

# THE BULLETIN

---

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

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

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

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

*The decisions are presented in the following way:*

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

**T. Markert**

Secretary of the European Commission for Democracy through Law

# THE VENICE COMMISSION

---

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

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

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

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

## Editors:

Sc. R. Dürr, T. Gerwien, D. Jones

A. Gorey, M.-L. Wigishoff

## Liaison officers:

Albania .....	D. Biba	Latvia .....	L. Jurcena
Algeria .....	H. Bengrine	Liechtenstein .....	I. Elkuch
Andorra .....	M. Tomàs Baldrich	Lithuania .....	J. Urbonaite
Argentina .....	R. E. Gialdino	Luxembourg .....	J. Jentgen
Armenia .....	G. Vahanian	Malta .....	A. Ellul
Austria .....	B. Wagner / C. Grabenwarter	Mexico .....	A. Oñate Laborde / V. Castro Borbon
Azerbaijan .....	R. Guliyev	Moldova .....	V. Sterbet
Belarus .....	S. Chigrinov / O. Sergeeva	Monaco .....	C. Sosso
.....	/ V. Seledovsky	Montenegro .....	J. Novaković
Belgium .....	A. Rasson Roland / R. Ryckeboer	Morocco .....	A. Hassouni
Bosnia and Herzegovina .....	Z. Djuricic	Netherlands .....	M. Chebti / M. van Roosmalen
Brazil .....	J.-B. Magalhaes	Norway .....	K. Buun Nygaard
Bulgaria .....	E. Enikova	Poland .....	M. Nowak
Canada .....	C. Marquis	Portugal .....	M. Baptista Lopes / A. Duarte Silva
Chile .....	C. Garcia Mechsner	Romania .....	T. Toader / R. Sabareanu
Croatia .....	M. Stresec	Russia .....	E. Pyrikov
Cyprus .....	N. Papanicolaou / M. Kyriacou	Serbia .....	N. Plavsic
Czech Republic .....	S. Matochová / T. Langasek	Slovakia .....	G. Fet'kova / J. Stivnický / Z. Gajdosova
.....	/ I. Pospisil	Slovenia .....	U. Umek
Denmark .....	J. Hansen	South Africa .....	S. Luthuli / E. Cameron
Estonia .....	G. Gustavson / U. Eesmaa	.....	/ A. Singh / L. Draga
Finland .....	S.-M. Tarkkanen / K. Uusitalo	Spain .....	L. Pomed Sanchez
France .....	C. Petillon / L. Brau / V. Gourrier	Sweden .....	L. Molander
Georgia .....	K. Kipiani	Switzerland .....	P. Tschümperlin / J. Alberini-Boillat
Germany .....	M. Böckel / G. Lübbe-Wolff	"The former Yugoslav Republic of Macedonia" .....	.....
Greece .....	T. Ziamou / O. Papadopoulou	.....	T. Janjic Todorova
Hungary .....	P. Paczolay / K. Kovács	Tunisia .....	B. Bertégi
Iceland .....	H. Torfason	Turkey .....	A. Coban
Ireland .....	T. Daly	Ukraine .....	O. Kravchenko
Israel .....	Y. Mersel	United Kingdom .....	A. Clarke / J. Sorabji
Italy .....	G. Cattarino	United States of America .....	P. Krug / C. Vasil
Japan .....	H. Minami	.....	/ J. Minear
Kazakhstan .....	B. Nurmukhanov		
Republic of Korea .....	K.-M. Kim		
Kyrgyzstan .....	K. E. Esenkanov		

European Court of Human Rights .....	S. Naismith
Court of Justice of the European Union .....	Ph. Singer
Inter-American Court of Human Rights .....	J. Recinos

## CONTENTS

Albania .....	465	Moldova .....	558
Algeria .....	466	Monaco .....	560
Andorra .....	468	Netherlands.....	561
Austria .....	471	Norway.....	562
Azerbaijan .....	475	Poland.....	563
Belarus .....	476	Portugal.....	568
Belgium .....	480	Russia .....	578
Bosnia and Herzegovina.....	487	Serbia.....	579
Bulgaria .....	489	Slovakia .....	588
Canada .....	491	Slovenia .....	591
Croatia .....	493	South Africa .....	598
Czech Republic.....	496	Spain.....	610
Germany .....	501	Switzerland .....	615
Hungary .....	522	“The former Yugoslav Republic of Macedonia” .....	617
Ireland .....	524	Turkey.....	621
Israel .....	528	Ukraine.....	623
Japan .....	533	United States of America .....	632
Korea .....	535	Court of Justice of the European Union.....	634
Latvia .....	538	European Court of Human Rights.....	649
Lithuania .....	542	Systematic thesaurus.....	653
Mexico.....	546	Alphabetical index.....	671

There was no relevant constitutional case-law during the reference period 1 September 2009 – 31 December 2009 for the following countries:

Denmark, Luxembourg.

Précis of important decisions of the reference period 1 September 2009 – 31 December 2009 will be published in the next edition, *Bulletin* 2010/1, for the following countries:

Armenia, Cyprus, Estonia.

# Albania

## Constitutional Court

### Important decisions

*Identification:* ALB-2009-3-001

a) Albania / b) Constitutional Court / c) / d) 02.02.2009 / e) 3/09 / f) Abrogation law / g) *Fletore Zyrtare* (Official Gazette), 12 / h) CODICES (Albanian, English).

*Keywords of the systematic thesaurus:*

4.6.7 Institutions – Executive bodies – **Administrative decentralisation.**

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.**

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

4.8.7.2 Institutions – Federalism, regionalism and local self-government – Budgetary and financial aspects – **Arrangements for distributing the financial resources of the State.**

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

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

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

*Keywords of the alphabetical index:*

Local government, powers / Decentralisation / Subsidiarity, principle / Local self-government / Local autonomy, implementation / Land, use, plan / Planning, urban, power, transfer.

*Headnotes:*

Local government is set up and functions on the basis of the principle of decentralisation of power. It is exercised through the principle of autonomy, which conditions the existence of a self-governing local power, in accordance with the concept of a democratic

state under the rule of law. Decentralisation is a process whereby authority and responsibility for specific functions are transferred from central government to local authority bodies. At its foundation lies the principle of subsidiarity, according to which “the exercise of public responsibilities should, as a general matter, belong more to the authorities closer to the citizens.” In a system based on self-government, the principle of subsidiarity requires that problems be looked at as local issues with an impact on the general interest. Local government bodies cannot be hindered from a jurisdictional perspective by central government organisations as they have their own sphere of activity, set out in the Constitution.

*Summary:*

I. A group of no less than one fifth of the deputies of the Assembly, under the terms of Article 134.1.c of the Constitution, suggested to the Constitutional Court that the changes made in Law no. 9895, 10 April 2008 on certain amendments and additions to Law no. 9482, 3 April 2006 on the legalisation, urbanisation and integration of unlicensed construction were unconstitutional. They pointed out that the powers bestowed by this Law to a special state agency under the Council of Ministers, such as ALUIZNI, have resulted in a centralisation of the entire process of the legalisation of informal construction, violating the constitutional principle of the decentralisation of power and local autonomy.

II. The Court noted the provision made within the Constitution for the basic competences and functions of local government bodies and the principles on the basis of which other competences may pass by law to them. The Constitution has formulated a concept of decentralisation which responds better to the need for substantial autonomy in local governance.

Local autonomy is conceptualised as a legal regime whereby local organisations operate independently in order to resolve issues placed within their sphere of competence by the Constitution and other legislation. The autonomy of local power can be seen most clearly in the division of competences, which is related to the initiative local government bodies have (or should have) to make their own decisions, on the basis of the Constitution and law, about problems arising in their respective jurisdictions, without intervention from central government.

Having analysed these constitutional concepts and the constitutional jurisprudence, the Court concluded that local government bodies are specifically the bodies that administer the territory under their jurisdiction.

From this perspective, the Court noted that, with regard to every decision or action with an impact on or implications for land use and urban composition in the sphere of “urban planning” and “land administration,” the process of legalisation of informal construction does not remain outside this concept.

The exercise of this activity by local government bodies and under their authority is also in conformity with the constitutional meaning that is given to the principle of the decentralisation of power. At the heart of this principle is the determination of the priority mission for local government bodies for good governance. The administration of local territories is an important aspect of good governance, and this includes planning matters, urban management and territorial control.

The rights of local authorities to self-governance would be deemed to have been breached if the legislator, in removing competences from local government bodies, were to weaken their role so much that their existence or self-government would become insignificant. Central government cannot hamper local government bodies from exercising their powers, because they have their own field of activity, provided by the Constitution.

#### *Languages:*

Albanian, English (translation by the Court).



## Algeria Constitutional Council

### Important decisions

*Identification:* ALG-2009-3-003

**a)** Algeria / **b)** Constitutional Council / **c)** / **d)** 19.02.1997 / **e)** 4-OA-CC-97 / **f)** Article 2 of the Ordinance establishing judicial districts / **g)** *Journal officiel de la République algérienne démocratique et populaire*, no. 15, 09.03.1997 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Standard, rule, regulation.

*Headnotes:*

Because the matters falling within the regulatory power of the President of the Republic are expressly defined in the Constitution, the Constitutional Council considers that, in establishing the separation of powers as a fundamental principle of the organisation of government, the drafters of the Constitution intended to confine each branch to exercising its constitutional powers and responsibilities only.

*Summary:*

After the President of the Republic had applied to it for a ruling on the constitutionality of Article 2 of the Ordinance establishing judicial districts, the Constitutional Council held that the establishment by presidential decree of the number, seat and jurisdiction of the courts set up in each judicial district was unconstitutional on the grounds that this was a matter for the law, not the President's regulatory power.

*Languages:*

Arabic.



*Identification:* ALG-2009-3-004

**a)** Algeria / **b)** Constitutional Council / **c)** / **d)** 06.03.1997 / **e)** 01-AOLO-CC-97 / **f)** Constitutionality of the Ordinance incorporating an Institutional Act on Political Parties / **g)** *Journal officiel de la République algérienne démocratique et populaire*, no. 12, 06.03.1997 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

5.3.10 Fundamental Rights – Civil and political rights – **Rights of domicile and establishment.**

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:*

Election, association / Election, electoral barrier.

*Headnotes:*

The equality of citizens before the law is a right guaranteed by the Constitution, which forbids all discrimination on grounds of personal or social circumstances. Institutions are vested by the Constitution with the task of guaranteeing that equality by removing obstacles to the effective participation of all in political life. The Constitution regards the fundamental freedoms and human rights guaranteed therein as the common heritage of all Algerian men and women, which it is their duty to hand down from one generation to the next in order to preserve its integrity and inviolability.

Furthermore, in refraining from linking the right of citizens to freely choose their place of residence to the national territory, the drafters of the Constitution intended to allow citizens to exercise a fundamental freedom, namely to freely choose their place of residence independently of the territory concerned.

*Summary:*

After the President of the Republic had applied to it for a ruling on the constitutionality of the Ordinance

incorporating an Institutional Act on Political Parties, the Constitutional Council held first of all that the role of the law is to apply the constitutional principle of the setting up of political parties by laying down the manner of and procedures for exercising that right, and not to set limits on it or empty it of all meaning. The rule prohibiting political parties from using party propaganda based on the three fundamental components of national identity (Islam, Arab and Berber) for political ends is therefore declared unconstitutional since it may harm the fundamental components of national identity.

As regards the requirement for the founder members of a political party to have Algerian as their nationality of origin or to have acquired Algerian nationality at least ten years previously, it is declared unconstitutional on the grounds that the Constitution leaves the definition of Algerian nationality to the law and that any legislation on this matter must comply with the Code of Nationality. Consequently, anyone who has acquired Algerian nationality enjoys all the rights associated with Algerian citizenship from the date on which Algerian nationality is acquired.

The requirement for the founder members of a political party to be lawfully established in the national territory is also declared unconstitutional because it infringes the right of all citizens enjoying their civil and political rights to freely choose their place of residence, and hence one of the fundamental freedoms enshrined in the Constitution, namely the freedom to choose one's place of residence whether it is inside or outside national territory.

Lastly, the requirement to attach to the political party's constituent documents a certificate to the effect that the parents of founder members born after July 1942 were not involved in acts against the war of national liberation is declared unconstitutional because it constitutes discrimination and an infringement of the principle of equality. The other obligations and duties which may be prescribed by law, in accordance with the Constitution, for the setting up of a political party must not take this discriminatory form. Furthermore, the Constitution vests institutions with the task of guaranteeing equality before the law by removing all obstacles to the effective participation of all in political life.

*Languages:*

Arabic.



# Andorra

## Constitutional Court

---

### Important decisions

*Identification:* AND-2009-3-001

**a)** Andorra / **b)** Constitutional Court / **c)** / **d)** 08.06.2009 / **e)** 2009-1-RE / **f)** Presumption of innocence and adjustment of sentence / **g)** BOPA (Official Gazette) / **h)** CODICES (Catalan).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Limitation / Sentence, enforcement.

*Headnotes:*

Criminal records subject to a limitation period may be taken into account in ordering an adjustment of sentence. The right to presumption of innocence may not be adduced in the framework of a request for adjustment of a final sentence.

*Summary:*

The appellant, who had had her driving licence removed for driving under the influence of alcohol, applied for authorisation to drive between 8 am and 3 pm from Monday to Friday every week in order to continue to exercise her occupational activities.

This request was rejected, whereupon the appellant lodged an *empara* appeal with the Constitutional Court, claiming a breach of her right to a fair trial, and more specifically of her right to presumption of innocence, notably because the judge had referred to two previous convictions, which had been removed from her police records and were therefore, in her view, non-existent.

In reply, the Constitutional Court drew a distinction between an amnesty, which retrospectively removes the criminal nature of specific acts and consequently

prohibits any reference to them and limitation period, which states that the sentence is deemed to have been enforced but not that the acts justifying the sentence have disappeared. The latter applies to the case in hand.

The Court also stresses that in this case the previous drink-driving offences were not taken into account during proceedings liable to give rise to a conviction. They were considered solely in the context of a request for adjustment of sentence.

“Presumption of innocence” should be interpreted as meaning that any suspect or defendant must be presumed innocent until his or her guilt has been established and he or she has been finally and irrevocably sentenced. Therefore, this rule is infringed where, before any conviction or, more specifically, before the exhaustion of all available remedies, an individual is publicly declared guilty of facts subject to judicial investigations.

In the instant case, there had been neither a prosecution nor any possibility of guilt and conviction. Consequently, the issues of presumption of innocence and any infringement thereof could not arise.

Accordingly, the Constitutional Court decided to reject the appeal.

*Languages:*

Catalan.



*Identification:* AND-2009-3-002

**a)** Andorra / **b)** Constitutional Court / **c)** / **d)** 14.07.2009 / **e)** 2009-4-RE / **f)** Personal summons as a safeguard on the right of access to justice / **g)** BOPA (Official Gazette) / **h)** CODICES (Catalan).

*Keywords of the systematic thesaurus:*

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



*Keywords of the alphabetical index:*

Court appearance.

*Headnotes:*

By virtue of the constitutional right to a fair trial, courts must adopt a particularly active attitude towards exhausting all possible means of ensuring the personal appearance of defendants in court, before resorting to summons by publication in the Official Gazette.

*Summary:*

The plaintiff, who was in a precarious financial situation, lodged a request with the court for a modification of the use of his former matrimonial home, on the grounds that his former spouse, who had been using it since 1998, spent long periods of time in a village in Almeria.

The defendant was invited to appear in court by means of a summons sent to the address mentioned in the judicial decisions. When this personal summons remained unanswered, she was summoned to appear by publication in the Official Gazette. She failed to appear and was therefore declared absent from proceedings. She consequently lodged an appeal with the Constitutional Court for constitutional protection on the grounds that she had been unable to defend herself and therefore for breach of her right to a fair trial.

The appellant contended that before commencing the proceedings in question, the plaintiff had known that she was not in Andorra, and specifically that she was in Almeria, in the residence which the couple had purchased before their marital break-up.

According to the Public Prosecutor's Office, the courts must confine themselves to implementing current legislation in Andorra in the field of judicial summonses.

The rights involved in this case come to the fore in the preliminary phase of proceedings, when the parties have their first opportunity to uphold their rights or legitimate interests in court. From the constitutional angle, the aim here is to guarantee that all citizens have at least a possibility of gaining access to the court in order to defend their rights.

This is why, in cases involving such matters, the courts must be particularly diligent and exhaust all the facilities provided by legislation in order to guarantee access to the courts. More specifically, in cases like

the instant one, the courts, by virtue of the constitutional right to a fair trial, must adopt an especially active attitude towards exhausting all possible means of ensuring the personal appearance of defendants before resorting to a summons by publication in the Official Gazette, because experience shows that the latter is ineffective and must consequently be used only in exceptional cases.

It is of course incumbent on judges and courts to organise proceedings in cases of which they have been seized in such a way as to avoid delay and preserve the rights of all parties. It is also true that they cannot be expected to show excessive zeal with the resources at their disposal, or to act in a manner liable to jeopardise the expedition of proceedings or the rights of the other parties involved. However, what we must expect of them, in accordance with the right of access to a judge, is a proactive attitude, i.e. an active endeavour to obtain information on the possible places of residence of defendants with a view to ascertaining their whereabouts. In certain circumstances, defendants may be required to keep the administration informed of their place of residence, but such requirements do not affect the relevant obligations of the judicial authorities.

In view of all the circumstances of the case and the importance of the right of access to justice, the fact of requiring greater vigilance from the courts cannot be deemed disproportionate or unreasonable.

For these reasons the Constitutional Court granted the protection requested, set aside the contested decisions and sent the case back for trial.

*Languages:*

Catalan.

*Identification: AND-2009-3-003*

**a)** Andorra / **b)** Constitutional Court / **c)** / **d)** 02.12.2009 / **e)** 2009-6-RE / **f)** Prohibition of arbitrariness in statements of legal reasons / **g)** BOPA (Official Gazette) / **h)** CODICES (Catalan).

*Keywords of the systematic thesaurus:*

3.22 General Principles – **Prohibition of arbitrariness.**  
 5.3.13.18 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Reasoning.**

*Keywords of the alphabetical index:*

*Locus standi*, appeal.

*Headnotes:*

Public authorities must have a recognised *locus standi* in constitutional protection proceedings for violation of the right to a fair trial.

In this context, the Constitutional Court must confine itself to analysing the conclusions adopted and assessing whether or not they are based on data which are manifestly erroneous from the material (rather than the legal) angle and whether or not they are logically correct in accordance with experiential criteria. The prohibition of arbitrariness, which the Constitution defines as the right to obtain a legally grounded decision, is particularly important in the judicial field. In this case, care must be taken to eliminate judgments which are manifestly at odds with the rules and concepts constituting the common opinion of the legal community.

*Summary:*

In litigation between the Social Security Fund (CASS) and one of its beneficiaries regarding the assessment of her degree of invalidity following an accident at work, as well as on the relevant pension that should be allocated, the appeal court granted the applicant invalidity owing to illness in addition to the invalidity caused by the accident at work, in two successive decisions.

The CASS claimed that the contested decisions infringed its right to secure a legally grounded decision to the extent that, firstly, the court provided no reasons for its reversal of case-law and secondly, it based its arguments on substantively erroneous premises.

The Constitutional Court first of all ruled on the CASS's *locus standi* as a public administrative department, in proceedings concerning the protection of fundamental rights.

By its very nature, the *empara* appeal (constitutional protection) allows citizens to defend their constitutional rights (the fundamental human rights

and public liberties) against action by the public authorities, rather than permitting such authorities to defend their competences against the decisions of other authorities, and in the instant case against the judiciary. However, despite the usual qualifications needed in case of *empara* appeals submitted by public bodies, the Constitutional Court has clearly ruled that the Constitution does not preclude the possibility of such bodies being empowered to lodge *empara* appeals.

This conclusion is especially relevant in the case of actual procedural rights, i.e. rights guaranteeing their ability to defend their interests in a context of equality of arms. The same does not apply to the right to obtain a legally grounded decision, to the extent that the *empara* appeal must not become an action geared to debating the interpretations upheld by the judiciary of the scope of the functions and competences of the other public authorities.

In substantive terms, the Court ruled that the right to obtain a legally grounded decision requires the legal reasons for the decision in question not to be arbitrary. Consequently, in order to guarantee this right, the Constitutional Court must examine the reasoning of the legal decisions against which the *empara* appeals are lodged. Nevertheless, the *empara* appeal does not create any third level of jurisdiction, and the right to obtain a legally grounded decision cannot transform the Constitutional Court into a court of cassation. It cannot replace the ordinary court, which is responsible for selecting, interpreting and implementing legal standards, except, obviously, in cases of violation of constitutional rights.

The parameter to be used by the Constitutional Court in cases of violation of the right to a fair trial, particularly the right to a legally grounded decision, is not the same as that used by the ordinary courts. The novelty of this parameter is the arbitrariness, particularly the logical arbitrariness, of the contested decisions, i.e. the fact that the Constitutional Court confines itself to analysing whether or not the premises, the proceedings and the conclusions adopted are based on data which are manifestly erroneous from a substantive (rather than a legal) point of view and whether or not they are logically correct according to experiential criteria. The prohibition of arbitrariness, which the Constitution defines as the right to obtain a legally grounded decision, is particularly important in the judicial field. In this case, care must be taken to eliminate judgments which are manifestly at odds with the rules and concepts constituting the common opinion of the legal community. The strict application of this parameter enables the Constitutional Court not to act

as a court of cassation. In other words, the right to obtain a legally grounded decision does not prohibit errors in the statement of reasons, but rather blocks manifest substantive errors, i.e. manifestly arbitrary statements of reasons.

In the instant case, the Constitutional Court admitted the appeal lodged with it, set aside the contested decisions on the grounds of their manifestly arbitrary statements of reasons and sent the case back to the appeal court for a new decision.

#### *Supplementary information:*

*Empara* appeal: application for protection of fundamental rights and freedoms submitted by an individual.

#### *Languages:*

Catalan.



## Austria Constitutional Court

### Statistical data

1 January 2009 – 31 December 2009

- Divergence of opinions between the Audit Office and a legal entity on the competences of the Audit Office (Article 126a B-VG): 1
- Financial claims (Article 137 B-VG): 22
- Conflicts of jurisdiction (Article 138 B-VG): 5
- Review of regulations (Article 139 B-VG): 179
- Review of laws (Article 140 B-VG): 378
- Review of international treaties (Article 140a B-VG): 4
- Challenge of elections (Article 141 B-VG): 7
- Complaints against administrative decrees (Article 144 B-VG): 1 683
- Complaints against decisions of the Asylum Court (Article 144a B-VG): 3 192

### Important decisions

*Identification:* AUT-2009-3-002

**a)** Austria / **b)** Constitutional Court / **c)** / **d)** 02.07.2009 / **e)** B 559/08 / **f)** / **g)** www.icl-journal.com / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Criminal offence, essential elements / European Court of Human Rights, case-law, evolution.

*Headnotes:*

The imposition of an administrative penalty for drink driving after the withdrawal of prosecution in criminal proceedings for physical injury resulting from negligence does not constitute a breach of Article 4 Protocol 7 ECHR; the two offences differ in their essential elements.

*Summary:*

I. On 15 July 2005 the applicant, whilst driving in a drunken state, knocked down a pedestrian who hurt his ankle. In a claim for penalty brought on 18 November 2005 the prosecution accused the applicant of having caused physical injury through negligence under Section 88.1 in conjunction with Sections 81.1.2 and 88.3 of the Austrian Criminal Code (StGB), of having abandoned the victim under Section 94.1 StGB and of having suppressed evidence under Section 295 StGB.

In its judgment of 31 January 2006 the Regional Court of St. Pölten found the applicant guilty of attempted opposition to public authority and of having suppressed evidence. At the same time, it separated the proceedings from the other matters of which the applicant was accused and referred them to the District Court at Lilienfeld. The prosecution then withdrew its demand for penalty with respect to these issues and the Regional Court of St. Pölten adjusted the corresponding proceeding via enactment of 7 February 2006.

On 7 November 2006 the District Administrative Authority of Lilienfeld imposed a fine of EUR 1.199 on the applicant for driving under the influence of alcohol under Section 5.1 in conjunction with Section 99.1.a of the Austrian Road Traffic Act (hereinafter, "StVO") and for absconding according to Section 4.1.c in conjunction with Section 99.2.a StVO. The applicant's blood alcohol level was determined at 1,38 per mille. The applicant's appeal against conviction and sentence was dismissed by the Independent Administrative Panel of Lower Austria (IAP) on 7 February 2008: According to the IAP, no breach of Article 4 Protocol 7 ECHR had occurred, as neither the question of the applicant's alcohol level nor the issue of absconding had been proved by the criminal court.

The applicant then filed an application with the Constitutional Court under Article 144 of the Federal Constitution (B-VG), alleging a violation of his constitutionally guaranteed rights to equal treatment and not to be prosecuted twice for the same offences under Article 4 Protocol 7 ECHR.

II. In view of recent case-law of the European Court of Human Rights (ECHR), including *Zolotukhin* Appl. 14.939/03; *Ruotsalainen* Appl. 13.079/03, *Maresti* Appl. 55.759/07, the Constitutional Court began by reviewing its own case-law on Article 4 Protocol 7 ECHR. It made reference to the *travaux préparatoires* concerning Protocol no. 7 whereby a decision is legally valid if there are no more remedies available against it, the remedies have been exhausted or the time span for appeal has lapsed. According to the *travaux préparatoires*, the principle of *ne bis in idem* assumes this type of valid decision is based on a specific national procedural law, which confines its scope to the national level. The Court then referred to the Austrian declaration given at the time of the ratification of Protocol no. 7, under which Articles 3 and 4 only relate to convictions in criminal proceedings in terms of the Austrian Code of Criminal Procedure. They do not exclude disciplinary or administrative prosecution based on the same conduct. The Constitutional Court concurred with the European Court of Human Rights that this declaration is not a valid *caveat* but acknowledged that, in conjunction with the *travaux préparatoires* it provides an informative base for the interpretation of Article 4 Protocol 7 ECHR.

The Constitutional Court then reviewed the ECHR's case-law regarding this Article. In *Gradinger v. Austria* (23 October 1995, Appl. 15.963/90, *Series A*, no. 328-C) the European Court of Human Rights found a violation of the principle of *ne bis in idem* because in a penal order concerning the applicant an administrative authority determined a specific blood alcohol concentration according to Section 5 in conjunction with Section 99.1.a StVO as given while in the preceding case concerning Section 81.2 StGB the criminal court did not. According to the European Court of Human Rights both legal norms varied in their character, purpose and description of the offence, but both controversial decisions were based on the same conduct.

In *Oliveira v. Switzerland* (ECHR 30 July 1998, Appl. 25.711/94, *Reports* 1998-V) the European Court of Human Rights found that one single act fulfilled multiple offences, whereas the heavier penalty absorbed the lesser. It even approved prosecution by different courts – consequently in multiple proceedings. In the absence of repeated prosecution of the same offence the European Court of Human Rights found no violation of Article 4 Protocol 7 ECHR.

According to the Constitutional Court, the European Court of Human Rights followed this case-law in *Franz Fischer v. Austria* (29 May 2001, Appl. 37.950/97). The applicant here caused a lethal

traffic accident whilst in a drunken state and subsequently absconded. Initially, he received an administrative penalty for drunk driving according to Section 5.1 in conjunction with Section 99.1.a StVO and was then condemned by the criminal court for involuntary manslaughter according to Section 81.2 StGB. The European Court of Human Rights found a breach had occurred of Article 4 Protocol 7 ECHR because the adopted legal norms did not vary sufficiently in their essential elements. The Constitutional Court noted that the European Court of Human Rights also followed this case-law in the matter of *Hauser-Sporn* (ECHR, 7 December 2006, Appl. 37.301/03). Here, the Court found that the criminal offences of having abandoned the victim and not having informed the police about the accident concerned different acts and omissions and consequently varied in their essential elements.

The Constitutional Court then discussed *Zolotukhin v. Russia* (ECHR 10 February 2009 [GC], Appl. 14.939/03, *Reports of Judgments and Decisions*), where a Russian national went on the rampage in a police station and was given an administrative penalty for insulting a public official and a criminal conviction for civil disorder. The European Court of Human Rights found there had been a breach of Article 4 Protocol 7 ECHR. In a review of its previous case-law the Court found three approaches to the question of “the same offence”: The first approach focused on the “same conduct” on the applicant’s part irrespective of its classification in law (*Gradinger v. Austria*). The second emanated from this premise, but also suggested that the same conduct may constitute several offences which may be tried in separate proceedings (*Oliveira v. Switzerland*; *Gauthier v. France*, 24 June 2003, Appl. 4483/02; *Öngün v. Turkey*, 10 October 2006, Appl. 15.737/02). A third approach puts the emphasis on the “essential elements” of the two offences (*Franz Fischer v. Austria*, *Sailer v. Austria*).

For the reason of legal certainty, the European Court of Human Rights found it necessary to harmonise these approaches. Initially, it followed the stance of the European Court of Justice (ECJ) and the Inter-American Court of Human Rights. Both found that an analysis of the international instruments incorporating the *ne bis in idem* principle in due form or another would reveal the variety of terms in which it is couched and called for an approach based solely on the material acts, irrespective of their legal qualification. According to the European Court of Human Rights an approach focusing on the legal qualification of two offences would be too restrictive for individual rights. In the Court’s opinion the Convention is a “living instrument” and has to be interpreted in terms of practicality and effectiveness

as well as the object and purpose of its provisions. According to the European Court of Human Rights therefore Article 4 Protocol 7 ECHR prohibits prosecution or punishment for a second offence if the elements of facts in both proceedings are either identical or essentially the same. An analysis of the description as to the former as well as the actual prosecuted facts is necessary.

The Constitutional Court noted that it follows this line of jurisprudence, one example being its decision VfSlg. 14.696/1996. Under Section 99.1.a and Section 99.6.c StVO, driving whilst under the influence of alcohol had to be punished as an administrative offence even if thereby a criminal offence was implemented. In this decision the Constitutional Court found that the refusal to recognise the subsidiary character of administrative sanctions constituted a violation of Article 4 Protocol 7 ECHR. In its decision VfSlg. 15.821/2000, the Constitutional Court found that with regard to Article 4 Protocol 7 ECHR an abandonment of prosecution and punishment would only be necessary if the content of injustice and damage of one type of delict was essentially the same as the other, so that there was no further need for punishment. The Constitutional Court noted that the European Court of Human Rights confirmed this decision (ECHR *Bachmaier*, Appl. 77.413/01; also: ECHR *Hauser Sporn*).

Concerning the decision *Zolotukhin v. Russia* the Constitutional Court concurred with the European Court of Human Rights over the need for legal certainty. But unlike the European Court of Human Rights the Constitutional Court did not consider plurality of approaches in the question of „the same offence“. In its own case-law as well as in the case-law of the European Court of Human Rights after *Oliveira v. Switzerland* it considered the basic issue to be that the offences rather than the actual conduct are decisive. The Constitutional Court therefore found the case-law of *Franz Fischer v. Austria* to be part of a continued renunciation from the case-law of *Gradinger v. Austria*. The Constitutional Court then argued that in *Asci v. Austria* (ECHR, 19 October 2006, Appl. 4483/02) the European Court of Human Rights emphasised the need to look for “the same essential elements“ and that this doctrine had already been considered in the decision VfSlg. 14.696/1996 and had also been harmonised with the doctrine of the concurrence of legal norms. According to the Constitutional Court the European Court of Human Rights refined this doctrine and determined it more precisely in *Zolotukhin v. Russia* so that the established legal certainty allowed for the implementation of case-law from the European Court of Human Rights especially in accordance with the basic principle of the separation of powers.

The Constitutional Court strengthened its point of view:

1. It argues that Article 4 Protocol 7 ECHR in its authentic English and respectively French versions (as well as other international human rights protection instruments) uses the term “offence” (infraction), whereas other instruments with this character would use other terms. The Constitutional Court cites the ECJ whereby the difference in wording between Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985, which uses the term “acts” and Article 4 Protocol 7 ECHR would be decisive. According to the Constitutional Court the ECJ in view of (and with explicit reference to) this wording referring to “acts” had to assume a further scope of application of *ne bis in idem*. But, regarding Article 4 Protocol 7 ECHR an interpretation focused on the legal qualification of an act would be decisive. In the opinion of the Constitutional Court a historical interpretation of Article 4 Protocol 7 ECHR based on the *travaux préparatoires* clarifies that only Article 14.7 of the UN Covenant on Civil and Political Rights was its prototype, and that Article 4 Protocol 7 ECHR does not prohibit competing responsibilities and prosecutions in criminal law. The Austrian explanation of Protocol no. 7 clarifies that the elements involved in the process of ratification emanated from the legitimacy of co-existing prosecution of an act from the perspective of criminal, disciplinary and administrative law.

2. The Constitutional Court noted that in accordance with the case-law of the European Court of Human Rights it also has to consider the object and purpose of the Convention. If the case-law established in *Franz Fischer v. Austria* complies with the objective of an effective protection of human rights, then the case-law of the Constitutional Court, which focuses on the acquisition of the essential content of injustice, would only be contradictory to the Convention if the legal basic conditions had been altered so that they could not be sufficiently achieved. This question can only be answered by considering the conditions of a certain national law.

3. In the opinion of the Constitutional Court this interpretation is in line with the intentions of legal certainty, effectiveness and the dynamics of the Convention as accentuated by the European Court of Human Rights. Austrian law allows, with respect to Article 18 B-VG and Article 7 ECHR, the administration of provisions concerning offences, responsibilities and procedures. This also allows for the division of the content on injustice into several offences and for provision for the responsibility of different authorities and courts. In cases of concurrence of several offences, clarification is needed on the basis of their aim and their elements concerning the content of

injustice whether a multiple prosecution and/or punishment is justified or – because of a violation of Article 4 Protocol 7 ECHR – not. If national legal norms and harmonised jurisprudence clarify whether a prosecution based on different offences may take place, it is necessary to prove whether the offences vary in their essential elements. If no national legal norms exist – as was the case in *Zolotukhin* – an assessment is needed on the facts (irrespective of their legal qualification) where the identity of an act is given.

4. According to the Constitutional Court, this interpretation of Article 4 Protocol 7 ECHR is also consistent with the inherent principle of the separation of powers in the Austrian Constitution which prohibits successive stages of appeal in “the same issue” between administration and justice and the continuation of administrative proceedings that have commenced but have not been concluded as a criminal proceeding and vice versa.

In this case, the national law and the harmonised case-law clarify that prosecution because of the same actual conduct based on two different offences is admissible if they vary in their essential elements. The second prosecution and the subsequent punishment are in conformity with the arrangements of Sections 22 and 30 of the Administrative Criminal Justice Act. Because the prosecution rescinded the accusation of having caused physical injury through negligence according to Section 88.1 and 88.3 StGB in conjunction with Section 81.2 StGB and because the related judicial proceedings had been closed, a legally valid decision in terms of the *travaux préparatoires* to Article 4 Protocol 7 ECHR was given. Once the prosecution had been withdrawn, it was no longer significant to the criminal court whether or not the applicant drove under the influence of alcohol. The proceedings were closed without reference to the levels of alcohol. The conviction therefore occurred due to offences that varied in their essential elements from those due to which the withdrawal of prosecution took place.

According to the Constitutional Court neither a violation of Article 4 Protocol 7 ECHR had taken place, nor a violation of the constitutionally guaranteed right to equal treatment or of another unclaimed constitutionally guaranteed right of the applicant.

*Languages:*

German.



# Azerbaijan

## Constitutional Court

### Important decisions

*Identification:* AZE-2009-3-003

**a)** Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 25.12.2009 / **e)** / **f)** / **g)** Azerbaijan, *Respublika, Khalq gazeti, Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

2.1.1.1 Sources – Categories – Written rules – **National rules.**

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

*Keywords of the alphabetical index:*

Criminal liability / Criminal procedure.

*Headnotes:*

The Court of Appeal asked the Constitutional Court for an opinion on the interpretation of a provision of the Criminal Code on persons who have committed a crime for the first time that does not represent a significant danger to the public, with a view to the elimination of disputes which arise in judicial practice.

*Summary:*

Several persons charged under the Criminal Code (CC) were released from criminal liability and the criminal prosecutions to which they were subject were suspended by decision of the district court. The court reached the conclusion that due to the absence of a sentence in force, defining the fault of the accused, the application of Article 73 of the CC was possible from the perspective of Article 63 of the Constitution.

The Court of Appeal asked the Constitutional Court for an interpretation of the provision “persons who have committed a crime for the first time that does not represent a significant public danger” under Articles 72, 73 and 74 of the Criminal Code with a

view to eliminating the type of disputes and ambiguities which arise in judicial practice. Further information was needed as to the application of this norm in relation to somebody who has no previous convictions but has committed one or more crimes which do not pose a significant danger to the public.

The Plenum of the Constitutional Court began by examining certain rules of the Constitution, legislation on criminal procedure and also considered the international agreements and practice of the European Court of Human Rights.

There is a universal presumption of innocence under Article 63.1 of the Constitution. Parts II and V of this article stipulate that those suspected of a crime must not be presumed guilty. Nobody may be accused of crime without the verdict of a law court.

As a conventional right, it is fixed in Article 11.1 of the Universal Declaration of Human Rights, Article 14.2 of the International Covenant on Civil and Political rights and Article 6.2 ECHR. These provisions state that everybody charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

The presumption of innocence is also stipulated within Article 21 of the Code of Criminal Procedure. Under this article, anybody suspected of having committed an offence shall be found innocent if his guilt is not proved in accordance with this Code and if the court did not adopt a final decision to that effect.

Even if there are reasonable suspicions as to the guilt of the person, this does not mean he or she should be found guilty. The accused or suspect receives the benefit of any doubts which cannot be removed in the process of proving the charge in accordance with the provisions of this Code, within the appropriate legal proceedings. He or she also receives the benefit of any doubts which are not removed in the application of criminal law and criminal procedural legislation (Article 21.2 of CCP).

The accused is not under an obligation to prove his or her innocence. It is for the prosecution to prove the charge or to refute the evidence given in defence of the accused (Article 21.3 of CCP).

The presumption of innocence stipulated in the Constitution, the various international agreements and national legislation together exclude the possibility of anybody being found guilty except by criminal condemnation in court. Thus a presumption of innocence, reflecting an objective legal status, protects those who are accused of or suspected of having committed a crime. The substance of the

guarantee influences the regulation of present and future criminal procedural matters. Moreover, the presumption of innocence presents itself as one of the guarantees within the Constitution of other human rights, and as one of the guarantees of protection of honour and dignity under Article 46.

This position was reflected in the decision of the European Court of Human Rights of 6 February 2007 in the matter of *Garycki v. Poland*. In this decision, it was specified that the presumption of innocence enshrined in Article 6.2 ECHR is one of the elements of a fair trial that is required by Article 6.1. The presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that they are guilty before they have been proved guilty according to law. It suffices, in the absence of any formal finding, that there is some reasoning to suggest that the court or an official regards the accused as guilty. A premature expression of such an opinion by the tribunal itself will inevitably run afoul of the above presumption (Paragraph 66).

#### Languages:

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



## Belarus Constitutional Court

### Important decisions

*Identification:* BLR-2009-3-007

**a)** Belarus / **b)** Constitutional Court / **c)** / **d)** 16.12.2009 / **e)** D-384/2009 / **f)** On the need to resolve conflicts between the legislative rules on the additional ground for terminating an employment agreement under point 5 of Article 47 of the Labour Code / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2009 / **h)** CODICES (English, Belarusian, Russian).

*Keywords of the systematic thesaurus:*

3.10 General Principles – **Certainty of the law.**  
4.6.9 Institutions – Executive bodies – **The civil service.**  
4.6.9.4 Institutions – Executive bodies – The civil service – **Personal liability.**  
5.1.4.2 Fundamental Rights – General questions – Limits and restrictions – **General/special clause of limitation.**

*Keywords of the alphabetical index:*

Labour code / Civil servant, authorities, special bond.

*Headnotes:*

In order to realise the principle of legal certainty and ensure uniform interpretation and application of legislative norms, the Constitutional Court found it necessary to resolve a conflict between the norms of the Labour Code and the Law on Combating Corruption in connection with grounds for the termination of employment contracts of state officials who refuse to enter into or who violate a written commitment to follow statutory restrictions.

*Summary:*

The Constitutional Court made a decision *ex officio* with a view to eliminating the conflict between the rules of the Labour Code and the Law on Combating Corruption.



The Constitutional Court noted that under Article 1 of the Constitution, the Republic of Belarus is a state based on the rule of law and bound by the principle of the supremacy of the law (the first part of Article 7 of the Constitution). The establishment of the supremacy of the law is largely connected with the creation of a legal system in which regulations are consistent with each other and there are no conflicts of laws. Legislative activities should be based on the principle of legal certainty that suggests the clarity, accuracy, consistency and logical coherence of legal norms.

Article 16 of the Law on Combating Corruption contains a provision whereby in order to avoid actions that may lead to the use of his or her official position and related opportunities and his or her credibility for personal, group and other non-work related purposes, state officials are to undertake to follow the restrictions set out by Article 17 of the above Law, as well as the national legislation on public service for public servants. They are to be informed of the legal consequences of derogations from this undertaking.

Any state official who refuses to be bound by the restrictions in question shall be dismissed from office. State officials who violate the commitments they have signed may be liable for sanctions including dismissal from office.

However, Article 47.5 of the Labour Code does not refer to a state official as an employee whose employment agreement will be terminated in case of the refusal to be bound or the default on written commitments to respect the restrictions.

The points stated above enable the Constitutional Court to sort out a conflict between the norms of the Labour Code and the part of the Law on Combating Corruption regarding the termination of the employment contract of a state official who is not bound by or has violated a written commitment to follow the established restrictions.

In order to resolve conflicts in the legislation, the Constitutional Court found it necessary to amend Article 47 of the Labour Code and to suggest that the Council of Members enact draft legislation introducing the necessary changes to the Labour Code and to submit it, in accordance with the established procedure, to the House of Representatives of the National Assembly.

#### *Languages:*

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



#### *Identification:* BLR-2009-3-008

**a)** Belarus / **b)** Constitutional Court / **c)** / **d)** 22.12.2009 / **e)** D-409/2009 / **f)** On the compliance with the Constitution of the Law Making Alterations and Addenda to certain Codes regarding Criminal and Administrative Liability / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2009 / **h)** CODICES (English, Belarusian, Russian).

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

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

5.3.13.1.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Non-litigious administrative proceedings.**

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

Liability, administrative / Administrative proceedings / Criminal code / Fine, minimum.

#### *Headnotes:*

The Constitutional Court in the exercise of obligatory preliminary control considered the constitutionality of the Law on Making Alterations and Addenda to certain Codes on Criminal and Administrative Liability.

#### *Summary:*

The Law makes alterations and addenda to the Criminal Code, the Code on Administrative Offences and the Procedural Executive Code on Administrative Offences (hereinafter, the “CC”, the “CAO”, and the “PECAO”, respectively).

The alterations to the CAO are intended to clarify the provisions of a number of legal norms regulating general conditions for the onset of administrative liability and the imposition of administrative penalties. Alterations and addenda to the PECAO are aimed at improving administrative procedure. Specific reference is made to the competence of those involved in the administrative procedure courts and authorities that consider administrative cases. Additional procedural rights are granted to parties to proceedings.

Under the alterations, determination of the application of the CAO, the principal offender, continued offence and all circumstances apart from administrative procedure or the termination of the execution of administrative penalties imposed under an administrative procedure may be established or excluded by legislative acts.

The Constitutional Court deemed it necessary to point out the unlawfulness of blanket norms of administrative offences. In general the unlawfulness of an act is set by the disposition of a relevant article of the Special Part of the CAO, in which the offence (breach) of the order or rules of certain activities are prohibited under threat of legal administrative sanctions. The specific acts that are an element of the objective side of the administrative offence are detailed in the legislative acts establishing the order or rules of such activities.

Based upon these standards, the act is unlawful and involves the application of measures of administrative liability in the presence of both conditions. To exclude the unlawfulness of an act and, therefore, administrative liability, the lack of at least one of the following elements will suffice: a norm of the CAO or a corresponding norm of a legislative act.

In order to harmonise the rules of criminal and administrative legislation, the Law makes alterations and addenda to the articles of the CC. They impose penalties for violations of the rules of economic activity, environmental safety and the environment, traffic safety and transport.

In this regard, the Constitutional Court noted that under part 2 of Article 50 of the CC the fine is determined by taking into account the nominal unit amount on the date of the criminal process, depending on the nature and degree of public danger of the crime and the financial position. It is set in a range from thirty to one thousand nominal units. The level of the fine imposed on someone who commits an offence under one of the articles of the CC cannot be less than the maximum administrative fine.

The Constitutional Court found the Law on Making Alterations and Addenda to certain Codes regarding Criminal and Administrative Liability to be in compliance with the Constitution.

