

Therefore, the provisions of Article 94 of the Constitution and those of Article 106.1.29 and 106.1.30 of the Constitution, which govern the procedure for signing and official publication of the Laws, the President's exercise of his veto right with a subsequent sending back for re-consideration to the Parliament of the Laws with written suggestions and reasons, and the procedure for the re-consideration of such Laws, also apply to the Laws enacted by the Parliament according to Chapter XIII of the Constitution.

The President may exercise his right to veto Laws enacted by the Parliament upon receipt of such Laws for signing at the relevant stages of the legislative process. That is a constitutional and legal form of participation of the President in the legislative process.

Signing or sending back the Laws to the Parliament for re-consideration is an exclusive constitutional right of the President. The President's exercise of the veto right,

as enacted by the Parliament in the Law of Ukraine "On making amendments to Article 98 of the Constitution of Ukraine" by sending a Law back to the parliament for re-consideration, complies with the Constitution.

The constitutional proceedings in the case under review relating to the compliance with the Constitution of the contents of the President's suggestions to the Law of Ukraine "On making amendments to Article 98 of the Constitution of Ukraine" is dismissed on the basis of Article 45.3 of the Law of Ukraine "On the Constitutional Court of Ukraine" for lack of jurisdiction of the Constitutional Court to consider such matters.

*Languages:*

Ukrainian.

*Identification:* UKR-2004-S-001

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 02.11.2004 / **e)** 15-rp/2004 / **f)** On the conformity with the Constitution (constitutionality) of Article 69 of the Criminal Code (a case concerning more lenient punishments imposed by courts) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 23/1998 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.  
4.7.2 Institutions – Judicial bodies – **Procedure**.  
5.3.16 Fundamental Rights – Civil and political rights – **Principle of the application of the more lenient law**.

*Keywords of the alphabetical index:*

Justice, implementation / Punishment, offence, minor, proportionality / Punishment, mitigation.

*Headnotes:*

The provisions of Article 69.1 of the Criminal Code prohibiting the application of a more lenient penalty to minor offences than those established by law are unconstitutional. The provisions of Article 69.1 of the Criminal Code which have been declared unconstitutional lose force as of the day of the adoption of this decision by the Constitutional Court.

### Summary:

According to Article 8.2 of the Constitution, Ukraine recognises and applies the principle of the rule of law. All elements of this principle are consistent with the justice ideology and the idea of law largely reflected in the Constitution.

Justice is crucial in determining the role of law as a regulator of social relations and a general human measure of law. Justice implies that the offence and punishment correspond.

A direct application of the constitutional principles of respect for humanity, justice and legitimacy may be found in the Criminal Code regulations. They allow for an offender who has committed a minor offence for the first time to be exempt from criminal responsibility in cases of true repentance (Article 45), the reconciliation between the offender and the victim and indemnification by the offender of the loss or damage incurred (Article 46), the granting of bail (Article 47), or a change in circumstances (Article 48). A person may be exempt from punishment where at the time of trial no ground exists for considering him socially dangerous (Article 74.4).

Exemption from punishment based on Articles 47 and 48 of the Code and in accordance with Article 74.4 thereof applies to minor and medium offences. This illustrates the application of the principle of legal equality in the differentiation of criminal responsibility.

Article 65 of the Code establishes general principles for sentencing. Based on these, a court shall sentence:

1. within the limits of the penalties under the provisions on the applicability of criminal responsibility in the Special Part of the Code;
2. in accordance with the provisions of the General Part of the Code; and
3. in consideration of the gravity of offence, the personality of the offender and the mitigating and aggravating factors (Article 65.1). Article 69 of the Code defines the grounds for mitigating the punishment under the relevant articles of the Special Part thereof (Article 65.3).

General sentencing principles apply to all offences regardless of their gravity.

The applicability to minor crimes of other regulations providing legal grounds and establishing procedures for exempting a person from criminal responsibility

and punishment (Articles 44, 45, 46, 47, 48 and 74 of the Code) may not be an obstacle to a court's individualising the punishment, for example, by using more lenient punishments than those established by law.