#### *Languages:*

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



#### *Identification: BLR-2009-3-009*

**a)** Belarus / **b)** Constitutional Court / **c)** / **d)** 24.12.2009 / **e)** D-418/2009 / **f)** On the conformity of the Law on the Legal Status of Foreign Nationals and Stateless Persons with the Constitution / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 4/2009 / **h)** CODICES (English, Belarusian, Russian).

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

3.16 General Principles – **Proportionality.**

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

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

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

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

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

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

5.4.20 Fundamental Rights – Economic, social and cultural rights – **Right to culture.**

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

Foreigner, freedom of movement / Foreigner, entry, residence / Foreigner, expulsion / Personality, right.

#### *Headnotes:*

The legal status of a foreigner covers all of his rights, freedoms, responsibilities, benefits, privileges and the forms and procedures for their application. The legal status of foreigners is regulated by legal acts at different levels. The Constitution stipulates that foreigners shall enjoy rights and liberties and execute duties on equal terms with citizens and other legal acts develop the rights, freedoms and duties of foreigners, determine their benefits and privileges, principles, forms and methods of legal regulation of their rights and freedoms, the execution of their duties, and the competence of state bodies in regulating the legal status of foreigners.

*Summary:*

The Constitutional Court in the exercise of obligatory preliminary control considered the constitutionality of the Law on the Legal Status of Foreign Nationals and Stateless Persons (hereinafter, the “law”).

This law specifies the constitutional rights, freedoms and duties of foreign nationals and stateless persons (hereinafter, “foreigners”). It determines the order of their entry, stay (residence) and departure, the mechanism for appeals against decisions and actions by bodies and officials in connection with the execution of the Law.

In accordance with the first part of Article 3 of the Law, national legislation relating to the legal status of foreigners is based on the Constitution and includes this Law and other national legislation, and international treaties to which the Republic of Belarus is party.

The procedure for exercising rights, freedoms, benefits, privileges and the duties of aliens, and procedures for exercising state bodies’ competence in regulating the legal status of foreigners may be set in by-laws. However, the restriction of rights and freedoms of foreigners in by-laws is inadmissible.

The Law contains various guarantees to ensure the rights and freedoms of foreigners, particularly in terms of personal rights and freedoms, freedom of movement and right to choose residence, right to participate in political parties and other social organisations; social and economic rights; right to work or to be engaged in business and other activities; property and personal non-property rights; right to healthcare; right to education; right to preserve national culture and respect the national dignity (Articles 7-15).

The Constitutional Court noted that the norms of the above articles of the Law develop the provisions of Articles 24-31, 36, 42-50 of the Constitution. It was also of the opinion that the provisions in the Law pertaining to the entry and exit of foreigners from the territory comply with the international legal obligations of the state. The restrictions the Law imposed do not violate the fundamental rights and freedoms stipulated in the International Covenants on Human Rights. They take into account the principle of proportionality, while ensuring national security, public order, protection of morals, public health, and the rights and freedoms of others.

The Constitutional Court found the Law on Legal Status of Foreign Nationals and Stateless Persons to be in compliance with the Constitution.

*Languages:*

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



# Belgium

## Constitutional Court

---

### Important decisions

*Identification:* BEL-2009-3-009

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 17.09.2009 / **e)** 142/2009 / **f)** / **g)** *Moniteur belge* (Official Gazette), 30.10.2009 / **h)** CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

5.2 Fundamental Rights – **Equality**.

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

*Keywords of the alphabetical index:*

Constitutional Court, jurisdiction, equality principle, combination with ECHR / Psychiatric establishment, internment / Internment, mental illness / Internment, judicial review / Internment, length / Equality, categories of persons, comparison / Constitutional Court, jurisdiction, law, enforcement measure / Sources of constitutional law, Constitution, combination with ECHR.

*Headnotes:*

Under Article 5.1 ECHR mentally ill persons can only be deprived of their liberty if this takes place in establishments that are suited to their particular needs. The balance between the interests of the authorities and those of the individual concerned is upset if that individual is detained indefinitely in an establishment that the competent court has ruled to be unsuitable for securing that individual's rehabilitation.

*Summary:*

The Constitutional Court was asked by the Ghent social protection commission to give a preliminary ruling on the compatibility of the social protection legislation with the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution), combined with Article 5 ECHR. The

case concerned a person who had been detained for many years and for whom no place had been found in a suitable establishment, having regard to his state of health.

The Council of Ministers found that the request was inadmissible because it did not indicate the category of persons against whom the discrimination was alleged. The Court dismissed the objection. If the Court was asked whether a law was compatible with the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution), combined with a provision of a convention establishing a fundamental right, the category of persons whose fundamental right had allegedly been breached had to be compared to the category of persons to whom this fundamental right applied.

The Court then referred to the case-law of the European Court of Human Rights whereby under Article 5.1 ECHR it was only lawful to detain mentally ill persons in establishments that were suited to their particular needs. If a competent court ruled that an interned person had to be admitted to an appropriate establishment, the relevant authorities had to ensure that such an establishment was available for the individual concerned. If the establishment nominated by the social protection commission could not accommodate the detained person, a reasonable balance had to be sought between the interests of the authorities and those of the individual concerned. Such a balance would not have been struck if that individual was detained indefinitely in an establishment that the competent court had ruled to be unsuitable for securing his or her rehabilitation. The Court referred in this regard to several judgments of the European Court of Human Rights.

However, it concluded that the breach of the fundamental right in question was not caused by the law on which it had been asked to rule. It was the consequence of the inadequate number of places available in establishments in which the measure ordered by the court could have been carried out.

Such a situation concerned the application of the law. It was therefore a matter for the ordinary courts that fell outside the Constitutional Court's jurisdiction, so there had to be a negative reply to the request for a preliminary ruling.

*Languages:*

French, Dutch, German.

---



*Identification:* BEL-2009-3-010

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 13.10.2009 / **e)** 157/2009 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

1.4.10.6.1 Constitutional Justice – Procedure – Interlocutory proceedings – Challenging of a judge – **Automatic disqualification.**

1.4.10.6.2 Constitutional Justice – Procedure – Interlocutory proceedings – Challenging of a judge – **Challenge at the instance of a party.**

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.**

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

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

*Keywords of the alphabetical index:*

Judge, Constitutional Court, opinion / Withdrawal, composition of the bench / Constitutional Court, right to a fair trial, Article 6 ECHR, applicability / Judge, Constitutional Court, professor / Judge, Constitutional Court, lodge / Judge, Constitutional Court, political sympathies.

*Headnotes:*

The Court will dismiss challenges to judges if the applicants are unable to adduce concrete evidence that the subjective impartiality of the judges whose withdrawal they are requesting is likely to be compromised. In this case, the applicants failed to show that the judges in question had openly adopted positions at any time and in a way that demonstrated an unlawful negative attitude to one of the parties to the case, which concerned questions of constitutionality referred to the Court.

The applicants' allegations concerning publications, would-be political sympathies and past or present affiliation to research centres or associations and the management committee of a nature park were not enough to objectively justify the applicants' concerns about the ability of the president and judges of the Court to carry out an impartial review of the constitutionality of the legislation in question.

*Summary:*

1. Under an Act of 4 July 1989, there is a system of party political funding in Belgium. An Act of 12 February 1999 introduced a new Section 15<sup>ter</sup> into the 1989 legislation, which provided that following an application from a certain number of members of parliament, a bilingual chamber of the *Conseil d'État*, the highest administrative court, could order withdrawal of the grant to a political party that could be shown to be manifestly hostile to the freedoms and fundamental rights laid down in the European Convention on Human Rights and its additional protocols.

An application by the extreme right wing party *Vlaams Blok* for the Act of 12 February 1999 to be set aside had been dismissed by the Constitutional Court (at that time still the Court of Arbitration) in Judgment no. 10/2001 of 7 February 2001 (see *Bulletin* 2001/1 [BEL- 2001-1-001]).

The aforementioned section 15<sup>ter</sup> was partly amended by the Act of 17 February 2005. Cases are now heard by the General Assembly, rather than a bilingual chamber, of the *Conseil d'État*. Decisions of the *Conseil d'État* are no longer subject to appeal on points of law.

An application had been made to the *Conseil d'État* to cancel the grant to *Vlaams belang*. During the proceedings, at the request of the party concerned the *Conseil d'État* asked the Constitutional Court for a number of preliminary rulings.

The Constitutional Court was asked to order the withdrawal of five of the twelve judges. The applicants challenged these judges' impartiality on account of certain publications, and their would-be political sympathies and past or present affiliation to research centres or associations or the management committee of a nature park. They also asked for an investigation to be ordered to establish whether judges were affiliated to certain associations.

2. The Court ruled first that whether courts were impartial under Article 6 ECHR had to be considered from two standpoints. Subjective impartiality, which must be presumed until there was proof to the

contrary, required judges to be free of personal prejudice or bias in cases they were hearing and not to have a personal interest in their outcome. Objective impartiality required sufficient guarantees to exclude any legitimate doubt in this respect (ECHR, 1 October 1982, *Piersack v. Belgium*, § 30; 16 December 2003, *Grievés v. United Kingdom*, § 69). The Court did not consider it necessary to decide whether Article 6.1 ECHR was applicable in this case, because its requirements in terms of courts' independence and impartiality were general principles of law. It therefore took account of the relevant case-law of the European Court of Human Rights.

The Court noted that according to the European Court of Human Rights, challenges to judges should not have the potential effect of paralysing the courts or causing excessive delays in the administration of justice (ECHR, 22 September 1994, *Debled v. Belgium*, § 37; 10 June 1996, *Thomann v. Switzerland* judgment, § 36; decision, 12 December 2002, *Sofianopoulos v. Greece*, p. 9). There was no possibility of appointing *ad hoc* judges. Under the relevant legislation, the Court had a balanced composition in terms of language, political affiliation and occupation, which offered a guarantee of impartiality.

The Court considered that a Constitutional Court judge's membership of a university research centre or a judge's political sympathies were not in themselves sufficient grounds to justify suspicions of partiality. It referred to the Strasbourg case-law (European Commission of Human Rights, 18 May 1999, decision, *Ninn-Hansen v. Denmark*, p. 20; ECHR, decision, 28 January 2003, *M.D.U. v. Italy*, p. 12; decision, 26 August 2003, *Filippini v. San Marino*, p. 5). Nor could judges' political sympathies alone raise legitimate doubts as to their impartiality. It had to be shown that they had received instructions concerning the case from their own political party.

The same applied to sympathies towards, or even membership of, associations that were not political parties, having regard to the freedom of association embodied in Article 27 of the Constitution and Article 11 ECHR. The European Court of Human Rights had ruled that the fact that a judge was a freemason did not of itself justify his enforced withdrawal.

Moreover, there was nothing to prevent former members of parliament from becoming judges and duties performed in their former parliamentary role could not of themselves constitute sufficient evidence of an appearance of partiality in judges appointed for life, whose independence was guaranteed by numerous statutory provisions.

Finally, judges could not be required to stand down for opinions expressed in works they had published as legal consultants or for handing down decisions in other cases contrary to the demands of one of the parties. More generally, the fact of having taken a prior public stand, in any position, but one bearing no relationship to the facts or proceedings of the current case, on a question of law that was once more raised in these proceedings, did not affect a judge's independence or impartiality.

The Court concluded that neither the subjective nor the objective impartiality of the judges concerned had been compromised. It dismissed the application for them to be required to withdraw. It also dismissed the request for an investigation to establish whether judges were affiliated to certain associations, or lodges.

#### Cross-references:

- See Judgment no. 10/2001 of 07.02.2001, *Bulletin* 2001/1 [BEL-2001-1-001];
- See Judgment no. 195/2009 of 03.12.2009, *Bulletin* 2009/3 [BEL-2009-3-004].

#### Languages:

French, Dutch, German.



#### Identification: BEL-2009-3-011

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 29.10.2009 / **e)** 168/2009 / **f)** / **g)** *Moniteur belge* (Official Gazette), 29.12.2009 / **h)** CODICES (French, Dutch, German).

#### Keywords of the systematic thesaurus:

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

2.1.1.4.15 Sources – Categories – Written rules – International instruments – **Convention on the Rights of the Child of 1989.**

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

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

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

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

*Keywords of the alphabetical index:*

Fundamental rights, conflicts, education, freedom to organise versus rights of the child / Education, school, choice / Education, school, parents' freedom of choice / Education, private schools / Education / Education, private / Home schooling / Education, interests of the child / Education, freedom to organise, limits / Education, compulsory / Education, equality of children / Education, respect for fundamental rights / Education, quality / Education, level, oversight / Education, language / Language, teaching / Education, schooling, compulsory.

*Headnotes:*

Parliament may establish conditions for and forms of oversight of private home schooling without infringing the freedom of instruction inherent in the freedom of education provided for in Article 24.1 of the Constitution, so long as these measures do not go beyond what is necessary to achieve objectives of general interest, namely to maintain certain general educational standards.

*Summary:*

“Agnes School”, a private company that runs two private schools with specific educational objectives, asked the Constitutional Court to set aside a French Community decree of 25 April 2008 laying down conditions for satisfying the compulsory education requirement outside the education system organised or subsidised by the French Community.

According to this decree, this type of education, which is neither organised or subsidised by the public authorities, constitutes a form of home schooling. The purpose of the decree is to ensure that pupils who are taught at home receive a standard of education that is equivalent to the minimum competences acquired by other pupils. These standards are monitored by an inspectorate, which can undertake inspections at any time and reports on the results. If it appears after a second inspection that the standard of education is inadequate, a supervisory commission may, after talking to those responsible, order children of compulsory school age to be enrolled in an “ordinary” school.

Agnes School argued that this regulation was incompatible with freedom of instruction (Article 24 of the Constitution).

The Court stated that freedom of instruction under the Constitution granted a right to organise, and thus to choose, schools based on any particular confessional or non-confessional philosophy. It also entitled private individuals, without prior authorisation and subject to respect for fundamental rights and freedoms, to organise and run education, in terms of both form and content, in accordance with their own principles, for example by establishing schools with their own distinctive pedagogical or educational aspects. Freedom of choice enabled parents to opt for home schooling or an educational establishment that was not state organised, subsidised or recognised, but such freedom of choice had to take account of children's higher interests and their fundamental right to education, and of the requirement for compulsory schooling.

In connection with the fundamental right of children to education, the Court referred to the safeguards in Articles 24 and 22bis of the Constitution, Article 2 Protocol 1 ECHR and Article 28 of the International Convention on the Rights of the Child. It also referred to the case-law of the European Court of Human Rights whereby, in the event of conflict, the rights of the parents, the interests of the child and his or her right to education took precedence (ECHR, 30 November 2004, *Bulski v. Poland* decision; see also ECHR, 5 February 1990, *Graeme v. United Kingdom* decision, 30 June 1993, *B.N. and S.N. v. Sweden* and 11 September 2006, *Fritz Konrad and others v. Germany* decision).

The communities might need to establish supervisory arrangements to monitor compliance with the compulsory schooling requirement, so that they could be sure that all children, including those educated at home, received suitable instruction to satisfy this requirement, thus guaranteeing their right to education. It then had to be established that the conditions and monitoring arrangements laid down did not infringe the freedom of instruction embodied in freedom of education (Article 24.1 of the Constitution) and that these measures were not disproportionate, in that they did not go beyond what was necessary to achieve objectives of general interest, namely to maintain equivalent standards of instruction.

The public authorities could monitor the quality of instruction given by educational establishments that chose not to opt for public funding, but the monitoring could not go so far as to include a requirement to comply with the objectives of development, final objectives or basic competencies. References to

required basic, minimum or final competences or a common knowledge base did not therefore mean that they could be imposed on children educated at home. They were simply indicative criteria of the basic general knowledge and skills that should be expected of children of different ages. Subject to this proviso, the decree was not incompatible with freedom of education. Bearing in mind the distinctive features of home schooling and freedom of education, allowance should be made, when assessing whether the level of studies was "equivalent", for the teaching methods and also for the ideological, philosophical and/or religious convictions of the parents and teachers, provided that these methods and convictions did not infringe the child's right to receive an education in a way that respected fundamental rights and freedoms and did not affect either the quality of the education or the level of studies to be attained.

The Court did not consider it unreasonable or disproportionate, following a comprehensive procedure that took account of the views of those responsible and of the child's interests, and after two successive findings of gaps in the education of a home-schooled child, for the authorities to order that that child be educated in an organised, subsidised or recognised educational establishment.

The Court also ruled that parents who opted for home schooling for their child could choose to give this schooling or have it given in the French Community exclusively or mainly in a language other than French. However it was not disproportionate to require pupils under the French Community's jurisdiction to undergo learning level tests in French, even if they were taught at home exclusively or mainly in another language.

#### Cross-references:

- See *Bulletin* 2009/2 [BEL-2009-2-003].

#### Languages:

French, Dutch, German.



#### Identification: BEL-2009-3-012

a) Belgium / b) Constitutional Court / c) / d) 03.12.2009 / e) 195/2009 / f) / g) *Moniteur belge* (Official Gazette) / h) CODICES (French, Dutch, German).

#### Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy**.  
 4.5.10.2 Institutions – Legislative bodies – Political parties – **Financing**.  
 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**.  
 5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence**.  
 5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality**.  
 5.3.13.21 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Languages**.  
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.  
 5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.

#### Keywords of the alphabetical index:

Fair trial, translation of evidence / Political party, subsidy, withdrawal / Court, judges giving an opinion on a draft standard which they must apply / Political party, hostility to human rights / Extremism, right-wing / Democracy, defence / Fair trial, language.

#### Headnotes:

The legislative provision allowing a political party to be temporarily deprived of part or all of the public subsidy to which it would normally be entitled on the grounds of its manifest hostility to the rights and freedoms secured by the European Convention on Human Rights and its additional protocols in force in Belgium is not contrary to the Constitution.

#### Summary:

1. The Law of 4 July 1989 laid down a political party funding system for Belgium. The Law of 12 February 1999 inserted into the latter Law a new Article 15<sup>ter</sup> empowering a bilingual chamber of the *Conseil d'État*, the highest administrative court, to decide, on the basis of a complaint from a specified number of parliamentarians, to withdraw the official subsidy from



any political party that has provably demonstrated hostility to the freedoms and fundamental rights secured by the European Convention on Human Rights (ECHR) and the additional protocols thereto.

An application from the extreme right-wing party *Vlaams Blok* to set aside the Law of 12 February 1999 was rejected by the Constitutional Court (still called the “Court of Arbitration” at the time) under Judgment no. 10/2001 of 7 February 2001 (see BEL-2001-1-001).

The aforementioned Article 15<sup>ter</sup> was partly amended by the Law of 17 February 2005. The dispute has now been transferred to the General Assembly, rather than a bilingual chamber, of the *Conseil d'État*. The latter's decision is not subject to appeal before the Court of Cassation.

Proceedings have been brought before the *Conseil d'État* to withdraw the subsidy for the *Vlaams belang*. In the context of these proceedings, the *Conseil d'État* puts a number of preliminary questions to the Constitutional Court, at the request of the party concerned.

The *Conseil d'État* first of all asks the Court whether the aforementioned Article 15<sup>ter</sup> is compatible with Article 13 of the Constitution, in conjunction with Articles 146 and 160 of the Constitution, with Article 6.1 ECHR, with Article 14 of the International Covenant on Civil and Political Rights and with the general principle of the independence and impartiality of the court in mandating the General Assembly of the Administrative Justice Section of the *Conseil d'État* to decide whether or not to suspend the subsidy, given that the *Conseil d'État* was involved as a consultative body in the preparation of the Law of 4 July 1989, particularly Article 15<sup>ter</sup> thereof, and that there is no strict separation between its consultative and judicial functions.

II. The Court first of all observed that the right of access to a court as guaranteed by Article 13 of the Constitution, Article 6.1 ECHR and Article 14.1 of the International Covenant on Civil and Political Rights, and also by a general principle of law, would be rendered null and void if the court failed to meet the requirements of a fair trial. This means that regard must be had to these safeguards and to Articles 146 and 160 of the Constitution, which provide that the court's jurisdiction is established by or in accordance with the law.

With reference to the case-law of the European Court of Human Rights, the Court considers that the mere fact of an institution exercising both consultative and judicial functions is not sufficient to establish a violation of the requirements of independence and

impartiality (Judgment *Sacilor Lormines*, § 66). Consideration must be given in this case to the manner in which its members' independence is guaranteed (*ibid*). The objective independence and impartiality of the *Conseil d'État* are not compromised by the sole fact of its comprising a legislation section and an administrative proceedings section.

However, the principles of independence and impartiality necessitate specific verification, *vis-à-vis* every set of proceedings, of whether the section of this institution exercising the judicial function has had any appearance of bias. The successive exercise by the same *Conseil* members of the consultative and judicial functions in “the same case” or in respect of “the same decision” can, in some cases, jeopardise this institution's structural impartiality (the Court refers to the judgments of the European Court of Human Rights, *Procola*, §§ 44 and 45, *Kleyn*, §§ 193 and 196 and *Sacilor Lormines*, § 62). According to the Court, this question should be settled by the *Conseil d'État* itself.

The Court considers that the General Assembly of the *Conseil d'État* itself must ensure compliance with the provisions and principles guaranteeing the right to a fair trial by an independent and impartial judge, as interpreted by the European Court of Human Rights.

The *Conseil d'État* put five further preliminary questions. In reply to these questions the Court ruled as follows:

- The fact that not all the members of the General Assembly of the Administrative Proceedings Section know the language of the political party in question does not infringe the latter's right to an independent and impartial judge, because members with insufficient command of the language of proceedings can apply for translations.
- Article 15 of the Law of 4 July 1989, which permits a political party to be temporarily deprived of part or all of the public subsidy to which it is normally entitled on the grounds of its manifest hostility to the rights and freedoms secured by the European Convention on Human Rights and its additional protocols in force in Belgium, does constitute interference with both freedom of expression (Article 19 of the Constitution) and freedom of association (Article 27 of the Constitution), but in view of all the circumstances in which this measure can be adopted, as set out in the Law, such interference does not involve a disproportionate infringement of these freedoms. A democracy must be in a position to defend itself robustly and in particular not allow political freedoms, which are specific to it and make it vulnerable, to be used to destroy it.

- The legislature could have, without flouting the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), firstly, taken a specific measure in respect of political parties which incite people to violate the central principles of democracy and, secondly, provided for the possibility of criminal sanctions, including prohibitions of rights, *vis-à-vis* persons committing certain offences, such as corruption, abuse of public property, misappropriation, etc.
- The rights of the defence do not necessitate translating all the evidence and supporting documents used in proceedings (ECHR, 19 December 1989; *Kamasinski v. Austria*, § 74; ECHR, 24 February 2009, *Protopapa v. Turkey*, § 80). In this connection, the legislator might have considered that action was needed to prevent such delaying tactics as the submission of bulky supporting documents, which would subsequently have had to be translated.

#### Cross-references:

- See also Decision no. 10/2001 of 07 02.2001, *Bulletin* 2001/1 [BEL-2001-1-001];
- See also the Interim Decision in this case, no. 157/2009 of 13.10.2009, *Bulletin* 2009/3 [BEL-2009-3-002].

#### Languages:

French, Dutch, German.



#### Identification: BEL-2009-3-013

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 17.12.2009 / **e)** 198/2009 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

#### Keywords of the systematic thesaurus:

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

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

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

#### Keywords of the alphabetical index:

Stateless person, right of residence / Refugee, recognised, right of residence / Convention on the status of refugees / Convention on the status of stateless persons / Law, lacuna / Court, legislative lacuna, rectify.

#### Headnotes:

Refugees and stateless persons have in common the fact of being granted a status on the basis of international conventions geared to protecting them in Belgian territory, which means that their situations are comparable.

Where stateless persons are found to have been granted this status because they have involuntarily lost their nationality and they can prove their inability to obtain a legal long-term residence permit in any other State with which they have links, their situation may be open to discrimination and therefore liable to infringe their fundamental rights.

Consequently, there is no reasonable justification for differentiated treatment in terms of residence rights between a stateless person who is in such a situation in Belgian territory and a recognised refugee.

#### Summary:

Brussels Labour Court submitted a question to the Constitutional Court as to the compatibility with the rules on equality and non-discrimination (Articles 10 and 11 of the Constitution), possibly in conjunction with Article 3 ECHR, of a provision of the Law of 15 December 1980 on access to the territory, residence and settlement and expulsion of aliens. The Law is alleged not to grant the same right of residence to recognised stateless persons as to recognised refugees.

The Court first of all points out that these two categories of aliens have in common the fact of being in Belgian territory, where their respective statuses have been granted on the basis of international conventions intended to protect them.

The Court compares the New York Convention of 28 September 1954 relating to the Status of Stateless Persons and the Geneva Convention of 28 July 1951 relating to the Status of Refugees. It concludes from

this comparison that recognised stateless persons and recognised refugees are in highly comparable situations, in the light not only of the substance of these provisions, but also of the duties *vis-à-vis* these persons which the relevant authority accepts by recognising their status as a stateless person or a refugee respectively.

The Court notes that, where stateless persons are found to have been granted such status because they involuntarily lost their nationality and can prove their inability to obtain a legal long-term residence permit in any other State with which they have links, their situation may be open to discrimination and therefore liable to infringe their fundamental rights. It concludes that there is no reasonable justification for the difference in treatment in terms of residence rights between the two categories. It does, however, point out that the discrimination derives not from the provision under review, but from the absence of a legislative provision granting stateless persons recognised as such in Belgium a right of residence comparable to that enjoyed by refugees. It adds that it is for the individual court, in pursuance of Article 159 of the Constitution, to verify the constitutionality of the relevant provision of the Royal Decree of 8 October 1981 on access to the territory, residence and settlement and expulsion of aliens.

#### Languages:

French, Dutch, German.



## Bosnia and Herzegovina Constitutional Court

### Important decisions

*Identification:* BIH-2009-3-003

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 25.09.2009 / **e)** U 5/09 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette) / **h)** [www.ustavnisud.ba/eng/odluke/povuci\\_pdf.php?pid=250407](http://www.ustavnisud.ba/eng/odluke/povuci_pdf.php?pid=250407); CODICES (Bosnian, English).

*Keywords of the systematic thesaurus:*

2.2.1.2 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and legislative acts.**

*Keywords of the alphabetical index:*

International law, domestic law, relationship / *Pacta sunt servanda*, principle / Treaty, effect in domestic law.

*Headnotes:*

Article III.3.b of the Constitution is contravened in cases where the domestic law is not in conformity with the general rule of international law *pacta sunt servanda* according to which every treaty in force is binding upon the parties to it and must be performed by them in good faith. The above Article will also be breached where it is not in conformity with the provisions of international treaty acceded to by Bosnia and Herzegovina.

*Summary:*

The Chairman of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina (hereinafter, “the applicant”) asked the Constitutional Court to assess the constitutional compliance of the Law on Protection of Domestic Production under the central European Free Trade Agreement CEFTA. The applicant argued that according to Article III.3.b of the Constitution, the general principles of international law form an integral part of the law of Bosnia and

Herzegovina and the Entities' and that "mutual co-operation" as well as 'the fulfilment of international obligations accepted in good faith are the responsibilities of the states. The CEFTA is an example of such an obligation, and the applicant was therefore of the view that the challenged Law contravened both the above principles and, as a result, also the Constitution of Bosnia and Herzegovina, an integral part of the Dayton Peace Agreement and the fundamental law on which the entire national legal system rests. The applicant further suggested that the Law was in breach of the CEFTA in substantive terms, specifically Article 5 of the Annex to the CEFTA which provides that no new customs duties on imports shall be introduced, and in procedural terms, because of the failure to act in accordance with the provisions of Articles 23bis, 24.1, 24.2 and 24.3 of Annex 1 to the CEFTA.

The Constitutional Court is obviously competent to review the constitutionality of a law; the question is, however, whether, in the present case, the possible inconsistency of the challenged law with the CEFTA refers to a problem of constitutionality of the law. The Constitution does not contain any explicit provision defining the rank of international treaties in domestic law or attributing competence in this field to the Constitutional Court. Nevertheless, silence over this question cannot be interpreted as a clear decision on the Court's lack of competence.

Firstly, internationalisation is one of the most characteristic general principles of this Constitution. The Constitution gives direct effect to a number of international treaties, especially in the field of human rights, and stipulates in Article II that the European Convention on Human Rights has "priority over all other law". Thus the Constitution is itself part of an international treaty. Article III.3.b in which the supremacy of the Constitution is established, mentions the general principles of international law that shall be an integral part of the law of Bosnia and Herzegovina and the Entities and have to be respected by the domestic law. In this provision, the supremacy of the Constitution is closely linked either to the general principles of international law or to the competences of the Constitutional Court, since the latter is charged with the constitutional review of the laws and more generally with the upholding of the Constitution (Article VI). Consequently, the competence of the Constitutional Court cannot be generally excluded. However, consideration is also necessary as to whether the general principles of international law give any indication about the relationship between domestic laws and ratified international treaties.

The Constitutional Court noted that one of the fundamental principles of international law, as the applicant had mentioned, is the principle of *pacta sunt servanda*, (the fulfilment in good faith of obligations under international law). This rule stipulates that every treaty in force is binding upon the parties to it and must be performed by them in good faith. This rule constitutes an integral part of the law of Bosnia and Herzegovina and the Entities, and under Article III.3.b of the Constitution, the CEFTA Convention imposes obligations on Bosnia and Herzegovina on the basis of multilateral treaties taken over by Bosnia and Herzegovina. In view of the above, the Constitutional Court concluded that it did at least have competence to review the laws which have been adopted on subjects previously covered by ratified treaties with regard to Article VI.3.a and VI.3.c.

Article 1 of Annex 1 to the CEFTA stipulates the objective of the Agreement, under which the Parties are obliged to establish a free trade area in accordance with the provisions of the Agreement and in conformity with the relevant rules and procedures of the World Trade Organisation (WTO) by 31 December 2010. Chapter I defines general obligations applicable to trade of all goods, and Article 5 governs customs duties on imports. There is also the following standstill clause, which stipulates as follows: "No new customs duties on imports, charges having equivalent effect, and import duties of a fiscal nature shall be introduced, nor shall those already applied be increased, in trade between the Parties as from the day preceding the signature of this Agreement."

Chapter III covers agricultural products. Article 10 of this chapter governs import duties. It stipulates that customs duties on imports, all charges having equivalent effect, and other import duties of a fiscal nature on products specified in Annex 3 to this Agreement shall be reduced or abolished according to the schedules listed in the Annex (paragraph 1). Contingent Protection Rules are also stipulated in Chapter C of Annex 1 to the CEFTA. They deal with the possibility of introducing anti-dumping measures (Article 22) and general safeguarding measures (Article 23). Article 24 stipulates the conditions and procedures for taking measures, and Article 25 covers difficulties in balance of payment.

With reference to the applicant's request, the key provision is comprised in Article 23bis of Annex 1 to the CEFTA, which prescribes the procedure for appropriate measures taken by the concerned Parties: Notwithstanding other provisions of this Agreement, and in particular Article 23, given the particular sensitivity of the agricultural market, if

imports of products originating in one Party, which are the subject of concessions granted pursuant to Annex 3, cause serious disturbance to the markets or to the domestic regulatory mechanisms of another Party, both Parties shall enter into consultations immediately to find an appropriate solution. Pending such a resolution, the Party concerned may take the measures it deems necessary and appropriate.

The Court according held that, pursuant to the rule of *pacta sunt servanda*, there is an undisputable obligation on the part of the institutions of Bosnia and Herzegovina and primarily the legislator to comply with the provisions of the treaties and to execute them in good faith. Consequently, there is an obligation of the institutions of Bosnia and Herzegovina to bring all laws into line with the provisions of the CEFTA. The Constitutional Court concluded that the challenged Law clearly did not conform to these obligations. Article III.3.b of the Constitution was violated by the enactment of this law.

President Miodrag Simovic and Judges Tudor Pantiru and David Feldman delivered dissenting opinions.

#### *Languages:*

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



## Bulgaria Constitutional Court

### Statistical data

1 September 2009 – 31 December 2009

Number of decisions: 6

### Important decisions

*Identification:* BUL-2009-3-001

**a)** Bulgaria / **b)** Constitutional Court / **c)** / **d)** 07.10.2009 / **e)** 08/09 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 81, 13.10.2009 / **h)**.

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

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

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

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

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

Election, irregularity / Election, candidate / Election, ballot, results / Election, votes, counting, irregularities, relevance / Election, report / Election, Central Electoral Committee.

#### *Headnotes:*

Where the Constitutional Court finds that a report on the counting of ballot papers contains an error, in that the votes obtained by two different political parties had been inverted, the Central Electoral Committee must then take this into account and determine the real results of the election in question.

#### *Summary:*

The Principal State Prosecutor of the Republic of Bulgaria had referred to the Constitutional Court an appeal lodged by a political coalition, the Blue

Coalition, whereby, referring to Section 112 of the Law on the election of members of parliament, it challenged the validity of the election held on 5 July 2009.

The applicant disputed the results in the 19<sup>th</sup> plurinominal constituency of Ruse and, accordingly, the election of a member in that constituency. The applicant also objected to the declaration of the results of that ballot by the Central Electoral Committee. The applicant claimed that the Electoral Committee of polling station no. 19-27-00-121 of the constituency in question had made a manifest error of fact in drawing up Report no. 000241 (Appendix 51). The applicant contended that the number of votes obtained by the Blue Coalition (registered on a single ballot paper as no. 19) and that obtained by the Coalition for the Fatherland, Democratic Initiative of Citizens, New Leaders (registered as no. 20) had been inverted by mistake. The report in question had thus recorded zero votes for the former coalition and 24 for the latter, whereas the real number of votes obtained was the opposite. The application submitted by the Blue Coalition was properly reasoned and supported by written evidence.

The Principal State Prosecutor had also forwarded the application lodged pursuant to Section 112 of the Law on the election of members of parliament by the candidate endorsed by the Blue Coalition in the constituency concerned. That candidate's application was thus based on the same grounds as those put forward by his coalition.

At a sitting held in private, the judges of the Constitutional Court examined the electoral documents of the polling station in question. By its preliminary decision of 29 September 2009, the Court found that the Blue Coalition had received 24 votes, whereas the Coalition for the Fatherland, Democratic Initiative of Citizens, New Leaders had received none. Accordingly, the figures in Report no. 000241 (Appendix 51) were not consistent with the true results of the ballot.

The Central Electoral Committee was then required to inform the Court of the consequences of that correction of the results of the ballot. If those results were amended, the Central Electoral Committee was required to communicate to the Court the changes thus made to the allocation of seats in the National Assembly.

On 6 October 2009, by decision NS-250 of 6 October 2009, the Central Electoral Committee transmitted the requisite information to the Court. When the 24 additional votes for the Blue Coalition were taken into

account, the allocation of seats in the various constituencies was then amended as follows: in the 19<sup>th</sup> constituency of Ruse, the Blue Coalition gained one seat, while the Movement for Rights and Freedoms lost one; in the 8<sup>th</sup> constituency of Dobrich: the Movement for Rights and Freedoms gained one seat, while the Blue Coalition lost one.

The Constitutional Court then adopted that decision and instructed the Central Electoral Committee to announce the results of the ballot on that new basis, by adding the 24 additional votes in question to the electoral score of the Blue Coalition.

Pursuant to Section 14.4 of the Law on the Constitutional Court, the present decision would enter into force on the date on which it is delivered.

*Languages:*

Bulgarian.



# Canada

## Supreme Court

---

### Important decisions

*Identification:* CAN-2009-3-005

**a)** Canada / **b)** Supreme Court / **c)** / **d)** 22.10.2009 / **e)** 32229, 32319 / **f)** Nguyen v. Quebec (Education, Recreation and Sports) / **g)** *Canada Supreme Court Reports* (Official Digest), [2009] 3 S.C.R. 208 / **h)** <http://scc.lexum.umontreal.ca/en/index.html>; 394 *National Reporter* 255; [2009] S.C.J. No. 47 (*Quicklaw*); CODICES (English, French).

*Keywords of the systematic thesaurus:*

4.3.4 Institutions – Languages – **Minority language(s)**.  
5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.

*Keywords of the alphabetical index:*

Language, minority, constitutional guarantees / Education, language, parents' freedom of choice / Education, eligibility, publicly funded school system.

*Headnotes:*

Section 73.2 and 73.3 of Quebec's Charter of the French language infringe the minority language educational rights guaranteed by Section 23.2 of the Canadian Charter of Rights and Freedoms by providing that instruction in English received in the province of Quebec in an unsubsidised private educational institution or pursuant to a special authorisation cannot be taken into account when determining whether a child is eligible to receive instruction in a publicly funded English-language school in that province.

*Summary:*

I. Under Section 23.2 of the Canadian Charter of Rights and Freedoms, a citizen of Canada with a child who has received or who is receiving instruction in the language of the linguistic minority may have his or her children receive primary and secondary school instruction in that same language. The Charter of the French language ("CFL"), enacted by the Quebec

Legislature, establishes that, in principle, French is the common official language of instruction in elementary and secondary schools in Quebec, but the first paragraph of Section 73 provides that children who have received or are receiving the major part of their elementary or secondary instruction in English in Canada may receive instruction in English in a public or subsidised private school in Quebec. In 2002, paragraphs 2 and 3 were added to Section 73 CFL in response to concerns about the growing phenomenon of "bridging schools" by which parents whose children were not entitled to instruction in the minority language in Quebec were enrolling their children in unsubsidised private schools ("UPSs") for short periods so that they would be eligible to attend publicly funded English schools. Section 73.2 provides that periods of attendance at UPSs are to be disregarded when determining whether a child is eligible to receive instruction in the publicly funded English-language school system. Paragraph 3 establishes the same rule with respect to instruction received pursuant to a special authorisation granted by the province in cases involving a serious learning disability, temporary residence in Quebec, or a serious family or humanitarian situation.

Parents with children falling within the scope of the 2002 amendments to the CFL asked that these be declared unconstitutional. The Administrative Tribunal of Québec and the Superior Court dismissed the proceedings, but the Court of Appeal reversed the decisions and held that Section 73.2 and 73.3 CFL infringed the rights guaranteed by Section 23 of the Canadian Charter and that the infringements were not justified.

II. In a unanimous decision, the Supreme Court of Canada affirmed the decision of the Court of Appeal and declared Section 73.2 and 73.3 CFL unconstitutional.

In the protection afforded by the Canadian Charter, no distinction is drawn as regards the type of instruction received by the child, as to whether the educational institution is public or private, or regarding the origin of the authorisation pursuant to which instruction is provided in a given language. Further, the requirement of the "major part" of the instruction, provided for in Section 73 CFL, must be interpreted as giving rise to an obligation to conduct a global qualitative assessment of a child's educational pathway. That assessment is based on factors that include time spent in different programs of study, at what stage of the child's education the choice of language of instruction was made, what programs are or were available, and whether learning disabilities or other difficulties exist. Yet the effect of Section 73.2 and 73.3 CFL is that periods of instruction received in a UPS or pursuant to a special authorisation are, in a

manner of speaking, struck from the child's educational pathway as if they had never occurred. The inability to assess a child's educational pathway in its entirety in determining the extent of his or her educational language rights has the effect of truncating the child's reality by creating a fictitious educational pathway that cannot serve as a basis for a proper application of the constitutional guarantees.

The purpose of the 2002 amendments to the CFL adopted by the Quebec Legislature is to protect and promote the French language in Quebec. This is sufficiently important to justify a limit on the guaranteed rights, but the means chosen do not constitute a minimal impairment of the constitutional rights guaranteed by Section 23.2 of the Canadian Charter.

The prohibition under Section 73.2 CFL against taking a child's pathway in a UPS into account is total and absolute, and it seems excessive in relation to the seriousness of the problem of bridging schools being used to make obtaining access to minority language schools almost automatic. When schools are established primarily to bring about the transfer of ineligible students to the publicly funded English-language system, and the instruction they give in fact serves that end, it cannot be said that the resulting educational pathway is genuine. However, it is necessary to review the situation of each institution, as well as the nature of its clientele and the conduct of individual clients. A short period of attendance at a minority language school is not indicative of a genuine commitment and cannot on its own be enough for a child's parent to obtain the status of a rights holder under the Canadian Charter. This approach makes it possible to avert a return to the principle of freedom of choice of the language of instruction in Quebec, involves a more limited impairment of the guaranteed rights and can more readily be reconciled with the concrete contextual approach applicable in assessing a child's educational pathway.

As for Section 73.3 CFL, it is inconsistent with the principle of preserving family unity provided for in Section 23.2 of the Canadian Charter, as it makes it impossible for children of a family to receive instruction in the same school system. The special authorisations mechanism falls within the authority of the Quebec government, which can grant authorisations that exceed what it is constitutionally obligated to grant, but cannot, after doing so, deny any rights flowing from the authorisations in question that are guaranteed by the Canadian Charter.

*Languages:*

English, French (translation by the Court).





# Croatia

## Constitutional Court

### Important decisions

*Identification:* CRO-2009-3-011

a) Croatia / b) Constitutional Court / c) / d) 17.11.2009 / e) U-IP-3820/2009 and Others / f) / g) *Narodne novine* (Official Gazette), 143/09 / h) CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

- 3.3 General Principles – **Democracy**.
- 3.5 General Principles – **Social State**.
- 3.10 General Principles – **Certainty of the law**.
- 3.12 General Principles – **Clarity and precision of legal provisions**.
- 5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens**.
- 5.3.38.4 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Taxation law**.
- 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

*Keywords of the alphabetical index:*

Tax law, special contribution / Economic stability / Tax, purpose / Tax, differentiation.

*Headnotes:*

The Constitutional Court is not competent to judge whether the general taxation system or particular forms of tax in the Republic of Croatia are appropriate and justified.

The constitutional guarantee of equality of all before the law, which is a special expression of equality as the highest value of the constitutional order, does not require every citizen to contribute equally to meeting public expenditure. Rather, it requires that every citizen should finance general state and public affairs in the same way, in accordance with his or her economic capabilities.

The Special Tax Act allows for the possibility for the preservation of the achieved level of social benefits in

conditions of economic crisis, including those that are financed from the government budget, which are an expression of the state's care for the socially most vulnerable individuals and groups.

It is not possible to achieve complete proportionality, equality and equity in any tax system.

*Summary:*

The Constitutional Court refused a request put forward by the President of the Republic for the constitutional review of Articles 1.1, 3 and 5.1 of the Special Tax on Salaries, Pensions and Other Incomes Act (hereinafter, the "Act"). It did not accept proposals put forward by several thousand natural and legal persons (the proponents) to review the constitutionality of the Act.

During the proceedings the Constitutional Court requested and received reports from Parliament, Government and written scientific opinions from expert advisers. It also held a consultative session and *ad hoc* consultative working meetings.

Under the Act, in force from 1 August 2009 to 31 December 2010 (Article 13), salary, pensions and other income from residents were to form a tax base on which tax would be paid at a rate of 2% on the total amount exceeding HRK 3,000.00 and 4% for incomes higher than HRK 6,000.00 (Article 5.1). At the same time the adjustment of pensions under the Pension Insurance Act was to be suspended between 1 January 2010 and 31 December 2010 (Article 1.2). The special tax was paid at the same time as the salary, pension and other incomes (Article 6), and the person liable to be assessed, to withhold and pay the special tax on salaries, pensions and other incomes was the payer of the salaries, pensions and other income (Article 3). The special tax was a temporary tax introduced as a result of a national economic crisis (Article 1.1).

One of the concerns raised about the Act was that Article 3 breached the constitutional principle of entrepreneurial and market freedom (Article 49.1 and 49.2 of the Constitution), and that the tax rates introduced had not guaranteed residents equality before the law (Article 14.2 of the Constitution). This is so because the tax burden is not proportional to the citizens' income and has a particular impact on the poorest members of society, thereby also conflicting with the principle of equality and equity of the tax system (Article 51.1 of the Constitution). It was suggested that the Constitutional Court pronounce Articles 1.1, 3 and 5.1 of the Act in breach of the Constitution, and order their repeal.

The proponents disputed other provisions of the Act and the Act in its entirety. They argued, that it violated the constitutional guarantee of equality of all before the law (Article 14.2 of the Constitution) as it exempted certain taxpayers from paying the taxes and of the principle that Croatia is a social state (Article 1 of the Constitution) because it endangers the existence of the poorest citizens. It was also suggested that the suspension of the adjustment breached the rule of law under Article 3 of the Constitution. The point was made, too, that the Act is an organic law that was not passed by the statutory majority of all the members of the Parliament and that it is retroactive in effect, which is prohibited under Article 89.4 of the Constitution. They proposed that the Constitutional Court order certain provisions of the Act to be repealed, or repeal the Act in its entirety, for breaching the Constitution.

The Constitutional Court began by examining the material that the Act regulates and its normative content. It observed that it would be legally and practically impossible to find that only some provisions of the Act contravene the Constitution and to direct a partial repeal. It also stressed that in the constitutional review of tax regulations, the Constitutional Court is not competent to judge whether the general taxation system or particular forms of tax in the Republic of Croatia are appropriate and justified.