Article 69, however, does not provide for this kind of punishment individualisation for minor offences, even though it does refer to special circumstances mitigating the penalty and considerably lowering the degree of an offence for felonies and serious and medium crimes. Therefore, the provisions of the article are inconsistent with the fundamental principle of justice in a state governed by the rule of law, since persons committing less serious crimes are disadvantaged compared to those committing more serious offences.

Article 69 of the Code violates the fundamental principle of justice of the rule of law because under that article it is impossible for either a punishment that is more lenient than the lower limit set out in the relevant article of the Special Part of the Code – or for another, more lenient, main punishment not specified in the article as a punishment for a specific kind of crime – to be imposed also for minor crimes whose degree of social dangerousness is much less than that of felonies, serious crimes and medium offences.

The restriction of the defendant's constitutional rights must be governed by the proportionality principle. The above-mentioned provisions of Article 69 are incommensurate with the stated purposes.

Article 65 of the Code implements the principle established by Article 61.2 of the Constitution that all legal responsibility is case-dependent. It is set out in detail in the General Part of the Code describing the system of punishment, exemption from criminal responsibility, exemption from and serving of a sentence and the use of a more lenient sentence. The punishment imposed must correspond to the degree of the social dangerousness of a crime, its circumstances and the personality of the offender, that is to say, be just. This is reflected in Article 65.1.3 of the Code under which the sentence being imposed must take into account the gravity of the offence as well as the personality of the offender and the mitigating and aggravating factors.

The constitutional provisions concerning the person, his rights and freedoms as well as Articles 65.2, 66, 223.2, 324.1.5 and 334.1 of the Ukrainian Code of Criminal Procedure that provide for aggravating or mitigating factors to be identified and taken into account reflect the humanistic context of the Constitution and increased sentencing consistency for all crimes, regardless of their gravity.

When determining a sentence under Articles 65.2 and 69.1 and the provisions of the relevant sanctions of the Special Part of the Code, the courts cannot implement the provisions of Article 61.2 of the Constitution and the above-mentioned Criminal Code articles. Article 69.1 therefore restricts the applicability of the constitutional principles of legal equality and individualised sentencing. Without the possibility of imposing more lenient sentences for minor crimes, the principles of justice and consistency of punishment are violated.

Articles 367.1.5 and 398.1.3 of the Code of Criminal Procedure provide for the possibility of setting aside or varying a judgment or a court ruling if it is inconsistent with the gravity of an offence and the personality of an offender in cases heard in courts of appeal or cassation. A punishment is considered inconsistent with the gravity of an offence or the personality of an offender if such punishment, even though it may not exceed the limits of the relevant article of the Code, is by its nature or severity (either too lenient or excessively severe) clearly unjust (Article 372). Article 373.1.1 of the Code of Criminal Procedure sets out that the court of appeal may vary the judgment and impose a more lenient punishment if the severity of the one imposed by the lower court is found to be inconsistent with the gravity of the offence or the personality of the offender.

Substantial violation of legislation relating to criminal procedure includes all violations of the Code of Criminal Procedure which have or may have prevented a court from comprehensively considering a case and delivering a verdict or ruling that is legal, based on evidence and just (Article 370.1).

The lack of a legal opportunity for an individualised or more lenient punishment, therefore, results in the inability of a court to take into account the gravity of the offence, the magnitude of damage incurred, the kind of guilt or motive, the property status of the accused and other critical circumstances when deciding on minor offences. This violates the principle of a just, case-dependent and commensurate punishment.

#### *Languages:*

Ukrainian.



## United States of America Supreme Court

### Important decisions

*Identification:* USA-2004-3-005

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 12.01.2005 / **e)** 04-104, 04-105 / **f)** United States v. Booker / **g)** 125 *Supreme Court Reporter* 738 (2005) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

1.1.4.2 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Legislative bodies.**

1.5.1.3.2 Constitutional Justice – Decisions – Deliberation – Procedure – **Vote.**

1.5.5 Constitutional Justice – Decisions – **Individual opinions of members.**

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

3.20 General Principles – **Reasonableness.**

4.7.2 Institutions – Judicial bodies – **Procedure.**

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:*

Sentence, determination / Sentence, increased / Judge, sentencing discretion / Judicial restraint / Court, law, interference, minimum.

*Headnotes:*

Under the constitutional requirements of a fair criminal trial, if an increase in a guilty person's punishment depends upon the finding of a fact, that fact must be admitted by the defendant or found by a jury under a standard of beyond a reasonable doubt.

Juries, not judges, must decide the facts that are the basis for a criminal sentence.

A court must refrain from invalidating more of a legislative act than is necessary and must retain those portions of the act that are constitutionally valid.



*Summary:*

In two separate criminal proceedings, following jury determinations of the defendants' guilt, federal court judges imposed sentences that increased the length of imprisonment beyond the maximum terms available to juries under the applicable statutes. The judges took these actions under the mandatory requirements of the Federal Sentencing Guidelines (hereinafter, the "FSG"). The FSG are found in legislation initially enacted by the U.S. Congress in 1984. Among other things, the FSG required a judge who found certain types of additional facts, such as the quantity of drugs in a narcotics case, to increase the length of the offender's prison sentence beyond the so-called "statutory maximum". The "statutory maximum" is the longest prison sentence for the crime in question when only the facts found by the jury are the basis for the sentence. Therefore, in the case of defendant Freddie Booker, the jury found Mr Booker guilty beyond a reasonable doubt of possessing at least 50 grams of crack cocaine – a finding that by itself would have resulted in a maximum sentence of 21 years and ten months in prison. In addition, however, the judge found, by a preponderance of the evidence, that the defendant also possessed an additional 566 grams of crack cocaine. The jury had not heard this evidence. Under the FSG, the judge's findings mandated a minimum sentence of 30 years in prison. In the case of Ducan Fanfan, the judge similarly found additional facts by a preponderance of the evidence that required a minimum 15-year prison sentence, instead of the maximum six-year sentence authorised by the jury verdict alone.

In the Booker case, the judge imposed the longer sentence and the defendant appealed to the Court of Appeals for the Seventh Circuit, which overturned the sentence. The judge in the Fanfan case concluded that he could not follow the FSG and imposed a sentence based solely upon the jury's guilty verdict. The United States Supreme Court accepted review of both cases and consolidated them into one decision.

In an unusual two-part decision produced by two different alignments of the Court's Justices, the Court ruled that:

1. the FSG violated defendants' rights to trial by jury under the Sixth Amendment to the U.S. Constitution; and
2. that the constitutional infirmity could be cured by severing the mandatory nature of the FSG from the rest of the applicable legislation.

In the first part of the decision, the Court concluded that the FSG violated the Sixth Amendment by giving judges the power to make factual findings on their own that increased sentences, without the jury's

having made such findings. This conclusion rested on the Court's determination that (except in cases of the defendant's own admission) juries, not judges, must decide the facts that form the basis of a criminal sentence; therefore, any fact, except for a prior conviction, that is necessary to support a sentence exceeding the standard maximum sentence must either be admitted by the defendant or proved to a jury beyond a reasonable doubt. In the decision's second part, the Court declared that judges must consult the FSG and "take them into account" in imposing sentences; however, the Sixth Amendment requires them to treat the FSG as advisory only. In addition, the Court ruled that appellate review of judges' sentencing determinations must be based on a "reasonableness" standard of review.

As to the Booker and Fanfan cases, the Court remanded both cases back to the courts of first instance for sentencing in accordance with the Court's decision.

*Supplementary information:*

The Sixth Amendment to the U.S. Constitution states in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed..."

The Court's decision in Booker, by making the FSG advisory instead of mandatory, restored to judges much of the sentencing discretion that the U.S. Congress had sought to withdraw when it enacted the FSG. The legislative goal in enacting the FSG had been to make sentences more uniform. In dissenting against the second part of the Court's decision, the four dissenting Justices stated that the Court, by transforming the FSG from mandatory commands to advisory guidelines, had violated the "tradition of judicial restraint" by exercising a legislative, rather than a judicial, power.