The Constitutional Court examined, against the background of the constitutional concept of the Republic of Croatia as a social state (Article 1 of the Constitution), the compliance of the Act with the fundamental principles and highest values of the constitutional order. Of most relevance to these proceedings were equality, social justice and the rule of law (Article 3 of the Constitution); prohibition of discrimination and equality of all before law (Article 14 of the Constitution), tax equality and equity (Article 51.1 of the Constitution), the general principle of proportionality (Article 16.1 of the Constitution), and the special principle of proportionality in the defrayment of public expenses (Article 51.1 of the Constitution).

The Constitutional Court found that the constitutional guarantee of equality of all before the law, which is a special expression of equality, as the highest value of the constitutional order, does not require equal contributions from every citizen to the defrayment of public expenses. Rather, it requires all citizens to finance general state and public affairs in the same way, in accordance with their respective economic capabilities.

The proponents had alleged that a certain group of taxpayers had been exempted from paying the

special tax due to the existence of a national economic crisis. The Court noted that on 24 September 2009, Parliament passed the Special Separate Tax on Incomes from Independent Activities and Other Incomes Act, which covered the group of taxpayers not included in the Act under dispute, and which placed an identical tax burden in an equal time period on that group. It held that the entry into force of this Act removed any serious concerns over the unconstitutionality of the disputed Act which might otherwise have necessitated a finding that the disputed Act was not in conformity with Article 14 of the Constitution, and to its repeal.

The Constitutional Court emphasised that the content of the concept of social state, the principle of social justice and the social rights guaranteed in the Constitution are abstract in nature, although of different levels of abstraction, and that the constitutional provisions on the social state and social justice, and constitutionally recognised social rights, cannot be applied directly. In order for them to be applicable, they must first be elaborated in a law.

The Constitutional Court noted the large number of taxpayers who are exempt from paying the separate tax due to modest salaries and pensions, and the fact that the special tax introduced by the Act also serves to preserve the achieved degree of social benefits under conditions of economic crisis (the aim was to preserve various social benefits that are financed from the state budget, which are an expression of the state's care for the socially most vulnerable individuals and groups, those who have been hindered in their personal or social development due to social neglect). This could be perceived as an expression of social sensitivity on the part of the legislator. It found the Act to be in compliance with the requirements those drafting the Constitution had in mind when they defined the Republic of Croatia as a social state and social justice as the highest value of its constitutional order.

The Constitutional Court found that the Act did not satisfy the principle whereby the amount of the tax due must not exceed the amount of the increase of the tax base which led to the taxation. The burden of the special tax was unequally distributed in the "boundary" area, at the margins of tax brackets, among those taxpayers whose incomes under Article 5 of the Act are on the borderline. This was not, however, overly onerous for any group of the addressees of the Act, even for those whose incomes are at the boundary area at the transition of tax brackets (e.g. 3,000.01 HRK). After payment of the special tax, their income would still be HRK 2,940.80, in excess of HRK 2,800.00 which is the amount of the statutorily guaranteed minimum

salary. The Constitutional Court did not rule out the possibility that the Act might create an excessive tax burden among certain of those addressees. An assessment of such a burden would need to be carried out against the background of the particular circumstances of each case. In such proceedings relating to protection of individual human rights, standards would be applied developed by the European Court of Human Rights in its jurisprudence on the protection of human rights under Article 3 ECHR (see the first part of the sentence of Article 23.1 of the Constitution).

The Act challenged is highly significant for the stability of national public expenditure and this presently takes priority over the requirements for achieving absolute equality and equity in levying the special tax. The temporary levy of the special tax is based on a qualified public interest (preservation of the stability of the national financial system under conditions of economic crisis by acting on the revenues of the state budget for a short time). In the absence of such measures, the state would be unable to perform the tasks with which it was charged under the Constitution. The differences the Act created among its addressees may attract some criticism, but are not sufficiently serious at this juncture to warrant the Act being pronounced in breach of the Constitution.

It follows from the above that the Act may be retained temporarily in the national legal order in its existing form.

The end of the period of the Act's effectiveness (and therefore the deadline for levying the special tax) has been set reasonably at 31 December 2010. Before that, the Government should, monitor on a continual basis, whether the legislation is still needed or whether it could be amended or repealed early.

The Act does not impinge upon or disturb entrepreneurial or market freedom for taxpayers and entrepreneurs, nor does it affect their participation in business relations. In addition, it poses no threat to the right of employers and entrepreneurs to determine salaries independently, whether they do so under the Labour Act or the Companies Act.

The Act introduced a temporary suspension of adjustment of pension growth. This measure does not contravene the Constitution, because it has a legitimate goal in the public or general interest. It will maintain pensions at their existing levels in the case of a decrease in the gross salaries of all the employees in the Republic of Croatia and a decrease of consumer prices, on which the assessment of the actual amount of the pension depends.

As the Act was passed by a majority of the members of Parliament, the need did not arise during the constitutional review proceedings to assess whether or not the Special Tax Act is an organic law.

The relationship between the Pension Insurance Act and the Act is the relationship between a general and a special law. It should be viewed in accordance with the principle "*lex specialis derogat legi generali*".

The Act accepts the general principle of taxing income as provided for by the Income Tax Act. The special tax was applied to salaries, pensions and other incomes for July 2009 (before its entry into force on 1 August 2009), but salaries, pensions and other incomes that will be earned in December 2010, and which will be paid in January 2011 or later, will not be subject to this taxation. This has ensured balance in the period for assessment and payment of the special tax. The Act does not therefore have a retroactive effect in a way that would be prohibited by Article 89.4 of the Constitution.

The Constitutional Court found the disputed Act to be in compliance with the Constitution.

Two judges of the Constitutional Court who found the Act to be in breach of the Constitution gave a joint separate opinion.

#### *Languages:*

Croatian, English.



# Czech Republic

## Constitutional Court

### Statistical data

1 September 2009 – 31 December 2009

- Plenary decisions on merits: 7
- Senate decisions on merits: 57
- Other plenary decisions: 6
- Other senate decisions: 961
- Other procedural decisions: 33
- Total: 1 182

### Important decisions

*Identification:* CZE-2009-3-007

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 10.09.2009 / **e)** Pl. US 27/09 / **f)** On shortening the term of office of the Chamber of Deputies by a “one off” constitutional act / **g)** *Sbírka zákonů* (Official Gazette), no. 6/2009 Coll; *Sbírka nálezů a usnesení* (Collection of Decisions and Judgments of the Constitutional Court); www.nalus.usoud.cz / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

- 1.3.5.4 Constitutional Justice – Jurisdiction – The subject of review – **Quasi-constitutional legislation.**
- 3.9 General Principles – **Rule of law.**
- 3.22 General Principles – **Prohibition of arbitrariness.**
- 4.5.3.1 Institutions – Legislative bodies – Composition – **Election of members.**
- 4.5.3.3.1 Institutions – Legislative bodies – Composition – Term of office of the legislative body – **Duration.**
- 5.3.38 Fundamental Rights – Civil and political rights– **Non-retrospective effect of law.**
- 5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights.**

*Keywords of the alphabetical index:*

Law, normative nature / Constitution, immutability, principle / Act, individual, adopted as normative act / Constitutional law, constitutional control / Constitution, material core / Parliament, elections.

*Headnotes:*

The term “statute” in Article 87.1.a of the Constitution, which allows the Constitutional Court to repeal statutes or their provisions if they are inconsistent with the constitutional order also applies to constitutional acts, in the context of their review in terms of the imperative of impermissibility of changes to the essential requirements for a democratic state governed by the rule of law under Article 9.2 of the Constitution. The principle of generality of the law is one of the essential requirements for a democratic state governed by the rule of law. Article 9.1 of the Constitution authorises the Parliament to amend or supplement the Constitution through a constitutional act. That authorisation does not include an adoption of a constitutional act that is a statute in form only and a legal act of individual application in terms of content.

*Summary:*

The plenum of the Constitutional Court, by a judgment of 10 September 2009, annulled constitutional Act no. 195/2009 Coll., on Shortening the Fifth Term of Office of the Chamber of Deputies, with effect from 10 September 2009. With effect from the same date, it also annulled Decision of the President of the Republic no. 207/2009 Coll., on Calling Elections to the Chamber of Deputies of the Parliament of the Czech Republic, countersigned by the Prime Minister. Under the constitutional act, the term of office of the Chamber of Deputies elected in 2006 would end in 2009 on the day of elections to the Chamber of Deputies. These were to be held by 15 October 2009 at the latest.

The Constitutional Court annulled the constitutional act due to its conflict with Article 9.1 and 9.2.2 of the Constitution. Under Article 9.1, the Constitution can only be supplemented or amended by constitutional acts. Article 9.2 precludes any changes to the essential requirements for a democratic state governed by the rule of law.

In relation to Article 9.2, the Constitutional Court stated that the imperative of the immutability of the Constitution is not a mere slogan or proclamation, but a constitutional provision with normative consequences for the democratic legislator as well as the Constitutional Court. This fact is reflected in the need to include constitutional acts within the term “statute” under Article 87.1.a of the Constitution, in terms of review for consistency with Article 9.2 and potential derogative consequences.

Against this background, the Constitutional Court considered the principle of generality of a statute or a constitutional act. It noted that the requirement for a constitutional act to be of general nature pursues the aim of ensuring separation of the legislative, executive and judicial powers and an equal constitutional framework for analogous situations. This rules out arbitrariness in the application of state authority and enables the guarantee of protection of individual rights in the form of right to judicial protection or protection of freedom. The act in question only applied to a unique event concerning a specific subject and a specific situation. From that perspective, the constitutional act had the form of a statute, but in terms of content it was a legal act of individual application. It could not be considered either as a supplement or an amendment to the Constitution under Article 9.1 of the Constitution.

The Constitutional Court concluded that Parliament had no authority under Article 9.1 to issue legal acts of individual application in the form of constitutional acts. The constitutionality of a “one-off” constitutional act under particular circumstances could only be established by protection of the material core of the Constitution under Article 9.2, in other words under absolutely exceptional circumstances such as a state of war or a natural catastrophe, and not covered by the Constitution or other constitutional act. At the same time, it would need to meet limitations arising from the proportionality principle. However, the aim in this case was a swift resolution of the governmental crisis. No relevant grounds therefore existed to justify the failure to observe the framework of authority of the adoption of constitutional acts under Article 9.1 of the Constitution.

The Constitutional Court also found that the breach of the principle of non-retroactivity encroached upon the essential requirements for a democratic state governed by the rule of law, under Article 9.2 of the Constitution. The constitutional act shortened the term of office of the Chamber of Deputies after it had been constituted and, as a result, conditions for exercising active and passive voting rights were set retroactively.

The constitutional act posed major problems, in terms of its individually-applied and retroactive nature, in terms of the conditions for authorisation and because of lack of conformity to the immutable principles of a democratic state governed by the rule of law. The Constitutional Court therefore annulled it.

The judge rapporteur in the matter was Pavel Holländer. Dissenting opinions to the judgment and the reasoning behind it were filed by judges Vladimír Kůrka and Jan Musil.

### *Languages:*

Czech.



### *Identification: CZE-2009-3-008*

**a)** Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 22.10.2009 / **e)** IV. ÚS 956/09 / **f)** On the right to a legally designated judge / **g)** *Sbírka nálezu a usnesení* (Collection of Decisions and Judgments of the Constitutional Court); [www.nalus.usoud.cz](http://www.nalus.usoud.cz) / **h)** CODICES (Czech).

### *Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.  
4.7.2 Institutions – Judicial bodies – **Procedure**.  
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:*

Judicial personnel, stability, principle / Proceedings, defective, judge removal from case / Judge, removal / Judge, assignment of a case to another judge / Lawful judge, principle.

### *Headnotes:*

The fact that an appeal court can remove a matter from a panel or individual judge on the grounds of serious defects having occurred in the proceedings is not inconsistent with the constitutionally guaranteed right to a legally designated judge (lawful judge) because it pursues the aim of protecting another constitutionally guaranteed right and does so using proportional means. A violation of the constitutional right to a legally designated judge does not occur simply because of a lack of justified grounds for removing a matter from a particular judge. It can also occur due to inadequacy in the reasoning of the decision.

*Summary:*

In response to the complainant's petition, panel IV of the Constitutional Court, by a judgment of 22 October 2009, annulled the decision of the High Court in Prague of 23 February 2009 which had overturned the decision of the Regional Court in Hradec Králové and assigned the matter to a new judge for review and decision. The complainant argued that the contested decision violated her right to a legally designated judge. At the root of the violation was the competence of the court of appeal to remove the matter from the legally designated judge on the grounds of serious defects in the proceedings and in the appeal court's decision. One such defect was its failure to state adequate grounds for its defence.

Dealing first with the alleged breach of the right to a legally designated judge, the Constitutional Court held that the authority of an appeal court to remove a matter from the legally designated judge on the grounds of serious defects in the proceedings is not inconsistent with the right to a legally designated judge. However, because it violates the constitutionally guaranteed stability of judicial personnel, any provision containing this authority is subject to the proportionality test. The provision in question satisfies the criterion of suitability for achieving the intended aim because it protects parties to proceedings from delays resulting from incorrect procedures by first instance courts. It satisfies the criterion of necessity (whereby only those means offering the most protection to the relevant fundamental rights and freedoms can be deployed). It satisfies the requirement of proportionality "in the narrow sense" under which interference in a fundamental right may not be disproportionate in relation to the intended aim. The Constitutional Court therefore found the provision to be in accordance with the constitutional order because it pursues the aim of protecting another constitutionally guaranteed right, and does so using proportional means. However, a restrictive interpretation is necessary in practice, and the grounds for overturning the decision of the court of the first instance must be of the nature of a serious defect.

Having reviewed the Court of Appeal's decision, the Constitutional Court concluded that the contested provision was not applied restrictively. Neither was it applied in such a way as to preserve, as far as possible, the constitutionally guaranteed right to a legally designated judge. It was not clear from the reasoning of the decision whether the High Court considered the conflict between the fundamental rights of the parties or simply mechanically applied the competence given to it by law. Where there is doubt as to the ability of the judge originally appointed

to conduct and conclude the proceedings in accordance with the rules of fair trial, the Court of Appeal should incline towards the constitutionally guaranteed stability of judicial personnel. From that perspective, the Constitutional Court had to find that the decision was defective in that it set out insufficient grounds to indicate a justified concern on the part of the Court of Appeal that further proceedings before the same judge would not meet the criteria of fair trial. The Constitutional Court therefore found that the decision violated the constitutionally guaranteed right to a legally designated judge.

The judge rapporteur in the matter was Michaela Židlická. No dissenting opinions were filed.

*Languages:*

Czech.

*Identification: CZE-2009-3-009*

**a)** Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 02.11.2009 / **e)** II. US 2048/09 / **f)** The competence of a mayor in the transitional period between elections to municipal assembly and the assembly's constitutive meeting versus the right to an undisturbed private life / **g)** *Sbirka nálezů a usnesení* (Collection of Decisions and Judgments of the Constitutional Court); [www.nalus.usoud.cz](http://www.nalus.usoud.cz) / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

- 2.3.7 Sources – Techniques of review – **Literal interpretation.**
- 2.3.9 Sources – Techniques of review – **Teleological interpretation.**
- 3.10 General Principles – **Certainty of the law.**
- 4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities.**
- 4.8.8.2.3 Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione temporis.***
- 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

*Keywords of the alphabetical index:*

Mayor, transitional period, powers / Local self-government, election / Housing, eviction.

*Headnotes:*

A formalistic approach to legislation giving priority to a linguistic interpretation of a statutory provision leads to a breach of the principle of protecting confidence in the law, legal certainty and predictability (the fundamental attributes of a law-based state).

The right to an undisturbed private life also includes the right to protection of domicile, both owned and rented.

*Summary:*

In response to the complainant's petition, panel II of the Constitutional Court, by a judgment of 2 November 2009, annulled the decision of the District Court in Mladá Boleslav of 30 October 2008 and the decision of the Regional Court in Prague of 8 April 2009 because they violated the complainant's fundamental right to a private life.

Proceedings before the ordinary courts resulted in the complainant being obliged to vacate an apartment that was owned by the municipality and which he had been using under a lease agreement. The agreement was made between the municipality and the complainant in the period before the new assembly's constitutive meeting. At this point, the municipality's mayor had only limited powers. The ordinary courts found that the mayor had no authority to conclude the lease agreement and it was therefore invalid. The complainant filed a constitutional complaint against this decision, alleging that the interpretation and application of the law were excessively restrictive. He also pointed out that the action on vacation of the apartment was filed after two years of peaceful use of the apartment and proper fulfilment of all obligations arising under the lease agreement.

The Constitutional Court focused on the issue of the mayor's authority to conclude lease agreements in the transitional period between elections to the municipal assembly and the municipal assembly's constitutive meeting. It noted that giving priority to linguistic interpretation of the law would lead to the illogical conclusion that during the transitional period the mayor could not exercise the authority of municipality's executive bodies although by law outside the transitional period he possesses and exercises that authority. The Constitutional Court was of the view that if the law authorises the mayor to

form and express the municipality's will in a specific defined area, no rational grounds exist to restrict that competence during the transitional period. Moreover, this limitation of competence only occurs due to an interpretation of the law that is formally possible, but constitutionally completely unacceptable.

The formalistic approach to the law, established in this case by giving priority to a linguistic interpretation over a teleological one, led to violation of the principle of protecting confidence in the law, legal certainty and the predictability of the law. These principles must apply to all actions of public authorities, including those of local government. In addition, in this case, a breach had occurred of the right to private life. This, according to the settled case law of the European Court of Human Rights, includes the right to protection of domicile. The Constitutional Court found that arbitrary interpretation and application of a legal regulation by ordinary courts interfered in the complainant's right to a private life.

The judge rapporteur in the matter was Eliška Wagnerová. No dissenting opinions were filed.

*Languages:*

Czech.

*Identification: CZE-2009-3-010*

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 03.11.2009 / **e)** Pl. ÚS 29/09 / **f)** The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community II / **g)** *Sbírka zákonů* (Official Gazette); *Sbírka nálezů a usnesení* (Collection of Decisions and Judgments of the Constitutional Court); [www.nalus.usoud.cz](http://www.nalus.usoud.cz) / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

1.3.5.1 Constitutional Justice – Jurisdiction – The subject of review – **International treaties.**

1.3.5.2.1 Constitutional Justice – Jurisdiction – The subject of review – Community law – **Primary legislation.**

2.2.1.6.1 Sources – Hierarchy – Hierarchy as between national and non-national sources –

Community law and domestic law – **Primary Community legislation and constitutions.**

3.1 General Principles – **Sovereignty.**

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

3.26.3 General Principles – Principles of Community law – **Genuine co-operation between the institutions and the member states.**

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

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

*Keywords of the alphabetical index:*

Treaty, constitutional review, preventive / Treaty, constitutional requirements / Treaty, European Union / Treaty, ratification.

*Headnotes:*

The purpose of proceedings on the conformity of an international treaty with the constitutional order is a preventive one, to rule out the risk of the Czech Republic assuming an international obligation that would be inconsistent with the constitutional order or to remove doubts over the treaty's conformity with the constitutional order before it becomes binding on the Czech Republic.

In a modern democratic state governed by the rule of law the sovereignty of the state is not an aim in and of itself, but a means for fulfilling the fundamental values which form the basis of the construction of a democratic state governed by the rule of law. The transfer of certain sovereign competences which arise from the sovereign state's free will and will be exercised with the sovereign's participation in a manner that is agreed upon in advance is not a weakening of sovereignty. Rather, it can lead to a strengthening of sovereignty as part of the joint actions of an integrated whole.

*Summary:*

The plenum of the Constitutional Court, in a judgment of 3 November 2009, found that the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community and ratification thereof are not inconsistent with the constitutional order of the Czech Republic. A petition filed by a group of senators criticised the Treaty of Lisbon for insufficient comprehensibility, conflict with the nature of the Czech Republic as a state governed by the rule of law, violation of the principle of political neutrality, democratic deficit in the decision-making processes in

the EU and violation of state sovereignty. This was the second judgment in which the Constitutional Court considered the conformity of the Treaty of Lisbon with the constitutional order (its first judgment can be found at file no. Pl. ÚS 19/08, of 26 November 2008, *Bulletin* 2008/3 [CZE-2008-3-012]).

The Constitutional Court began by dismissing arguments concerning inadequate comprehensibility and lucidity of the Treaty of Lisbon and its individual provisions. It emphasised that the subject matter of review is an international treaty governing the very foundations of the EU. Such a document cannot be subject to the same requirements that the Constitutional Court, in its case law, applies to domestic legislation.

Regarding the question of "democratic deficit" in the decision-making process, the Constitutional Court pointed out that the Treaty of Lisbon does not prevent member states from regulating the institution of a "special mandate" for representatives of the executive power to act in Union bodies. Neither does the lack of such procedures mean that the Treaty of Lisbon is inconsistent with the constitutional order. Note should also be taken of the tendency towards strengthening of the role of parliaments which is supported by the Treaty of Lisbon itself. Therefore, Article 10.1 of the TEU establishing the principle of representative democracy as the basis for the functioning of the EU is not inconsistent with the constitutional order. This provision is aimed not only at processes that take place at a European level and at the European Parliament, but also at the domestic level. Thus, democratic processes at domestic and European levels complement each other and are mutually dependent.

The Constitutional Court found no substantive conflict between the value orientation of the constitutional order of the Czech Republic and values that are expressed as the objectives of the EU. It emphasised that the prohibition on tying the state to an ideology or religion does not mean an absence of values and ideas in the constitutional order or norms that are applied on its basis, for example, the legal order of the EU.

As regards the alleged violation of state sovereignty, the Constitutional Court referred to its deliberations stated in Judgment file no. Pl. ÚS 19/08. According to the Court, in a modern democratic state governed by the rule of law sovereignty of the state is not an aim in and of itself, but a means for fulfilling the fundamental values on which the construction of a democratic state governed by the rule of law stands. The transfer of certain sovereign competences that arises from sovereign's free will and will be exercised with the sovereign's participation in a manner that is agreed



upon in advance is not a weakening of sovereignty. Rather, it can lead to a strengthening of sovereignty as part of the joint actions of an integrated whole. The Czech Republic “signed up” to the concept of shared or pooled sovereignty when it applied to join the EU.

The Constitutional Court also took the view that the concept of enhanced cooperation does not contravene the cited provisions of the constitutional order. From the perspective of international law, enhanced cooperation is a legitimate form for the exercise of sovereignty. Consent to enshrine it does not affect the principle of government by the people or the sovereignty of the Czech Republic. The contested provisions leave it to future constitutional authorities to decide whether and how the Czech Republic will join in enhanced cooperation. As regards the framework for withdrawal from the EU and the alleged conflict with the principle of state sovereignty, the Constitutional Court emphasised that sovereignty does not mean arbitrariness or an opportunity to freely violate existing international obligations.

The judge rapporteur in the matter was Pavel Rychetský. No dissenting opinions were filed with regard to the judgment or the reasoning behind it.

#### Languages:

Czech.



## Germany

### Federal Constitutional Court

#### Important decisions

*Identification:* GER-2009-3-021

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 16.01.2003 / **e)** 2 BvR 716/01 / **f)** Exclusion of presence in proceedings before a juvenile court / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 107, 104-133 / **h)** *Europäische Grundrechte-Zeitschrift* 2003, 58-67; *Zeitschrift für das gesamte Familienrecht* 2003, 296-303; *Strafverteidiger Forum* 2003, 84-88; *Zentralblatt für Jugendrecht* 2003, 144-152; *Familie-Partnerschaft-Recht* 2003, 266-270; *Neue Juristische Wochenschrift* 2003, 2004-2009; *Zeitschrift für Jugendkriminalrecht und Jugendhilfe* 2003, 68-76; CODICES (German).

#### Keywords of the systematic thesaurus:

5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**  
5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

#### Keywords of the alphabetical index:

Parent, rights, criminal law, constitutional requirements, conflict / Criminal proceedings, juvenile court, exclusion of parents / Parental rights / Parents, juvenile court, criminal proceedings, involvement.

#### Headnotes:

1. It is part of the parental responsibility, protected by Article 6.2.1 of the Basic Law, that parents should protect the rights of their children *vis-à-vis* the state or third parties. As a result, it is a constitutional necessity for parents to be involved early on in criminal proceedings in a juvenile court. Provisions which deprive parents of the right to be involved or exclude them from the trial are encroachments upon their constitutionally protected rights.

2. Safeguarding the administration of the criminal law and the enforcement of the state's right to punish in judicial proceedings are constitutional tasks which

can come into conflict with the parental right to raise a child. A conflict between parental rights and the constitutional requirement that the criminal law protect legal interests does not lead inevitably to parental rights being overruled; it must be resolved through a weighing of interests, whereby the parental right concerned and the protection of legal interests by the criminal law must be balanced against each other.

3. The enforcement of the state's right to punish may encroach upon the parental right to raise a child but this does not make the requirement that such encroachment be based on a sufficiently definite status dispensable.

#### Summary:

I. The applicant is the father of a boy who is a minor; the boy was prosecuted before a juvenile criminal court on charges of having caused bodily harm and grievous bodily harm. In principle persons who are in charge of raising a minor and the minor's legal representatives are entitled to be present at the minor's trial; they should also be summoned to appear (§ 67.1 of the Juvenile Court Act, *Jugendgerichtsgesetz*). These rights may, however, be withdrawn to the extent that the above-mentioned persons are suspected of having been involved in the offence of which the minor is accused or there is a justified fear that the person entitled to attend could abuse his or her rights (§ 51.2 of the Juvenile Court Act). In these cases, a guardian *ad litem* and, if necessary, defence counsel must be appointed pursuant to § 68.2 of the Juvenile Court Act to represent the interests of the minor in criminal proceedings which are pending. On this legal basis, the applicant who is his son's sole legal representative was excluded from the trial in the original proceedings.

The Court explained its actions by referring to previous occurrences during the proceedings which indicated that the applicant had shown himself to be a "counterproductive influence on the minor in every way"; this "had been clearly shown in the proceedings so far and did not need to be further elaborated upon".

After the applicant's appeal against his exclusion from the trial had been unsuccessful, he lodged a constitutional complaint. In essence, he alleged a violation of his constitutionally protected parental right. In his view, his exclusion had occurred arbitrarily and violated his right to a hearing in court as well as the principles of a fair hearing. He claimed that if he had been able to attend the trial, the judgment would have been different. His son would

have at least been acquitted on one count. As it was, his son had been put in a defenceless position.

II. The Second Panel of the Federal Constitutional Court held the statutory rule indirectly challenged by the applicant to not be in conformity with the parental right to raise a child to the extent that it allows persons who bear parental responsibility within the meaning of Article 6.2 of the Basic Law to be excluded from proceedings before a juvenile court. At the same time, the Second Panel overturned the challenged decisions of the previous competent courts. The original proceedings were referred to another Local Court (*Amtsgericht*), which had not heard the case.

1. The Panel's reasoning was based upon the following constitutional standards:

The Basic Law protects parents in the exercise of their parental right to raise a child from state encroachment. At the same time, in raising the child, parents are obliged to make the best interests of the child their guiding principle. Safeguarding the administration of the criminal law and the enforcement of the state's right to punish in judicial proceedings are constitutional tasks which can come into conflict with the parental right to raise a child. A conflict between parental rights and the constitutional requirement that the criminal law protects legal interests, does not inevitably lead to parental rights being overruled. In such cases conflicting needs must be weighed and balanced. The Panel was also of the view that encroachments upon the parental right guaranteed by the Basic Law require a statutory basis in the form of a sufficiently specific Act. The person affected must be able to understand the legal situation. This also applies to the restriction of the parental right to the extent that it allows encroachment upon the parental right for the purposes of enforcing the state's right to punish.

2. § 51.2 of the Juvenile Court Act does not meet these constitutional standards to a large extent.

Parents may also protect the rights of their children *vis-à-vis* the state or third parties by using their constitutionally protected responsibility of child raising. This also includes the right to assert their own ideas of child raising in criminal proceedings in a juvenile court. The questions of how a minor should testify in relation to the offences alleged against him or her and which of the means provided by the Juvenile Court Act and the Code of Criminal Procedure he or she should use to invalidate the allegations made are child raising matters and child raising is first and foremost a parental task. Provisions which deprive parents of the right to

participate or exclude them from the trial are encroachments upon the constitutionally protected rights of parents. The exclusion of parents from a trial against their child is serious. This encroachment can prevent the exercise of parental rights in criminal proceedings in a juvenile court and put the minor, who is dependent on his or her parents' support, in a largely unprotected position. The statutory basis for such a measure must make the parties affected clearly and completely aware of the legislator's intention. § 51.2 of the Juvenile Court Act, which enables parents to be excluded from the trial to the extent that there are "reservations" about whether they should be present, fails to do so. Its area of application cannot be determined with sufficient clarity and certainty by using any of the conventional methods of interpretation. The Panel explained this in detail by interpreting the provision in accordance with its wording, structure, drafting history and purpose. The legislator itself failed to regulate the essential issues in relation to the application of the provision in this connection. § 51.2 of the Juvenile Court Act does not describe the procedural situation in which the parents may be excluded nor does it state how convinced judges must be before they can be said to have "reservations". Finally, conceivable measures which could compensate for the encroachment such as the appointment of a guardian *ad litem* or the appointment by the court of a defence counsel are also left open.

The Panel also stated that § 51.2 of the Juvenile Court Act cannot be interpreted in conformity with the Constitution in view of the section's uncertainty, since there is no clear interpretation of it which is in conformity with the Constitution. Nevertheless, if one allowed an interpretation which was in conformity with the Constitution, the constitutional necessity for the enactment of a statute to be specific – which requires that any encroachment on a fundamental right be based upon a statutory regulation and have its nature and scope defined by the legislator itself – would be devoid of effect.

The challenged decisions were not in conformity with the Basic Law, as far as the exclusion of the father from the trial was concerned, since they were based upon the unconstitutional provision in § 51.2 of the Juvenile Court Act. To the extent that the competent courts refused to appoint a defence counsel for the minor, their decisions were based upon a fundamental misjudgment of the meaning of Article 6.2 of the Basic Law; the decisions showed that the competent courts were not aware of the seriousness of the encroachment upon a fundamental right caused by the exclusion of the father and the resulting procedural consequences. The conviction of the son also violated the father's fundamental right

under Article 6.2 of the Basic Law. His parental right granted him a constitutional right to attend the trial. The father was deprived of such a right by an unconstitutional provision. At any rate, the possibility cannot be excluded that the Local Court would have decided differently if the father had had the opportunity to attend the oral hearing, to exercise his rights and to support his son.

#### *Supplementary information:*

In 2006, after the Federal Constitutional Court's decision, the legislator replaced the provision under § 51.2 of the Juvenile Court Act, which had been declared unconstitutional, by a more detailed regulation. In its sentence 1, the new version of § 51.2 sets out five combinations of circumstances in which the judge may exclude persons in charge of raising the accused, and legal representatives of the accused, from the proceedings.

#### *Languages:*

German.



#### *Identification:* GER-2009-3-022

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 28.01.2003 / **e)** 1 BvR 487/01 / **f)** Statutory fees of lawyers in the new *Länder* / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 107, 133-150 / **h)** *Anwaltsgebühren Spezial* 2003, 64-66; *Neue Juristische Wochenschrift* 2003, 737-739; *Zeitschrift für das gesamte Familienrecht* 2003, 293-296; *Anwaltsblatt Sonderheft* 2003, 175-179; *Monatsschrift für Deutsches Recht* 2003, 353-354; *Der Deutsche Rechtspfleger* 2003, 211-213; *Deutsches Verwaltungsblatt* 2003, 391-394; *Zeitschrift für Vermögens- und Immobilienrecht* 2003, 199-201; *Bundesrechtsanwaltskammer-Mitteilungen* 2003, 74-78; *Das juristische Büro* 2003, 191-195; *Der Rechtsbeistand* 2003, 21-26; *Neue Justiz* 2004, 136-139; CODICES (German).

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

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

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

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

Lawyer, legal fees, reduced / Lawyer, legal fees, acceding territory (former GDR) / Lawyer, legal fees, dependent on law office location.

#### *Headnotes:*

In view of the changes in the legal conditions for legal work, it can no longer be considered to be in conformity with the general principle of equality before the law in Article 3.1 of the Basic Law that the statutory fees of lawyers who have set up firms in the new *Länder* be decreased by 10 % (Annex I chapter III subject area A part III no. 26 letter a sentence 1 of the Treaty of 31 August 1990 between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity, Unification Treaty, *Vertrag vom 31 August 1990 zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands, Einigungsvertrag*) in conjunction with § 1 of the Fee Decrease Adjustment Ordinance (*Ermäßigungssatz-Anpassungsverordnung*).

#### *Summary:*

I. It was agreed in the Treaty of 31 August 1990 between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity (Unification Treaty) that lawyers whose law firms were located in the new *Länder* (states) or who represented a client from the new *Länder* before a court or public authority in the new *Länder* would be subject to a so-called reduced fee. This reduction amounted to 20% as compared to the legal fees payable in the old federal *Länder* and was intended to take into account the different economic conditions which prevailed in the former German Democratic Republic. In 1996 the reduction rate was adjusted and decreased to 10%. It remains in force unchanged to this day. However, since 1 March 2002 the rate has ceased to apply for the eastern part of Berlin.

The applicant is a lawyer whose legal practice was originally in Stuttgart. She has had a law firm in Dresden since 1994. She represented a client who was resident in Munich in divorce proceedings before the family division of the Local Court (*Amtsgericht – Familiengericht*) in Dresden. In addition, a Munich lawyer who acted as the applicant's agent was involved. In fixing the fees payable to the applicant, the Dresden Family Court took into account the 10 %

fee reduction applicable for the eastern part of Germany.

Appeals against the fees fixed to the Local Court and the Higher Regional Court (*Oberlandesgericht*) were unsuccessful. The applicant's constitutional complaint was directed against the order made by the Higher Regional Court and the regulation on the fee reduction applicable for the eastern part of Germany.

II. The First Panel was of the view that it was not consistent with the general principle of equality before the law that the statutory fees for lawyers who had set up their law firms in the new *Länder* should be reduced by 10 %. The underlying regulation could continue to be applied until a new regulation in conformity with the Basic Law came into force or at the latest until 31 December 2003. The Court's reasoning was as follows: the general principle of equality before the law does not bar the legislator from making any differentiation whatsoever. The fundamental right will, however, be violated if one group of persons is treated differently to another group of persons as the result of a regulation, when the differences between both groups is not of such kind or so weighty as to be able to justify the unequal treatment. The greater the detrimental effect of the unequal treatment on the exercise of fundamental freedoms protected by the Basic Law, such as, for example, the freedom to practise one's occupation or profession, the more limited the legislator's discretion will be.

According to the First Panel, the regulation concerning the decreased fee in the East in relation to lawyers whose firms were in the new *Länder* did not meet the foregoing standard. It used as its nexus the place where the lawyer's firm was located. As a result, all lawyers who established firms in one of the new *Länder* were also at a disadvantage, as compared to lawyers whose firms were in Berlin or one of the old *Länder*, when they were representing a client who was not from the acceding territory before the courts or public authorities in Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt or Thuringia. They could only charge fees for their legal services which were 10% less than those which lawyers who had law firms in Berlin or the old *Länder* could charge their clients.

Moreover, Parliament was taking into account social considerations when it decreased the fee in 1990. Its purpose was to take into consideration the different economic positions of lawyers and persons seeking justice who were resident in the former German Democratic Republic. This was a suitable justification for the differentiation for as long as the difference between the professional conditions for legal practice in the acceding territory and the Federal Republic of

Germany was such that lawyers in the acceding territory mostly advised clients from the acceding territory and lawyers from the remaining federal territory were for the most part excluded from doing so. At the beginning, this was the case in relation to the most important field of practice, namely civil disputes.

Initially, after the accession by the German Democratic Republic to the Federal Republic of Germany, the only lawyers who could appear before Regional Courts (*Landgerichte*), Family Courts and all higher courts in civil matters in the old federal *Länder* were those lawyers who were admitted to the bar of the court hearing the case or – in family law matters – the superior Regional Court. In contrast, in the five new *Länder* – in keeping with the law of the German Democratic Republic which at first continued to apply – every lawyer could appear before every court. In other words, every lawyer was entitled to appear and conduct a case. There was no local admission to a particular court in the sense of a localisation. This legal situation continued until 31 December 1999. The Act reforming the Professional Rules Governing Lawyers and Patent Attorneys (*Gesetz zur Neuordnung des Berufsrechts der Rechtsanwälte und der Patentanwälte*) dated 2 September 1994 amended the provisions on proceedings in which the parties must be represented by a lawyer. Pursuant to the above-mentioned legislation, the parties could be represented before the Regional Courts and Family Courts by any lawyer admitted to practise before those courts. However, this regulation which abandoned the connection between the right to appear and conduct a case and local professional representation (localisation) in relation to civil litigation before the Regional Courts and Family Courts first took effect in the entire Federal Republic on 1 January 2000. Since then lawyers can appear in legal disputes before the Regional Courts and Family Courts in both the eastern and western parts of the federal territory. The original coexistence of two physically separate areas in which lawyers from the old *Länder* could not appear in the new *Länder* and vice versa no longer exists. At the same time, the original justification for the challenged regulation on the decrease of fees has disappeared.

The fee regulation concerning the fee reduction in the eastern part of Germany for lawyers whose offices are in the new *Länder* was unconstitutional as a result of the Panel's decision, but not null and void. The legislator was given until the 31 December 2003 as the time limit for the enactment of the new regulation which had become necessary. It was decided by the Panel that the current regulation on fees was still applicable during the transitional period. For this reason, the decision by the Higher Regional Court which the applicant was still challenging and which

was based on the challenged fee regulation, was not constitutionally objectionable. To this extent the constitutional complaint was rejected as unfounded.

#### *Supplementary information:*

The Lawyers' Remuneration Act (*Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte*), which was enacted in 2004 and is currently valid, no longer provides any differences between the old and the new *Länder* as regards the amount of lawyers' fees.

#### *Languages:*

German.



#### *Identification:* GER-2009-3-023

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 29.01.2003 / **e)** 1 BvL 20/99, 1 BvR 933/01 / **f)** Provisions on custody for cases arising prior to the current statutory regulation / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 107, 150-186 / **h)** *Europäische Grundrechte-zeitschrift* 2003, 48-58; *Das Jugendamt* 2003, 90-100; *Zeitschrift für das gesamte Familienrecht* 2003, 285-292; *Sozialrecht in Deutschland und Europa* 2003, 105-107; *Neue Juristische Wochenschrift* 2003, 955-961; *Der Deutsche Rechtspfleger* 2003, 179-187; *Monatschrift für Deutsches Recht* 2003, 391-393; *Familie-Partnerschaft-Recht* 2003, 205-211; *Zentralblatt für Jugendrecht* 2003, 187-198; *Das Standesamt* 2003, 202-209; *Entscheidungssammlung zum Familienrecht* BGB § 1626a no. 2; CODICES (German).

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

5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**  
5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

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

Child born out of wedlock, custody / Child, best interests / Parent and child, reforming the law / Parents, unmarried, joint custody / Transitional provision / Parental rights.

*Headnotes:*

1. The best interests of the child require that from the child's birth, there be a person who can act in a legally binding manner on behalf of the child. In view of the diversity of the living conditions of children who are born out of wedlock, it is constitutional that custody of a child born out of wedlock is normally attributed to its mother upon the child's birth.

2. The possibility of joint custody, which § 1626a.1.1 of the German Civil Code (*Bürgerliches Gesetzbuch*) facilitates to the parents of a child born out of wedlock is based on a regulatory concept of custody that establishes, in view of the best interests of the child, that the parents' consensus about joint custody be the precondition of joint custody. At present there is no evidence to substantiate that this regulatory concept does not sufficiently take into account the parental right pursuant to Article 6.2 of the Basic Law of a father of a child born out of wedlock.

3. In cases in which both parents live with the child and both parents have shown their willingness to cooperate already by factually caring for the child jointly, the legislator was justified in assuming that the parents will generally make use of the possibility of joint custody that now exists, i.e. that they will legalise their factual care by declarations concerning custody.

4. The legislator is obliged to observe the factual development and to review whether its assumption stands the test of reality. If it becomes apparent that it normally does not, the legislator will have to ensure that the fathers of children born out of wedlock who live with the mother and a child as a family are given access to joint custody that sufficiently takes their parental right under Article 6.2 of the Basic Law into account, with due consideration being given to the best interests of the child.

5. Parents who lived with their child born out of wedlock, but who separated before the Act reforming the Law of Parent and Child came into force on 1 July 1998, must be given the possibility of having judicially reviewed whether joint custody is not contrary to the best interests of the child although one parent does not agree with it.

*Summary:*

I. Pursuant to applicable family law, it is generally the mother alone who has the custody of a child born out of wedlock. The father can exercise custody together with the mother only if he marries the mother or if both parents declare that they want to jointly assume custody (§ 1626a of the German Civil Code,

*Bürgerliches Gesetzbuch*, hereinafter: the Code). This means that it is not possible to establish joint custody of a child born out of wedlock against the mother's will. If the parents live apart, custody can also be awarded to the father only with the mother's consent (§ 1672.1 of the Code).

Custody can only be awarded to the father against the mother's will if the mother, for instance, abuses custody or neglects the child and if custody is withdrawn from the mother by a Family Court, and if the award of custody to the father serves the best interests of the child (§§ 1666 and 1680 of the Code). The same applies if the mother is factually prevented from exercising custody or if the mother dies.

In each of the original cases that are the basis of the proceedings before the Federal Constitutional Court, the father lived in extramarital cohabitation with the mother and the mutual child that was born out of wedlock, until the mother separated from him and moved out with the child. Thereafter, each of the fathers requested that he be awarded joint custody of the child together with the mother. The mothers, however, refused to make a corresponding declaration concerning custody.

In the first case, the Family Court stayed the proceedings. It submitted to the Federal Constitutional Court's review the question of whether it is compatible with Article 6.2 and 6.5 of the Basic Law that pursuant to §§ 1626a and 1672 of the Code, the father of a child born out of wedlock who had lived together with the child's mother and the child in a relationship that was similar to a family cannot be awarded joint custody of his child as long as the child's mother refuses her consent, without consideration being given to the individual case.

In the second case, the Family Court denied the motion of a father to award to him, together with the mother, custody of their child born out of wedlock. Appeals against the Court's decision were unsuccessful. The father and his son lodged a constitutional complaint.

II. The First Panel decided that § 1626a of the Code is, at present, essentially constitutional. Lacking is, however, a transitional arrangement for parents who separated before the entry into force of the Act reforming the Law of Parent and Child (*Kindschaftsrechtsreformgesetz*) on 1 July 1998. In this respect, § 1626a of the Code is not compatible with Article 6.2 and 6.5 of the Basic Law. The legislator must establish a transitional arrangement for such cases until 31 December 2003. Until the entry into force of the new legal regulation, § 1626a of the Code may not be applied by the courts and

administrative authorities to the extent that a decision depends on the constitutionality of the statute. In the constitutional complaint proceedings, the Panel overturned the challenged decisions and referred the matter back to the Higher Regional Court.

The Panel essentially gave the following reasoning for its decision:

The fact that custody is generally attributed to the mother of the child born out of wedlock is constitutionally unobjectionable and does not infringe the father's parental right. Upon their marriage, parents of children born in wedlock have legally committed themselves to assuming responsibility for each other and for a mutual child. As concerns parents who are not married to each other the situation is different; the legislator cannot generally assume even nowadays that they live together and are willing and able to jointly assume responsibility for their child. There is also no sufficient factual evidence to substantiate the assumption that generally, the father of a child born out of wedlock wants to assume the responsibility for the child together with its mother. The best interests of the child, however, require, that from the child's birth, there be a person who can act in a legally binding manner on behalf of the child. In view of the diversity of living conditions of children born out of wedlock, it is justified that custody of a child born out of wedlock is normally attributed to its mother, and not to its father or jointly to both parents, upon the child's birth.

This decision taken by the legislator is also not constitutionally objectionable because the legislator facilitated for parents who want to jointly take care of their child to provide so in a legally binding manner already upon the child's birth by making concurrent declarations concerning custody.

The regulation that makes the parents' consensus about joint custody the precondition of joint custody is also constitutional. The statutory regulatory concept of custody of a child born out of wedlock is based on several assumptions by the legislator that at present do not raise doubts as regards their constitutionality.