The Court's Booker decision means that much attention will be placed on the federal Courts of Appeals, which under the new "reasonableness" standard will be called upon to review the discretionary sentencing decisions of judges in the courts of first instance.

*Languages:*

English.





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\* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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<sup>1</sup> This chapter – as the Systematic Thesaurus in general – should be used sparingly, as the keywords therein should only be used if a relevant procedural question is discussed by the Court. This chapter is therefore not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only look for decisions in this chapter, the subject of which is also the keyword.

<sup>2</sup> Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

<sup>3</sup> For example, rules of procedure.

<sup>4</sup> For example, age, education, experience, seniority, moral character, citizenship.

<sup>5</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>6</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>7</sup> Vice-presidents, presidents of chambers or of sections, etc.

<sup>8</sup> For example, State Counsel, prosecutors, etc.

<sup>9</sup> (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

<sup>10</sup> For example, assessors, office members.

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<sup>11</sup> (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

<sup>12</sup> Including questions on the interim exercise of the functions of the Head of State.

<sup>13</sup> Referrals of preliminary questions in particular.

<sup>14</sup> Enactment required by law to be reviewed by the Court.

<sup>15</sup> Review *ultra petita*.

<sup>16</sup> Horizontal distribution of powers.

<sup>17</sup> Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

<sup>18</sup> Decentralised authorities (municipalities, provinces, etc.).

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<sup>19</sup> For questions other than jurisdiction, see 4.9.

<sup>20</sup> Including other consultations. For questions other than jurisdiction, see 4.9.

<sup>21</sup> 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).

<sup>22</sup> As understood in private international law.

<sup>23</sup> Including constitutional laws.

<sup>24</sup> For example, organic laws.

<sup>25</sup> Local authorities, municipalities, provinces, departments, etc.

<sup>26</sup> Or: functional decentralisation (public bodies exercising delegated powers).

<sup>27</sup> Political questions.

<sup>28</sup> Unconstitutionality by omission.

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<sup>31</sup> Pleadings, final submissions, notes, etc.

<sup>32</sup> May be used in combination with Chapter 1.2. Types of claim.

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<sup>37</sup> This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

<sup>38</sup> Including its Protocols.



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<sup>40</sup> Including the principle of a multi-party system.

<sup>41</sup> Includes the principle of social justice.

<sup>42</sup> See also 4.8.

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<sup>46</sup> Prohibition of punishment without proper legal base.

<sup>47</sup> Including compelling public interest.

<sup>48</sup> Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

<sup>49</sup> Including questions of treason/high crimes.

<sup>50</sup> Including prohibition on monopolies.

<sup>51</sup> For the principle of primacy of Community law, see 2.2.1.6.

<sup>52</sup> Including the body responsible for revising or amending the Constitution.

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<sup>53</sup> For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

<sup>54</sup> For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

<sup>55</sup> For example, the granting of pardons.

<sup>56</sup> For regional and local authorities, see Chapter 4.8.

<sup>57</sup> Bicameral, monocameral, special competence of each assembly, etc.

<sup>58</sup> Including specialised powers of each legislative body and reserved powers of the legislature.

<sup>59</sup> In particular, commissions of enquiry.

<sup>60</sup> For delegation of powers to an executive body, see keyword 4.6.3.2.

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<sup>61</sup> Obligation on the legislative body to use the full scope of its powers.

<sup>62</sup> Representative/imperative mandates.

<sup>63</sup> Including the convening, duration, publicity and agenda of sessions.

<sup>64</sup> Including their creation, composition and terms of reference.

<sup>65</sup> State budgetary contribution, other sources, etc.

<sup>66</sup> For the publication of laws, see 3.15.

<sup>67</sup> For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

<sup>68</sup> For local authorities, see 4.8.

<sup>69</sup> Derived directly from the Constitution.

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<sup>70</sup> See also 4.8.