The legislator was justified in assuming that normally, joint custody that is imposed upon one parent against his or her will entails more disadvantages than advantages for the child. In the interest of the child, joint custody requires a minimum of consensus from the parents. If the parents are neither willing nor able to co-operate, joint custody can be contrary to the best interests of the child. Pursuant to the law, custody is, in principle, jointly incumbent upon both parents. The legislator supposes that both parents' intent to jointly assume custody, which is either manifested by marriage or is expressly declared,

shows their willingness to co-operate and most adequately guarantees a joint exercise of custody by the parents, which corresponds to the best interests of the child. Parents who are not married to each other can manifest by way of concurrent declarations that they intend to jointly take care of their child, which opens their access to joint custody.

Both parents of a child born out of wedlock can only exercise custody jointly if they concurrently want to do so. This does not restrict the father's parental right in an unjustified manner. Also in the case of married parents, joint custody is based on their concurrent declarations in the marriage ceremony.

If both parents live together with the child and have already shown their willingness to co-operate by their joint factual care of the child, the legislator's assumption is justified that the parents will normally make use of the legal possibility of jointly assuming custody and will legalise their factual care by declarations concerning custody. In such cases, the establishment of joint custody is not dependent on a review of the best interests of the child in the individual case.

As a consequence, parents who are not married to each other have been given factual access to joint custody, in a manner that is constitutionally unobjectionable, primarily if they live together with the child and not only after having separated. If the mother does not want to make a declaration concerning custody, although she lives together with the father and the child, the legislator was justified in assuming that such behaviour is an exception, based on important reasons determined by the wish to safeguard the best interests of the child. Under this assumption the fact that the law in this case does not provide for court review of the individual case does not infringe the parental right of the father of a child born out of wedlock, because if such important reasons exist, it cannot be expected of the courts, in the specific case, to deem joint custody conducive to the best interests of the child.

By defining typical circumstances in such a manner, the legislator has established regulations that only safeguard the parental right of the father of a child born out of wedlock under Article 6.2 of the Basic Law if the legislator's assumptions are correct. Therefore the legislator must observe the actual development and review whether the assumptions live up to reality. If it becomes apparent that this is normally not the case, the legislator will have to ensure that fathers of children born out of wedlock who live together as a family with the mother and the child are given access to joint custody that sufficiently takes their parental right under Article 6.2 of the Basic Law into account, with due consideration being given to the best interests of the child.

Parents who lived together with their child born out of wedlock and who jointly cared for the child, but separated before the entry into force of the Act reforming the Law of Parent and Child on 1 July 1998, were barred from joint custody at the time when they lived together. In these cases, a transitional arrangement is lacking. In this respect, the legal regulation of joint custody of a child born out of wedlock is constitutionally insufficient. The parental right, under Article 6.2 of the Basic Law, of the father of a child born out of wedlock is infringed if he does not have access to joint custody of his child only because at the time when he lived together with the mother and the child there was no possibility for him and the mother of establishing joint custody of the child and because after their separation, the mother is not (or no longer) willing to make a declaration concerning custody, although joint custody is in the best interests of the child. Fathers affected by such a situation must be provided with the possibility of judicial review of whether, in the individual case, joint custody is not contrary to the best interests of the child although one parent is against joint custody. In such cases, there is neither a factual basis for the assumption that the parents lack the necessary willingness to co-operate as concerns the custody of their child nor for an assumption that joint custody normally serves the best interests of the child.

Thus, § 1626a of the Code is partly unconstitutional because it lacks a transitional provision for cases arising prior to the current statutory regulation.

#### *Supplementary information:*

The transitional regulation which was demanded by the Federal Constitutional Court in its decision was incorporated into the Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch – EGBGB*) in its Article 224 § 2.3 to 224 § 2.5.

#### *Languages:*

German.



#### *Identification:* GER-2009-3-024

**a)** Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 18.03.2003 / **e)** 1 BvR 329/03 / **f)** / **g)** / **h)** *Zeitschrift für Verbraucherinsolvenzrecht* 2003, 223-224; *Zeitschrift für das gesamte Insolvenzrecht* 2003, 653-654; *Neue Zeitschrift für das Recht der Insolvenz und Sanierung* 2003, 448-449; *Neue Juristische Wochenschrift* 2003, 2668; *Konkurs-, Treuhand und Schiedsgerichtswesen* 2003, 393-395; CODICES (German).

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

5.2 Fundamental Rights – **Equality.**

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

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

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

Protection, legal, guarantee, equal / Legal advice and assistance / Insolvency proceedings, legal aid / Insolvency proceedings, counsel, appointment.

#### *Headnotes:*

The competent court does not infringe the principle of equality before the law, which is guaranteed by Article 3.1 of the Basic Law in conjunction with Article 20.3 of the Basic Law, or the principle of effective legal protection if a party who does not have sufficient command of the German language is denied the appointment of counsel.

This applies in particular to so-called private insolvency proceedings, in which the applicant must comply with the essential prerequisites already before the opening of the insolvency proceedings.

#### *Summary:*

I. The constitutional complaint concerns the denial of the appointment of counsel to the assisted party in insolvency proceedings pursuant to § 4a.2 of the Insolvency Statute (*Insolvenzordnung*, hereinafter, the “Statute”). Insolvency proceedings serve to discharge, under certain conditions, an illiquid debtor of his or her residual debt to make it possible for the debtor to lead a life without debt in the foreseeable future.



The applicant, who does not have sufficient command of the German language, had been denied the appointment of her counsel in the opening proceedings. The competent courts assumed that the insolvency proceedings were not overly complex, because there were only two creditors, and that the applicant's language problems required the provision of an interpreter, but not the appointment of counsel.

II. The Third Chamber of the First Panel did not admit the constitutional complaint for decision. When denying the applicant the appointment of counsel, the Courts did not violate fundamental rights. In the opening proceedings, including the proceedings regarding the plan for the settlement of debts, the appointment of counsel was not yet constitutionally required. The principle of equal legal protection under Article 3.1 in conjunction with Article 20.3 of the Basic Law and the guarantee of effective legal protection (Articles 19.4 and 20.3 of the Basic Law) do not require to place not so well-to-do parties to proceedings on a completely equal footing with well-to-do parties. Instead, it is only required to place not so well-to-do parties on an equal footing with well-to-do parties who reasonably weigh their chances of success in the proceedings and also take the costs risk that is caused by the proceedings into account. In legal aid proceedings, a court decision which, for example, holds in a generalised manner that due to the court's duty to make official investigation, it is not required to appoint counsel, infringes this principle. The different roles of court and counsel may make the appointment of counsel appear as a requirement also in proceedings in which it is the court's duty to make official investigation. The counsel's legal duty to provide clarification and to give advice exceeds the scope of the court's duty to make an official investigation. In its decision whether to appoint counsel, a court must take the special circumstances of the individual case into account. Such circumstances include, in particular, the applicant's own ability to safeguard his or her rights and the complexity of the factual and legal situation, but also the importance of the proceedings for the person affected.

Considering this, it is not objectionable if the insolvency courts, as in the present case, restrict the appointment of counsel in the opening proceedings to exceptional cases. The most important submissions of declarations and documents that are required for a request to open insolvency proceedings to be lodged in due form, which is the prerequisite for a subsequent discharge of residual debt, must be made by the debtor already before the opening of

insolvency proceedings (§ 305.1 of the Statute). The debtor:

- must have made an attempt to settle out of court with the creditors, and must already have drawn up a plan for the out-of-court settlement;
- must submit a record of assets and a record of the claims against him or her; if appropriate, the debtor must request from the creditors to provide him or her with a written statement of their claims, if necessary, the debtor must enforce the provision of such statement by legal action. Moreover, the debtor must submit a plan for the settlement of debts, for which § 305.1.4 of the Statute makes detailed provision. For such submissions, one would normally employ the services of a lawyer. Because these steps are required before the opening of the proceedings, and because they are not regarded as part of the proceedings, a not so well-to-do party can employ the services of a lawyer for such steps pursuant to the Legal Advice and Assistance Act (*Beratungshilfegesetz*).

#### *Languages:*

German.



#### *Identification:* GER-2009-3-025

**a)** Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 14.04.2003 / **e)** 1 BvR 1998/02 / **f)** / **g)** *Kammerentscheidungen des Bundesverfassungsgerichts Band 1, 111-117* / **h)** *Neue Juristische Wochenschrift* 2003, 2976-2978; CODICES (German).

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

3.9 General Principles – **Rule of law**.  
 5.2 Fundamental Rights – **Equality**.  
 5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial**.

*Keywords of the alphabetical index:*

Legal aid, grant / Legal protection, guarantee of equality / Civil-law proceedings, legal aid.

*Headnotes:*

The principle of equality before the law that is guaranteed by Article 3.1 of the Basic Law in conjunction with Article 20.3 of the Basic Law is violated if the competent court places excessive requirements on the chances of success of the legal remedy or defence sought, thus clearly defeating the purpose of legal aid, which is to achieve a large degree of similarity in the treatment of not so well-to-do parties as regards their recourse to a court.

If the taking of evidence is a serious possibility, and if there are no specific and clear indications which point to an outcome of the taking of evidence that, in all probability, will be to the applicant's disadvantage, it is contrary to the principle of equality before the law to deny a not so well-to-do party legal aid on the grounds that the party's legal remedy or defence sought has no chance of success.

*Summary:*

I. Before the competent Local Court (*Amtsgericht*), the applicant sought damages for pain and suffering with the allegation that the defendant had injured him in a pub brawl. The Local Court took testimonial evidence and obtained the public prosecutor's investigation records. The Local Court thereupon rejected the action on the grounds that it could not be established that the defendant took part in the brawl.

Under the condition of his being granted legal aid, the applicant lodged an appeal and named other witnesses. The Regional Court (*Landgericht*), as the competent court of appeal, denied the application for legal aid. The Regional Court held that the interrogation of the newly named witnesses would be tantamount to exploration, because the applicant himself could not furnish a description of the offender. The Court further held that the applicant's hope that the witnesses would recognise the defendant as the offender was not sufficient for ordering their interrogation.

By way of his constitutional complaint, the applicant challenges the violation of Article 3.1 of the Basic Law (principle of equality before the law) in conjunction with the principle of the rule of law.

II. The Third Chamber of the First Panel granted the constitutional complaint and overturned the challenged Regional Court decision. The reasoning

was essentially as follows: Article 3.1 of the Basic Law in conjunction with the principle of the rule of law requires that there be a large degree of similarity in the treatment of well-to-do and not so well-to-do parties to legal proceedings seeking legal protection.

Admittedly, the grant of legal aid can be made dependent on whether the legal remedy or defence sought appears to have a sufficient chance of success. When a court is deciding whether to grant legal aid, its examination of how successful a claim is likely to be should, however, not be allowed to make the legal remedies or defences involved in such claim issues in the summary proceedings of legal aid, since to do so, would be to set the latter in the place of the proceedings in the main action. Legal aid proceedings are supposed to make accessible the legal protection that is required by the principle of the rule of law, not to provide such protection themselves.

The competent courts' interpretation and application of the provisions concerning legal aid violate constitutional law if mistakes are apparent in the challenged decision that are based on a fundamentally erroneous view of the meaning of the principle of equality before the law that is enshrined in Article 3.1 in conjunction with Article 20.3 of the Basic Law. This is the case if the competent court places excessive requirements on the chances of success of the legal remedy or defence sought, thus clearly defeating the purpose of legal aid, which is to achieve a large degree of similarity in the treatment of not so well-to-do parties as regards their recourse to a court.

If the taking of evidence is a serious possibility, and if there are no specific and clear indications that point to an outcome of the taking of evidence that will, in all probability, be to the applicant's disadvantage, it is contrary to the principle of equality before the law to deny a not so well-to-do party legal aid because the party's legal remedy or defence sought has no chance of success.

The Regional Court's decisions do not comply with these principles. The Court's forecast concerning the named witnesses' evidence does not provide specific and clear indications that point to an outcome of the taking of evidence that will, in all probability, be to the applicant's disadvantage. The taking of evidence with regard to a relevant fact can only be denied on the grounds that such taking of evidence constitutes impermissible exploratory questioning if:

- the fact for which evidence is adduced is defined in so vague a manner that its relevance cannot be assessed; or

- if the fact has the form of a definite allegation, the allegation, however, is made at random, which means that it is unfounded and therefore constitutes an abuse of the right to a hearing in court.



This is not the case here. The applicant's motion to take evidence names the witnesses in order to furnish proof of the fact that the defendant is the offender, and that they can recognise him. The relevance of this assertion can be easily assessed. Considering this, the Regional Court's assumption that the interrogation of the witnesses would be tantamount to purely exploratory questioning lacks a sufficient procedural basis and places requirements upon the chances of success under the terms of § 114 of the German Code of Civil Procedure (*Zivilprozessordnung*, hereinafter, the "Code"), which are so excessive that they are not constitutionally justifiable.

There was also no need for the applicant's motion to take evidence to contain the witnesses' description of the offender. It is clearly not required for a sufficiently defined motion to take evidence that the party giving evidence makes the evidence appear reasonable in terms of an anticipated evaluation of evidence. In this case, the Regional Court misjudged the fact that the party giving evidence does not have to consider, while submitting evidence, whether the submitted evidence is probable.

The challenged decisions are based on the violation of the Constitution that has been established. They are therefore overturned. It cannot be excluded that the Regional Court would have made an order that would have been more advantageous to the applicant if the proceedings before the Regional Court had complied with Article 3.1 of the Basic Law.

For the constitutional assessment it is irrelevant whether the Regional Court could have denied the chances of success of the appeal for other reasons. For such hypothetical considerations there is no room in constitutional complaint proceedings. It is not for the Federal Constitutional Court to decide issues that concern the Code to the extent that they do not affect the sphere of constitutional law. Therefore, the Federal Constitutional Court may also not itself decide, thereby anticipating the competent court's decision, for example whether it is impermissible pursuant to § 531 of the Code to name witnesses for the first time in the instance of appeal, which would be a possible reason for denying the chances of success in the instance of appeal.

#### *Languages:*

German.

#### *Identification:* GER-2009-3-026

**a)** Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 09.05.2003 / **e)** 1 BvR 114/03 / **f)** / **g)** / **h)** CODICES (German).

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

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

Proceedings, subsidiarity, Constitutional Court, principle.

#### *Headnotes:*

If an applicant regards a procedural-law provision as unconstitutional, he or she must already assert this before the court whose jurisdiction he or she has invoked so that the court receives an impulse which induces it to examine the constitutional question and, if necessary, to adjust its proceedings in such a way that the infringement of the Constitution is prevented or remedied, or that the alleged infringement of the Constitution is referred to the Federal Constitutional Court pursuant to Article 100.1 of the Basic Law (concrete review of statutes). If the applicant does not do so, he or she infringes the principle of subsidiarity (sentence 1 of § 90.1 of the Federal Constitutional Court Act).

#### *Summary:*

I. The applicant claims that a court of appeal can, by its choice of the type of decision, and in a manner that is not open for review, deny a second-instance oral hearing and control the recourse to appeal proceedings that deal with points of law. According to the applicant, this is an infringement of the right to take recourse to a court and of the right to a hearing in court. The applicant further asserts that it is not justified pursuant to Article 3.1 of the Basic Law (principle of equality before the law) that appeal judgments pursuant to §§ 542 et seq. of the German Code of Civil Procedure (*Zivilprozessordnung*, hereinafter, "the Code") and orders that dismiss an

appeal as inadmissible pursuant to sentence 4 of § 522.1 of the Code are appealable, but that orders that immediately reject an appeal pursuant to § 522.3 of the Code are unappealable.

II. The Third Chamber of the First Panel did not admit the constitutional complaint for decision, its reasoning being essentially as follows:

The principle of subsidiarity under § 90.2 of the Federal Constitutional Court Act, which requires the applicant to make, already in the original proceedings, use of all possibilities to ensure that the alleged fundamental rights violation is remedied or prevented, has not been complied with. If an applicant regards a procedural-law provision as unconstitutional, he or she must already assert this before the court whose jurisdiction he or she has invoked so that the court receives an impulse that induces it to examine the constitutional question and, if necessary, to adjust its proceedings in such a way that the infringement of the Constitution is prevented or remedied, or that the alleged infringement of the Constitution is referred to the Federal Constitutional Court pursuant to Article 100.1 of the Basic Law (concrete review of statutes). This procedure is supposed to achieve that:

1. the Federal Constitutional Court is submitted a case whose constitutional aspects have already been examined; and
2. that the legal opinion of a court of general jurisdiction is made known to the Federal Constitutional Court.

The applicant has not complied with this requirement. When the court of appeal announced, by way of its order pursuant to sentence 2 of § 522.2 of the Code, that it would immediately reject the appeal, the applicant should at least have challenged this as being unconstitutional and should have pointed out that by way of this procedure, he was denied recourse to the instance of appeal.

#### *Languages:*

German.



#### *Identification: GER-2009-3-027*

**a)** Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 02.09.2009 / **e)** 1 BvR 3171/08 / **f)** Excessive duration of proceedings / **g)** / **h)** *Anwaltsblatt* 2009, 801-803; CODICES (German).

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

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

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

Civil proceedings, duration, excessive / Proceedings, speeding up.

#### *Headnotes:*

1. The guarantee of effective legal protection, which also applies in civil-law disputes, results in the competent courts' obligation to terminate proceedings in a reasonable period of time.

2. When considering the question of when the duration of proceedings becomes excessive, all circumstances of each individual case must be taken into account. These include the importance of the matter to the parties, the consequences lengthy proceedings might have for the parties, the complexity of the facts of the matter, the parties' behaviour as well as activities by third parties which cannot be influenced by the court, especially those of judicially appointed independent experts.

Furthermore, the courts must take the overall duration of the proceedings into account; and with an increasing length of the proceedings, they have to make sustained efforts to speed them up.

3. With regard to the duration of proceedings, it may be necessary to accept the organisational effort that results from keeping the records twice.

#### *Summary:*

I. The constitutional complaint relates to civil proceedings concerning a compensation claim brought after the termination of a partnership contract of a firm of tax consultants. The applicant had terminated the contract because the defendant had acted for clients on his own account.

The proceedings have been pending before the Hanover Regional Court (*Landgericht*) since 1995, i.e. for fourteen years. Two partial rulings issued by the Regional Court were overturned by the Higher Regional Court (*Oberlandesgericht*) in 2004 and 2008, and the matter was referred back to the Regional Court on both occasions. What is in dispute, apart from the value of the firm, is whether and to what extent the applicant continued to act for clients after the termination of the partnership and thereby generating turnover that would reduce her compensation claim. The outcome of the proceedings is of particular importance to the applicant for two reasons. Firstly, according to the applicant's submissions, the claim constitutes the major part of her property. Secondly, she is still burdened by debts incurred by the acquisition of the terminated participation in the firm of tax consultants.

The extraordinarily long duration of these complicated proceedings, in which an opinion and five supplementary opinions from independent experts have been asked for to date, is due to some circumstances which cannot be imputed to the court. Apart from the complexity of the legal action, it should particularly be taken into account that a considerable period of time passed due to the taking of the opinions. Their delivery was delayed by the fact that necessary documents were seized by the public prosecution office for some time. Moreover, the result of the public prosecutor's investigations was important for assessing the value of the firm. Therefore, the parties waited for it, in order to avoid duplicated effort. As a result, the first opinion could only be delivered in 2000. A counterclaim asserted in 2001 and setoffs claimed in 2002 have resulted in further complications and delays to the proceedings.

II. The Third Chamber of the First Panel of the Federal Constitutional Court admitted the constitutional complaint for decision and established a violation of the right to effective legal protection under Article 2.1 in conjunction with Article 20.3 of the Basic Law.

The Regional Court cannot be reproached for delaying the proceedings simply by inaction. However, the finding of a violation of the Constitution is based on the fact that in view of the increasing duration of the proceedings, which was extraordinarily long, the Regional Court should not have confined itself to treating the proceedings like a normal but complex legal action. Rather, the Higher Regional Court should, after a few years, have availed itself of all possibilities at its disposal to speed up the proceedings. Accessing other resources internal to the court should also have been a consideration. The

Regional Court could have avoided some of the delays. When, for instance, the composition of the chamber presiding over the case changed, procedural orders such as setting the date for an oral hearing and asking for one of the supplementary opinions were made by the chamber in its new composition. The chamber in its old composition could have done this. Apart from avoidable minor delays, the fact that the Regional Court did not start to take evidence until April 2009 on the question of whether the applicant's claim might be reduced due to her possibly continuing to act for clients of the partnership carries particular weight. No evidence was taken although the parties had named many witnesses to the court and the relevance of this point had been bindingly established by the Higher Regional court as early as in 2004. The Regional Court could have examined the witnesses at the same time the supplementary opinions were asked for. In view of the duration of the proceedings, the effort resulting from the compilation of a duplicate record would have had to be accepted. The supplementary opinions were not of prior importance to the examination of the witnesses; it was therefore not mandatory to take them in advance. It is also hard to understand why the Regional Court did not request the fourth supplementary opinion parallel to the appellate proceedings on the second partial ruling in 2007. At this advanced stage, this would have considerably sped up the proceedings.

#### *Cross-references:*

On the issue of the excessive duration of proceedings, see also decision no. 1 BvR 2662/06 passed shortly before on 30 July 2009 (accessible in German under its file number on the Federal Constitutional Court's website).

#### *Languages:*

German.



*Identification:* GER-2009-3-028

a) Germany / b) Federal Constitutional Court / c) Second Chamber of the Second Panel / d) 03.09.2009 / e) 2 BvR 1826/09 / f) Extradition decision, European arrest warrant / g) / h) *Strafverteidiger Forum* 2009, 455-458; CODICES (German).

*Keywords of the systematic thesaurus:*

3.10 General Principles – **Certainty of the law.**  
 3.12 General Principles – **Clarity and precision of legal provisions.**  
 5.3.9 Fundamental Rights – Civil and political rights – **Right of residence.**

*Keywords of the alphabetical index:*

Arrest, warrant / Extradition, safeguard / Criminal prosecution, within the European Union.

*Headnotes:*

1. The constitutional prerequisites placed on the extradition of Germans and the principles of legal clarity and legal certainty require that every statute implementing sentence 2 of Article 16.2 of the Basic Law (protection of German nationals from extradition abroad) is understandable in its own right and that it sufficiently predetermines the decisions on applications for the grant of extradition. Only if sufficient legal clarity exists will decisions as to the boundaries of the freedom of citizens not be left to the discretion of the administration. Courts can only control the administration on the basis of legal standards if statutes are sufficiently precise and clear. If this is not the case, there is a risk of infringing the constitutional ban on excessiveness. The requirements placed on clarity are particularly applicable in cases of chains of reference and where a particular subject is regulated by the interplay of statutes.

2. A ruling, which even within the scope of application of the Council Framework Decision of 13 June 2002 on the European arrest warrant focuses on the meaning and objective of the European arrest warrant to simplify extraditions between the Contracting States, overlooks the claim concerning the protection resulting from being German. In a weighing of interests, which is always necessary, the individual interest must be balanced with the European interest in cross-border prosecution.

*Summary:*

I. The applicant has German and Greek nationality. He was suspected of giving bribes in commercial practice and of money laundering. The Greek authorities requested his arrest on the basis of a European arrest warrant to ensure his extradition to Greece.

Following the applicant's provisional arrest on 25 June 2009, the Higher Regional Court (*Oberlandesgericht*) declared his extradition admissible on 10 August 2009. On 12 August 2009, the Chief Public Prosecutor decided to grant his extradition.

§ 9 no.2 of the Act on International Mutual Assistance in Criminal Matters (the Act) provides that if German jurisdiction is also established for the offence, extradition is not permissible if prosecution or execution is statute-barred under German law or is ruled out on account of a German law granting exemption from punishment.

In the view of the Higher Regional Court, the statute is not contrary to the applicant's extradition. The Court acknowledged that under German law, the offences with which the applicant had been charged would have become statute-barred in September 2008. However, the period of limitation was interrupted within the meaning of § 9 no. 2 of the Act. Extradition for criminal prosecution is also permissible if the offence can no longer be punished within the domestic territory, but the prosecuting authorities of the requesting state have performed acts that would be suitable to interrupt the period of limitation under German law. The Court held that the Greek authorities had performed such acts.

In his constitutional complaint, the applicant challenged the rulings of the Higher Regional Court and of the Munich Chief Public Prosecutor.

II. The Second Chamber of the Second Panel of the Federal Constitutional Court admitted the applicant's constitutional complaint for decision to the extent that it challenges a violation of his fundamental right to protection from extradition stemming from sentence 1 of Article 16.2 of the Basic Law.

The rulings of the Higher Regional Court and of the Chief Public Prosecutor were overturned as they resulted in a violation of the Constitution. This is not a final ruling on the extradition itself. Instead, the competent agencies are called upon to make a new decision. The Chamber does not, on principle, object to the extradition of a German national to Greece on the basis of a European arrest warrant. It found, however, that the decisions granting extradition show

shortcomings as regards their precision and in the weighing of interests.

Constitutional case-law acknowledges that a balance must be struck in every concrete case between European interests in cross-border prosecution and the claim to protection of the holders of fundamental rights affected that follows from sentence 1 of Article 16.2 of the Basic Law. This fundamental-rights guarantee covers the high demands placed on legal certainty in the domestic law governing extradition proceedings. With regard to the question of legal certainty in extradition proceedings, it is decisive and it must therefore be taken into account in the present case that pursuant to § 9 no. 2 of the Act, extradition for offences in which German jurisdiction is also established can only be carried out if prosecution is not yet statute-barred under German law. The running of limitation periods can be interrupted by investigation measures, but only the Greek authorities, not the German authorities, had carried out these measures.

A violation of the fundamental right to protection from extradition occurred because the Higher Regional Court and the Chief Public Prosecutor should not have restricted themselves to examining whether prosecution measures taken by Greek authorities would also be suitable to interrupt the limitation period under the relevant provisions of German law. Instead, the German authorities, relying on the requirements placed on precision in extradition proceedings, should have taken into account the insecurities and "imponderables" which such comparative considerations across legal systems necessarily involve. Apart from language difficulties, the fact that the provisions and procedures governing the law of criminal procedure are different in every European Union Member State can give rise to uncertainty and create the potential for breaches of fundamental rights. This also applies to European arrest warrant proceedings. They simplify extradition between the European Union Member States within an economic and judicial area that grows ever closer together. However, they also allow every European Union Member State to deny extradition of its nationals if prosecution is statute-barred within the domestic territory. The open question of whether and to what extent foreign procedural acts have an effect on the running of the limitation period within the German legal system was not dealt with sufficiently by the challenged ruling of the Higher Regional Court, and particularly with regard to the precision of the legal basis.

#### *Cross-references:*

Another European arrest warrant was issued against the applicant on 29 June 2009 for a different complex of offences. In this case as well, the Munich Higher

Regional Court declared extradition permissible, and the Munich Chief Public Prosecutor again decided to permit extradition. The applicant lodged another constitutional complaint, on account of which the Federal Constitutional Court overturned these decisions on 9 October 2009. The Federal Constitutional Court's decision in German and the corresponding press release in German and English are accessible on the Federal Constitutional Court's website under their file no. 2 BvR 2115/09.

#### *Languages:*

German.



#### *Identification:* GER-2009-3-029

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 13.10.2009 / **e)** 2 BvE 4/08 / **f)** Bundeswehr deployment in Kosovo / **g)** / **h)** CODICES (German).

#### *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, use, abroad / Defence, approval.

#### *Headnotes:*

A new approval by the *Bundestag* of a deployment of armed forces abroad is only necessary if the mandate of deployment under international law has evidently ceased to exist or if the German *Bundestag* has expressly made its approval contingent on the continued existence of specific conditions.

#### *Summary:*

I. Since 1999, the *Bundeswehr* (German Federal Armed Forces) has been participating in the international KFOR mission in Kosovo. The mission

takes place on the basis of a UN mandate under NATO leadership; it seeks to prevent the violent confrontations between Serbs and Kosovo Albanians from flaring up again. In February 2008, Kosovo unilaterally declared its independence, breaking away from Serbia, and has since been recognised by a large number of states, among them the Federal Republic of Germany. After the declaration of independence, the Federal Government continued the *Bundeswehr's* ongoing military commitment. The *Organstreit* proceedings (proceedings on a dispute between supreme constitutional bodies) brought by the Left Party parliamentary group in the German *Bundestag* are directed against this. The parliamentary group is of the opinion that Kosovo's declaration of independence has essentially changed factual and legal circumstances. It applied for a finding that fresh approval should have been obtained from the German *Bundestag* before continuing the KFOR deployment of the *Bundeswehr*.

II. The Second Panel of the Federal Constitutional Court rejected the application directed against the Federal Government pursuant to § 24 of the Federal Constitutional Court Act. Under this provision, applications may be rejected by a unanimous order of the court if they are inadmissible or clearly unfounded. The Panel did not object to the *Bundeswehr* deployment having been continued after Kosovo's declaration of independence. It held that the Federal Government was not constitutionally obliged to obtain a new approval from the German *Bundestag* without delay.

The Federal Constitutional Court's case-law has clarified that the *Bundeswehr* is a parliamentary army. Every deployment of armed forces therefore requires approval from the *Bundestag*, which in principle must be obtained in advance. It follows from this principle, which is known as the requirement of parliamentary approval (*Parlamentsvorbehalt*), that the Federal Government must obtain fresh approval from the *Bundestag's* of a deployment of armed forces if factual or legal circumstances have ceased to exist which have been cited as necessary preconditions for a deployment in the resolution of approval. With regard to the question of when a new resolution of approval by the *Bundestag* will be necessary, aspects of legal certainty and legal clarity are decisive and must therefore be taken into account in the present case. Accordingly, a parliamentary resolution of approval cannot lose its effect if the continued existence of the circumstances on which the *Bundestag* based its approval merely becomes doubtful. Instead, the requirement of parliamentary approval demands that in cases of doubt, the *Bundestag* itself assumes responsibility for the final assessment of the circumstances in question. The

*Bundestag* has the possibility under constitutional law to dispel doubts about the continued validity of its approval. If necessary, it can exercise its right to recall the troops, i.e. it can formally end a deployment of armed forces. Such a resolution to recall the troops can only be dispensed with – in the sense that approval is automatically rendered ineffective – if the circumstances to which the approval relates have obviously ceased to exist. This standard of evidence is constitutionally required, because otherwise the Basic Law would place the Federal Government in a dilemma: it would have to obtain new *Bundestag* approvals as purely precautionary measures with every contentious change of the factual or legal circumstances, so as to avoid accusations of a violation of the Constitution by omission.

Even after Kosovo's declaration of independence, the *Bundeswehr* deployment was allowed to continue on the basis of the parliamentary approval granted previously. A new decision by the German *Bundestag* can be dispensed with, because the unilateral breaking away from Serbia has not evidently dispensed with the mandate of deployment under international law on which the *Bundestag* had made contingent its previous approval. On the contrary, the UN mandate for the KFOR mission has neither been eliminated to date, nor has it been replaced by a new resolution. It remains in force for an unlimited period of time. If the required standard of evidence is applied, the Panel does not have to review whether the UN mandate continues to exist only formally, but not substantively, as was suggested by the applicant. The objective of *Organstreit* proceedings is to protect the rights of the state bodies in their relations with one another; not general supervision under the Constitution or even under international law. Moreover, the German *Bundestag* has not formulated any essential preconditions for approval apart from the continued applicability of the UN mandate. The *Bundestag* could easily have expressed willingness to approve the *Bundeswehr* deployment in Kosovo only if certain external circumstances applied. However, it has not done so.

#### *Languages:*

German.





*Identification:* GER-2009-3-030

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 04.11.2009 / **e)** 1 BvR 2150/08 / **f)** Wunsiedel assembly, Commemoration of Rudolf Hess / **g)** / **h)** *Deutsches Verwaltungsblatt* 2010, 41-48; *Neue Juristische Wochenschrift* 2010, 47-56; CODICES (German).

*Keywords of the systematic thesaurus:*

1.4.9 Constitutional Justice – Procedure – **Parties**.  
 5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion**.  
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.  
 5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly**.

*Keywords of the alphabetical index:*

Constitutional complaint / Political party, racist / Extremism, right-wing.

*Headnotes:*

1. Although it is not a general law, § 130.4 of the German Criminal Code is compatible with Article 5.1 and 5.2 of the Basic Law. In view of the injustice and the terror, eluding general categories, that National Socialist rule brought to Europe and large tracts of the world, and the fact that the foundation of the Federal Republic of Germany was understood as a counter-concept to that rule, an exception to the ban on special legislation regarding opinion-related laws is inherent in Article 5.1 and 5.2 of the Basic Law for provisions that set limits to the propagandistic approval of the historical National Socialist rule of arbitrary force.

2. The openness of Article 5.1 and 5.2 of the Basic Law to such special provisions does not detract in any way from the substance of freedom of opinion. The Basic Law does not justify a general ban on the dissemination of right-wing extremist or National Socialist thought with regard to the intellectual effect of its content.

*Summary:*

I. The applicant gave advance notice of his intention to organise an open-air event in the town of Wunsiedel once a year until 2010. The event was also to take place on 20 August 2005. The intended motto of the event was “In Commemoration of Rudolf Hess”. Rudolf Hess was Adolf Hitler’s deputy within the National Socialist German Workers’ Party

between 1933 and 1941. The assembly planned for August 2005 was banned due to a danger to public security under § 15.1 of the Assemblies and Processions Act (*Gesetz über Versammlungen und Aufzüge*) in conjunction with § 130.4 of the Criminal Code (*Strafgesetzbuch*). The immediate enforcement of the ban was ordered.

§ 15.1 of the Assemblies and Processions Act allows a competent authority to ban the assembly or procession, or make it contingent on certain conditions, if according to the circumstances prevailing when the order is issued, the holding of the assembly or procession would pose a direct threat to public security or public order. Under this provision, a danger to public order can be presumed if there is a risk of a breach of criminal law provisions such as § 130.4 of the Criminal Code. This Article reads as follows: “Any person who, publicly or in an assembly, disturbs the public peace by approving, glorifying or justifying the National Socialist rule of violence and arbitrariness in a manner violating the dignity of the victims shall be punished with imprisonment for up to three years or a fine.” The applications for temporary relief made in respect of the ban of the assembly and the action brought as a result were unsuccessful at all instances.

In his constitutional complaint, the applicant, who died on 29 October 2009, contested § 130.4 of the Criminal Code and the interpretation the Federal Administrative Court (*Bundesverwaltungsgericht*) gave to it in the present case. He also suggested that his fundamental rights of freedom of assembly and freedom of opinion had been breached, as had the principle of precision of statutes.

II. The First Panel of the Federal Constitutional Court rejected the constitutional complaint as unfounded, based on the following considerations:

a. The constitutional complaint is admissible

It can be decided upon in spite of the applicant’s death. This follows from the objective function of the instrument of the constitutional complaint to safeguard, interpret and further develop constitutional law. The decision to be taken by the court has wider ramifications than the personal impact on the applicant, such as clarification of the legal situation concerning expressions of opinion in a large number of future public gatherings and assemblies. It is of general constitutional importance. The matter was also almost at “decision point” at the time of the applicant’s death. The Panel had deliberated it, and the proceedings were almost complete.

b. The constitutional complaint is unfounded

§ 130.4 of the Criminal Code is compatible with the Basic Law. It encroaches on the area of protection of the freedom of opinion (Article 5.1 of the Basic Law) because the provision makes reference to expressions of opinion which approve of, glorify and justify the National Socialist rule of arbitrary force. It makes them punishable under certain other conditions.

In principle, encroachments on the freedom of opinion are only permissible on the basis of a general law pursuant to Article 5.2 alternative 1 of the Basic Law. A law that restricts opinions is deemed impermissible “special legislation” if it is not drafted in a sufficiently open manner and if it is from its inception only directed against certain convictions, attitudes or ideologies. As regards encroachments on the freedom of opinion, the general nature of the law which is required guarantees a specific and strict ban on discrimination with regard to certain opinions.

The Basic Law gives credence to the power of free discussion as the most effective weapon against the dissemination of totalitarian ideologies that show contempt for humanity. Accordingly, even the dissemination of National Socialist ideas, which radically challenge the existing order, does not *prima facie* fall outside the area of protection of the freedom of opinion. The free order of the Basic Law primarily assigns the task of counteracting the associated dangers to civic commitment in free political discourse.

§ 130.4 of the Criminal Code is not a general law within the meaning of Article 5.2 alternative 1 of the Basic Law: It does not aim to protect the victims against force and arbitrariness in general and deliberately does not focus on the approval, glorification and justification of the rule of arbitrary force of totalitarian regimes. Instead, it is limited to positive opinions only with regard to National Socialism.

Although it is not a general law, § 130.4 of the Criminal Code is, by way of exception, compatible with Article 5.1 and 5.2 of the Basic Law. In view of the injustice and terror caused by National Socialist rule, an exception to the ban on special legislation is inherent in Article 5.1 and 5.2 of the Basic Law for provisions that set limits to the propagandistic approval of the historical National Socialist rule of arbitrary force.

This exception, however, does not detract from the content of freedom of opinion. Freedom of opinion guarantees that laws are not directed against purely intellectual effects of expressions of opinion. The

objective of hindering statements on account of their incompatibility with social or ethical views eliminates the very principle of freedom of opinion and is illegitimate. Therefore, the Basic Law does not justify a general ban on the dissemination of right-wing extremist or National Socialist thought with regard to the intellectual effect of its content.

§ 130.4 of the Criminal Code meets the requirements of the principle of proportionality. Aimed at the protection of public peace, the provision pursues a legitimate objective. In this context, the protection of public peace is to be understood, in a restricted sense, as the protection of the peacefulness of public debate. However, it does not mean protection against a “poisoning of the intellectual climate” or against an insult, constituted by totalitarian ideologies or an obviously erroneous interpretation of history, of the population’s ability to know right from wrong. Public peace is aimed at protection of legal interests at a very early stage which makes reference to emerging threats. In this context, it is a constitutionally viable assessment by the legislator that approving the National Socialist rule of arbitrary force will as a general rule appear to today’s population as an aggressive act and an attack on those who see their worth and their rights called into question, and which, with a view to historic reality, has a stronger effect than a mere confrontation with an ideology that is hostile towards democracy and freedom. The terms used in § 130.4 are also suitable, necessary and proportionate (in the narrower sense). It does not rule out an approving view of measures taken by the National Socialist regime or positive reference to days, places or forms which are reminiscent of this time and have a highly symbolic value. Instead, its realisation presupposes the approval of National Socialism as a rule of arbitrary force and as a historical reality. The approval can also take the shape of a glorifying tribute to a historical person if it emerges from the concrete circumstances that this person stands for the National Socialist rule of arbitrary force *per se*.

§ 130.4 of the Criminal Code is also in harmony with Article 103.2 of the Basic Law (principle of precision of criminal law provisions). Certain doubts may arise as to whether “disturbance of public peace” as an element of criminal offences that justifies punishment is compatible with Article 103.2 of the Basic Law. This concept is open to many interpretations and is susceptible to an interpretation that does not take due account of the fundamental significance of the liberty rights in the constitutional order. However, the element of “disturbance of public peace” in a criminal law provision does not pose a problem regarding the requirement of precision under Article 103 of the Basic Law if it is lent concrete shape by the

other elements of the criminal offence which can themselves carry the threat of punishment. Thus, it has the effect of a corrective element allowing the possibility to enforce fundamental rights assessments in individual cases. To this extent the legislator was allowed to regard the approval, glorification or justification of the historical National Socialist rule of arbitrary force, expressed in public or in an assembly, by itself, in principle at any rate, as punishable and sufficiently definite.

The interpretation given to § 130.4 of the Criminal Code by the Federal Administrative Court in these proceedings is in line with the Constitution. The confirmation of the ban on the planned assembly is within the boundaries of evaluation of the non-constitutional courts. In particular, the assessment that the assembly for the “commemoration of Rudolf Hess” would have been tantamount to approving the historical National Socialist rule of arbitrary force, does not pose constitutional problems.

#### Languages:

German.



#### Identification: GER-2009-3-031

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 01.12.2009 / **e)** 1 BvR 2857/07, 1 BvR 2858/08 / **f)** Berlin shop opening hours, Sunday opening in the retail sector / **g)** / **h)** *Gewerbearchiv* 2010, 29-34; CODICES (German).

#### Keywords of the systematic thesaurus:

5.1.1.5.2 Fundamental Rights – General questions – Entitlement to rights – Legal persons – **Public law**.  
5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.

#### Keywords of the alphabetical index:

Retail activity, regulation / Shop, closure / Religious community / Sunday, secular character.

#### Headnotes:

1. The legislator’s duty to protect fundamental rights – in this case, stemming from Article 4.1 and 4.2 of the Basic Law – is shaped by the mandate under objective law of protecting Sundays and holidays which follows from Article 139 of the Weimar Constitution (*Weimarer Reichsverfassung*) in conjunction with Article 140 of the Basic Law.

2. The provisions concerning the Sundays in Advent under § 3.1 of the Berlin Shop Opening Hours Act (*Berliner Ladenöffnungsgesetz*) are not in harmony with the guarantee of rest from work on Sundays and holidays.

#### Summary:

I. The *Länder* (states) of the Federal Republic of Germany have legislative competence over the law governing shop opening hours. They have regulated this matter in different ways. The Berlin Shop Opening Hours Act of 2006 (hereinafter, the “Act”) lifts the ban on the Sunday opening of shops for all four successive Sundays in Advent from 1 p.m. to 8 p.m. without any other preconditions. The ban can be lifted “in the public interest” on four more Sundays and holidays per year through a general order made by the Senate Administration. Retail shops can also open between 1 p.m. and 8 p.m. on two other Sundays or holidays on the occasion of “special events, in particular company anniversaries and street parties”. On working days, shops may open 24 hours a day.

The Evangelical Church Berlin-Brandenburg-Silesian Oberlausitz and the Berlin Archdiocese filed constitutional complaints challenging the possibilities for Sunday and holiday trading in Berlin, which are more extensive in comparison to the former legal regulation and to the provisions on shop opening hours in other federal *Länder*.

II. The First Panel of the Federal Constitutional Court decided that the provisions on shop opening hours on all four Sundays in Advent are incompatible with Article 4.1 and 4.2 in conjunction with Article 140 of the Basic Law and Article 139 of the Weimar Constitution.

The constitutional complaints are admissible. The churches which lodged the constitutional complaint were authorised to do so. The question of whether and to what extent religious communities can, by means of a constitutional complaint, invoke the constitutional guarantee of Sundays and holidays provided by Article 139 of the Weimar Constitution (in conjunction with Article 140 of the Basic Law) had not been clarified

as yet in the Federal Constitutional Court's case-law. This guarantee is not anchored in the Basic Law's list of fundamental rights, but in the so-called Weimar Church Articles, which are part of the Basic Law (see Article 140 of the Basic Law). The applicants sufficiently expounded the possibility of a violation of their fundamental right under Article 4.1 and 4.2 of the Basic Law (freedom of religion), at any rate in connection with the guarantee of Sundays and holidays under objective law. The possibility of a violation of a fundamental right exists where the constitutional complaint raises a question under constitutional law which has not yet been decided by the Federal Constitutional Court and which does not exclude that a right which can be asserted by means of a constitutional complaint exists. This is the case here as regards the question of whether it is possible to strengthen the fundamental right under Article 4.1 and 4.2 of the Basic Law and to lend it concrete shape through the guarantee of protection under objective law provided by Article 140 of the Basic Law in conjunction with Article 139 of the Weimar Constitution.

The constitutional complaints are partly well-founded. The possibility provided in the challenged provisions of opening shops on all four Sundays in Advent is not compatible with the Basic Law.

As regards its significance as a duty of the legislator to protect, the fundamental right under Article 4.1 and 4.2 of the Basic Law is shaped by the mandate under objective law of protecting Sundays and holidays pursuant to Article 139 of the Weimar Constitution (in conjunction with Article 140 of the Basic Law). Apart from its secular and social significance, the protection of Sundays and holidays is rooted in a religious, Christian tradition. Accordingly, the legislator is to guarantee a minimum level of protection of Sundays and of holidays which are recognised by law (in this case, religious holidays).

The concept of protection, on which the provisions on Sunday and holiday trading in the *Land* Berlin are based, does not take sufficient account of the *Land* legislator's duty to protect. The Act is not a targeted encroachment on the applicants' freedom of religion, and the different provisions on Sunday and holiday trading do not constitute the "functional equivalent" of an encroachment, because the provisions under challenge here are directed at retail shop owners and not at the religious communities. Freedom of religion is, however, not limited to the function of a right of defence. Instead, it also requires, in a positive sense, the safeguarding of space for the active exercise of religious conviction and the realisation of autonomous personality in the area of ideology and religion. The state also has a duty to protect those religious communities, which are organised as corporations

under public law. However, it is, in principle, for the legislator to work out a concept of protection and to implement it by means of provisions. In doing so, the legislator has a broad scope for assessment, evaluation and action.

Viewed in isolation, Article 4.1 and 4.2 of the Basic Law do not impose a duty on the state to place religious, Christian holidays and Sundays under the protection of a general rest from work. This concept would require further elaboration. The fundamental right of religious freedom is, however, shaped by the guarantee of Sundays and holidays under Article 140 of the Basic Law in conjunction with Article 139 of the Weimar Constitution. As an evaluation which is made in the Basic Law, this guarantee affects the interpretation and definition of the scope of protection of Article 4.1 and 4.2, and must therefore also be observed when the legislator's duty to protect resulting from the fundamental right is shaped. Article 139 of the Weimar Constitution contains a mandate of protection for the legislator which provides for the scope of protection of the fundamental right under Article 4.1 and 4.2 of the Basic Law in terms of guaranteeing a minimum level of protection.

The functional orientation of the Weimar Church Articles towards recourse to the fundamental right under Article 4.1 and 4.2 of the Basic Law also applies to the guarantee of the days of rest from work and of spiritual edification in Article 139 of the Weimar Constitution. This is so despite the lack of explicit religious and Christian references in the provision itself. According to its legislative history, its systemic embodiment in the Church Articles and its objectives of regulation, Article 139 of the Weimar Constitution has a religious content, which goes hand in hand with a decidedly social objective and with a secular and neutral orientation. The safeguarding of Sundays and holidays does not simply promote and protect the exercise of the freedom of religion. It also protects the essential basis of man's possibilities of recreation and of social coexistence. It therefore also serves to guarantee the exercise of other fundamental rights which serve the development of one's personality. Rest on Sundays and holidays also serves as a benefit to the protection of marriage and the family as well as to relaxation and the maintenance of health. Its importance essentially results from the synchronicity of time as regards rest from work.

The duty of the state to observe ideological and religious neutrality permits to shape the protection of Article 4.1 and 4.2 of the Basic Law through Article 139 of the Weimar Constitution. The Basic Law itself places Sundays and holidays, to the extent that they are recognised by the State, under a special mandate of protection by the State.

Article 139 of the Weimar Constitution establishes relationship of rule and exception with regard to work on Sundays and holidays. In principle, typical “working day activity” has to cease on those days, with the protection of Sundays and holidays not being limited to their religious or ideological meaning. In the secularised social and state order the provision is also aimed at pursuing secular objectives such as personal rest, contemplation, relaxation and diversion. Here, the possibility of spiritual edification, which is also covered by Article 139 of the Weimar Constitution, is intended to be granted to all people irrespective of religious commitment.

It therefore becomes apparent that the statutory concepts of protection of guaranteed rest on Sundays and holidays must make these days, in a recognisable manner, days of rest from work. The possibility of Sunday trading accordingly requires a factual reason which will not detract from the protection of Sundays. A mere economic interest by retail shop owners in generating turnover and an everyday interest in purchasing by potential buyers are not, in principle, sufficient justifications. Exceptions must remain recognisable as such to the public; they should not amount to life on Sundays and holidays being virtually identical to life on working days.

The precept of rule and exception grows in importance when the arguments against Sunday trading are accorded less weight and when more retail outlets open in terms of the area and the lines of commerce and classes of products involved. A comprehensive lifting of the ban on opening shops across the entire retail sector requires justifying reasons of particular weight if the ban is intended to be lifted for several successive Sundays and holidays, and for many hours in each case.

Shop opening hours attain great weight in terms of the classification and evaluation of interruptions of the rest from work. In order to achieve the aim of protecting Sundays, a cessation of the typical working-day activity is required. Due to its public effect, shop opening determines the character of a day in a special manner. This will have an impact on those who do not have to work and who do not want to shop, but strive for rest and spiritual edification, especially the adherents of Christian religions and the religious communities themselves. According to their understanding, the day is one of rest and contemplation. As bans on shop opening on working days have almost been lifted altogether in Berlin, the argument that the supply of needs and the provision of goods must be secured is of less significance.

The Berlin provision concerning the Sundays in Advent lifts the ban on Sunday opening of shops for

seven hours on four successive Sundays by virtue of law and with no other preconditions. This does not satisfy the requirement that Sunday rest is the rule because a self-contained period of time occupying around one twelfth of the year is completely exempt from the principle of rest from work. The provision results in the removal of the protection of Sundays and holidays for one month for retail shops. There is insufficient justification for such intensive impairment.

A restrictive interpretation of the provision whereby the Senate Administration can allow, in the public interest, retail shops to open exceptionally on a maximum of four other Sundays and public holidays by means of a general order is compatible with the applicants’ fundamental right under Article 4.1 and 4.2 of the Basic Law in conjunction with Article 140 of the Basic Law and Article 139 of the Weimar Constitution. There are fifty-two Sundays in a year and nine other holidays that do not necessarily fall on a Sunday and so the provision cannot be objected to. Moreover, the lifting of the ban requires an administrative decision which allows the possibility of a weighing up of the interests and objects of legal protection which are affected in a given case. Constitutional objections to the requirement of “public interest” for lifting the ban, which is very general as regards its drafting, can be addressed by an interpretation which takes the evaluation made in Article 139 of the Weimar Constitution into account. Such an interpretation requires a public interest of such a weight that it justifies the exceptions from the rest from work. In any case, providing these possibilities of opening shops by general order requires time restrictions if the provision is interpreted in conformity with the Constitution. These restrictions are not explicitly provided by the provision itself.

Although it was pronounced unconstitutional, the provisions on the opening of retail shops on all four Sundays in Advent remained in force this year, in view of the requirements of freedom to practice an occupation for retail shop owners, the confidence that they placed in the provision and the arrangements they had already made for the 2009 Christmas period. Whether and to what extent the Berlin *Land* legislator will adapt its concept of protection depends on its legislative discretion, taking into account the principles of this decision.

#### *Languages:*

German.



# Hungary

## Constitutional Court

### Statistical data

1 September 2009 – 31 December 2009

Number of decisions:

- Decisions by the Plenary Court published in the Official Gazette: 25
- Decisions in Chambers published in the Official Gazette: 12
- Other decisions by the Plenary Court: 63
- Other decisions in Chambers: 16
- Number of other procedural orders: 47

Total number of decisions: 163

### Important decisions

*Identification:* HUN-2009-3-005

a) Hungary / b) Constitutional Court / c) / d) 17.12.2009 / e) 127/2009 / f) / g) *Magyar Közlöny* (Official Gazette), 2009/184 / h).

*Keywords of the systematic thesaurus:*

4.10.7.1 Institutions – Public finances – Taxation – **Principles.**  
5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation.**

*Keywords of the alphabetical index:*

Tax, income, calculation / Tax, spouse / Taxation, legal basis / Family allowance.

*Headnotes:*

“Quasi taxation” of family allowance was against the Constitution.

*Summary:*

I. With effect from 1 September 2009, family allowance was classified as non taxable emolument. The family allowance should have been split fifty-fifty between each individual living in a spouse or common-law spouse relationship in the same household, and in the case of single parents only half of the family allowance was taken into account for taxation. The family allowance was not classified as a non-taxable emolument in certain circumstances, such as payment of a higher level of family allowance to long-term sick or mentally-impaired children, or where the family allowance was claimed by somebody entitled to it in his or her own right, or where benefits were paid to foster parents.

II. The Court held the provision under which, as a general rule, family allowance was classified as a non-taxable emolument, unconstitutional. Under Article 70/I of the Constitution everyone in the Republic of Hungary must contribute to public revenues in accordance with their income and wealth. In the Court's view, the challenged provision extended taxpayers' tax liability to income that they had not actually received, since the parent not in receipt of family allowance was required to declare it as a non-taxed emolument, as well as the parent who was in receipt of it.

The Court directed the repeal of the legislation concerned with retroactive effect. However, the Court emphasised that joint taxation of spouses, when household income is divided by two, would not be unconstitutional.

Under that scheme, the income tax of a spouse would be calculated by applying the tax function to half of the sum of taxable incomes of the spouses. The resulting amount would then be doubled to determine the couple's tax liability.

*Languages:*

Hungarian.



*Identification:* HUN-2009-3-006

a) Hungary / b) Constitutional Court / c) / d) 17.11.2009 / e) 110/2009 / f) / g) *Magyar Közlöny* (Official Gazette), 2009/162 / h).

*Keywords of the systematic thesaurus:*

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.**

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

*Keywords of the alphabetical index:*

Tax, calculation / Taxation, principle of lawfulness.

*Headnotes:*

An amendment to the tax law, which included employers' payroll taxes, as well as gross wages, as the basis for personal income tax, was in line with the Constitution.

*Summary:*

I. Several petitions were filed with the Constitutional Court against the tax-base calculation method of "super-grossing" on the grounds that the method was unlawful and unconstitutional. It would extend taxpayers' tax liability to income that they have not actually received, due to the introduction of certain items that increased the tax base.

One of the petitioners was the Ombudsman for Civil Rights, who argued that the changes would result in the tax being levied on more than just earned income.

The amendment to the tax law was approved by Parliament in the summer of 2009, and came into force at the start of 2010.

II. The Court rejected all the petitions and held the amendment simply expanded the tax base with a correcting factor. The new rules on "super grossing" therefore came into effect on 1 January 2010.

The Court's reasoning was that the items increasing tax base used in this method of calculation were not regarded as income under the Personal Income Tax Act. The Court took the view that the addition to the tax base was merely a correcting factor or a mathematical operation with an impact on the tax

base. The Court also pointed out that as there was no "general rate" for the social security contribution; the rate in effect on 31 December 2009 would have to be applied. However, retroactive application of that rate would only be permissible if this was more favourable for the tax payer.

*Languages:*

Hungarian.

*Identification:* HUN-2009-3-007

a) Hungary / b) Constitutional Court / c) / d) 16.12.2009 / e) 121/2009 / f) / g) *Magyar Közlöny* (Official Gazette), 2009/184 / h).

*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.**

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

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

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

*Keywords of the alphabetical index:*

Law, version in force, determination / Law, partial annulment, remainder, enforceability.

*Headnotes:*

Act XI of 1987 on the order of legislation, which defines how legislation should be drawn up and regulated, was repealed on the basis that Parliament had failed to bring the Act into line with the Constitution.

*Summary:*

I. Several petitioners, including the Ombudsman for Civil Rights, a Member of Parliament and various law professors filed petitions with the Court requesting the repeal of the whole Act XI of 1987 on the order of legislation.

II. The Court began with an examination of the consolidated version of the Act in force. The Act had been “re-gazetted” in its entirety in Official Gazette no. 2007/106. However, the Court could not treat it as the Act currently in force, as the “re-gazetted” text contained provisions that were no longer in force. Nonetheless, the text as it appeared in the Official Gazette was the basis of the constitutional review.

The Court noted that several parts of the Act were constitutionally compliant. However, those paragraphs left intact after the removal of the unconstitutional parts would no longer constitute an interpretable and enforceable law. The Court accordingly ordered the full, but not immediate revocation of the law. Parliament was charged with drafting and enacting a new Act on the order of legislation by 31 December.

Justice Trocsanyi attached a concurring opinion to the judgment in which he emphasised that the Court itself should have determined the text of the Act currently in force, and that it should have annulled the Act with effect from the date of publication of this decision.

#### *Languages:*

Hungarian.



## Ireland

### Supreme Court

#### Important decisions

*Identification:* IRL-2009-3-003

**a)** Ireland / **b)** Supreme Court / **c)** / **d)** 23.10.2009 / **e)** SC 082/05 / **f)** Carmody v. The Minister for Justice, Equality and Law Reform and the Attorney General / **g)** [2009] IESC 71 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Legal aid, absence / Legal aid, right / Legal assistance, lawyer.

*Headnotes:*

The legal profession in Ireland is divided between:

- i. solicitors, who deal directly with clients and tend to work for clients principally in their offices; and
- ii. counsel i.e. practising barristers, who do not deal directly with clients and generally act solely as advocates in court proceedings when engaged by solicitors to so act.

A defendant in a criminal prosecution before the District Court (a court of local and limited jurisdiction which tries minor offences) who is unable to pay for his/her own legal representation, is generally entitled by law solely to paid legal assistance from a solicitor.

However, in exceptional circumstances, and where the issues are particularly grave or complex, a defendant appearing before the District Court, who is unable to pay for his/her own legal representation, has a constitutional right to apply for legal aid which includes counsel as well as a solicitor.



*Summary:*

I. The Supreme Court of Ireland is the final court of appeal in civil and constitutional matters. It hears appeals from the High Court, which is a superior court of full original jurisdiction in all matters, including civil and constitutional matters. As the decision of the Supreme Court summarised here is an appeal decision, the parties will be referred to as the “appellant” and the “State”, even when discussing the original High Court decision.

The appellant, Mr Carmody, was a farmer charged in the District Court with 42 offences, all arising from various regulations intended to protect cattle from brucellosis and prevent the spread of the disease. The maximum penalties which could be imposed on the appellant, if imposed consecutively, would be two years in prison and fines of up to € 3 174.

When he was brought before the District Court the appellant sought paid legal assistance (referred to as “legal aid” in the judgment) and was granted representation by a solicitor of 26 years’ experience.

The solicitor considered that the legal services of counsel were also necessary, due to the complexity of the case and the possible gravity of the consequences of conviction for the appellant. However, the law governing the provision of legal aid lacked any provision to allow a defendant to apply for, and obtain, legal aid which would include counsel as well as a solicitor in criminal cases before the District Court.

The solicitor therefore took High Court proceedings, seeking a declaration that the law in question was incompatible with the constitutional right to legal aid and the broader right to a fair trial. The High Court found no incompatibility with the Constitution.

II. On appeal, the Supreme Court overruled the High Court decision. The Supreme Court held that, unless it could be assumed that no criminal case before the District Court could ever require representation by counsel, the fact that the District Court under the impugned law had no jurisdiction whatsoever to provide for legal aid including counsel as well as a solicitor for a defendant in a criminal trial, no matter how grave the charge or exceptional the circumstances, or what the interests of constitutional justice require, must be considered arbitrary.

The Court held that the necessity, in the interests of justice, for representation by counsel as well as a solicitor to be provided for a defendant in a criminal case before the District Court could not be excluded. The District Court’s jurisdiction in criminal matters had

expanded significantly since the law on legal aid had been enacted in 1962. In the Court’s view, while they may be infrequent, cases would inevitably arise where it would be essential that a defendant lacking the means to pay for representation by counsel be provided such legal aid.

The right to representation by counsel as well as a solicitor would arise where it is established that, because of the particular gravity and complexity of the case or other exceptional circumstances, such representation is essential in the interests of justice. Accordingly, any such defendant must have a right to apply for such legal aid and have the application determined on its merits.

The Supreme Court clarified that this right only required the State to provide such legal aid as to allow a defendant to obtain representation for the preparation and conduct of a defence which is essential to the interests of justice, but no more than this. The right does not require the State to provide the optimum form of representation or the representation desired by the defendant.

The Court stressed that the provision of legal aid to obtain representation by a solicitor alone will suffice in the vast majority of cases to vindicate the constitutional right to legal aid. In addition, in exceptional circumstances there are also other means to assist a defendant in the conduct of his or her case e.g. by requiring the prosecution to furnish written submissions on the law, in advance of a final decision, to the Court and to the defence.

The Supreme Court concluded that the State had a duty to provide a mechanism or procedure whereby the right of a defendant in criminal proceedings before the District Court to representation by counsel as well as a solicitor, in appropriate cases, may be vindicated. The appellant was entitled to have his constitutional right vindicated given that Article 40.3 of the Constitution imposes a duty on the organs of the State to defend and vindicate the personal rights of the citizen. The Supreme Court, as one of the organs of State, in exercising its judicial function must seek to vindicate such rights.

According to established case law, the Court was not required to simply grant the remedy sought by the appellant: it had the power to choose the remedy it considers most appropriate to vindicate the right. The Court chose to order that the appellant could not be tried for the criminal offences in question until the State provided the necessary statutory or administrative procedure to allow the appellant to apply for legal aid which would include counsel as well as a solicitor. The Court held that the decision

regarding the application was to be made, not by the Supreme Court, but by the Court or body on which the State conferred the jurisdiction to grant such legal aid.

*Languages:*

English.



*Identification:* IRL-2009-3-004

**a)** Ireland / **b)** Supreme Court / **c)** / **d)** 15.12.2009 / **e)** SC 469/06 & 59/07 / **f)** Roche v. Roche / **g)** [2009] IESC 82 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Embryo, implantation / Fertilisation *in vitro*, consent, withdrawal / Embryo, frozen, legal status / Gamete, implantation, consent, withdrawal / Foetus, legal status.

*Headnotes:*

Article 40.3.3 of the Constitution, which protects “the right to life of the unborn”, does not apply to a frozen embryo which has not yet been implanted in the uterus. The question of legal protection for frozen embryos is a matter for the *Oireachtas* (parliament) to decide.

*Summary:*

I. The Supreme Court of Ireland is the final court of appeal in civil and constitutional matters. It hears appeals from the High Court, which is a superior court of full original jurisdiction in all matters, including civil and constitutional matters. The decision of the Supreme Court summarised here is an appeal from the High Court (see *Bulletin* 2007/1 [IRL-2007-1-003]). The parties are referred to as the “appellant” (wife) and the “respondent” (husband), even when discussing the High Court judgment.

The appellant and the respondent, a wife and husband respectively, had undergone *in vitro* fertilisation (IVF) treatment in 2002, producing six embryos. Three embryos were implanted in the appellant’s uterus, resulting in the birth of a daughter. The remaining three embryos were frozen and placed in storage in the IVF clinic. After the birth of their daughter, the appellant and respondent separated. Years later, the appellant requested that the three frozen embryos be released to her, in order to have them implanted in her uterus. The clinic refused to release them in the absence of the respondent’s consent, which he refused to give.

The appellant took an action to the High Court claiming that the frozen embryos constitute “the unborn” within the meaning of Article 40.3.3 of the Constitution, and that the State was therefore obliged to facilitate their implantation in her uterus.

Article 40.3.3, which was inserted into the Constitution of Ireland by a national referendum in 1983, states:

“The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, to defend and vindicate that right.”

The High Court held that the term “the unborn” as used in Article 40.3.3 of the Constitution has been taken to mean the foetus *in utero* and that the purpose of Article 40.3.3 of the Constitution was to copper-fasten the statutory prohibition on abortion, and to preclude developments similar to those in the United Kingdom and the United States whereby abortion was legalised in certain circumstances. The Court held that the issue of whether the term could be taken to encompass embryos *in vitro* was a matter for the legislature and not for the courts to decide.

Further, the Court held that the onus of proving that the term “the unborn” could mean anything other than a foetus *in utero* lay on the appellant. In the Court’s view, the appellant had not provided the Court with any evidence upon which it could decide this issue in her favour. Accordingly, the Court held that the term “the unborn” as used in Article 40.3.3 of the Constitution does not include embryos *in vitro* or outside the womb and, by extension, could not include the three frozen embryos the subject of the instant proceedings.

II. The High Court judgment was appealed to the Supreme Court, which unanimously upheld the High Court decision. The five judges who heard the appeal issued five separate judgments and a number of key points made in these judgments are worth noting.

Judge Denham emphasised that the Supreme Court's task in this case was not to decide principles of science, theology or ethics, or decide on issues such as the meaning of "life", "the beginning of life" or "potential life". Rather, its task was to make a legal decision on the interpretation of a term used in the Constitution i.e. the meaning of "the unborn" in Article 40.3.3 of the Constitution.

The majority of judges held that Article 40.3.3 of the Constitution concerned solely the unborn child in the womb, on the basis of various rationales:

- that this conclusion is suggested by the Irish language version of the text;
- that this conclusion is supported by previous decisions concerning Article 40.3.3;
- that the text of the provision addresses the special relationship between a woman and the child she carries; and
- that the provision was not drafted with IVF in mind.

However, although the Supreme Court unanimously held that the appellant had not established that the frozen embryos in this case constituted "the unborn" within the meaning of Article 40.3.3 of the Constitution, the Chief Justice stated that he could not accept that simply because an embryo exists outside the womb that it is incapable of falling under the protection of Article 40.3.3.

In his view, Article 40.3.3 of the Constitution was intended not only to prohibit the legalisation of abortion, but to provide positive protection of human life before birth. The Chief Justice stressed that in the possible scenario that the frozen embryos were considered to have the qualities of human life, they would inevitably attract constitutional protection. Whether medical science would in the future develop so as to permit embryos to develop further outside the womb was a matter for speculation.

The Chief Justice stated that the human embryo is generally accepted as having moral qualities and a moral status. It contains within it the potential, at least, for life and its creation and its use cannot be divorced from concepts of human dignity. He referred to a number of instruments, including Article 18 of the Council of Europe Convention on Human Rights and Biomedicine and Article 3 of the Charter of Fundamental Rights of the European Union which prohibit the misuse of embryos.

The other Supreme Court judges also stressed that spare embryos resulting from *in vitro* fertilisation, being lives or potential lives, ought to be treated with respect. Judges Geoghegan and Fennelly suggested

that there may be a constitutional obligation on the State to enact legislation or regulations to give concrete form to the respect owed to embryos. Judge Fennelly further opined that it may be open to the courts in a future case to consider whether an embryo enjoys constitutional protection under other provisions of the Constitution. Judge Hardiman referred to scientific advances in the area of embryology and cautioned: "Science will not stand still waiting for us to update our laws."

The Chief Justice concluded that it is not for a Court, faced with divergent views on the subject, to pronounce on the truth of when human life begins. In the absence of any consensus on the issue, the onus rests on the legislature to define, by law, and on the basis of policy choices, when "the life of the unborn" acquires legal protection.

#### *Languages:*

English.



# Israel

## Supreme Court

---

### Important decisions

*Identification:* ISR-2009-3-010

**a)** Israel / **b)** Supreme Court (sitting as the Court of Criminal Appeal) / **c)** Sole judge / **d)** 06.12.2005 / **e)** CrimApp no. 10697/05 / **f)** Abdul Azbarga v. State of Israel / **g)** / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.17 General Principles – **Weighing of interests.**

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

5.3.6 Fundamental Rights – Civil and political rights – **Freedom of movement.**

5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship.**

*Keywords of the alphabetical index:*

Detention, judicial supervision / Detainee, rights.

*Headnotes:*

The right of freedom of worship may conflict with the provisions of the law concerning arrest or imprisonment. In such cases a balance needs to be reached on the basis of the specific circumstances, common sense and experience.

Ultimately the attitude towards applications to be allowed to participate in communal prayers while under house arrest, both for Jews and for Muslims, as well as for members of other religious communities in accordance with what is accepted in their religions, should be one that inclines towards granting the application, where circumstances allow.

*Summary:*

On 5 September 2005, an indictment was filed against the appellant in the Tel-Aviv-Jaffa District Court, which attributed to him an offence of attempted murder under Section 305.1 and 29.a of the Penal Law, 5737-1977. When the indictment was filed, the

tate applied for the appellant to be held under arrest until the proceedings were concluded. On 20 September 2005, the District Court denied the application and ordered the appellant to be placed under house arrest. The appellant filed an application for a review in the District Court, requesting that he should be allowed to go out to pray twice a day at the mosque situated at a distance of approximately 200 metres from the place of the house arrest in Qalansuwa. On 7 November 2005, the District Court denied the application. The appellant filed an appeal with the Supreme Court.

The appeal was allowed in part.

The Supreme Court (Justice E. Rubinstein) noted that the question in the case under consideration is one of the proper balance between the right to communal prayer, even if its religious status is essentially and mostly that of a desirable practice, and the constraints of arrest. The Court studied in detail the religious framework both in Islam and Judaism concerning participation in communal prayers, including the relevant sources in both religions. The Court held that freedom of worship is one of the basic values of the State of Israel as a Jewish and democratic state, and it is one of the principles listed in the Declaration of Independence. Yet, the right of freedom of worship may conflict, and in the case of arrest or imprisonment it does conflict, with the provisions of the law concerning arrest or imprisonment. In such cases a balance needs to be reached on the basis of the specific circumstances, common sense and experience.

The Court further held that ultimately the attitude towards applications to be allowed to participate in communal prayers while under house arrest, both for Jews and for Muslims, as well as for members of other religious communities in accordance with what is accepted in their religions, should be one that inclines towards granting the application, where circumstances allow. However, every case should be considered on its own merits, and naturally there may be cases in which it will not be allowed. The Court should consider in such cases – the balance between the grounds for arrest in the law, such as the danger presented by the person under arrest, perverting the course of justice and fleeing from justice, on the one hand, and the desire to pray with the community, on the other. Each of these grounds should be examined, as well as the guarantors and arrangements for supervision, in cases that the Court decides to approve.

The Court reviewed all of the considerations relevant to the case at hand, including the fact that approximately two and a half months had passed since the arrest decision; the fact that during the

month of Ramadan (and while under house arrest) the appellant had been allowed to attend prayers twice a day, and there was no report of his having breached that trust; and the danger that the appellant presented (as can be seen *prima facie* from the offence attributed to him). Under these circumstances the Court decided to allow for a gradual arrangement, according to which the appellant would, initially be permitted to go to pray each Friday at the mosque. If this arrangement was adhered to, if there were no other breaches, and if he was still under house arrest, then from the beginning of March 2006 he would be allowed to attend one prayer each day (the morning prayer which takes place between the hours of five and six in the morning), apart from Friday, when he would be permitted to go to the midday prayer.

#### Cross-references:

- HCJ 1890/03 *Bethlehem Municipality v. State of Israel* [2005] *IsrSC* 59(4) 736; [2005] (1) *IsrLR* 98;
- HCJ 10356/02 *Hass v. IDF Commander in West Bank* [2004] *IsrSC* 58(3) 443; [2004] *IsrLR* 53;
- HCJ 5555/05 *Federman v. Central District Commander* (unreported).

#### Languages:

Hebrew, English (translation by the Court).



#### Identification: ISR-2009-3-011

**a)** Israel / **b)** High Court of Justice (Supreme Court) / **c)** Panel / **d)** 12.12.2006 / **e)** HCJ 2557/05 / **f)** Majority Camp *et al.* v. Israel Police *et al.* / **g)** To be published in [2006](2) *IsrLR* (Official Gazette) / **h)** CODICES (English).

#### Keywords of the systematic thesaurus:

- 3.17 General Principles – **Weighing of interests.**
- 4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces.**
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
- 5.3.28 Fundamental Rights – Civil and political rights – **Freedom of assembly.**

#### Keywords of the alphabetical index:

Constitutionality, review / Assembly, freedom / Demonstration, authorisation.

#### Headnotes:

The freedom of speech is the 'essence' of democracy – a basic right that is also a supreme principle in every democratic system of government. The right to demonstrate and hold processions is an inseparable component of the right to freedom of speech.

The duty of the state to protect the constitutional right of freedom of speech and demonstration has a negative and a positive aspect. The significance of the positive duty is reflected in the duty of the state, within the limits of reason and taking into account the means available to it and the order of priorities determined by it, to allocate the resources that are required in order to allow the realisation of the right of freedom of speech and demonstration.

Providing security at events that involve the realisation of basic freedoms is one of the most basic and obvious duties of the police. They are not entitled to impose this responsibility, in whole or in part, on the persons who wish to realise their right. It does not follow from this position that the Israel Police is liable to provide security at every demonstration that is requested. The right to freedom of expression and demonstration, like all rights, is not an absolute one. Limits may be imposed on its realisation.

#### Summary:

The petitioners wished to hold a march from Rabin Square to Disengoff Square and to hold a demonstration there. The demonstration was intended to express support for the government's plan of disengagement from the Gaza Strip. The police commissioner made the granting of the licence for the demonstration conditional upon the presence of cordons, security personnel and organisers on behalf of the organisers of the demonstration and at their expense. He also made the granting of the licence conditional upon the presence of fire engines and ambulances. The fire extinguishing authority and Magen David Adom made the provision of services conditional upon payment by the organisers of the demonstration. The petitioners estimated the cost of these demands at more than one hundred thousand sheqels.

The petition before the Court challenged the legality of the demands made by the police commissioner, the fire extinguishing authority and Magen David Adom. The petitioners claimed that the respondents are not entitled to impose on them demands that fall within the scope of the natural duties of the police and which have a considerable cost. The petitioners further argued that the demands of the police, the fire extinguishing services and Magen David Adom constitute a serious violation of the constitutional right of the petitioners and their supporters to demonstrate and their right to freedom of speech.

The petition was granted.

The High Court held that the freedom of speech is the 'essence' of democracy – a basic right that is also a supreme principle in every democratic system of government. The right to demonstrate and hold processions is an inseparable component of the right to freedom of speech. It constitutes one of the main ways of expression of opinions and raising social issues on the public agenda.

The duty of the state to protect the constitutional right of freedom of speech and demonstration has two aspects. First, the state has a duty not to violate a person's right of freedom of speech and demonstration, for instance by imposing a prohibition on his ability to realise his right. This is the negative aspect of the right. It is enshrined in Section 2 of the Basic Law: Human Dignity and Liberty that one may not harm the life, body or dignity of a person. Second, the state has a duty to protect the right of freedom of speech and demonstration. This is the positive aspect of the right. It is enshrined in Section 4 of the Basic Law: Human Dignity and Liberty ('every person is entitled to protection of his life, body and dignity'). In the case before the Court, the significance of the positive duty is reflected in the duty of the state, within the limits of reason and taking into account the means available to it and the order of priorities determined by it, to allocate the resources that are required in order to allow the realisation of the right of freedom of speech and demonstration.

The duty of the state according to the 'positive' aspect of the right of freedom of speech and demonstration means, *inter alia*, its duty to allow the realisation of the right to demonstrate by providing security and maintaining public order during the demonstration. The Israel Police is the body with responsibility for this aspect. The task of maintaining public order during a demonstration and protecting the possibility of realising the constitutional right of freedom of expression, procession and demonstration is one of the main, patent and vital functions of the Israel Police. This conclusion is required both from the

viewpoint of the functions of the police under the law and also in view of the importance of the protection of basic constitutional rights in a democracy.

Providing security at events that involve the realisation of basic freedoms is one of the most basic and obvious duties of the police. Indeed, just as it is inconceivable that the police should impose a financial burden on someone requesting its protection against a burglar, so too it is inconceivable that the police should impose a financial burden on someone wishing to realise his right to freedom of speech and demonstration. Property rights and the right to physical safety are important rights. Protecting them is a part of police functions. But the freedom of speech and the right to demonstrate are also basic rights and the police are charged with protecting them. They are not entitled to pass the responsibility for security and maintaining public order at demonstrations, in whole or in part, to the persons who wish to realise their right to demonstrate. Thereby the police fail in their public duty. Thereby a financial burden is also imposed on those wishing to realise their right, and their right to freedom of speech and demonstration is violated. Indeed, fixing a 'price tag' for the realisation of a right means a violation of the right of those persons who cannot pay the price. Moreover, imposing a financial burden on persons who wish to realise their right to freedom of speech may cause particular harm to those wishing to express ideas that give rise to considerable opposition. This is because it may be assumed that the expense of maintaining security in such circumstances will be higher than the norm. The protection of the freedom of speech is vital in precisely this type of situation. There is potential here for a grave violation of the freedom of speech and the right of demonstration and procession, on the basis of financial ability or on the basis of the content of the speech and the degree of opposition that it arouses. The result of this violation, beyond the direct violation of the constitutional rights of the persons who wish to demonstrate, is that the public debate is harmed. The marketplace of opinions and ideas is weakened. The democratic nature of the system of government is prejudiced.

It does not follow from this position that the Israel Police is liable to provide security at every demonstration that is requested. The right to freedom of expression and demonstration, like all rights, is not an absolute right. Limits can be imposed on its realisation.

When deciding upon an application to hold a demonstration, the police commissioner is entitled to take into account, *inter alia*, the question of the forces and resources that are available to the police for the

purpose of providing security at the event, the other operations that the police are liable to carry out at that time, and the police's order of priorities in carrying out its duties. Therefore, if the police commissioner is of the opinion that in view of the police's additional operations, or in view of the range of the forces that are required for providing security at a given event, it is unable to allocate the forces required to maintain public order, he may make the demonstration conditional upon restrictions of time, place and manner. In extreme circumstances, in the absence of a less harmful possibility, he may even refuse to give a licence for the demonstration. Notwithstanding, the saving of resources is not a consideration that will in itself justify a refusal to provide security at a demonstration

#### Cross-references:

- HCJ 153/83 *Levy v. Southern District Commissioner of Police* [1984] *IsrSC* 38(2) 393; *IsrSJ* 7 109;
- HCJ 4804/94 *Station Film Ltd v. Film and Play Review Board* [1996] *IsrSC* 50(5) 661; [1997] *IsrLR* 23;
- HCJ 2481/93 *Dayan v. Wilk* [1994] *IsrSC* 48(2) 456; [1992-4] *IsrLR* 324;
- HCJ 5009/97 *Multimedia Co. Ltd v. Israel Police* [1998] *IsrSC* 52(3) 679;
- HCJ 399/85 *Kahane v. Broadcasting Authority Management Board* [1987] *IsrSC* 41(3) 255;
- HCJ 6658/93 *Am Kelavi v. Jerusalem Police Commissioner* [1994] *IsrSC* 48(4) 793;
- HCJ 6897/95 *Kahane v. Brigadier-General Kroiser* [1995] *IsrSC* 49(4) 853;
- *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992);
- *Jones v. City of Opelika*, 319 U.S. 103 (1943).

#### Languages:

Hebrew, English (translation by the Court).



#### Identification: ISR-2009-3-012

a) Israel / b) High Court of Justice (Supreme Court) / c) Panel / d) 29.12.2009 / e) H.C.J 2150/07 / f) Abu Safiya *et al.* v. Minister of Defence *et al.* / g) / h).

#### Keywords of the systematic thesaurus:

- 3.13 General Principles – **Legality**.
- 3.16 General Principles – **Proportionality**.
- 3.17 General Principles – **Weighing of interests**.
- 4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces**.
- 5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin**.
- 5.3.6 Fundamental Rights – Civil and political rights – **Freedom of movement**.

#### Keywords of the alphabetical index:

Terrorism, fight.

#### Headnotes:

An arrangement that completely prohibits the traffic of Palestinians on the road exceeds the authority of the military commander, in the special circumstances of the case, and is inconsistent with the rules of international law regarding a belligerent occupation. Despite the existence of an alternative road for Palestinian traffic in the territory, a complete ban on the inhabitants of the territory using a road that was intended to serve them did not properly balance the rights of the Palestinians as 'protected inhabitants' against security needs, since alternative security measures did exist, and the complete ban was therefore disproportionate.

#### Summary:

Road 443 was closed to the traffic of Palestinian vehicles in 2002, as a result of the security situation and following attacks that took place along the route of the road. Between then and now, the road has been closed to the traffic of Palestinian vehicles. The petitioners, who are inhabitants of several villages located near road 443, requested the High Court to order the respondents, including the Minister of Defence and the IDF Commander in the territory, to allow free traffic of Palestinians, on foot and by car, on road 443.

The High Court granted the petition in part. The majority opinion, which was written by Justice U. Vogelman, held that although the military commander is competent to impose traffic restrictions by virtue of his duty to preserve public order and security on traffic routes in Judaea and Samaria, his authority does not extend to imposing a permanent and complete ban on the traffic of Palestinian vehicles on the road. This is because a complete ban makes the road one that is used solely for 'internal' Israeli traffic – between the centre of Israel and Jerusalem – rather

than one that serves the needs of the local population, even though land was expropriated from the inhabitants of the territories in order to construct it. An arrangement that completely prohibits the traffic of Palestinians on the road exceeds the authority of the military commander, in the special circumstances of the case, and is inconsistent with the rules of international law regarding a belligerent occupation. Justice Vogelmann went on to hold that despite the existence of an alternative road for Palestinian traffic in the territory, a complete ban on the inhabitants of the territory using a road that was intended to serve them did not properly balance the rights of the Palestinians as 'protected inhabitants' against security needs, since alternative security measures did exist, and the complete ban was therefore disproportionate. Justice Vogelmann emphasised that the judgment did not determine future security arrangements; these will be determined by the military commander, in a manner that will provide protection for the Israeli inhabitants using the road. The judgment will come into effect five months from the date on which it was given, in order to allow the military commander to determine the necessary security arrangements.

Justice E.E. Levy was of the opinion that the military commander acted within the scope of his authority when he decided to close the road to Palestinian traffic as a result of the serious terrorist attacks in which Israelis were murdered on and near the road. Notwithstanding, Justice Levy held that the security measures and their proportionality should be examined in accordance with current circumstances, and in the prevailing circumstances of a relative calm in the security position, an absolute closure on a permanent basis was not a proportionate measure. Since it was proved that the military commander himself was of the opinion that an absolute closure should be avoided and that he wished to find a more proportionate solution, there was no reason, in Justice Levy's opinion, to grant an absolute order in the petition, and it would be better to allow the military commander to propose a suitable solution. In any case, Justice Levy emphasised, five months was not a sufficient period of time for the proper implementation of the judgment, and the result might be perilous.

President Beinisch agreed with the opinion and reasoning of Justice Vogelmann, both with regard to the lack of authority and with regard to the question of proportionality, and emphasised that in practice the three justices all agreed that the sweeping closure of road 443 to Palestinian traffic was not currently proportionate, and that an alternative solution needed to be found to protect the safety of persons travelling on the road. President Beinisch added that the

freedom of movement is a basic human freedom, and that every effort should also be made to uphold it in the territories that are held by the State of Israel under a belligerent occupation. She therefore held that the military commander should refrain, in so far as possible, from adopting such an extreme measure as an absolute ban on the use of a certain road by the protected inhabitants, which caused serious suffering to a whole population and disrupted their lives. Notwithstanding, President Beinisch warned against referring to security measures adopted in order to protect persons travelling on the roads as segregation based on improper reasons of race and ethnicity, and she held that the comparison made by the petitioners between preventing the traffic of Palestinian inhabitants along road 443 and the crime of Apartheid was so extreme and radical that there was no basis for raising it at all.

#### *Cross-references:*

- HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2002] IsrSC 56(6) 352; [2002-3] IsrLR 83;
- HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [2005] IsrSC 59(2) 481.

#### *Languages:*

Hebrew, English (translation by the Court).





# Japan

## Supreme Court

---

### Important decisions

*Identification:* JPN-2009-3-001

**a)** Japan / **b)** Supreme Court / **c)** Grand Bench / **d)** 30.09.2009 / **e)** / **f)** (Gyo-Tsu), 209/2008 / **g)** *Minshu*, 63-7 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections**.

5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.

*Keywords of the alphabetical index:*

Election, seats, allocation / Vote, relative weight / Constituency, disparities.

*Headnotes:*

The Constitution requires equality in the value of votes but, at the same time, the Constitution leaves it to the Diet's discretion to decide the mechanism of an election system.

The Diet also has discretion to decide how to reflect the population variation in the mechanism of an election system. However, where there has been extreme inequality in the value of votes due to population variation, and this has remained the case for some considerable time, and the Diet has failed to take any measures to correct such inequality, this failure is judged to be beyond the bounds of its discretionary power, the provision on the apportionment of seats therefore becomes unconstitutional.

*Summary:*

In these proceedings, the validity of the election of members of the House of Councillors held on 29 July 2007 was challenged. The appellants, voters in the Tokyo Constituency, alleged that the provisions of the Public Offices Election Act (hereinafter, the "Election Act") on the apportionment of seats were in violation of Article 14.1 of the Constitution and invalid.

Under the Election Act, a proportion of the membership of the House of Councillors was to be elected in prefecture-based constituencies, according to the demarcation of constituencies and the number of members to be elected in each constituency prescribed in the appended table of the Act. The Election Act apportioned an even number of seats, amounting to not less than two, to each constituency in proportion to the population. When this system was introduced, the maximum disparity between constituencies in terms of the population per member was 1:2.62; thereafter, it gradually expanded. Several revisions were made to the Election Act, but the maximum disparity was 1:5.06 at the time of the election held on 29 July 2001. The Grand Bench of the Supreme Court held, in its judgment of 14 January 2004, that the provision on the apportionment of seats cannot be deemed to have been unconstitutional. However, six Justices expressed dissenting opinions. Another four Justices pointed out that there would be room for acknowledging unconstitutionality if the current situation was left to stand with no steps taken to rectify it.

An expert committee was then established and various suggested corrective measures were discussed, following the policy of maintaining the existing mechanism of the election system. Based on one of these proposals, the Act for Partial Revision of the Election Act was enacted on 1 June 2006. As a result, at the time of the Election, the maximum disparity was 1:4.86.

The report of the expert committee pointed out that, as far as the existing mechanism was maintained, it would be difficult to hold the disparity below the level of 1:4.

The Constitution requires equality in the substance of the right to vote, or in other words, equality in the influence of votes in electing Diet members or equality in the value of votes. However, the Constitution, at the same time, leaves it to the Diet's discretion to decide the type of electoral system that should be introduced to reflect the people's interests and opinions fairly and effectively in the political process. In view of this, equality in the value of votes is not the sole and absolute criterion for deciding the mechanism of an election system, but it must be realised in harmony with other policy purposes and grounds that the Diet is authorised to consider, such as the unique characteristics of the House of Councillors. Consequently, as long as specific decisions made by the Diet can be reasonably approved as ones within the scope of exercise of its discretion, such decisions cannot be judged to be unconstitutional even though they might give rise to a

need for a degree of compromise regarding equality in the value of votes.

The mechanism of the election system is reasonable to a considerable degree, in view of the fact that:

- i. the Constitution adopts a bi-cameral system in order to invest the House of Councillors with specific features in terms of its substance and function;
- ii. a prefecture can be defined as a unit with its own historical, political, economic, and social significance and substance, as well as being a political entity; and
- iii. Article 46 of the Constitution requires elections to take place for half the members of the House of Councillors every three years.

Therefore, the said mechanism cannot be described as being beyond the scope of reasonable exercise of the Diet's discretionary power.

Furthermore, in view of constant population variation in times of dramatic social and economic changes, the issue of how to reflect such variation in the mechanism of an electoral system requires complicated and sophisticated policy considerations and judgments. Decisions on this issue are effectively left to the discretion of the Diet. However, where there has been extreme inequality in the value of votes due to population variation and this has remained the case for some considerable time, but the Diet has failed to take any measures to correct such inequality and such failure of the Diet is judged to be beyond the bounds of its discretionary power, the provision on the apportionment of seats becomes unconstitutional.

Following the 2004 judgment, the Election Act was revised. As a result, the maximum disparity was 1:4.86 at the time of the Election. After the Election, an expert committee in charge of the electoral system was set up, demonstrating the Diet's intention to continue studying the issue of the disparity. However, a considerable period of time would be needed for sweeping reforms of the existing mechanism of the electoral system, and it was extremely difficult to make such reforms prior to the Election.

In view of the circumstances mentioned above, the Diet's failure to make any additional revisions of the provision on the apportionment of seats by the time of the Election could not be deemed to be beyond the bounds of its discretionary power. It could not therefore be concluded that the provision was unconstitutional at the time of the Election.

However, a disparity still exists that has not been eliminated, even by the Act for Partial Revision. This

demonstrates the existence of extreme inequality in the value of votes between constituencies, and efforts are needed to correct it. The Diet should therefore commence, as soon as possible, an appropriate study on this issue, taking full account of the importance of equality in the value of votes.

Five justices expressed dissenting opinions and four justices expressed concurring opinions.

*Languages:*

Japanese, English (translation by the Court).



# Korea

## Constitutional Court

### Important decisions

*Identification:* KOR-2009-3-001

a) Korea / b) Constitutional Court / c) / d) 25.05.2006 / e) 2005Hun-Ba91 / f) Case on Three Strike Law for Drunk Driving / g) 18-1(B) KCCR *Korean Constitutional Court Report* (Official Digest), 98 / h) CODICES (English).

*Keywords of the systematic thesaurus:*

3.11 General Principles – **Vested and/or acquired rights**.  
 5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures**.  
 5.4.3 Fundamental Rights – Economic, social and cultural rights – **Right to work**.

*Keywords of the alphabetical index:*

Driving licence, withdrawal / Right and freedom, statutory limitation, requirement / Public safety / Drink driving.

*Headnotes:*

Under the Road Safety Act, the Commissioner of the Local Police Agency is required to revoke a person's driving licence if he or she is caught driving under the influence of alcohol for the third time.

Restrictions may be placed on the right to choose one's occupation and freedom of action in general for reasons of national security, the maintenance of order and public welfare in accordance with Article 37.2 of the Constitution. This sets the boundaries of the permitted scope of restriction.

The legislative purpose of a statute may be legitimate and the means adopted to achieve it may be appropriate, but if the legislator can achieve the purpose of the law through optional provisions and still attempts to use mandatory provisions in disregard of the individuality and uniqueness of the case at hand, such mandatory provisions violate the principle of the least restrictive means.

When legislation is enacted, which restricts basic rights, the public interest protected by the legislation must outweigh the private interest infringed by it.

*Summary:*

I. The case was filed by an applicant whose driving licence had been revoked after he was caught drunk driving for the third time. He alleged that Article 78.1.14 of the Road Traffic Act, whereby somebody who is caught driving under the influence of alcohol for the third time automatically loses their licence, was unconstitutional, as it does not stipulate the time span within which the three offences must take place and indiscriminately applies compulsory revocation to anyone caught drink driving three times, irrespective of the gravity of his or her previous offences.