<sup>71</sup> The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

<sup>72</sup> Civil servants, administrators, etc.

<sup>73</sup> Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

<sup>74</sup> Other than the body delivering the decision summarised here.

<sup>75</sup> Positive and negative conflicts.

<sup>76</sup> Notwithstanding the question to which to branch of state power the prosecutor belongs.

<sup>77</sup> For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

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<sup>78</sup> Comprises the Court of Auditors in so far as it exercises judicial power.

<sup>79</sup> See also 3.6.

<sup>80</sup> And other units of local self-government.

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<sup>81</sup> See also keywords 5.3.41 and 5.2.1.4.

<sup>82</sup> Organs of control and supervision.

<sup>83</sup> Including other consultations.

<sup>84</sup> For questions of jurisdiction, see keyword 1.3.4.6.

<sup>85</sup> Proportional, majority, preferential, single-member constituencies, etc.

<sup>86</sup> For example, *Panachage*, voting for whole list or part of list, blank votes.

<sup>87</sup> For aspects related to fundamental rights, see 5.3.41.2.

<sup>88</sup> For the creation of political parties, see 4.5.10.1.

<sup>89</sup> For example, names of parties, order of presentation, logo, emblem or question in a referendum.

<sup>90</sup> Tracts, letters, press, radio and television, posters, nominations, etc.

<sup>91</sup> For the access of media to information, see 5.3.23, 5.3.24, in combination with 5.3.41.

<sup>92</sup> Impartiality of electoral authorities, incidents, disturbances.

<sup>93</sup> For example, signatures on electoral rolls, stamps, crossing out of names on list.

<sup>94</sup> For example, in person, proxy vote, postal vote, electronic vote.

<sup>95</sup> This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.

<sup>96</sup> For example, Auditor-General.

<sup>97</sup> Includes ownership in undertakings by the state, regions or municipalities.

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<sup>98</sup> Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

<sup>99</sup> For example, Court of Auditors.

<sup>100</sup> The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

<sup>101</sup> *Staatszielbestimmungen*.

<sup>102</sup> Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

<sup>103</sup> Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

<sup>104</sup> Positive and negative aspects.



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<sup>105</sup> For rights of the child, see 5.3.44.

<sup>106</sup> The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in Chapter 3.

<sup>107</sup> Includes questions of the suspension of rights. See also 4.18.

<sup>108</sup> Taxes and other duties towards the state.

<sup>109</sup> Universal and equal suffrage.

<sup>110</sup> According to the European Convention on Nationality of 1997, ETS no. 166, “‘nationality’ means the legal bond between a person and a state and does not indicate the person’s ethnic origin” (Article 2) and “... with regard to the effects of the Convention, the terms ‘nationality’ and ‘citizenship’ are synonymous” (paragraph 23, Explanatory Memorandum).

<sup>111</sup> For example, discrimination between married and single persons.

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<sup>112</sup> This keyword also covers “Personal liberty”. It includes for example identity checking, personal search and administrative arrest.

<sup>113</sup> Detention by police.

<sup>114</sup> Including questions related to the granting of passports or other travel documents.

<sup>115</sup> May include questions of expulsion and extradition.

<sup>116</sup> Including the right of access to a tribunal established by law; for questions related to the establishment of extraordinary courts, see also keyword 4.7.12.

<sup>117</sup> In the meaning of Article 6.1 of the European Convention on Human Rights.

<sup>118</sup> This keyword covers the right of appeal to a court.

<sup>119</sup> Including the right to be present at hearing.

<sup>120</sup> Including challenging of a judge.

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<sup>121</sup> Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

<sup>122</sup> This keyword also includes the right to freely communicate information.

<sup>123</sup> Militia, conscientious objection, etc.

<sup>124</sup> Aspects of the use of names are included either here or under "Right to private life".

<sup>125</sup> Including compensation issues.

5.3.41.3	Freedom of voting	
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<sup>126</sup> This keyword also covers "Freedom of work".

<sup>127</sup> This should also cover the term freedom of enterprise.

<sup>128</sup> 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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