He also argued that the provision was more stringent than necessary; administrative discipline already applied to the first two drink driving offences. This interfered with the certainty and predictability of the law. Finally, he argued that the conduct described in Article 78.1.14 (traffic accidents caused by reckless or negligent driving) and Item 12 (failure to take necessary measures or to file a report after causing injuries through traffic accidents) is more culpable than the conduct regulated by the provision in point and yet such conduct is regulated by optional revocation. This constitutes a violation of the principle of equality.

II. The Constitutional Court, by a unanimous decision, found the provision to be constitutional for the reasons set out below:

Compulsory revocation of a driving licence, as stipulated by the Road Traffic Act, makes it impossible for anybody whose work requires driving to continue with their work and restricts others in their ability to carry out their work. The Road Traffic Act, therefore, restricts occupational freedom in the sense of being able to choose one's profession and the method of performing one's duties. It also hinders the general freedom of action of those who do not drive for a living.

However, the Road Traffic Act provisions under dispute have the legitimate legislative purpose of protecting "life and limb", property interests and road safety. Somebody who has disobeyed the rule against drink driving three times can be deemed deficient in the sense of responsibility toward road traffic regulations and in the awareness of safety required of a traffic participant. The revocation of such a person's driving licence is an appropriate means to accomplish the legislative purpose.

The gravity of the public interest in protecting individuals, society and the state from the enormous damage resulting from drink driving should be emphasised. The private interests infringed due to mandatory revocation and the indirect damages arising from it cannot be compared in terms of gravity to the public interest. The provision under dispute does not, therefore, violate the principle of balance among legal interests and does not amount to excessive restriction of occupational freedom and general freedom of action.

The Court acknowledged that limitations may be needed in terms of the time span within which the repeated offences must have taken place to be recognised as a habit if the violation is serious and calls for administrative discipline. In the context of the provision under dispute, the related legislative purpose of disciplining habitual drunk drivers, the space-temporal limitation on the detection of drink driving, the enormous social and economic damages arising from drink driving and the need for administrative discipline, the “three strikes” rule is a sufficient indication of the offender’s profound deficiency in compliance with rules and awareness of safety. The failure to place a limitation on the period within which the three violations must take place in the road traffic legislation does not violate the principle of minimum restriction.

#### Languages:

Korean, English (translation by the Court).



#### Identification: KOR-2009-3-002

a) Korea / b) Constitutional Court / c) / d) 27.07.2006 / e) 2005Hun-Ma277 / f) Urine Testing of Narcotic Offenders / g) 18-2 KCCR *Korean Constitutional Court Report* (Official Digest), 280 / h) CODICES (English).

#### Keywords of the systematic thesaurus:

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

5.3.13.1.5 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Non-litigious administrative proceedings**.

#### Keywords of the alphabetical index:

Governmental action, review of constitutionality / Legitimate purpose / Prisoner, treatment.

#### Headnotes:

To be a subject matter of the Constitutional Court’s review, an action by the government must constitute a *de facto* exercise of power or an exercise of governmental power.

The status of an administrative action as a *de facto* exercise of governmental power should be individually determined by a full scrutiny of the relationship between the administrative agency and the subject, the extent and attitude of the subject’s opinion on and participation in that *de facto* act, the purpose and course of the act and the existence of the legal basis for the relevant order or enforcement measure.

An applicant has standing for his or her constitutional complaint when it is unclear whether an administrative action constitutes a *de facto* exercise of power and there is uncertainty as to the proceedings which have to be exhausted before a constitutional complaint is deemed to be insufficient or ineffective to provide proper relief.

However, even if a constitutional complaint is of assistance in terms of relief for subjective interests, if the act challenged is likely to be repeated and its constitutional interpretation has an important meaning, there is a justifiable interest at stake.

No enforced investigative measure shall be taken unless it is pursuant to a judge-issued warrant.

Although the government act may be in line with a statutory act and necessary for the maintenance of safety and order, it must not infringe the essence of basic rights or violate the rule against excessive restriction, which requires such acts to have a legitimate purpose, use appropriate means, provide minimum restrictions, and a degree of balance amongst legal interests.

#### Summary:

I. The applicant was sentenced to imprisonment for violating of the Narcotics Control Act. While serving his sentence, he was required to collect urine in a paper cup and submit it once a month for a “reagent-drop test”. He filed a constitutional complaint, arguing that the prison’s urine test violates the constitutional requirement of warrant and infringes the constitutional freedom of action and bodily freedom.

II. The Constitutional Court rejected his complaint by a unanimous decision for the following reasons:

If the applicant was forced to take a urine test in the absence of any legal basis or obligation, the issue of infringement on the general freedom of action would arise (the right not to do something one does not wish to do, such as the collection and submission of urine, and the right not to have to expose one's physical condition and information thereon to others). This is enshrined in Article 10 of the Constitution (human dignity and worth and the right to the pursuit of happiness) and in Article 12 of the Constitution (protection of infringement of bodily freedom).

The requirement by the Chief Warden that inmates submit a urine sample is carried out in secluded conditions by a person of superior rank who is obliged to comply with instructions and orders related to the execution of the punishment. Its purpose is to maintain safety and order in prison and it is imposed unilaterally. Even if there is no direct punishment for non-compliance, inmates suffer from the psychological anxiety that they may be subject to inferior treatment if they do not comply. The act therefore constitutes a *de facto* exercise of power and an exercise of governmental power under Article 68.2 of the Constitutional Court Act.

The requirement for the submission of a urine sample is for the maintenance of safety and order and not for an investigation. It requires inmates' co-operation and cannot be described as involuntary. The warrant requirement does not apply here.

Due to their addictive nature, narcotics, once smuggled into correctional facilities, have the ever-present risk of being consumed by inmates. The correctional aim is forfeited for the inmate who consumes them and such consumption can lead to dangerous conduct towards other inmates and accidents. The monthly testing of narcotics offenders through urine tests is needed for the early detection and blocking of the smuggling and consumption of narcotics and the maintenance of safety and order in correctional facilities. Narcotics consumption cannot be detected through external observation. The testing involves the voluntary submission of urine samples, there are no punitive measures for non-compliance, and the test itself takes three minutes, during which time a reagent is dropped into the sample. The subject must engage in the undesired act of collecting and submitting his or her urine, and the right of self-determination with respect to one's own excretion is restricted. However, in the light of its ends and means, the urine test does not violate the ban against excessive restriction.

*Languages:*

Korean, English (translation by the Court).



# Latvia

## Constitutional Court

### Important decisions

*Identification:* LAT-2009-3-004

a) Latvia / b) Constitutional Court / c) / d) 21.10.2009 / e) 2009-01-01 / f) On the compliance of Section 1.1 of the Law on Expropriation of Immovable Property for the Needs of the Border Checkpoint Terehova with Article 105 of the Latvian Constitution / g) *Latvijas Vestnesis* (Official Gazette), 27.10.2009, no. 170(4156) / h) CODICES (Latvian, English).

*Keywords of the systematic thesaurus:*

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

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

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

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

3.13 General Principles – **Legality.**

3.17 General Principles – **Weighing of interests.**

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

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

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

*Keywords of the alphabetical index:*

Expropriation, elements / Fairness, principle.

*Headnotes:*

International norms of human rights and the practice of their application serve as a means of interpretation from the perspective of constitutional law of the contents and scope of fundamental rights and the principle of the democratic state under the rule of law provided this does not lead to a decrease or limitation of fundamental rights enshrined in the Constitution.

To ensure efficient protection of constitutional rights, the Constitutional Court must assess the actual exercise of these rights and consider issues beyond the apparent implementation of requirements.

The fact that a decision regarding coercive expropriation of property is taken based on a law does not relieve the legislator of the responsibility to perform an assessment of the objections presented and to justify the decision. The fact that other national institutions have already performed such assessments does not relieve the legislator of its responsibility to assess the issue itself.

The condition that real estate can only be expropriated in an exceptional case means that the aim of such expropriation cannot be reached and appropriately implemented by applying other measures. This means that coercive expropriation of real estate cannot become a normal method of meeting the needs of the State; such a method should only be deployed in exceptional cases and under observance of the appropriate.

When property is expropriated against the owner's will, there is a substantial restriction on property rights. The legislator must consider whether other measures could be deployed to meet public needs and real property must only be expropriated in genuinely exceptional circumstances.

*Summary:*

I. Parliament enacted legislation whereby a plot of land belonging to the applicant with an area of 6.15 hectares was expropriated.

The applicant argued that the State had expropriated an excessive area of land.

II. The Constitutional Court upheld the applicant's contention, holding that it was not necessary for the State to expropriate the entire property. Compulsory expropriation of only such part of the immovable property as is necessary for executing certain clearly planned works will be viewed as being compliant with the right to own property enshrined in the Constitution. In the case under consideration, part of the immovable property was expropriated as a reserve.

The Constitutional Court accordingly recognised the contested norm as being non-compliant with the Constitution and ineffective as from the date of its adoption.

*Cross-references:*

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 2000-03-01 of 30.08.2000; *Bulletin* 2000/3 [LAT-2000-3-004];
- Judgment no. 2002-01-03 of 20.05.2002;
- Judgment no. 2004-18-0106 of 13.05.2005; *Bulletin* 2005/2 [LAT-2005-2-005];
- Judgment no. 2005-10-03 of 14.12.2005;
- Judgment no. 2005-12-0103 of 16.12.2005;
- Judgment no. 2007-03-01 of 18.10.2007; *Bulletin* 2007/3 [LAT-2007-3-005];
- Judgment no. 2008-11-01 of 22.12.2008;
- Judgment no. 2008-35-01 of 07.04.2009;
- Judgment no. 2008-47-01 of 28.05.2009.

European Court of Human Rights:

- *Sporrong and Lönnroth v. Sweden*, Judgment of 23.09.1982, paragraphs 66–74;
- *James and Others v. the United Kingdom*, Judgment of 21.02.1986, paragraphs 40, 41, 46;
- *Lithgow and Others v. the United Kingdom*, Judgment of 08.07.1986, paragraph 120;
- *Hentrich v. France*, Judgment of 22.09.1994, paragraph 42;
- *Pialopoulos and Others v. Greece*, Judgment of 15.02.2001, paragraphs 59–62;
- *Jokela v. Finland*, Judgment of 21.05.2002, paragraph 45;
- *Broniowski v. Poland*, Judgment of 22.06.2004, paragraph 151;
- *Bruncrona v. Finland*, Judgment of 16.11.2004, paragraphs 69, 82–87.

*Languages:*

Latvian, English (translation by the Court).

*Identification:* LAT-2009-3-005

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 21.12.2009 / **e)** 2009-43-01 / **f)** On the compliance of Section 2.1 of the Law on State Pension and State Allowance Disbursement between 2009 and 2012” with Articles 1 and 109 of the Constitution of the Republic of Latvia and on the compliance of Section 3.1 of the above Law with Articles 1, 91, 105 and 109 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 22.12.2009, no. 201(4187) / **h)** CODICES (Latvian, English).

*Keywords of the systematic thesaurus:*

1.6 Constitutional Justice – **Effects**.  
 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**.  
 2.1.1.4.9 Sources – Categories – Written rules – International instruments – **International Covenant on Economic, Social and Cultural Rights of 1966**.  
 3.4 General Principles – **Separation of powers**.  
 3.10 General Principles – **Certainty of the law**.  
 3.16 General Principles – **Proportionality**.  
 3.17 General Principles – **Weighing of interests**.  
 3.18 General Principles – **General interest**.  
 3.19 General Principles – **Margin of appreciation**.  
 3.21 General Principles – **Equality**.  
 4.5.2.3 Institutions – Legislative bodies – Powers – **Delegation to another legislative body**.  
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.  
 5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.  
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

*Keywords of the alphabetical index:*

Pension, reduction / Pension, amount / Solidarity principle / Legitimate aim / Budget.

*Headnotes:*

The provisions of the Constitution do not bestow the right to a specific amount of social security, and the State should refrain from excessive interference in its citizens' financial affairs. The amount of social security granted by the State may vary depending on the amount of funds at its disposal. However, the fundamental rights of persons established by the Constitution are binding on the legislator irrespective of the economic situation in the State.

In determining appropriateness, the Constitutional Court cannot replace the legislator and present more appropriate political decisions or advise how to allocate the State budgeted funds.

In a situation of extremely limited State financial resources of the State, the latter has freedom of action to change the conditions for pension disbursement – with the aim of sustaining a just social insurance system.

Conceptual decisions over the receipt of an international loan and its terms and conditions are an important matter for State and public life. In compliance with the procedure established by the Constitution, these decisions must be taken by the legislature itself.

The amount of pension working pensioners receive can be restricted, taking into account their income from employment.

#### *Summary:*

The point at issue here was the ten percent reduction in old age and service pensions granted by regulations, and a 70% reduction in the old-age pensions and service pensions of employed pensioners.

The Constitutional Court was charged with determining whether the rights of persons to social security were infringed, and whether the principle of legal security was breached.

The Court concluded that the amount of social security paid may be changed if the State's financial situation alters, and the State has the right to reduce the amount of social security if the amount of public financial resources is reduced. However, irrespective of the economic situation prevailing in the State, the fundamental rights of persons enshrined in the Constitution are binding on the legislator.

The Court indicated that the pension system should be sustainable; so that it should be guided not only towards current recipients of pensions, but also towards ensuring the security of subsequent generations.

The economic situation influenced the stability of the special budget on social insurance. Consequently, the sustainability of the social budget came under threat.

In earlier case-law, the Court had concluded that the reduction of pensions may have a legitimate objective – solving financial problems in the social budget. The Parliament and the Cabinet of Ministers were therefore duty-bound to act in such a way as to ensure the long-term welfare of society.

Savings in the social budget achieved by cutting pensions comply with consequences caused by an economic recession; this is a way of achieving a legitimate aim.

In assessing the compliance of the norms with the principle of proportionality, the Constitutional Court reviewed opinions from the Parliament and the Cabinet of Ministers as to the fact that cuts in pensions are connected with requirements by international creditors. The Court indicated that international liabilities cannot serve as an argument in favour of restricting fundamental rights. Moreover, the Cabinet of Ministers could not conclude any such agreement without due authorization by Parliament.

The material submitted in the case indicated a lack of appropriate planning in the social budget. The budget deficit was advanced by several unconsidered decisions which would also have an impact on future pensioners.

In assessing the proportionality of the norms, the Court investigated whether, when considering possible alternatives, the most lenient solution was selected. The legislation was adopted on an urgent basis and applies to all pensioners, with no scope for analysis of the impact on different groups of pensioners.

Parliament had also failed to take into account the fact that pensioners are a group within society in need of particular protection. Pensioners' rights to social security were not respected, even during the period of economic growth, as the non-uniformity of incomes and the risk of poverty for elderly persons increased in this period, too.

The State is also obliged to ensure a minimum level of social security. Therefore, by temporarily withholding payment of pensions, the State should have provided special protection for those pensioners who receive pensions that do not comply with social security and who might need to apply for social assistance. In the judgment, the Constitutional Court suggested methods that could be applied to establish those groups of pensions whose pensions cannot be cut, even on a temporary basis.



Given the lack of assessment of alternatives by the legislator, and lack of provision for a more lenient solution, the Court found that the contested norms did not comply with the Constitution.

The Court also assessed the observance of the principle of legal certainty. The legislator had made no provision either for a transitional period or for compensation. The Court therefore concluded that a fair balance between the interests of the society and those of particular pensioners had not been achieved.

The Constitutional Court declared the contested provisions void from the date of their adoption. Deductions of pensions would be terminated by 1 March 2010 at the latest. Parliament was directed to establish a procedure for recompense for any such deductions by 1 March 2010.

#### Cross-references:

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 2000-08-0109 of 13.03.2001; *Bulletin* 2001/1 [LAT-2001-1-001];
- Judgment no. 2001-02-0106 of 26.06.2001; *Bulletin* 2001/2 [LAT-2001-2-003];
- Judgment no. 2001-11-0106 of 25.02.2002; *Bulletin* 2002/1 [LAT-2002-1-003];
- Judgment no. 2001-12-01 of 19.03.2002; *Bulletin* 2002/1 [LAT-2002-1-004];
- Judgment no. 2002-04-03 of 22.10.2002; *Bulletin* 2002/3 [LAT-2002-3-008];
- Judgment no. 2003-05-01 of 29.10.2003; *Bulletin* 2003/3 [LAT-2003-3-011];
- Judgment no. 2003-14-01 of 04.12.2003;
- Judgment no. 2004-21-01 of 06.04.2005;
- Judgment no. 2005-08-01 of 11.11.2005;
- Judgment no. 2006-04-01 of 08.11.2006;
- Judgment no. 2006-13-0103 of 04.01.2007;
- Judgment no. 2007-01-01 of 08.06.2007; *Bulletin* 2007/3 [LAT-2007-3-004];
- Judgment no. 2007-03-01 of 18.10.2007; *Bulletin* 2007/3 [LAT-2007-3-005];
- Judgment no. 2007-04-03 of 09.10.2007;
- Judgment no. 2007-23-01 of 03.04.2008;
- Judgment no. 2007-24-01 of 09.05.2008; *Bulletin* 2008/2 [LAT-2007-2-003];
- Judgment no. 2009-08-01 of 26.11.2009; *Bulletin* 2007/3 [LAT-2007-3-005].

European Court of Human Rights:

- *Lithgow v. the United Kingdom*, Judgment of 08.07.1986, paragraphs 120-122;
- *Guillemin v. France*, Judgment of 02.09.1998, paragraph 24;
- *Jucys v. Lithuania*, Judgment of 08.01.2008, paragraphs 37, 39;
- *Stec and Others v. the United Kingdom*, Judgment of 12.04.2006, paragraph 51;
- *Moskal v. Poland*, Judgment of 15.09.2009, paragraph 61;
- *Kjartan Ásmundsson v. Iceland*, Judgment of 30.03.2005, paragraph 39.

#### Languages:

Latvian, English (translation by the Court).



# Lithuania

## Constitutional Court

### Important decisions

*Identification:* LTU-2009-3-006

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 02.09.2009 / **e)** 26/06 / **f)** On disability pension (pension for loss of capacity to work) / **g)** *Valstybės Žinios* (Official Gazette), 106-4434, 05.09.2009 / **h)** CODICES (English, Lithuanian).

*Keywords of the systematic thesaurus:*

3.10 General Principles – **Certainty of the law.**  
 5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security.**  
 5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension.**  
 5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health.**

*Keywords of the alphabetical index:*

Disabled person, right / Disabled person, social assistance / Legitimate expectation / Social security.

*Headnotes:*

The legislator enjoys a wide discretion over the choice of a pension system and has the right to reorganise the established system of disability pension maintenance by changing its grounds, the persons to whom it is granted and paid, and the conditions for granting and paying it. However, when carrying out this type of overhaul, the legislator must observe the Constitution and the pension maintenance system can only be reorganised by law. Disability pensions provided for by the Constitution must be guaranteed, as must obligations undertaken by the state, which are not in conflict with the Constitution.

If the disability pension was granted and paid to the person under the law, it must continue to be paid; it cannot be terminated during the established period. The persons who fulfil the conditions defined in the law have the right to demand that the state grant and pay this pension to them. The term “disability pension” is *expressis verbis* consolidated in Article 52

of the Constitution. It may only be referred to in laws with another term (formula), if this term or formula does not deny or distort the constitutional notion of this pension.

*Summary:*

In these proceedings, the Constitutional Court evaluated the model of establishing disability as defined in national legislation. It noted that in the course of an overhaul of the social integration of disabled persons, the system of disability pensions and establishment of disability, changes were made to the method of establishing disability, although this was consolidated in legislation as the model of establishment of the lost capacity to work (level of capacity to work). A pension for loss of capacity to work was introduced, instead of the previous disability pension; and a new minimum level of capacity to work was established at 45% (the person could claim at the point where they had lost 45% of their capacity). The Court noted that this criterion now also applied to those whose level of capacity to work had been affected by accidents at work or the consequences of occupational diseases. They had been granted and were in receipt of disability pension on the basis of having lost 30% of their capacity to work as of 1 July 2005.

When the reorganisation of the disability pensions system took place, in 2005, the Law on State Social Insurance Pensions (wording of 19 May 2005) which was set out in a new wording, as well as the Law on the Social Integration of Persons with Incapacities (wording of 11 May 2004) gave certain guarantees to those to whom state social insurance disability pensions were granted and paid according to the previous legal regulation. For instance, state social insurance disability pensions granted for a certain period would continue to be paid until the period of granting and paying these pensions expired, and pensions granted for an unlimited period would not be discontinued.

Those persons in receipt of pensions paid for an unlimited period, acquired the legitimate expectation that their pensions would continue to be paid for an unlimited period. However, persons who had been granted disability pensions for a specific limited period could not legitimately expect to continue to receive their pensions once the established payment period had expired. Such expectations may not be considered legitimate and, under the Constitution, they are not protected and defended by the state.

The Court observed that the legal regulation in force by 1 July 2005, stipulated that in terms of disability pensions, the maximum period of disability was two years. Disability pensions that were granted for a limited period could be granted for a maximum of two years. Anybody granted a disability pension for two years acquired the legal expectation that the pension which was granted to him would be paid until the expiry of the period of validity of the disability group, which could not exceed two years. The Court stressed that those persons who were established as disabled for a limited period until July 2005 under the old legal regulations and to whom state social insurance disability pensions were granted and paid, retained the acquired rights (including the rights to their disability pension) over the entire period of payment of the disability pension they had been granted. Their legitimate expectation that their disability pension would continue to be paid until the expiry of the period of validity of the establishment of their disability had not been breached.

It was also held in this ruling that under Article 52 of the Constitution and the constitutional principle of a state under the rule of law, the term of payment of a disability pension should be established solely by the law, and that the period for which this pension is to be paid is one of the conditions of payment of the disability pension. The legislator may impose different conditions for granting and paying disability pensions (including time periods) and the amounts payable on various grounds, by taking into account various factors such as somebody's state of health and, in terms of the amount payable, the person's participation in the insurance scheme against respective social hazards. Nonetheless, the conditions surrounding the granting and payment of disability pensions (including the time period) must be in accordance with the law, clear and non-discriminatory. The period of time over which the disability pension is to be paid must not be unreasonably short and it must not be changed too often.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2009-3-007

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 24.09.2009 / **e)** 16/09 / **f)** On the constitutionality of legislation relating to reorganisation of the armed forces / **g)** *Valstybės Žinios* (Official Gazette), 115-4888, 26.09.2009 / **h)** CODICES (English, Lithuanian).

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

3.9 General Principles – **Rule of law**.  
 4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces**.  
 5.1.1.1 Fundamental Rights – General questions – Entitlement to rights – **Nationals**.  
 5.3.26 Fundamental Rights – Civil and political rights – **National service**.

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

National service / Defence, national / Security, national.

#### *Headnotes:*

The independence of the state, its territorial integrity and constitutional order are among the most important constitutional values. Protection of these concepts is the priority obligation of state power and all citizens. Ensuring the implementation of this duty is a guarantee of the security of the state. Citizens have a constitutional duty to defend the state against a foreign armed attack and must be well-prepared for this eventuality in order to properly implement this duty. Military service is one of the means of ensuring such readiness. If legislators reorganise the national defence system, for example by switching to armed forces organised on the grounds of professional and voluntary military service and providing for extra grounds of postponement of compulsory initial military service, they have a constitutional duty to regulate the system of military service in such a way as to establish efficient means of preparation for citizens who are under a duty to perform obligatory military service in order to defend the state. This would take a different form from obligatory initial military service; it could take the form instead of obligatory military training. Citizens would then be prepared to carry out their constitutional duty to defend the state against foreign armed attack (*inter alia* in the event of mobilisation).

#### *Summary:*

A group of parliamentarians challenged a legal regulation seeking to reconsider the need for obligatory military service and seeking to reorganise

the Lithuanian armed forces along the lines of professional and voluntary military service. The regulation would preserve compulsory military service in case of mobilisation. The applicants suggested that the regulation was out of line with constitutional norms, in particular Article 139 which stipulates that the defence of the State of Lithuania against foreign armed attack shall be the right and duty of each citizen of the Republic of Lithuania (§ 1) and Lithuanian citizens must perform military or alternative national defence service according to the procedure established by law (§ 2).

The Court emphasised that the constitutional duty of citizens to perform military or alternative national defence service under Article 139.2 of the Constitution is not an end in itself – it is directly related to the duty to defend the state against a foreign armed attack which is enshrined in Article 139.1 of the Constitution. In certain aspects, it is also linked to the right of citizens to resist anyone who encroaches on the independence, territorial integrity, and constitutional order of the state which is enshrined in Article 3.2 of the Constitution. The Constitution provides for the duty to perform military or alternative national defence service, but does not expressly establish all possible kinds of military service, the form this should take and requirements for the subjects of military service. There is no express duty within the Constitution to perform such obligatory military service which is named in laws as obligatory initial military service.

The legislator is committed to establish the organisation of the national defence system. A duty stems from the provisions of Articles 3, 139, 141 and 142 of the Constitution to establish the type of legal regulation which would give the Republic of Lithuania access to regular and well-trained armed forces with the ability to fulfil the constitutional obligation to defend the state against foreign armed attack. However, the legislator enjoys broad discretionary powers in regulating the organisation of national defence. The legislator may choose various models of armed forces and forms of military service. The Constitution does not prohibit the establishment of a legal regulation organising the national armed forces, which are under a duty to protect and defend the state and its citizens from armed attack, along the lines of professional and voluntary military service. Article 139 of the Constitution may not be interpreted as meaning that the armed forces must be organised only on the grounds of obligatory military service and that every citizen is obliged to perform the type of obligatory military service described in national legislation as obligatory initial military service. The formation of the armed forces organised on the grounds of professional and voluntary military service does not deny the

constitutional obligation of citizens to defend the State of Lithuania against a foreign armed attack, and at the same time the legislator is not exempted from the duty to establish the type of legal regulation which would prepare citizens properly for the implementation of this constitutional obligation. The legislator has the constitutional duty to regulate by law the procedure of performance of compulsory military service in the event of mobilisation which would ensure the defence of the state from armed aggression. In addition, the legislator must establish such legal regulation whereby legal preconditions would be created to properly prepare citizens in advance so that when mobilisation is announced, they could properly implement their constitutional duty to defend the state. There is a need in the state not only for the regular armed forces, but also a necessary number of citizens properly prepared to defend it.

The Court explained that preparation of citizens to defend the state does not simply include preparation to defend the state against foreign aggression by force of arms. The needs and means of national defence are very diverse. The military power of the state can be strengthened by expansion of the armed forces and armaments. This may also be achieved in certain respects however through industrial means and information technology.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2009-3-008

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 28.10.2009 / **e)** 28/07-29/07 / **f)** On autonomy of schools of higher education / **g)** *Valstybės Žinios* (Official Gazette), 130-5652, 31.10.2009 / **h)** CODICES (English, Lithuanian).

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

1.3.5.12 Constitutional Justice – Jurisdiction – The subject of review – **Court decisions**.  
 4.6.8.1 Institutions – Executive bodies – Sectoral decentralisation – **Universities**.  
 5.4.21 Fundamental Rights – Economic, social and cultural rights – **Scientific freedom**.

*Keywords of the alphabetical index:*

Education, institution, autonomy / Executive power.

*Headnotes:*

The case arose from a provision that read “the autonomy of a school of higher education is conceived as the right to independently determine and establish in the regulations or statute its organisational and governmental structure”. This means that administrative institutions of schools of higher education that perform functions of self-governance are formed by the schools of higher education themselves. The methods and procedures of setting up these institutions are established in accordance with national legislation by the schools of higher education in their by-laws or statutes. Representatives of the institutions of the executive power of the state may be appointed to the institutions of schools of higher education which perform functions of control and supervision with a view to ensuring responsibility and accountability of the school of higher education before society. The methods and procedures of setting up such institutions may be established by law by the legislator, whilst respecting the principle of autonomy of schools of higher education.

*Summary:*

The Court was asked to construe some provisions of an earlier ruling on the autonomy of schools of higher education, in particular with regard to administration.

The Constitutional Court has held on several occasions that it is also empowered to construe its other final acts. The purpose of the institute of construction of Constitutional Court rulings and other final acts is to reveal the contents and meaning of corresponding Constitutional Court rulings or other final acts more broadly and in more detail where necessary in order to ensure proper execution of that Constitutional Court ruling. The Constitutional Court cannot construe the content of its ruling in such a way that the meaning of its provisions, the notional entirety of the elements constituting the content of the ruling and the arguments and reasons upon which that Constitutional Court ruling is based, is changed. Corrections to Official constitutional doctrine must always have a constitutional basis and be explicitly reasoned in a respective act of the Constitutional Court. They are to be related to the consideration of new Constitutional Court precedents as opposed to official construction of provisions of the Constitutional Court rulings and other final acts.

The provision of the Constitutional Court ruling of 20 March 2008, the construction of part of which is requested by the petitioner, presented a traditional notion of the autonomy of schools of higher education. The concept of autonomy of schools of higher education is to be construed in the context of the principle of the constitutional principle of academic freedom.

The Court held that under the Constitution, the legislator, whilst respecting the principle of autonomy of schools of higher education, may establish by laws the basis of organisational and administrative structure of schools of higher education. In order to ensure the constitutional implementation of the principle of academic freedom and public interests, conditions must be created in schools of higher education to ensure all-round education of the personality. Schools of higher education enjoy freedom of teaching, of scientific research and creative activities. To this end, the institutions of administration that carry out the functions of self-administration of schools of higher education must be consolidated in the administrative structure of schools of higher education. This is the only way to guarantee the imperative of autonomy for schools of higher education under the Constitution.

It would not be possible to ensure autonomy of schools of higher education, *inter alia* the constitutional principle of academic freedom, if schools did not enjoy financial independence, i.e. if their governing bodies could not adopt (on the basis of laws) decisions on the use of funds and other property for performing their mission. Therefore, the function of adopting decisions based on laws concerning the use of funds and other property, which is necessary for carrying out the mission of the school of higher education, is to be allocated *inter alia* to the functions of the governing bodies that implement the function of self-governance of the school of higher education. Self-governance must be implemented through the institutions of schools of higher education, and the procedure of forming these institutions should not enable the academic community of the school of higher education to influence adoption of decisions on administration. Self-government institutions must be formed by the schools of higher education themselves, once they have established the methods and procedures of doing so in their bye-laws or statutes. Only in this way can one guarantee the constitutional implementation of the principle of academic freedom. Usually these institutions are formed from members of their academic community.

The Court noted the state's obligation to supervise the activity of educational establishments, and to ensure coordination of the principle of autonomy of schools of higher education with the principle of responsibility and accountability before society, to guarantee the quality of studies and development of scientific research in the administrative structure of the school of higher education. Generally, this obligation can only be fulfilled if provision is made for an institution which performs functions of control and supervision and which has the aim of ensuring the responsibility and accountability of the school of higher education before society, but which is not directly related to implementation of the principle of academic freedom. Membership of this type of governing body may be drawn not only from representatives of the academic community but also from representatives of institutions of the executive power of the state. The legislator must respect the principle of autonomy of schools of higher education but may also establish by law the ways and procedure of setting up governing bodies. The legislator cannot establish any such legal regulation where the institution of control and supervisions aside from these functions would also perform the functions of administration of the school of higher education, which are assigned to the self-government institutions usually formed from members of the academic community.

#### *Cross-references:*

This decision explains some provisions of the former Constitutional Court's Ruling 28/07-29/07 of 20.03.2008.

#### *Languages:*

Lithuanian, English (translation by the Court).



## Mexico Supreme Court

### Important decisions

*Identification:* MEX-2009-3-013

a) Mexico / b) Supreme Court / c) Plenary / d) 06.03.2000 / e) 121 / f) Judicial review 2352/97 / g) *Semanario Judicial de la Federación*, Tome XI, June 2000, 28, 29 and 30; IUS 191, 690; 191, 691; 191, 692; *Relevant Decisions of the Mexican Supreme Court*, p. 369-370 / h).

*Keywords of the systematic thesaurus:*

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

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

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

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

*Keywords of the alphabetical index:*

Competition, economic, protection / Competition, fair / Freedom of action, economic / Freedom of expression, holder of rights / Media, audiovisual.

*Headnotes:*

It is unconstitutional to prohibit foreign films from being dubbed into Spanish.

*Summary:*

Having reviewed relief proceedings *amparo* 2352/97, 222/98 and 2231/98, brought by *United International Pictures*, variable capital company, *Twentieth Century Fox Films de México*, variable capital company and *Buenavista Columbia TriStar Films de México*, variable capital limited liability company, the Supreme Court ruled, by an eight-vote majority, that Article 8 of the Federal Cinematography Law is unconstitutional.

This Article stipulates that “films shall be exhibited in public in their original version and, if applicable, subtitled into Spanish, in accordance with the terms set forth by the regulation. Films classified for young audiences and educational documentaries may be exhibited in Spanish”.

The companies mentioned above brought the relief proceedings because the competent authorities had denied them the authorisation they had requested in order to exhibit various foreign films dubbed into Spanish. As a consequence, the companies argued that their constitutional guarantees of freedom of expression and freedom of commerce had been breached to their detriment.

The Supreme Court ruled that the Article in question did not breach the precept of freedom of expression, since it did not prevent the free expression of ideas. However, most of the judges considered that Article 8 of the Federal Cinematography Law infringed the freedom of commerce by inhibiting the commercial activity of exhibitors of cinematographic films before an important number of people who are unable to read and who would cease to visit movie theatres that showed films subtitled in Spanish but shown in their original foreign language.

In this regard, the draft judgment prepared by Justice Sergio Salvador Aguirre Anguiano indicated that, according to data produced by the National Statistics, Geographical and Information Institute in 1995, there were more than 14 million illiterate citizens in Mexico. There was also a potential breach of the guarantee of equality, in that the television broadcasting companies were permitted to broadcast films dubbed into Spanish that did not fall within the “AA” classification for children, making an inappropriate distinction between the television companies and the film exhibitors, thus affording them a different treatment for the same commercial activity.

Justices Genaro David Góngora Pimentel, Olga Sánchez Cordero, and José Vicente Aguinaco Alemán voted against granting the constitutional relief to the plaintiff corporations by considering the contested article unconstitutional. One of the reasons they gave was that cinematographic films are artistic works that must be conserved in their original form in order to faithfully put across the spirit and characteristics of the various cultures they portray.

#### *Languages:*

Spanish.



#### *Identification:* MEX-2009-3-014

**a)** Mexico / **b)** Supreme Court / **c)** Plenary / **d)** 07.03.2000 / **e)** 122 / **f)** Judicial review 3008/98 / **g)** *Semanario Judicial de la Federación*, Tome XI, April 2000, 72; IUS 191, 979; *Relevant Decisions of the Mexican Supreme Court*, p. 371-372 / **h)**.

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

3.18 General Principles – **General interest**.  
5.3.24 Fundamental Rights – Civil and political rights – **Right to information**.  
5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data**.

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

Ethics in government / Information, classified, protection / Information, right / Rights of third parties, infringement / Data, medical.

#### *Headnotes:*

The interpretation of the right to information under the Federal Constitution requires authorities to abstain from providing manipulated, incomplete, or false information, which would constitute a serious breach of guarantees. This right must therefore be understood as an individual right, limited by national interests and the respect of third party rights.

#### *Summary:*

The right to information guaranteed by the state is linked to the values upheld by Article 6 of the Federal Constitution, which ensures that the state has the attributes to ensure that the provisions of this Article are exercised to the benefit of the individual, political parties, and society, without acting against the public interest, the principle of ethics or third party rights.

Such considerations support the conclusion that Article 22 of the Mexican Social Security Institute Act did not contravene the above right by establishing that documents, data, or information provided by employers, employees and other parties to the Mexican Social Security Institute in compliance with their legal obligations, are strictly confidential and may not be disclosed or divulged even in a

nominative or individual manner, except in cases of lawsuits or legal procedures to which the Mexican Social Security Institute is a party and in cases provided for by law. The purpose of this confidentiality is to prevent the indiscriminate disclosure of this information, whilst allowing its use in lawsuits and legal proceedings.

#### Languages:

Spanish.



#### Identification: MEX-2009-3-015

a) Mexico / b) Supreme Court / c) Plenary / d) 24.08.2000 / e) 124 / f) Judicial review 26/99 / g) *Semanario Judicial de la Federación*, Tome XII, August 2000, 575, 962, 963, 966, 967 and 980; IUS 191, 291 a191, 296; *Relevant Decisions of the Mexican Supreme Court*, p. 377-379 / h).

#### Keywords of the systematic thesaurus:

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

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

4.4.3.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**

4.10.6 Institutions – Public finances – **Auditing bodies.**

#### Keywords of the alphabetical index:

Bank, banking secrecy / Audit / Budget control.

#### Headnotes:

The federal legislator has the constitutional power to recognise the public debt and instruct its payment. Therefore, private interests safeguarded by trust secrets are controlled by the collective interest, which must prevail in the Chamber of Representatives when exercising its power.

Subordinate bodies lack the legal capacity to appear as defendants in constitutional disputes.

#### Summary:

On 24 August 2000, the Supreme Court, ruled on constitutional dispute no. 26/99. The cause of action consisted of a determination as to whether, as intended by the Chamber of Representatives of the Congress of the Union, the head of the Federal Executive should instruct the Minister of Finance and Public Credit and the Director of the National Banking and Securities Commission to instruct *Banco Union*, S.A. to provide information on trusts operated by the credit institutions mentioned in public instruments numbered 100-342, dated 23 July, 601-VI-DGC-5269, dated 2 July and 102-VI-186, dated 6 July 1999, or whether, as the Executive contended, it was legally obstructed from giving these orders and would be rendered liable for breaching trust secrets.

In this regard, the Supreme Court unanimously ruled that the arguments of the House of Representatives were well-founded. As a consequence, the Court determined that the head of the Executive should instruct the Minister of Finance and Public Credit and the Director of the National Banking and Securities Commission to instruct *Banco Union*, S.A. to provide information previously requested on trusts operated by such credit institution within 30 days.

The Supreme Court concluded that it was evident from an interpretation of Article 82.VIII and Article 74.IV of the Federal Constitution that the Chamber of Representatives acted in the public interest when conducting a review of the public accounts and the approval of the public debt. Therefore, private interests safeguarded by trust secrets are controlled by the collective interest, which must prevail in the Chamber of Representatives when exercising its authority. Questions surrounding the review of public finances do not, as a general rule, directly affect the rights of individual parties. However, in the exceptional cases where this occurs, the conclusion must be reached that the interest protected by the trust secret is not in contrary to such authority, which is the case where private debts become public debts.

The Supreme Court noted that Articles 117 and 118 of the Credit Institutions Law establish and regulate certain banking and trust secrets. Nonetheless, credit institutions must maintain the utmost discretion with regard to the legal affairs of their clients and take the necessary steps to prevent loss or damage being caused to such clients due to breaches of that secrecy. These secrets must not, however, obstruct the prosecution of illegal acts or the supervision of financial entities.



*Languages:*

Spanish.

*Identification:* MEX-2009-3-016

**a)** Mexico / **b)** Supreme Court / **c)** Plenary / **d)** 25.09.2000 / **e)** 125 / **f)** Miscellaneous relief proceedings 2698/2000-PL / **g)** *Semanario Judicial de la Federación*, Tome XII, September 2000, 23; IUS 191, 090; *Relevant Decisions of the Mexican Supreme Court*, p. 381-382 / **h)**.

*Keywords of the systematic thesaurus:*

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

4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**

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

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

*Keywords of the alphabetical index:*

Judiciary, self government / Judicial Council, act, judicial control / Information, restriction.

*Headnotes:*

There is no provision in the Federal Constitution which constrains a body of the Federal Judiciary from submitting records to the legislator.

*Summary:*

I. The then Chief Justice of the Supreme Court, acting as representative of the Federal Judiciary Council, asked the Supreme Court to determine, through the application of Article 133 of the Federal Constitution, whether or not the Federal Institute of Bankruptcy Proceedings Specialists (IFECOM) is required to abstain from obeying Article 311.XIV of the Bankruptcy Act, which consists of reporting to the Congress of the Union on the performance of its functions on a six month basis.

II. The Supreme Court was competent to hear the proposed consultation, as it referred to a matter that could undermine the principle of division of powers, and particularly the autonomy of the Federal Judiciary.

The consultation proposed required the interpretation of Article 311.XIV of the Bankruptcy Law, in accordance with the principles of the separation of powers, the autonomy of the Federal Judiciary and constitutional supremacy. The IFECOM, in its capacity as auxiliary body to the Federal Judiciary Council, is required to submit a report on its performance to the full Bench of the Supreme Court and the Federal Judiciary Council. These reports may be published for the information of interested parties, including the Congress of the Union. It also encourages the right of access to information, which must be guaranteed by the state.

The fact that the IFECOM gives information to the Congress of the Union could imply a breach of the constitutional principles mentioned above, since there is no provision in the Supreme Law preventing any Federal Judiciary entity from submitting records to the legislator.

In summary, the Court concluded that IFECOM is required to comply with the obligation imposed by Article 311.XIV of the Bankruptcy Act and that its report must be issued publicly for the information of all interested parties, including the Congress of the Union, which can receive a copy.

*Languages:*

Spanish.

*Identification:* MEX-2009-3-017

**a)** Mexico / **b)** Supreme Court / **c)** Second Chamber / **d)** 11.10.2000 / **e)** 127 / **f)** Judicial review 26/99 / **g)** *Semanario Judicial de la Federación*, Tome XII, December 2000, 428; IUS 190, 652; *Relevant Decisions of the Mexican Supreme Court*, p. 385-386 / **h)**.

*Keywords of the systematic thesaurus:*

5.1.2 Fundamental Rights – General questions – **Horizontal effects.**

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

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

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

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

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

*Keywords of the alphabetical index:*

Evidence, illegally obtained.

*Headnotes:*

Private communications are inviolable. The civil courts must not admit illegally-obtained recordings of private communications as evidence in proceedings.

*Summary:*

The Second Chamber of the Supreme Court heard relief proceedings *amparo* under review no. 2/2000. It decided that the Federal Constitution not only contains mandates for the authorities, but also establishes duties for citizens under its Articles 2, 4 and 27, which deal with acts or omissions by citizens, although the mandates constitute an enforceable guarantee to the authorities. It went on to conclude that Article 16.9 of the Federal Constitution, which states that the privacy of private communications is inviolable, can be interpreted as a fundamental right in the sense that neither the authorities nor citizens may intervene in a communication, except in cases and under conditions set out by the above Article. Consequently, when citizens fail in these duties, they commit a constitutional offence, irrespective of the related effects caused or the means of defence provided by the relevant ordinary legislation.

The Second Chamber also determined that this cannot be construed to represent the validation of a fact that is essentially illegal. This is because Article 16.9 and 16.10 of the Federal Constitution should be taken to mean that any authority reviewing the Constitution wished to establish as a fundamental right the inviolability of private communications as well as the enforceable obligation of authorities and citizens to respect such prerogative. This should be

done in such a manner that only the federal judicial authority, at the request of the Authority authorised by law or the prosecuting authorities of the entity in question may authorise the intervention in a given private communication, providing the petition is in writing and sets out the basis and legal causes behind the petition, including the type and duration of the intervention, and the parties involved, on the understanding that authorisation may not be granted in cases of electoral, tax, commercial, civil, labour, or administrative communications, or in the case of communications between a party subject to detention and his or her defence counsel.

*Languages:*

Spanish.

*Identification: MEX-2009-3-018*

**a)** Mexico / **b)** Supreme Court / **c)** Plenary / **d)** 18.01.2001 / **e)** 131 / **f)** Contradicting Resolutions 44/2000-PL Between the Second Collegiate Criminal Court of the Circuit Second and the First Collegiate Criminal Court of the First Circuit / **g)** *Semanario Judicial de la Federación*, Tome XIII, January 2001, 9; IUS 190, 355; *Relevant Decisions of the Mexican Supreme Court*, p. 399-400 / **h)**.

*Keywords of the systematic thesaurus:*

4.4.3.5 Institutions – Head of State – Powers – **International relations.**

4.16 Institutions – **International relations.**

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

*Keywords of the alphabetical index:*

Extradition / Extradition, national, possibility / Extradition, proceedings / Extradition, treaty.

*Headnotes:*

The extradition of Mexican citizens to the United States of America shall be at the discretion of the Executive Branch.

*Summary:*

The contradiction rested on an interpretation of Article 4 of the Federal Penal Code and whether it prevented access by the discretionary authority of the Executive to petitions for the extradition of Mexican citizens, as mentioned in Article 9.1 of the Extradition Treaty by and between the United Mexican States and the United States of America.

The Supreme Court carried out a grammatical and systematic analysis of Article 4 and determined that it did not contain any provision which would prevent the extradition of Mexican citizens. It simply established an applicable rule of law, in the sense that, if a Mexican citizen were tried in the Mexican Republic for an offence committed abroad, he or she would be subject to penalties prescribed under Mexican Federal law rather than those prescribed by the country in which the offence was committed.

The contradiction was resolved in the sense that the possibility of a Mexican citizen being tried in compliance with Article 4 of the Federal Penal Code did not prevent the Executive from enforcing the extradition request in the use of its discretionary power conferred to it by the international treaty in question. Article 9.1 of the treaty stipulates that neither of the two parties shall be obliged to extradite any of its citizens, but that the Executive of the country of the party subject to extradition can comply with the extradition request in the event that its laws do not prevent such extradition and that such extradition is deemed admissible.

*Languages:*

Spanish.

*Identification:* MEX-2009-3-019

**a)** Mexico / **b)** Supreme Court / **c)** Plenary / **d)** 27.02.2001 / **e)** 133 / **f)** Contradictory resolutions 14/2000. PL Between the First and Second Collegiate Administrative Courts of the First Circuit / **g)** *Semanario Judicial de la Federación*, Tome XIII, April 2001, p. 126; IUS 189, 914; *Relevant Decisions of the Mexican Supreme Court*, p. 403-404 / **h)**.

*Keywords of the systematic thesaurus:*

5.3.37 Fundamental Rights – Civil and political rights – **Right of petition.**

*Keywords of the alphabetical index:*

Authority, notion / Public service / Administration, good, principle.

*Headnotes:*

The state and its authorities, or the relevant officials and employees, are obliged to issue written documents in response to petitions brought by citizens, which are to be heard within the shortest possible time. It can be deduced from this that the petition must be presented to a civil servant representing the authorities, in a relationship over and above subordination between the government and the citizen, to ensure that citizens can exercise the right to a written response. If the authority fails to comply with its obligation to answer, then the citizen may bring a petition for relief.

*Summary:*

I. Contradicting Resolutions 14/2000-PL read as follows. The First Circuit (First Collegiate) Administrative Court considered that the private or public nature of the relationship between a private individual and an official is irrelevant, because civil servants never lose such character and are therefore always required to respect the right of petition guaranteed under Article 8 of the Federal Constitution, which assumes implicit acceptance of the admission of the *Amparo* Law. The First Circuit Administrative Court determined that when establishing the admissibility of relief proceedings, the nature of the relationship between the individual making the request and the official receiving the petition is paramount. In the context of the inter-relationship of individual rights, the relief proceedings are inadmissible because the silence attributed to the official or civil servant is not an act of authority, but rather a private act.

II. The Supreme Court identified a discrepancy between the two Resolutions and noted that the point of contradiction lay in determining the admissibility of the relief proceedings in the context of the breach by a public official of the right of petition, when the petition in question made reference to aspects of a private relationship. A question had also arisen over the scope of the right of petition. A definition was needed as to whether the concept of authority for such purposes is to be determined based on the public or private capacity in which the official acts in relation to the petitioner.

The Court concluded that the concept of authority excluded the acts of private parties and added that, if the legal relationship between the bodies of authority of the State and citizens fell within the category of relationships qualified as 'beyond subordination'. In terms of the rights of the holders of individual guarantees against unilateral acts of authority, and the right of petition, the legal nature of the relationship between the petitioner and the public official is a determining factor for the admissibility of the relief proceedings.

The right to petition is one of the subjective public rights granted by the Federal Constitution to citizens. In terms of their legal relationship beyond the subordination of the state and of relief proceedings as a defence mechanism which protects these rights, the concept of authority for relief purposes is closely linked to the subject of the legal relationship implied by individual guarantee.

Therefore, the right under discussion allows citizens to present themselves before any authority to file a request for written documents that specifically adopts the character of an administrative petition, action or remedy.

#### *Languages:*

Spanish.



#### *Identification:* MEX-2009-3-020

**a)** Mexico / **b)** Supreme Court / **c)** Plenary / **d)** 08.03.2001 / **e)** 136 / **f)** Action of unconstitutionality 9/2001 / **g)** *Semanario Judicial de la Federación*, Tome XIII, March 2001, 447; IUS 190, 236; *Relevant Decisions of the Mexican Supreme Court*, p. 409-410 / **h)**.

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

1.3.5.3 Constitutional Justice – Jurisdiction – The subject of review – **Constitution.**

1.3.5.8 Constitutional Justice – Jurisdiction – The subject of review – **Rules issued by federal or regional entities.**

2.2.2.2 Sources – Hierarchy – Hierarchy as between national sources – **The Constitution and other sources of domestic law.**

3.6.3 General Principles – Structure of the State – **Federal State.**

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

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

Constitution, federal and regional / Legislation, national, application, general.

#### *Headnotes:*

The constitutions of the states of the Republic are subordinate to the Federal Constitution and are therefore subject to review by the Supreme Court. Declarations of the invalidity of laws enacted by State legislatures may therefore not be considered as breaches of state sovereignty.

Deputies who are members of a new legislature are authorised to institute relief proceedings, upon the conclusion of the term of office of the legislature that issued the general norm under dispute.

State constitutions must provide for a term of priority (such as that granted to the State Congress in order to call extraordinary elections) whenever and for whatever reason there is no constitutional Governor in office.

#### *Summary:*

Relief proceedings that challenge local constitutions containing general norms are admissible. To hold otherwise would provide grounds to avoid abstract control of subordination to the Federal Constitution. If the Permanent Constituent established this means of analysis of the regularity of the general norms subordinate to the Federal Constitution, including Local Constitutions, this channel is clearly admissible. Also, although the States are free and sovereign in all matters relating to their internal regime, at no time may the State constitutions contravene the provisions of the Federal Constitution.

The Court also established that deputies, who are members of a new legislature, are authorised to institute relief proceedings, once the legislature that issued the general norm under challenge has concluded its term of office. The contrary would imply that legislation published on the last day or after the end of the term of office may not be challenged, if the members of this body are not now representatives

and their substitutes form part of a different legislature. Such a situation would be illogical and run counter to the principle that the body of authority is always the same, irrespective of the individuals who exercise authority on its behalf.

The Supreme Court held that State constitutions, which must adhere to the provisions and principles of the Supreme Law, must provide for a term of priority (such as that granted to the State Congress in order to call extraordinary elections) whenever and for whatever reason there is no constitutional Governor in office. Any other interpretation would undermine the constitutional precept that stipulates that the election of State Governors must be direct, and that local constitutions and legislation must guarantee that such officials are elected through universal, free and secret suffrage. If the legislative assembly could not call an election in the necessary timeframe to appoint a substitute Governor to complete the constitutional term of office, this would undermine the public will.

#### *Languages:*

Spanish.



#### *Identification:* MEX-2009-3-021

**a)** Mexico / **b)** Supreme Court / **c)** Second Chamber / **d)** 17.04.2001 / **e)** 139 / **f)** Direct judicial review 600/1999 / **g)** *Semanario Judicial de la Federación* Tome XIX, May 2004, 325; IUS 181, 578; *Relevant Decisions of the Mexican Supreme Court*, 415 -416 / **h)**.

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

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

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

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

Defence, effective / Investigation, criminal.

#### *Headnotes:*

A suitable defence during preliminary investigations does not depend on whether the actions of prosecuting authorities are performed in the presence of the accused or his or her counsel.

#### *Summary:*

According to the First Chamber of the Supreme Court, the provision of a suitable defence during preliminary investigations does not depend on whether the actions of the Prosecuting Authorities are performed in the presence of the accused or his or her counsel. Article 20 of the Federal Constitution sets out that, with a view to satisfying the prevailing social and economic needs of our country and to eliminate the humiliating and shameful practices to which those involved in the investigation of offences used to be subject, the Federal Constitution made provision for accused persons to have a suitable defence during the jurisdictional stage. This allows the accused to present evidence, file objections against any acts of authority affecting the legitimate interests of the defence, set out a systematic argument based on the laws that apply to the specific case and use any benefits set out in the procedural legislation for the purposes of defence. The Federal Constitution also extended the guarantees for accused persons at this stage to the preliminary investigations stage, with the proviso that this be “with regard to the administrative nature thereof”.

Therefore, insofar as this is permitted by the actions and procedures that must be carried out during preliminary investigations, the guarantees enjoyed by the accused in the jurisdictional stage may be provided in full. Failure to comply with this requirement would violate Article 16 of the Federal Constitution, by virtue of which the prosecuting authorities are responsible for the preliminary investigations and solely responsible for deciding whether criminal action is to be taken in the investigations they conduct. The prosecuting authorities are also obliged to inform the assigned competent court of the facts within forty-eight hours, if they believe that there is sufficient proof of the crime and grounds for demonstrating the responsibility of the accused.

#### *Languages:*

Spanish.



*Identification:* MEX-2009-3-022

**a)** Mexico / **b)** Supreme Court / **c)** Second Chamber / **d)** 27.04.2001 / **e)** 140 / **f)** Judicial review 600/1999 / **g)** *Semanario Judicial de la Federación*, Tome XIV, July 2001, 507; IUS 189, 312; *Relevant Decisions of the Mexican Supreme Court*, p. 417-418 / **h)**.

*Keywords of the systematic thesaurus:*

4.7.1 Institutions – Judicial bodies – **Jurisdiction**.  
 4.16 Institutions – **International relations**.  
 5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.

*Keywords of the alphabetical index:*

Extradition, competence / Extradition, proceedings / Judicial authority, principle of exclusive jurisdiction.

*Headnotes:*

Federal Judiciary courts are not the only authorities competent to hear and resolve international requests for extradition.

*Summary:*

The Second Chamber of the Supreme Court held that the courts of the Federal Judiciary are not the only authorities competent to hear and resolve international requests for extradition, as the involvement of the judicial authority in extradition proceedings, in accordance with Article 119 of the Federal Constitution, is restricted to issuing a ruling ordering that the request be complied with. Furthermore, in order for federal courts to be competent for the purposes of resolving international extradition issues, in accordance with Article 104.I of the Federal Constitution, there must be a lawsuit (proceedings involving legitimate parties subject to Mexican jurisdictional authority).

The Chamber added that international extradition is an act that takes place between sovereign nations. One of them is the requesting party and the other the requested party; and the legal relationship that arises between them is of an international nature. Thus competence over a matter which is of a supranational nature cannot pertain to a national court only.

Additionally, the person whose extradition is sought has no active legitimacy; extradition is an act that takes place between nations. If a requested nation refuses to grant an extradition, it is the nation requiring the extradition that is negatively affected.

Similarly, acceptance of the legal relationship that arises between the requesting state and the person whose extradition is sought would not validate the competence of a court of the requested country; the court would not have this authority because of the nature of the parties, especially since one of them is a foreign nation.

*Languages:*

Spanish.



*Identification:* MEX-2009-3-023

**a)** Mexico / **b)** Supreme Court / **c)** Plenary / **d)** 07.05.2001 / **e)** 141 / **f)** Action of unconstitutionality 13/2000 / **g)** *Semanario Judicial de la Federación*, Tome XIII, may 2001, 626, 627, 702, 786; IUS 189, 594; 189, 542; 189, 775; 189, 760; *Relevant Decisions of the Mexican Supreme Court*, p. 419-420 / **h)**.

*Keywords of the systematic thesaurus:*

3.4 General Principles – **Separation of powers**.  
 4.5.2 Institutions – Legislative bodies – **Powers**.  
 4.6.9.4 Institutions – Executive bodies – The civil service – **Personal liability**.

*Keywords of the alphabetical index:*

Public service / Responsibility, authority / Civil servant, rights and obligations.

*Headnotes:*

The responsibility of a local civil servant must be sanctioned by his or her immediate superior and not by the legislative power.

*Summary:*

The Representatives of the Forty-Eighth Legislature of the State of Morelos challenged the approval and issuing of Decrees 1207, 1222 and 1234, which amended Articles 40.LV and 44 of the State of Morelos Constitution, and Articles 37, 38.g, 41 and 66 of the State of Morelos Congress Act. They questioned the constitutional compliance of these provisions.

The Supreme Court declared invalid Article 40.LV of the State of Morelos Political Constitution, amended by Decree no. 1234. The rationale behind the decision was that it was not constitutional for the State of Morelos Congress to be empowered to hear liability proceedings and to issue penalties against municipal and state civil servants in respect of claims and complaints filed by individuals arising from violations of the principles of impartiality, integrity, professionalism, honesty, efficiency, loyalty and austerity. This would run counter to the principles set out in the field of civil servant responsibilities in Title Number Four of the Federal Constitution, especially Articles 108 and 113 of the Federal Constitution. Under these provisions, the proceedings and the penalty (both administrative) are generally applied to the immediate superior of the public official who is thought to have committed the offence or, at government level, to a specific agency. Were a local Congress to grant itself these powers through the reform in question, it would jeopardise the balance of powers that the local Constitution must safeguard, as established by the provisions of Articles 41, 49 and 116 of the Federal Constitution. These seek to restrict and balance public powers so that no one power stands above another. This basic principle must also be upheld in the State constitutions.

With regard to the other alleged grounds for invalidity, the Supreme Court recognised the validity of Article 44 of the State of Morelos Constitution, Articles 37, 38.g, 41 and 66 of the State of Morelos Congress Act, amended through Decrees 1234, 1217 and 1222, respectively, given that they did not contravene Articles 35.I and 35.II, 36.III, 39, 40, 41, 49, 71, 72, 79, 115.1, 116 and 124 of the Federal Constitution, which set out the model to be adopted by the states with regard to their internal regime, the division of powers and the legislative procedure.

*Languages:*

Spanish.

*Identification:* MEX-2009-3-024

**a)** Mexico / **b)** Supreme Court / **c)** First Chamber / **d)** 30.05.2001 / **e)** 142 / **f)** Direct relief proceedings under review 1615/99 / **g)** *Semanario Judicial de la Federación*, Tome XIV, December 2001, 186; IUS 188, 294; *Relevant Decisions of the Mexican Supreme Court*, p. 421-422 / **h)**.

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Detention, conditions / Detention pending trial / Detention, duration / Fundamental rights, limitation / Judicial protection, effective, right / Judge, duties / Judge, qualifications.

*Headnotes:*

In order for the decision of the constitutional period for *habeas corpus* to end, the defendant must be physically or materially placed at the disposal of the court authority at the detention centre corresponding to his or her location.

*Summary:*

With regard to the decision surrounding the constitutional timeframe of seventy-two hours for *habeas corpus*, the First Chamber of the Supreme Court resolved that in order for this timeframe to end, it is not sufficient for the remand documentation issued by the prosecuting authorities simply to state that the defendant is in custody at the disposal of the court authority dealing with the matter at their local detention centre or health centre. The defendant must also be placed at the court's disposal either physically or materially at the detention center under the jurisdiction of the Court hearing the case.

The Judge must be legally and physically able to authenticate or validate the custody required by the Prosecuting Authorities as decreed in the investigation stage, and to observe and duly ensure compliance with the procedural and substantive prerogatives set out in the Constitution and laws for the suspect.

The First Chamber also determined that where the defendant is placed at the courts' disposal and it is indicated that he or she is in custody at a place other than the seat of the court, even if such place lies within the judge's jurisdiction, it is clear that the requirements are not being complied with, as a result of which the effects set forth by law must not be granted.

#### Languages:

Spanish.



#### Identification: MEX-2009-3-025

a) Mexico / b) Supreme Court / c) First Chamber / d) 17.10.2001 / e) 150 / f) *Judicial review* 633/38 and 1158/99; 1469/2000; 1179/2000 and 1231/2001 / g) *Semanario Judicial de la Federación*, Tome XV, May 2002, 17; IUS 186, 895; *Relevant Decisions of the Mexican Supreme Court*, p. 421-422 / h).

#### Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**  
 3.14 General Principles – ***Nullum crimen, nulla poena sine lege.***  
 5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**

#### Keywords of the alphabetical index:

Penalty, excessive / Punishment, cruel and unusual / Punishment, definition.

#### Headnotes:

Punishments, which legally and directly affect innocent third parties are “unusual” in the sense of the prohibition of cruel and unusual punishments of Article 22 of the Federal Constitution.

#### Summary:

In the course of resolving several criminal relief matters, the First Chamber of the Supreme Court, given the deficient nature of the complaint, decided to

rule on whether or not the penalties established under Article 371, last paragraph, of the Federal District Penal Code violated Article 22 of the Federal Constitution. This provision establishes a more severe penalty than the one specified under Article 370 of the above Code.

The Chamber indicated that the doctrine and the Court itself defined an “excessive” (*transcendental*) penalty as one that not only affected the party responsible for the crime, but also relatives of that person who were not involved in the perpetration of the offence. A penalty will be excessive insofar as it is imposed directly or indirectly against innocent people, who are usually relatives of the active perpetrator of the crime, and contradicts the principle of the standing of criminal punishment (whereby it is only applied to the party responsible for the crime and his or her accomplice(s) or accessory(ies).

An indirect impact (for example where the main family breadwinner is sent to prison or the income of his or her spouse and children is jeopardised) is not, strictly speaking, an excessive penalty, unless it is set specifically in order to harm the family, which would be the case if confiscation were added to a death penalty.

Regarding the unusual punishment referred to under Article 22 of the Federal Constitution, the imposition of which does not comply with the application of a regulation containing it, but with the arbitrary nature of the authority imposing it. As a result, the constitutional prohibition regarding unusual punishments confirms the effectiveness of the principle of *nulla poena sine lege* referred to under Article 14 of the Federal Constitution, that is, the principle of legal certainty.

The punishment in question here was alleged to have breached Article 22 of the Federal Constitution in that it provided for a punishment parameter of five to fifteen years' imprisonment, thus imposing an excessive, cruel and unusual punishment. This contention was found to be groundless. In addition to referring to causes and details considered by the judge in order to impose said punishment, it cannot be upheld that the punishment set forth for this special type is cruel and unusual, especially if the challenged article contains a special type of robbery, the aggravated punishment of which complies with the legal circumstances other than the amount or quantity stolen.

#### Languages:

Spanish.





*Identification:* MEX-2009-3-026

**a)** Mexico / **b)** Supreme Court / **c)** First Chamber / **d)** 17.10.2001 / **e)** 152 / **f)** Contradicting resolutions 34/2000-PS Between the First and Second Collegiate Courts of the Ninth Circuit / **g)** *Semanario Judicial de la Federación*, Tome XV, March 2002, 74; IUS 187, 542; *Relevant Decisions of the Mexican Supreme Court*, p. 449-450 / **h)**.

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Accountant, public, status / Evidence, value.

*Headnotes:*

A statement of account certified by a public accountant empowered by the credit institution must include the name of the accountant in order not to leave the plaintiff defenceless.

*Summary:*

I. Criteria set forth by the Ninth Circuit Courts (First and Second Collegiate Courts) resulted in contradicting opinions 34/2000-PS. The first court considered that bank statements certified by a public accountant and authorised by the banking institutions were not ineffective if the name of the public accountant who performed the corresponding certification did not appear therein, for Article 68 of the Credit Institutions Act does not establish such a requirement. The other court, however, deemed that bank statements certified by a public accountant empowered by the banking institutions were ineffective if the name of the subscriber did not appear therein.

II. The First Chamber of the Supreme Court determined that there were contradicting decisions, and resolved that its own criterion should prevail.

The Chamber noted that Article 68 of the Credit Institutions Act confers the standing of executive title to whichever contract or policy puts on record the credit granted by the banking institution along with a bank account certified by the public accountant empowered by said banking institution, without any further requirements. The evidential value of the certification is assumed in each case, in the absence of evidence to the contrary. This would indicate that, although Article 68 does not specify that bank statement must bear the name of the public accountant who certified them, if the defendant objects to the bank statement because it does not contain this requirement, this omission would leave him or her without a defence, as it would be impossible to prove that the accountant does not have the relevant qualification or is not authorised by the institution to perform the certification. This contravenes the guarantee of a hearing under Article 14 of the Federal Constitution. For this defence to be truly effective, the individual must be allowed to present evidence demonstrating the facts set out therein and make any supporting statements.

*Languages:*

Spanish.



# Moldova

## Constitutional Court

### Important decisions

*Identification:* MDA-2009-3-003

**a)** Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 17.09.2009 / **e)** 4 / **f)** Ascertain the circumstances justifying the interim office of the President of the Republic of Moldova / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

*Keywords of the systematic thesaurus:*

4.4.2 Institutions – Head of State – **Temporary replacement.**

4.4.5.1 Institutions – Head of State – Term of office – **Commencement of office.**

*Keywords of the alphabetical index:*

Head of State, continuity of discharge / President, resignation, replacement.

*Headnotes:*

Under Article 135.1.f of the Constitution, one of the tasks of the Constitutional Court is to ascertain the circumstances justifying the interim office of the President of the Republic of Moldova.

Article 90.1 of the Constitution provides that the office of the President of the Republic of Moldova may become vacant as a result of the expiry of the presidential mandate, of resignation from office, removal from office, definite impossibility of executing his or her duties or death.

Under Article 91 of the Constitution, if the office of President becomes vacant or the President has been dismissed or finds him or herself temporarily unable to discharge his or her duties, the interim office will devolve on the Speaker of the Parliament or the Prime Minister in the order of priority.

The role of the constitutional provisions in Article 91 is to ensure continuity in the exercise of the duties of the Head of State.

*Summary:*

I. The Constitutional Court examined the circumstances justifying the interim office of the President.

On 11 September 2009, Parliament took note of the resignation of Mr Vladimir Voronin from the function of President of the Republic. It declared his office vacant.

By Decision no. 15-XVIII of 11 September 2009, Parliament resolved that the interim office of the President should be ensured by the Chairman of the Parliament Mr Mihai Ghimpu. The decision was transmitted to the Constitutional Court to ascertain the circumstances justifying the interim office of the President, this being one of its tasks, in conformity with Article 135.1.f of the Constitution.

II. Under Article 90.1 of the Constitution the office of the President of the Republic may become vacant as a result of the expiry of the presidential mandate, of resignation from office, removal from office or the definitive impossibility of executing his duties or death.

In conformity with Article 91 of the Constitution, in the event the office of the President of the Republic becomes vacant or the President has been dismissed or finds himself or herself temporarily unable to discharge his or her duties, the office will devolve upon the Speaker to the Parliament or the Prime Minister in order of priority.

The text of the Constitution clearly defines the situations which lead to the necessity to appoint an Acting President.

The Court pointed out that the resignation of the Head of State might be qualified as wilful and subjective, something that happened through his own actions. The Head of State submitted his resignation to the Parliament which was acted upon by the latter declaring vacant the office of President. In the opinion of the Constitutional Court, these circumstances justify the setting – up of the interim office of the President of the Republic. In order to safeguard the continuity of discharge of the duty of the Head of State, Parliament, by Article 1 of its Decision no. 15-XVIII of 11 September 2009, stipulated that the interim office of the President should devolve upon the Chairman of Parliament.

*Languages:*

Romanian, Russian.



*Identification:* MDA-2009-3-004

**a)** Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 27.10.2009 / **e)** 18 / **f)** Interpretation of the provisions of Articles 90.1, 90.2, 91 and 135.1.f of the Constitution of the Republic of Moldova / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

*Keywords of the systematic thesaurus:*

1.3.3 Constitutional Justice – Jurisdiction – **Advisory powers.**

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

3.1 General Principles – **Sovereignty.**

4.4.2 Institutions – Head of State – **Temporary replacement.**

4.4.5.4 Institutions – Head of State – Term of office – **End of office.**

*Keywords of the alphabetical index:*

President, acting, qualifications / Sovereignty, exercise, permanent / Power, vacuum, impossibility.

*Headnotes:*

Under Article 90 of the Constitution, the office of the President of the Republic of Moldova may become vacant due to the expiry of the presidential mandate, resignation from office, removal from office, death or inability to continue performing his or her duties. Under Article 90.2, a request to remove the President will be put forward to Parliament for a decision on the request.

Article 91 of the Constitution provides that if the office of President becomes vacant, or the President has been dismissed or finds him or herself temporarily unable to discharge his or her duties, the interim office will devolve upon the Speaker of the Parliament or the Prime Minister in order of priority.

Under Article 135.1.f of the Constitution, the Constitutional Court ascertains the circumstances justifying the interim office of the President.

*Summary:*

I. Following a claim by the Parliamentary Faction of the Party of Communists, the Court interpreted the

provisions of Articles 90.1, 90.2, 91 and 135.1.f of the Constitution. The Parliamentary Faction had asked in the claim whether it was advisory or compulsory to seek the opinion of the Constitutional Court in ascertaining the circumstances justifying the interim office of the President in cases of resignation. It had also sought clarification as to the sequence of events for the Parliament and the Constitutional Court in cases of resignation by the President, and as to the timing of the setting up of the interim office of President. Clarification was also sought as to who would perform the duties of Head of State between the declaration of the position being vacant and the installation of the interim office. The Parliamentary faction also asked whether the Acting President was under a duty to comply with the requirements set out in Article 78.2 of the Constitution.

II. In the course of interpreting these provisions, the Constitutional Court also took the opportunity of clarifying the meaning of certain concepts associated with the office of President, including resignation, vacancy and interim office. With regard to resignation, the Court noted that the resignation from office of the President of the Republic of Moldova takes the form of a written request submitted to Parliament in which the President resigns from the position. The resignation of the Head of State will be deemed voluntary and subjective circumstances will have occurred on his or her initiative. In view of the multitude of tasks within the President's remit, the Court noted that political power under the concept of national sovereignty belongs to the people and must be exercised permanently and without interruption due to its unitary, inalienable and indivisible character. Following this reasoning, the leadership of the country is an uninterrupted activity even if, in certain circumstances, the duties of ensuring the normal functioning of state mechanisms may devolve on the Speaker or Prime Minister.

The Court also noted that vacancy of the Presidential office will commence at the point of expiration of his or her mandate and terminate when a new President is elected.

The Court explained that the interim office of the President of the Republic of Moldova is a situation or period of time during which the Chairman of Parliament or the Prime Minister as the case may be will temporarily carry out the function of President until the next Head of State is sworn in according to Articles 78, 79 and 90 of the Constitution. As a vacuum of power cannot be allowed, the interim office comes into effect immediately the vacancy of the office of President is announced.

In its decision the Court also commented on the nature of the judgment of the Constitutional Court, observing that a judgment should be defined as an opinion and a competent assessment of an issue under discussion within the framework of the issuing organ. Regardless of whether it is handed down before or after the announcement of a vacancy due to resignation, it has an advisory character.

As to compliance by the Acting President with the requirements outlined in Article 78.2 of the Constitution, the Court noted that the function of Acting President of the Republic of Moldova (exercised by the Chairman of Parliament or Prime Minister) is a provisional function. It is not necessary for the Acting President to meet the special requirements foreseen for candidates for the office of President.

#### *Languages:*

Romanian, Russian.



## Monaco Supreme Court

### Important decisions

*Identification:* MON-2009-3-001

**a)** Monaco / **b)** Supreme Court / **c)** / **d)** 05.12.2007 / **e)** T.S. 2007-15 / **f)** Sylvain Gozès v. State of Monaco / **g)** / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Statement of reasons, obligation, scope / Statement of reasons, foreign judgment.

*Headnotes:*

As in other countries which have enacted legislation on the reasons on which administrative acts are based, applicants and the administration must adapt to these new rules: applicants must not confuse judicial review of the reasons (a matter of formal legality) and judicial review of the grounds (a matter of substantive legality); the administrative authorities must be aware that a clear, substantial, precise and even, if necessary, a rather long statement of reasons is often sufficient to avoid contentious proceedings, and therefore the risk that the administration will be censured for what is ultimately merely a procedural error which, in most cases, would be easy to avoid.

*Summary:*

The interest of this decision lies in the fact that it is the first to annul an individual administrative decision on the ground that it infringed Law no.1312 of 29 June 2006 on the reasons on which administrative acts are based, which entered into force on 1 January 2007. According to Section 1 of that law, administrative decisions which, “on pain of nullity”, must state the reasons on which they are based include those which “restrict the exercise of public freedoms or constitute a control measure”. In this

case, there was no doubt about the need to state the reasons for a measure for the control of aliens (the refusal to revoke an earlier expulsion order). The difficulty arose from the fact that the reasons stated for the contested decision comprised solely a reference to a civil conviction pronounced against the applicant by a foreign court. However, Section 2 of Monegasque Law no. 1312 states: "The reasons shall be stated in writing and shall include, in the body of the decision, a statement of the considerations of law and of fact which constitute its basis".

As that provision drew directly on foreign legislation having the same purpose, in particular French legislation, the Supreme Court was to a certain extent influenced by French administrative case-law. However, there was no question of placing unduly severe obligations on the Monegasque administration. Thus, in the *Gozès* case, the Supreme Court stated that it would have been sufficient to attach to the contested decision the actual text of the judgment convicting the person concerned. As the judgment in question was a civil judgment and, moreover, had been delivered by a foreign court (so that the Monegasque administration might be aware of the substance of the judgment without having the actual text), the Supreme Court decided that, if the judgment was not attached to the administrative decision, it was at least necessary for the body of that decision to state how and why that judgment constituted a ground for rejecting the applicant's application, that is to say, ultimately, how and why the applicant's presence on Monegasque territory represented a threat to public order.

#### *Supplementary information:*

Since that decision of 5 December 2007, the Supreme Court has had occasion to state, still in matters relating to the control of aliens, that it might be sufficient to cite the facts disclosed by a criminal (and not civil) conviction and the rules on immigration control in order for the decision to be regarded as stating sufficient reasons (T.S. 01.12.2008, *Di Martino*, no. 2008-3; 16.02.2009, *Amar*, no. 2008-5).

#### *Languages:*

French.



## Netherlands Council of State

### Important decisions

*Identification:* NED-2009-3-003

**a)** Netherlands / **b)** Council of State / **c)** Third Chamber / **d)** 25.11.2009 / **e)** 200902039/1/H2 / **f)** X (a citizen) v. Tax and Customs Administration/Allowances Service / **g)** *Landelijk Jurisprudentienummer*, LJN:BK4364 / **h)** CODICES (Dutch).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Social security.

*Headnotes:*

A decision to pay zero amount as rent allowance to an applicant who narrowly exceeds the financial eligibility limit does not constitute a breach of the principle of equality before the law which is protected under the Constitution.

*Summary:*

The Tax and Customs Administration/Allowances Service decided that the total amount of rent allowance over the year 2006 to which X was entitled was zero. The applicant contested the decision, but the Tax and Customs Administration/Allowances Service dismissed her objections. X then launched proceedings in an administrative law court. The District Court upheld the Tax and Customs Administration's decision. X then appealed to the Administrative Jurisdiction Division of the Council of State, arguing that the decision taken by the Tax and Customs Administration was contrary to both Article 1 of the Constitution and the Equal Treatment Act, which the District Court had allegedly failed to recognise.

Under Article 7 of the Rent Allowance Act, entitlement to rent allowances and the amounts payable depend on the financial capacity of the applicant and – if applicable – that of his or her partner and fellow tenants. Therefore, the General Income-related Schemes Act applied. Under Article 47 of this Act, a ministerial order may contain varying stipulations for exceptional cases in which application of Article 7 of the General Income-related Schemes Act would result in extreme unfairness. Implementing regulations have been adopted accordingly. X's income over the year 2006 was € 54 above the financial eligibility limit set out in the Rent Allowance Act.

The Administrative Jurisdiction Division of the Council of State held that apart from the implementing regulations, the Tax and Customs Administration/Allowances Service did not have any power to declare Article 7 of the General Income-related Schemes Act inapplicable. It was disputed that X's case was not among the exceptional cases listed in the implementing regulations.

The Administrative Jurisdiction Division of the Council of State also held that X's claim could not be based on the Equal Treatment Act. Article 7 of this Act provides that it is unlawful to discriminate *inter alia* in offering goods or services. However, under parliamentary history and the legal system, the grant of rent allowances is not covered by this provision. Article 7a is applicable but this provision protects against discrimination in the field of social protection, including social security and access to social advantages, only on the grounds of race.

Finally, the Administrative Jurisdiction Division of the Council of State held there had been no violation of Article 1 of the Constitution. Those with differing financial capacity cannot be considered not to be in equal circumstances under this provision. Besides, it does not follow from Article 1 of the Constitution that differences in financial capacity should be expressed by using a more flexible sliding scale than that which had been adopted in the implementing regulations based on the General Income-related Schemes Act.

#### Languages:

Dutch.



## Norway Supreme Court

### Important decisions

*Identification:*NOR-2009-3-005

a) Norway / b) Supreme Court / c) Grand Chamber / d) 13.11.2009 / e) 2009, 1412 / f) / g) *Norsk retstidende* (Official Gazette) / h) CODICES (Norwegian).

#### Keywords of the systematic thesaurus:

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

#### Keywords of the alphabetical index:

Law, *travaux préparatoires* / Non-retrospective effect of law.

#### Headnotes:

Any developments with respect to sentencing levels have to occur gradually and the *travaux préparatoires* of an Act that had not yet been passed cannot serve as a basis for sentencing.

#### Summary:

The case concerned sentencing following the conviction for breach of Section 229, third sentencing alternative, cf. Section 232 of the Penal Code – inflicting bodily harm with a particularly dangerous weapon (a knife) that resulted in the death of the victim. The question of principle before the Supreme Court was whether regard should be given to statements in the *travaux préparatoires* to Act no. 74 of 19 June 2009 concerning a considerable increase in sentencing levels when passing sentence in cases where the offence had been committed before the Act was passed. The Supreme Court held that a development in sentencing levels had to take place gradually. The Supreme Court dismissed the appeal and affirmed the Court of Appeal's sentence of four years and six months imprisonment. The judgment was passed with dissenting votes (10-1).

*Languages:*

Norwegian, English (translation by the Court).



## Poland

### Constitutional Tribunal

#### Statistical data

1 September 2009 – 31 December 2009

Number of decisions taken:

Judgments (decisions on the merits): 30

- Rulings:
  - in 12 judgments the Tribunal found some or all challenged provisions to be contrary to the Constitution (or other act of higher rank)
  - in 18 judgments the Tribunal did not find the challenged provisions to be contrary to the Constitution (or other act of higher rank)
  
- Initiators of proceedings:
  - 7 judgments were issued at the request of courts – question of legal procedure
  - 7 judgments were issued at the request of private individuals (physical or natural persons ) – the constitutional complaint procedure
  - 3 judgments were issued at the request of the Commissioner for Citizens' Rights (i.e. Ombudsman)
  - 2 judgements were issued upon the request of legal persons (limited liability companies) – the constitutional complaint procedure
  - 1 judgement was issued upon the request of the Supreme Council of the Judiciary
  - 1 judgement was issued upon the request of the Supreme Bar Council
  - 2 judgements were issued upon the request of Municipal Councils
  - 2 judgements were issued upon the request of a group of MPs
  - 5 judgements were issued upon the request of the President of the Republic – preliminary review procedure
  
- Other:
  - 6 judgments were issued by the Tribunal in plenary session
  - 8 judgments were issued with dissenting opinions

## Important decisions

*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 Trybunału 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 Trybunału Konstytucyjnego* (Official Digest), 1991, item 34;
- Judgment U 6/92 of 19.06.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, item 13; CODICES [POL-1992-X-002];
- Judgment S 1/94 of 13.06.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, item 28;
- Judgment K 12/94 of 12.01.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, item 2; *Bulletin* 1995/1 [POL-1995-1-003];
- Judgment K 11/94 of 26.04.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, item 12;
- Judgment K 8/95 of 04.10.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, item 28;
- Judgment K 9/95 of 31.01.1996, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1996, no. 1, item 2; [POL-1996-1-002];
- Judgment U 7/96 of 19.02.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 1, item 11;
- Judgment K 19/96 of 24.02.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 1, item 6; *Bulletin* 1997/1 [POL-1997-1-005];
- Judgment K 21/96 of 24.06.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 2, item 23; *Bulletin* 1997/2 [POL-1997-2-016];
- Judgment K 10/97 of 08.04.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 3, item 29;
- Judgment K 24/98 of 21.10.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 6, item 97; CODICES [POL-1998-X-003];
- Judgment P 2/98 of 12.01.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 1, item 2; *Bulletin* 1999/1 [POL-1999-1-002];
- Judgment P 11/98 of 12.01.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 1, item 3; *Bulletin* 2000/1 [POL-2000-1-005];
- Judgment K 33/99 of 03.10.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 6, item 188;
- Judgment P 2/00 of 20.02.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 2, item 32;
- Judgment K 22/01 of 23.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 215;
- Judgment K 33/00 of 30.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 217; *Bulletin* 2001/1 [POL-2001-1-005];
- Judgment P 9/01 of 12.03.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 2A, item 14; *Bulletin* 2002/3 [POL-2002-3-022];
- Judgment K 26/00 of 10.04.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 2A, item 18; [POL-2002-3-025];
- Judgment P 10/01 of 28.05.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 3A, item 35;
- Judgment K 41/02 of 20.11.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 6A, item 83; *Bulletin* 2003/1 [POL-2003-1-006];
- Judgment P 10/02 of 08.07.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 6A, item 62;
- Judgment SK 22/02 of 26.11.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 9A, item 97; *Bulletin* 2004/1 [POL-2004-1-004];
- Judgment K 45/02 of 20.04.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 4A, item 30;
- Judgment P 2/03 of 05.05.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 5A, item 39; *Bulletin* 2004/2 [POL-2004-2-015];
- Judgment K 4/04 of 20.06.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 6A, item 64;
- Judgment Kp 1/05 of 22.09.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 8A, item 93;
- Judgment K 32/04 of 12.12.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 11A, item 132; *Bulletin* 2006/1 [POL-2006-1-001];

- Judgment SK 30/05 of 16.01.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 1A, item 2; *Bulletin* 2006/1 [POL-2006-1-002];
- Judgment K 21/05 of 18.01.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 1A, item 4; *Bulletin* 2006/1 [POL-2006-1-003];
- Judgment S 2/06 of 25.01.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 1A, item 13;
- Judgment K 4/06 of 23.03.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 3A, item 32; *Bulletin* 2006/1 [POL-2006-1-006];
- Judgment U 4/06 of 22.09.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 8A, item 109;
- Judgment K 8/07 of 13.03.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 3A, item 26; *Bulletin* 2008/1 [POL-2008-1-001];
- Judgment P 13/06 of 15.05.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 6A, item 57;
- Judgment Kpt 2/08 of 20.05.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 5A, item 78; *Bulletin* 2009/2 [POL-2009-2-003].

- 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*).

Languages:

Polish.



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*);

# Portugal

## Constitutional Court

---

### Statistical data

1 September 2009 – 31 December 2009

Total: 229 judgments, of which:

- Abstract *ex post facto* review: 2 judgments
- Concrete reviews: 137
- Appeals against refusals to admit: 15
- Electoral matters: 65
- Matters concerning political parties: 4
- Political party and election campaign accounts: 5
- Declarations of assets and income: 1

### Important decisions

*Identification:* POR-2009-3-011

a) Portugal / b) Constitutional Court / c) Second Chamber / d) 28.09.2009 / e) 486/09 / f) / g) *Diário da República* (Official Gazette), 215 (Series II), 05.11.2009, 45119 / h) CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

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

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

5.3.36.2 Fundamental Rights – Civil and political rights – Inviolability of communications – **Telephonic communications.**

*Keywords of the alphabetical index:*

Telephone, tapping.

*Headnotes:*

As a corollary to the protection that is afforded to the privacy of personal life, the right to privacy of communications does not simply include a prohibition on interfering with telephone calls in real time, but also precludes third parties from subsequently

gaining access to elements that would disclose the factual conditions in which a communication took place. Detailed invoicing developed within the Portuguese legal system as a mechanism that was designed to protect the users of essential public services, particularly the telephone service. This protection is given in the form of an obligation on the part of the service provider to identify each telephone call and how much it cost.

The introduction of detailed invoicing has improved subscribers' ability to check whether the amounts charged by the service provider are correct. However, it also gives rise to the possibility that the privacy of users of a telephone service may be endangered by the existence of information about the "factual conditions in which communications take place". As defined by law, a detailed invoice must at minimum include information about all the calls that were made during a given period, the telephone numbers that were called, the date of each call, the time at which it began and its duration.

The data contained in the detailed invoices and (insofar as they enable the transmission of communications) the cell location data that use those communications as the basis for providing the mobile equipment's geographic position, constitute telecommunications traffic data. They accordingly enjoy the protection which the Constitution affords to the secrecy of telecommunications.

Permission to intercept and record telephone conversations and communications covers not only access to the content of those communications, but also access to all the data that is provided by the act of carrying out the intercepts.

At the time of the case in point, the applicable rules governing the interception and recording of telephone conversations and communications also allowed access to the applicable detailed invoicing and the cell location data that provide the geographic location of mobile equipment based on acts of communication.

*Summary:*

This appeal on the grounds of unconstitutionality addressed an interpretation of a Code of Criminal Procedure (hereinafter, the "CCP") rule allowing the interception and recording of telephone conversations and communications, which was also said to encompass data concerning the detailed invoicing of those communications and the applicable cell location data.

The appellant argued that access to traffic data is a different – albeit no less substantial – form of invasion to that posed by the interception of telephone communications. Thus it raises issues of the restriction of fundamental rights. Under the Constitution, such restrictions can only be permitted by a law that expressly states its intention to authorise them.

In particular, this is because such access makes it possible to produce and attach significance to evidence that results from interference in telecommunications for which criminal procedural law makes no provision.

The law does not currently include a system of *amparo* remedies or other forms of “constitutional shelter”, that would allow a citizen to complain directly about a breach of the Constitution. Instead, there is a normative review system, under which the Constitutional Court is not allowed to examine the constitutional merit of an action in a specific case whereby a detailed set of concrete facts are subsumed in the abstract provisions of a given legal rule. However, the constitutional review system provides for the possibility of considering the validity of a format which is generally known as “normative interpretation”. Faced with a typified reality with a high degree of abstraction – as is the case with “access to detailed invoicing” and “cell location” – the arguments that the Court ought not to address possible violations of the principle of legality lose their foundation. In these cases the Constitutional Court does not serve as a court of review of a lower court’s decision, in the way in which the other courts interpret and apply infra-constitutional law; indeed, it is forbidden to do so. Instead it merely verifies whether the normative criterion adopted by the court, whose decision has been brought before it – i.e. that an abstract typified reality should be considered to be included in a given legal precept – breaches the principle that legal provisions which restrict fundamental rights can only be made in the form of a law.

The appeal under consideration in this ruling touched upon the subject of the prohibitions of certain forms of evidence in criminal cases. It did so against a backdrop of an alleged breach of the constitutional protection afforded to the privacy of personal life and, more specifically, to the secrecy of telecommunications.

Even in matters concerning criminal liability, the constitutional values of the search for the material truth and that justice must be done are subject to limits imposed by human dignity and fundamental human rights. In procedural terms, these take the form of prohibitions on certain types of evidence. Anybody, even persons suspected of having

committed any type of crime, is entitled to invoke these prohibitions.

Nonetheless, not all prohibitions on obtaining evidence are absolute. The prohibition on obtaining evidence by means of intrusions into private life, at a person’s home, in correspondence and in telecommunications, can be waived either by the agreement of the holder of the rights in question, or via restrictions on the inviolability of those rights that are authorised under the Constitution.

The constitutional legislator made express provision for restrictions on the secrecy of telecommunications, and then only in the field of criminal procedural law. The rule here is that recordings, which result from telephone tapping, may not be produced or given value in court. However, the Constitution permits the existence of an ordinary criminal procedural law that authorises the production of such evidence and the consequent attachment of value to it.

As to the type of data involved in a telecommunications service, there is still a consensus among Portuguese legal authors and in Portuguese jurisprudence that there should be three classifications for data, namely basic data, traffic data and content data. Unlike the basic elements (elements needed to establish a basis for communication), both the “traffic elements” (functional communication elements) and the “content” elements are directly related to the communication itself, in that they concern the latter’s identifiability and the actual content of the message or communication.

The functional (traffic) elements or data needed for, or produced by, the establishment of the connection via which a concrete communication with a given content is operated or transmitted are the address, the destination and the route. The secrecy applicable to telecommunications encompasses not only the content of communications, but also the traffic as such.

Detailed invoicing includes so-called traffic data related to the communications that take place.

Cell location does not require the mobile equipment to make telephone calls – it is enough for that equipment just to be switched on.

In conformity with a European Directive, the law considers that the location data which provides the geographic position of terminal equipment is only traffic data to the extent that a mobile network processes it in order to make it possible to transmit communications.

This type of traffic data is always recorded and stored for a limited period of time. Telephone service users are aware of this, so it would be hard to say that access to such data as part of criminal proceedings can be described as a hidden method of criminal investigation.

The constitutional requirement that the law must make provision for such techniques before the public authorities can use them to intrude on telecommunications as part of a criminal-law procedure is designed to place the greatest possible limits on the existence of areas in which those authorities are able to exercise their discretion.

On a purely literal level, the text of the criminal procedural law provision in question does not make any explicit reference to the possibility of gaining access to detailed invoicing and cell locations. At first sight, it appears only to mention the possibility of access to content data – i.e. telephone tapping.

However, it is only through interpretation that the source and content of a legal rule can be understood. When interpreting legal rules, caution is needed to respect the principle of legality in criminal proceedings, and, in this particular case, the risk of causing serious injury to fundamental rights.

The interception and recording of telephone conversations or communications necessarily includes a kind of “detailed invoicing” of those communications, which is undertaken by the police involved in the case, and which takes material form in the shape of the recording that is to be attached to the case file.

At the same time, interceptions of telephone communications are always technically and necessarily preceded by the cell location of the mobile equipment involved, without which it is not possible to establish and transmit communications.

It can therefore be concluded that the Criminal Code provision that allows the interception and recording of telephone conversations or communications also permits access to all the traffic data inherent in the implementation of this particular technique for intruding into telecommunications.

As this traffic data only forms part of the data that is made available by carrying out telephone tapping, there is nothing to stand in the way of the requirement (and indeed, it becomes imperative) to ensure that the techniques for intruding into telephone conversations are restricted to the extent needed to achieve the intended criminal investigation objective. In fact, access to this traffic data may even be sufficient in its own right; it may be possible to dispense with the need

to perform telephone tapping when this is no longer indispensable for the purposes of the investigation.

The Constitutional Court concluded that, inasmuch as access to detailed invoicing and cell location are included in the content of the techniques for intruding into telecommunications for which the legislative authorities have made express provision, the normative interpretation before it did not fail to respect the principle of legality.

#### *Supplementary information:*

Various references were made in the Ruling to European legislation and comparative law, as well as to case-law from the same sources.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2009-3-012

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 29.09.2009 / **e)** 493/09 / **f)** / **g)** *Diário da República* (Official Gazette), 35 (Series II), 19.02.2010, 7483 / **h)** CODICES (Portuguese).

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

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

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

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

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

Nationalisation / Expropriation, compensation, amount.

#### *Headnotes:*

The rule providing that the compensation the State must pay to former holders of rights to property that has been nationalised should take the form of public debt securities is not unconstitutional.

*Summary:*

The object of this appeal was a request to consider the constitutionality of certain articles of the Law approving the payment of compensation to former holders of rights to property which has been nationalised or expropriated. The applicable rules result in a transfer of public debt securities in lieu of payment, with the terms and conditions governing the transfer to be regulated by official order, to include redemption and deferral periods and interest rates that are differentiated by class or band, depending on the overall amount to be compensated, as per the data set out in the table annexed to the Law in question.

The Court which had made the decision on this appeal refused to apply certain articles of the Law on the grounds that they were unconstitutional. This was due to the form of payment of the compensation laid down by the Law and to the length of the redemption and deferral periods applicable to the loans that corresponded to the public debt securities which were transferred in order to satisfy the right to compensation.

The Lower Court held that the failure to pay the amounts due in compensation immediately was justified. Nonetheless, it held that the provision for payment in the form of Treasury Bonds which, were redeemable over a long period, combined with a fixed rate of remuneration, which was clearly lower than the actual rate of inflation, meant that although the compensation initially could not be described as derisory, the compensation that was actually paid "became derisory" over time.

In accordance with this finding, the court decided to uphold the suit in part by issuing an order that the state must update the amount allocated as compensation by subjecting it to certain monetary correction coefficients.

The Constitutional Court noted that one of the principles on which the country's socio-economic organisation is based is that of the "public ownership of natural resources and the means of production, in accordance with the collective interest".

As part of the dynamic underlying the state's actions and in accordance with this public interest, this principle bestows legitimacy on actions involving compulsory dispossession of means of production and their transfer to the public sector. This results in a change of ownership of property by a unilateral act of authority. This property was previously in the hands of private subjects. These actions must be considered against the background of the constitutional guarantee of the right to property.

For this reason, the Constitution enshrines the constitutional possibility of the "public appropriation of means of production" and places the responsibility on the legislator to set out the applicable requirements.

In the strict sense of the two terms, nationalisation is not the same as expropriation. Distinctions can be made between the two concepts as regards their objects, grounds and purposes and, consequently, the rules that govern them (particularly the procedure for their implementation). The characteristics that typify nationalisation set it apart from expropriation in the national interest.

Nor are the two sets of rules the same when it comes to the constitutional criteria governing compensation. Whereas the Constitution states that expropriation in the public interest may only occur "upon payment of just compensation", the Article on nationalisation as a form of public appropriation of means of production limits itself to requiring the law to determine "the criteria for setting the applicable compensation", without specifying the yardstick the law should use in order to do so.

The Constitution refrains from predetermining a criterion that it deems appropriate for calculating compensation, and uses plural criteria to describe that which it charges the law with determining. The conclusion can therefore be drawn that in cases of nationalisation, the legislative authorities enjoy a high degree of discretionary power, which is entirely absent in the case of expropriations in the public interest.

In the case of expropriations, the principle of just compensation requires that the latter be both full and nearly equivalent to the saleable value of the property, as determined by its market price. Given the specific nature of nationalisations, the Constitution leaves the legislative authorities enough room for manoeuvre to enable them to weigh up the situation and ensure that the compensation rules reflect a variety of complex and variable factors of a political, economic and social nature, with the ability to justify a compensatory quantum that is not entirely equivalent to the loss suffered by the previous owner. This does not mean that the sub-constitutional legislator is entirely free from any form of constitutional parameters that will affect the value of compensation and the way in which it is paid and will require them to be appropriate in constitutional terms. It simply implies that in the absence of a specific, restrictive criterion derived from a principle of commutative justice, such as that applicable to expropriations, nationalisations are subject to less stringent general principles of justice, in their role as basic principles of a democratic State based on the rule of law. These

general principles merely require that the compensation must not lose a large part of its effectiveness and consistency due to the fact that the previous owner is granted an amount which is derisory or manifestly unreasonable.

The Court noted that this is the guideline it has uniformly outlined to date. It noted arguments that had been put forward to the effect that the same criteria should be used to set compensation for both nationalisations and expropriations, but felt that the existing guideline should be reiterated.

#### *Supplementary information:*

Six Justices, including the initial rapporteur and the President of the Court, expressed dissenting opinions to the Ruling, which were linked to their belief that the legislative criteria in the case before the Court were unreasonable: because the risks of monetary erosion were placed primarily on the previous owner of the nationalised property, due to the very long period over which the securities were to be redeemed and the very low interest rate applicable to them. Also, the legislative authorities gave the securities which served to pay the price of the nationalisations a legal status that seriously affected their value within the context of the rules that govern a market economy. The conditions that were imposed on the mobilisation of the securities were not established in accordance with the inherent rules of a market for financial products, resulting in a massive reduction in the value of the securities. The point was also made that given the differences in their natures, purposes and circumstances giving rise to them, compensation for nationalisation does not have to be the same as that for expropriation in the public interest. The Constitution has always required compensation to be paid in cases of nationalisation and has only left it to the law to set the criteria for determining the amount of that compensation – criteria which can vary depending on the type and value of the nationalised property and sometimes on the justification for its nationalisation. The criteria must, however, respect the principle of justice that is implicit in the concept of a democratic State based on the rule of law.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2009-3-013

**a)** Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 18.11.2009 / **e)** 583 / **f)** / **g)** *Diário da República* (Official Gazette) / **h)** CODICES (Portuguese).

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

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

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

Regulation, scope.

#### *Headnotes:*

Circulars from the Fiscal Administration do not constitute “rules” in terms of the Constitutional Court’s competence to control constitutionality.

#### *Summary:*

The Public Prosecutors’ Office lodged an appeal against a decision handed down in a Ruling of the Supreme Administrative Court, refusing to apply a rule as it was unconstitutional.

The Public Prosecutors’ Office explained that this was an optional appeal, because the rule in question was not set out in an international convention, a legislative act or a regulatory decree. However, it contended that because the “Circular” contained a regulatory decree, which manifestly possessed “external efficacy” and its application had been expressly and effectively denied, the legitimacy of the Public Prosecutors’ Office to launch the appeal was undisputable. Its interest in acting lay in the need to defend the objective legal order in the face of the applicant’s argument that this particular rule was not in conformity with the Constitution.

The Constitutional Court rejected the respondent’s arguments that the Supreme Administrative Court’s decision, which annulled the charging of Valued Added Tax (VAT), should be upheld, but felt that the Constitutional Court ought to consider a question which might prevent it from hearing the appeal. This question was whether the prescriptive content of the “Circular” qualified as an object for an appeal to seek a concrete review of constitutionality. Both the appellant and the respondent felt that the rule, which the Supreme Administrative Court refused to apply, was a regulatory rule with “external efficacy” and therefore qualified as an object for an appeal.



Since 1985 the Constitutional Court has adopted a rule that is functionally suited to the control system which the Constitution imposes on the Court in order to determine what objects are qualified for constitutionality review cases. This definition of a rule embraces acts of public authorities that contain a “rule of conduct” for private individuals or the Public Administration, a “decision criterion” for the latter or for the courts, or, in general, a “standard against which to assess forms of behaviour”. However, it is not enough for the legal instrument, containing the rule in question, to oblige the Public Administration to comply with a given criterion that it has itself established (and until such time as it changes it), when it undertakes individual, concrete applicative acts.

The concept of control is designed to ensure that there is a legal protection system that typifies a constitutional democratic State based on the rule of law. This criterion must therefore also be binding on the other subject of the relationship (normative heteronomy) and constitute a parameter which a judge must take into account, unless he makes a supplementary finding that it is invalid.

If the source of the “decision criterion” is an administrative one and the criterion is only binding within the administrative department that issued it, there is no need for the type of legal protection and affirmation of the supremacy of the Constitution that would warrant the intervention of the Constitutional Court.

A problem that is frequently posed in fiscal law is that of the normative importance of so-called “administrative guidelines”.

These are internal regulations, binding only on the Fiscal Administration itself and the organs that are hierarchically below the organ that issued the regulations. They are not binding on private individuals or the courts. This is the case for organisational regulations, which apply to the internal operation of the Fiscal Administration by creating working methods or forms of action, and interpretative regulations, which serve to interpret legal or regulatory precepts. These acts, many of which are termed “circulars”, emanate from the Public Administration’s power to organise itself and from its hierarchical power. They contain generic service orders, and for this reason compliance with them is assured, but only within their subjective scope (that of the applicable hierarchical relationship). They include directives for future actions, which are transmitted in writing to all the subordinates of the administrative authority that issued them. They are forms of standardised

decision-making, which are implemented in order to rationalise and simplify the way in which departments and services operate. Although they may indirectly protect the legal security of taxpayers and ensure equal treatment by means of a uniform application of the law, they do not regulate their subject matter in disputes with taxpayers, nor do they constitute rules by which courts must abide when they take decisions.

The circumstance that, under the terms of the General Law governing Taxation, the Fiscal Administration is bound by the general guidelines set out in circulars that are in force at the time of a tax-related fact, and, under certain circumstances, is under a duty to convert the binding information and other types of assessment provided to taxpayers into administrative circulars, does not change this point of view, because it does not transform this content into a rule with external efficacy. There is no doubt that in their disputes with the Public Administration, natural and legal persons can invoke publicised administrative guidelines and, where appropriate, have them enforced by the courts, even if this means sacrificing the principle of legality. However, it is under the principle of good faith and legal security that the content of circulars prevails, and not because of their normative value. Persons who are affected by circulars only abide by them for as long as it suits them to do so.

Circulars consequently do not possess heteronymous binding force in relation to private individuals, nor are they binding on the courts unless it is as the result of any value they may contain in terms of legal theory.

The prescriptions contained in the Fiscal Administration’s “circulars” therefore do not constitute rules for the purposes of the system whereby the Constitutional Court exercises its competence to control constitutionality.

### *Languages:*

Portuguese.



*Identification:* POR-2009-3-014

a) Portugal / b) Constitutional Court / c) Second Chamber / d) 18.11.2009 / e) 596/09 / f) / g) *Diário da República* (Official Gazette), 248 (Series II), 24.12.2009, 52025 / h) CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Burden of proof / Right to damages.

*Headnotes:*

The right to damages, whether it be for a breach of consumer rights, for a failure to fulfil contractual obligations, for a breach of so-called “absolute” rights, or for acts which are lawful, but have the potential to cause damage to others, presupposes that the legislative authorities take a position both as to whether there has to be fault in relation to the fact that caused the damage, and, on a secondary level, as to the person who bears the burden of proof in this regard.

In certain cases, the right to damages for an accident suffered on a motorway may be partially founded on a third party’s right to property, safety considerations and the protection of other rights that are recognised by the Constitution. The rights to life, to physical integrity, and to the protection of health, for example, will always justify the legislator in opting to shift the burden of proof in relation to the damaging fact to the person who is legally responsible to drive safely.

Motorway concession holders bear the burden of proving that they have fulfilled their safety obligations. They achieve this by showing that they have acted without fault in relation to whatever caused the accident. It is not sufficient to point to a general fulfilment of these obligations; they must prove that they have done so in a concrete fashion in the case in question.

Subjecting motorway concession-holders to this burden of proof in terms of their fulfilment of their road and traffic safety obligations does not breach the right of private economic enterprise.

*Summary:*

The case arose from a legislative provision defining a number of rights pertaining to users of roads which are classified as concessionary motorways, primary routes (IPs) and supplementary routes (ICs). The provision is interpreted in such a way that in the event of a traffic accident on a motorway caused by animals crossing the road, the burden of proving fulfilment of his or her safety obligations is placed on concession-holders. They can only avoid this presumption by showing that the animal’s presence on the road was in no way attributable to them, but rather to somebody else. They must positively establish that a concrete event, and one which must not fall within the remit of their moral responsibilities, prevented them from fulfilling those obligations.

In this particular instance, a traffic accident had occurred because a fox strayed onto the motorway lane in which the driver was travelling. The protective fencing was not completely intact and contained a hole at the place of the accident.

The appellant explained that it carried out periodic inspections of the wire fencing along the motorway, repairing any problems straightaway. On the day of the accident it was not foreseeable that the fencing could have been damaged. An inspection had taken place shortly before the accident occurred and the fence had been in good condition. Vandalism had caused the fence to be damaged and therefore the appellant was not to blame for the occurrence of the accident.

The Constitutional Court considered that the imposition of the burden to prove fulfilment of the safety obligations applicable to road traffic on motorways is not contrary to the rules of fair process enshrined in the Constitution. The Court said that there was no suggestion that the legislative authorities’ option to place this burden on the party that finds itself in the best position to, in advance, obtain the material means or instruments with the ability to prove the facts (both because of its material domination of the motorways and the appropriate equipment and infrastructure resources for ensuring added safety for road traffic, and because of its economic capacity to make use of those resources), was in any way lacking in sufficient material grounds.

The Court also observed that, unlike other roads, the type of goods and services offered by motorway providers presupposes the existence of high, specific levels of safety which are reflected in the design, construction, maintenance and operation of highways to extremely demanding material and normative standards. Use of motorways is subject to

standardised terms and payment of a fee (although the state in fact defrays this fee for use of the SCUT – “*Sem Custos para os Utentes*” without cost for users – dual carriageways). The Court accordingly concluded that the placing of a burden of proof on motorway concession holders to demonstrate concrete fulfilment of their safety obligations to every road user could not be described as a breach of the principle of proportionality. The existence of these safety obligations is said to be a key factor in influencing large numbers of consumers to use motorways.

As the establishment in law of this burden of proof does not constitute an interference in the field of the stipulation of concrete contractual relations, it can also be argued that the burden does not cause any abnormal and unpredictable disturbance to the habitual prediction of risks that parties weigh up before they decide to enter into contractual arrangements; it is certainly not a factor that would intolerably affect the autonomy of will presupposed by the right to civil capacity and to the free development of personality.

At stake here are special economic activities with a high risk of damage to third-party property and rights. It is to be expected that the legislative authorities might subject such an activity to special liability rules. This is especially true where the activity is undertaken under a public concession scheme, as it may result in responsibility falling on the state for dealing with the consequences of damage to users of the services or goods in question, particularly in terms of fulfilment of the duties to provide health and social security services. The argument that there is a breach of the principle of the protection of trust also fails.

The Constitutional Court also rejected the appellant’s arguments that this rule breaches the constitutional rights to property and to private economic enterprise. The Constitution expressly recognises the right of private economic enterprise as a fundamental right, but not as an absolute right. This means that it must be exercised “within the overall frameworks laid down by the Constitution and the law and with regard to the general interest”. The Constitution also establishes the precept that “consumers have the right to the good quality of the goods and services consumed, [...] to the protection of [...] safety and their economic interests, and to reparation for damages”.

The Court consequently held that the rule in dispute was not unconstitutional.

### *Supplementary information:*

Ruling no. 597/09, which bears the same date and which was issued by the same Section of the Constitutional Court, but was drawn up by a different rapporteur, addresses the same question of constitutionality and complements the arguments set out in the present Ruling.

### *Languages:*

Portuguese.



### *Identification:* POR-2009-3-015

**a)** Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 02.12.2009 / **e)** 612/09 / **f)** / **g)** *Diário da República* (Official Gazette), 16 (Series II), 25.01.2010, 3471 / **h)** CODICES (Portuguese).

### *Keywords of the systematic thesaurus:*

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

### *Keywords of the alphabetical index:*

Expropriation, compensation.

### *Headnotes:*

The case arose from a rule of the Expropriation Code that does not permit compensation for the imposition of a *non aedificandi* easement on the whole of the remaining section of a plot of land, the other part of which was expropriated in order to build a motorway. It was found to be in breach of the right to just compensation and the principle of equal contributions to public costs.

The fact that a combination of damaging effects (the expropriation of one part of a plot of land, and the loss of the construction potential in relation to the remainder) were imposed on one landowner constitutes a specific reason which, in the type of situation addressed in this appeal, indicates that, for

motives of justice and equality, the landowner ought to be able to make a concrete demand for compensation, given that the primacy afforded to the power to expropriate has had an overall effect on the economic function of the property.

### Summary:

The Public Prosecutors' Office appealed against a decision by the Guimarães Court of Appeal refusing to allow the application of an Expropriation Code rule. Under that rule, the constitution of an administrative easement which affects the essence of the use of property by imposing exceptional burdens on it, cannot be one of the reasons for the payment of compensation.

The administrative easement at stake in this appeal is a *non aedificandi* easement designed to protect the roads included in the national highway network. This easement was created as the result of the construction of a motorway through one part of a piece of land, which was expropriated, but the easement itself was imposed on the remaining part, which was not expropriated and in relation to which, prior to the imposition of the easement, it had been possible to apply for planning permission for construction purposes.

*Non aedificandi* administrative easements are restrictions that are created by law, sometimes directly and on other occasions as the result of an administrative act. Their effect is to prohibit construction on certain plots of land, or to impose special conditions on building on those plots, because there may be a factor such as a shared border or spatial proximity, which may be in the public interest.

The case in question concerned a *non aedificandi* easement that affected the unexpropriated part of a piece of land. The other part of the land had been the object of expropriation in order to build the road in favour of which the easement was constituted. According to the factors, which the Expropriation Code states must be taken into account, the unexpropriated plot was classifiable as "land suitable for construction"; according to the facts determined by the lower court and the judgment contained in the ruling which is the subject of appeal, subjection to the *non aedificandi* easement implied the total loss of this previous capacity for construction. In the decision against which this appeal to the Constitutional Court was brought, the Court of Appeal considered that this loss of value ought to be taken into account in the expropriation process.

According to the Expropriation Code, the attribution or otherwise of the right to compensation is not directly dependent on the constitution of an easement, but is instead linked to the nature of the losses that arise from the imposition of the burden. The right to compensation for administrative easements is always treated in the same way, whether they are constituted in the wake of an expropriation process or whether they are totally independent of it.

Compensation is limited to the loss of the existing forms of usage, and the owner of the asset on which a burden has been placed is granted a right to compensation with a more restrictive nature than that attributed to the owner of an asset that has been expropriated (in the latter situation title is extinguished to the right to all or part of a piece of land and the land is transferred to somebody else in order to achieve a public purpose). Apart from those cases where the imposition of an easement removes all economic value from the land or renders any use of it unfeasible, the owner of land that is burdened with a *non aedificandi* easement only has the right to receive reparation for the loss of value that corresponds to the concrete usages which were effectively made of it when the easement was constituted.

Whereas "just compensation" for the expropriation of a plot of land ("classic" expropriation or expropriation of title to the property) includes reparation for the building potential that exists on the date on which the declaration of public interest is issued, the right to compensation as the result of the imposition of a legal *non aedificandi* easement only encompasses the current, effective usage that is taken away from the property on which the burden has been placed. Therefore, when such a plot can be classified as "land suitable for construction" under the objective criteria set out in the Code, in the event that at that time it was not currently and effectively being used with a view to construction (perhaps building was under way already or planning permission had already been granted for a construction or urban development project), it would not be possible to provide reparation for the burden (or more precisely, for the loss of value inherent in the imposition of the burden) that derived directly from the legal easement (associated with the construction of the motorway that justified the partial expropriation).

This was the normative treatment that the Court of Appeal's decision not to allow application of the rule sought to avoid.

The question before the Constitutional Court was whether or not the Constitution guarantees compensation for the loss of value suffered by an owner whose property is subjected to a burden by the imposition of a *non aedificandi* easement that covers the whole of a portion of land which remained after the expropriation of another part of that property, when the remaining portion had previously constituted “land suitable for construction” and the reduction in *utilitas rei* is factually associated with an expropriation process. In other words whether, when the extinction of the right to property caused by that expropriation is combined with an essential decrease in the possibilities provided by the right to ownership of the remaining part of the land, thereby generating both an overall effect which is historically and functionally derived from the expropriation, and an overall diminution of the usages of the property, failure to pay compensation would imply a disproportionate reduction in the right to property and a breach of the equality that ought to apply to the protection of that right.

This type of easement has the potential to cause a singular limitation on the pre-existing, objective possibilities of using the land and consequently a significant restriction on its actual use (loss of the whole of the existing status of suitability for construction). The effects of this restriction are equivalent to expropriation, because it causes the loss of a factor which adds value to the land and which, if the property were to be expropriated under the same circumstances, would necessarily be taken into account when the compensation was calculated. This is a cost with a particular impact on the citizens who have had to shoulder this burden. It implies the total and permanent loss of an existing option that was inherent in ownership of the asset (the suitability for construction which the remaining portion already possessed as land that had been classified as suitable for construction) – a loss which has been imposed for reasons of public interest. In the light of the principle that citizens must be treated equally when it comes to bearing public costs, it is justifiable for a landowner, who is simultaneously subject to an expropriation and imposed a burden, to be compensated for the corresponding loss of value.

The Court accordingly pronounced the rule under challenge to be unconstitutional.

#### *Supplementary information:*

The ruling is accompanied by a concurring opinion from the rapporteur, who added that while he was in agreement with the finding that the rule was unconstitutional (naturally, because otherwise he could not have been the ruling’s rapporteur), he

personally felt that the ruling should have gone further. In his opinion the Constitution requires the payment of compensation for the imposition of any administrative easement that causes special and abnormal (or serious) damage in the legal sphere of the owners of land that is classifiable as “land suitable for construction”, regardless of the additional circumstance of the convergence of a partial expropriation and the imposition of a loss in relation to the same piece of land (and the same subject).

#### *Languages:*

Portuguese.



# Russia

## Constitutional Court

---

### Important decisions

*Identification:* RUS-2009-3-004

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 19.11.2009 / **e)** 18 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 27.11.2009 / **h)** CODICES (Russian).

*Keywords of the systematic thesaurus:*

4.7.8.2 Institutions – Judicial bodies – Ordinary courts – **Criminal courts.**

5.1.4.1 Fundamental Rights – General questions – Limits and restrictions – **Non-derogable rights.**

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

5.3.13.10 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial by jury.**

*Keywords of the alphabetical index:*

Death penalty / Criminal procedure.

*Headnotes:*

The introduction of juries throughout Russia as from 1 January 2010 did not allow the application of the death penalty.

*Summary:*

The Constitutional Court considered a request from the Russian Supreme Court concerning interpretation of Article 5 of the Constitutional Court ruling of 2 February 1999. The point at issue was whether the death penalty could be applied as from 1 January 2010.

On 2 February 1999, the Constitutional Court ruled that the death penalty would no longer be applied in Russia until jury trials were introduced throughout the Federation. The ruling was based on Article 20.2 of the Constitution, which provides that application of the death penalty is a transitional and exceptional measure. Moreover, the right to life (i.e. the right not to be sentenced to death and executed) must be

guaranteed, in accordance with the international rules binding on Russia and the universally recognised principles of international law.

In the ruling, the Constitutional Court assumed that the death penalty would be abolished within a reasonable time, which would be before juries were introduced throughout the Federation.

The Russian Federation indicated its intention to introduce a moratorium on the execution of death sentences and take the steps needed to abolish the death penalty. This was one of the key requirements for its accession to the Council of Europe. Russia was admitted to the Council on condition of these commitments and ratification of Protocol no. 6 to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty (28 April 1983).

At the time, the Council of Europe interpreted the intentions expressed by Russia in the light of the undertakings entered into and the assurances of their implementation provided by the Russian Government. Under Article 18 of the Vienna Convention on the Law of Treaties of 23 May 1969, a state must refrain from acts which would defeat the object and purpose of a treaty prior to its entry into force. Russia is therefore required to refrain from any acts which could compromise the imminent ratification of Protocol no. 6.

Accordingly, Russian courts have not been able to deliver or execute death sentences since 16 April 1997. In the 10 years since the adoption of the moratorium on the death penalty, stable safeguards against being sentenced to death have developed. The arrangements in place in Russia and the relevant international rules therefore mean that the process of abolition is imminent and irreversible.

*Languages:*

Russian.



# Serbia

## Constitutional Court

---

### Important decisions

*Identification:* SRB-2009-3-001

**a)** Serbia / **b)** Constitutional Court / **c)** / **d)** 02.04.2009 / **e)** IY- 409/2005 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), no. 39/2009 / **h)** CODICES (Serbian).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Administrative act, judicial review.

*Headnotes:*

Excluding the possibility of mounting an administrative challenge to a second instance decision by a Minister is in breach of the principle that the legality of final individual acts deciding on rights, duties or legally-based interests must be subject to court review in administrative disputes.

*Summary:*

The Public Attorney's Office of the Tutin Municipality requested an assessment of the constitutionality of the provisions of Article 86.10 of the Law on Planning and Construction (Official Gazette, no. 47/03), (hereinafter, the "Law"). The Public Attorney's office suggested that it ran counter to the constitutional principle under which all administrative acts are subject to court control and that acts adopted by the Ministry may only be overturned in an administrative dispute.

The time limit for bringing legislation adopted on the basis of the 1990 Constitution into line with the new Constitution (prescribed by Article 15 of the Constitutional Law for the Implementation of the Constitution) expired on 31 December 2008. It was therefore appropriate for the Constitutional Court to

assess the constitutionality of Article 86.10 of the Law, under Article 167 of the Constitution.

In proceedings arising from the Public Attorney's request, the Constitutional Court noted that Article 86.10 of the Law stipulates that decisions by the relevant Minister on appeals against decisions on the cessation of the right of use of land for development (construction land) shall not be subject to administrative dispute. It also observed that Article 198.2 of the Constitution stipulates that the legality of final individual acts deciding on rights, duties or legally-based interests are to be subject to court review in an administrative dispute, if no other form of court protection is prescribed by the law. However, Article 194.3 of the Constitution stipulates that all laws and other general acts adopted in the Republic of Serbia must comply with the Constitution.

Article 124.4 of the Constitution of 1990, which was in force at the time when the contested Law was adopted, allowed for the exclusion of administrative disputes by legislation in exceptional circumstances in certain administrative matters. Based on this provision, the Constitutional Court adopted its stance regarding Article 86.10 of the Law in Decision IY-187/03. In this case, the Court held that the provision of Article 86.10 of the Law, which precludes the possibility of administrative challenges to second instance decisions on the cessation of the right of use of construction land, is not in breach of the Constitution, because Article 124.4 of the Constitution allows for the exclusion of administrative disputes in exceptional cases and in certain specified administrative cases.

The Court also took note of Article 15 of the Constitutional Law on the Implementation of the Constitution. This required all legislation to be brought into line with the Constitution by 31 December 2008 at the latest, and would have included the Law on Planning and Construction. This Law was not amended when the 2006 Constitution came into force and so Article 86 of the Law was not amended either.

A preliminary question arose in these proceedings as to whether the contested provision of Article 86.10 of the Law was in force and, therefore, whether it was subject to constitutional review. The point was made that the provisions of Article 86 of the Law were of a temporal character, in that they primarily prescribed time limits at the expiration of which certain rights were lost, and Article 86.10 of the Law had a direct legal link to them.

However, despite the fact that Article 86.10 of the Law was enforced mainly due to the expiry of time limits for requesting court protection, this provision

still exists within the legal system and may be applied. It is therefore subject to constitutional review. Regarding the provisions of the Law, the Court established that the law did not provide for different court protection in respect of decisions adopted by the relevant Minister, as prescribed in Article 198.2 of the Constitution. The Court therefore held that Article 86.10 of the Law, which excludes the possibility of conducting an administrative dispute against a second instance decision by a Minister competent to decide upon appeals lodged against decisions by a municipal or town administrative authority on the cessation of the right of use of city construction land, does not comply with the Constitution.

Moreover, the Constitutional Court ascertained that the Law was not brought into line with the 2006 Constitution. The present Constitution, by comparison with the 1990 Constitution on the basis of which the current Law was enacted, contains new provisions of significance for construction and planning. The Law contains numerous provisions which are either no longer applicable (they set down time limits after which certain rights were lost), or which were temporary but were extended despite the fact that the time limits had expired. The Constitutional Court is in receipt of a considerable number of petitions demanding the constitutional review of this Law and indicating problems over its application in practice. Proceedings are also under way at lower instance courts, in litigation arising from the application of provisions of the Law. Consequently, the Constitutional Court decided, pursuant to Article 105 of the Law on the Constitutional Court, to notify the National Assembly about the problems of achieving constitutionality in this important area.

#### *Languages:*

English, Serbian.



#### *Identification:* SRB-2009-3-002

**a)** Serbia / **b)** Constitutional Court / **c)** / **d)** 23.04.2009 / **e)** IY- 191/2008 / **f)** / **g)** / **h)** CODICES (Serbian).

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

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

4.8.8.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods.**

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

Local self-government, competence.

#### *Headnotes:*

A city municipality is not a special territorial unit; neither does it form a direct part of the territorial organisation. Rather it forms part of the internal territorial and organisational structure of the City of Belgrade.

The administrative offices of the City of Belgrade are authorised, by legislation, to make decisions in implementing the supervision of activities and actions by administrative offices of the city municipality, to dissolve the assembly of the city municipality, schedule elections for membership of the city municipality assembly and appoint a provisional body to implement current and urgent matters falling within the competence of the assembly and executive bodies of the city municipality.

#### *Summary:*

The Constitutional Court was asked to assess the legality of the provisions of Articles 94 and 95 of the Statute of the City of Belgrade (Official Gazette of the City of Belgrade, no. 39/08). The petitioner argued that these provisions gave powers to City administrative bodies to decide on the dissolution of the assembly of city municipalities, on the schedule of elections to membership of the assembly, and to appoint provisional bodies, which is an explicit competence of the bodies under the Law on Local Self-government.

Article 94 of the Statute the City of Belgrade (Official Gazette, no. 39/08) stipulates that decisions on the dissolution of a town municipality are to be adopted by the City Assembly, at the suggestion of the City Council. The President of the City Assembly is to arrange elections for membership of a city municipality's assembly.

Article 95 of the Statute stipulates that if no elections for membership of the assembly are held within a city municipality or if elections are held but no assembly is formed within two months of the publication of the



election results, the City Assembly shall appoint a provisional body. The President of the City Assembly will make the decisions as to the arrangements for new elections to the assembly of the city municipality.

In the course of its review of the lawfulness of the above provisions of the Statute, the Constitutional Court considered various provisions of the Law on Local Self-government (Official Gazette, no. 129/07), the Law on Territorial Organisation (Official Gazette, no. 129/07) and the Law on the Capital City (Official Gazette, no. 129/07).

Under the provisions of the law, local government is exercised in municipalities, towns and the City of Belgrade, which represent the units of local self-government and territorial units within the territorial organisation. All units of local self-government perform local government tasks, thus presenting the authentic competence of a municipality. A municipality is a basic territorial unit within which local self-government is carried out. It is able to carry out all the rights and duties that fall within its competence, both independently and through its offices. The City shall implement the competences of municipality and other competences and affairs of the state administration entrusted to it by law, and the City of Belgrade shall implement the competences of municipality and town, as well as other competences and affairs of the state administration entrusted to it by the Law on the Capital City. The provisions of the Law on Local Self-government regarding municipalities also apply to towns, unless this Law specifies otherwise.

The Constitutional Court noted that the legislation governing territorial organisation and local government does not mention town municipalities as units of local government, or as territorial units within the framework of the territorial organisation. The Statute of a town may, but is not obliged to, prescribe that two or more town municipalities are to be established in the territory of a town. Town municipalities are established in the territory of the City of Belgrade according to the Statute of the City of Belgrade, in order to carry out more effectively and economically certain competences of the City of Belgrade. The Statute of the City of Belgrade defines in more detail the procedures for setting up and dissolving city municipalities, procedures for altering their boundaries, changes to the offices and method of election to their governing bodies, and it also defines the mutual relations between the City administrative bodies and those of a city municipality. Included within the Statute is a definition of the type and scope of activities within the competences of the City of Belgrade to be implemented by city municipalities, to the effect that city authorities do not

possess authentic competence, but instead perform the affairs of local self-government entrusted to them by the City within the scope of its competence.

The Constitutional Court accordingly held that a city municipality is not a special territorial unit, or a direct part of the territorial organisation, but a part of internal territorial and organisational structure of the City of Belgrade as prescribed by the contested Statute of the City of Belgrade. The Law on Local Self-government defines a municipality as a basic territorial unit in which local self-government is carried out, which is capable of accomplishing all rights and duties within its competence independently and through its offices. A city municipality has no authentic competence in the implementation of affairs of local government; certain matters are merely entrusted to it by the Statute from the competences of the City of Belgrade. The Constitutional Court held that a city municipality does not possess the capacity of a local self-government unit, and the City of Belgrade has this capacity pursuant to the law.

The delegation of certain local government matters from the competences of the city to the competences of the city municipality represents the special mutual relationship which has developed between the administrative offices of the City of Belgrade and those of the city municipality. This mutual relationship is also reflected in the implementation of supervision over the legality of activities of the city municipality administrative offices by those of the City and in the prescription of measures that the City offices may adopt in implementing the supervision. A parallel can be drawn between local government units, whose activities are supervised by the bodies of the Republic, and the autonomous province. In the same way, the supervision of the activities and acts of city municipality administrative offices in carrying out City-related duties, which have been delegated to them, is carried out by the City of Belgrade. The measures to be adopted by state administration in the supervision of activities of the municipality are identical to the measures that may be adopted by the offices of the City of Belgrade when supervising the activities of the city municipalities.

#### *Languages:*

English, Serbian.



*Identification: SRB-2009-3-003*

a) Serbia / b) Constitutional Court / c) / d) 30.04.2009 / e) UŽ- 303/2009 / f) / g) / h) CODICES (Serbian).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Extradition, detention / Extradition, proceedings.

*Headnotes:*

In extradition proceedings, courts do not examine the criminal accountability of persons to be extradited. If all requirements prescribed by law are fulfilled, they may, however, state that there are sufficient grounds for reasonable doubt as to whether the foreigner, whose extradition has been requested, has committed the criminal offence concerned.

*Summary:*

The applicant filed a constitutional appeal against the decision of the District Court in Novi Pazar, Kv. 18/09 of 4 February 2009, and the decision of the Supreme Court of Serbia, Kž. II 343/09 of 12 February 2009, alleging a breach of his right to freedom and security under Article 27 of the Constitution.

The applicant argued that the District Court in Novi Pazar, during extradition proceedings which the Kingdom of the Netherlands had launched in order to extradite him, had made substantive errors that rendered the contested decisions unlawful.

The Constitutional Court noted the following significant facts and circumstances of importance in this dispute:

On 4 February 2009, the first instance court adopted a decision establishing the fulfilment of presumptions to extradite the applicant, a citizen of Montenegro, to conduct criminal proceedings before the competent bodies of the Kingdom of the Netherlands for the criminal offence of murder and threat, and unlawful possession of ammunition. In the reasoning for the decision, it was stated that the Kingdom of the Netherlands requested, via the Ministry of Justice, the

extradition of the suspect applicant from Montenegro, for the above criminal offences. All the necessary documentation was enclosed with the request. On 7 November 2008, the suspect was ordered to be placed in detention pending extradition. When he was then interrogated before the investigation judge of the first instance court, he did not contest his identity, but did not admit that he had committed criminal offences requiring extradition. The District Public Prosecutor found that presumptions for extradition were not fulfilled (without stating the reasons). The case file shows that all necessary data and evidence were submitted to the court as prescribed in Article 541 of the Criminal Procedure Code; all presumptions for extradition prescribed in Article 540 of the Code were fulfilled; the decision was adopted pursuant to Articles 540 and 546 of the Criminal Procedure Code.

On 12 February 2009, the Supreme Court of Serbia adopted the contested decision, dismissing the appeal as groundless. In the reasoning for the decision, it was specified that the first instance court properly established that legal presumptions for the extradition of the applicant, as the accused, were fulfilled. An opinion from the Republic's Public Prosecutor was provided. The Public Prosecutor was of the view that the first instance decision was correct. The suggestion in the appeal that the first instance court file did not contain sufficient evidence for reasonable doubt was groundless, as it clearly follows from the documentation enclosed that the DNA analysis of the accused increased suspicion that he had committed the criminal offences in question.

On 11 March 2009 the Minister of Justice made the decision to allow the extradition of the applicant to the Kingdom of the Netherlands.

The provisions of Article 27 of the Constitution, a violation of which is indicated in the constitutional appeal, establish that:

- everyone is entitled to personal freedom and security. Deprivation of liberty shall be allowed only on the grounds and in a procedure stipulated by the law (paragraph 1);
- any person deprived of liberty by a state body shall be informed promptly in a language they understand about the grounds for arrest or detention, the charges brought against them, and their rights to inform any person of their choice about their arrest or detention without delay (paragraph 2);
- any person deprived of liberty shall have the right to initiate proceedings to enable the court to review the lawfulness of the arrest or detention and order the release if the arrest or detention was unlawful (paragraph 3);

- sentences that entail the deprivation of liberty may only be handed down by the court (paragraph 4).

The Constitutional Court also considered provisions of the Criminal Procedure Code, the Law on International Legal Aid in Criminal Cases, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Convention on Extradition, the Addition Protocol to the Convention and the Second Additional Protocol to the Convention.

Having examined the constitutionality of the constitutional complaint from the perspective specified in the provisions of the Constitution and the law, the Constitutional Court established that the decisions did not violate the constitutional rights of the applicant guaranteed by Article 27 of the Constitution.

The conditions prescribed in Article 27, which safeguards the right to freedom and security, namely the right to protection against arbitrary actions by the state when a person's liberty is at stake, were satisfied in full in this case. The decision on the deprivation of liberty and the determination of extradition detention were adopted in proceedings prescribed by law and for reasons prescribed by law. When he was deprived of his liberty, the applicant was informed straightaway, in a language he understood, about the reasons for his detention, and he was able to inform a person of his choosing about his deprivation of liberty. The fact that he immediately instructed one lawyer and his sister another, who attended his hearing before the investigation judge the day after his detention, is a clear sign that the police and judicial authorities acted diligently and followed constitutional principles and the procedure prescribed by law. All decisions adopted by the Court were immediately delivered to the applicant, and all of them contained notification as to his right to appeal. The applicant did not, however, appeal against the decision on extradition detention or the subsequent two decisions on the extension of extradition detention. The Supreme Court decided in favour of the appeal against the decision of the District Court in Novi Pazar, establishing the fulfilment of presumptions for extradition, in urgent proceedings (within a period of five days).

The Constitutional Court found that the decisions under dispute were adopted by legally-established courts with jurisdiction over the matter, in correct and lawful proceedings with a view to the extradition of the accused. The competent authority of the Kingdom of the Netherlands attached to the request for extradition all the documents and evidence required

in accordance with the law and in the form prescribed. The contested decision of the Court, establishing the fulfilment of presumptions for extradition, is therefore based on law. The Constitutional Court found that the arrest warrant issued by the Public Prosecutor of the Amsterdam District stating evidence for the reasonable suspicion that the applicant had committed criminal offences, of which he stood accused, meets the requirements prescribed in the provision of the law which should indicate, *inter alia*, the evidence for reasonable doubt. Thus, the presumption for reasonable doubt for extradition prescribed by law was also fulfilled – there were sufficient grounds for reasonable doubt that the foreigner, whose extradition was sought, had committed the criminal offence concerned. An appeal against the first instance decision is based on a repeated claim by the applicant that incomplete documentation was attached to the extradition proceedings. The contested decision of the Supreme Court, dismissing the applicant's appeal against the first instance decision, was adopted in compliance with law.

#### *Languages:*

English, Serbian.



#### *Identification: SRB-2009-3-004*

**a)** Serbia / **b)** Constitutional Court / **c)** / **d)** 28.05.2009 / **e)** IY- 149/2008 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), no. 50/2009 / **h)** CODICES (Serbian).

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

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

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:*

Fundamental right, not open to restriction, limitation / Derogation.

*Headnotes:*

Only the courts have the power to determine or allow derogation from the constitutional guarantee of the inviolability of the confidentiality of letters and other means of communication, for a defined time span and in the manner prescribed by law, where this is necessary for the conduct of criminal proceedings or to safeguard national security.

*Summary:*

The Constitutional Court was asked to examine the constitutionality of Article 55.1 of the Law on Telecommunications (Official Gazette, nos. 44/03 and 36/03).

This provision imposes a ban on all activities or use of devices which endanger or violate the privacy and confidentiality of messages transmitted by telecommunication networks, unless the user has given his or her consent, or if these activities are conducted in line with the law or a court order issued pursuant to the law.

The petitioner argued that when this provision was enacted, the legislator, without constitutional grounds, expanded the legal grounds for derogation from the confidentiality of letters and other means of communication guaranteed by Article 41 of the Constitution. The petitioner suggested that the provision implies that a court order is not always needed in order to restrict the confidentiality of letters and other modes of communication. Instead, by invoking this provision, it is possible to prescribe another legal basis for restricting that right by a special law. Therefore, this provision, in its contested part, is also at odds with Article 20 of the Constitution.

The Constitution provides that the rule of law is a fundamental prerequisite for the Constitution, that it is based on inalienable human rights, and that the rule of law shall, *inter alia*, be exercised through constitutional guarantees of human and minority rights and observance of the Constitution and Law by the authorities (Article 3 of the Constitution). The Constitution also states that the human and minority rights, which it guarantees, shall be implemented directly. It safeguards and directly implements human and minority rights, which are guaranteed by generally accepted rules of international law, and international treaties to which the Republic of Serbia

is a signatory. The law may prescribe the manner of exercising these rights only if explicitly provided in the Constitution or where this is necessary to exercise a particular right because of its nature. Any such legislation must under no circumstances influence the substance of the relevant guaranteed right (Article 18.1 and 18.2 of the Constitution). The human and minority rights guaranteed by the Constitution may be restricted by law, if the Constitution allows such restriction, and for the purposes allowed by the Constitution, to the extent necessary for fulfilling the constitutional purpose of restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right (Article 20.1 of the Constitution). The confidentiality of letters and other means of communication are inviolable; any derogation is only permissible for a specified period of time and based on a court decision, if it is necessary for the conduct of criminal proceedings or to safeguard national security, in a manner provided by the law (Article 41 of the Constitution). The Republic of Serbia is also under a constitutional obligation to regulate and provide for the exercise and protection of citizens' freedoms and rights (Article 97.2 of the Constitution).

The Constitutional Court was of the view that Article 20.1 of the Constitution implies that human and minority rights guaranteed by the Constitution may only be restricted by the law if the Constitution allows for such restriction, for the purposes allowed by the Constitution, to the extent necessary to fulfil the constitutional purpose of restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right. Proceeding from the constitutional guarantee of inviolability of confidentiality of letters and other means of communication and the permissible derogations from confidentiality established by Article 41 of the Constitution, the Constitutional Court assessed that, under Articles 20.1 and 41.2 of the Constitution, the courts alone are competent to determine or allow derogation from the constitutional guarantee of the inviolability of the confidentiality of letters and other means of communication, for a defined time span and in the manner prescribed by law, where this is necessary for the conduct of criminal proceedings or to safeguard national security.

Under Article 55.1 of the Law, the prohibition of activities or use of devices, which endanger or violate the privacy and confidentiality of messages transmitted by telecommunication networks, may be derogated from if such activities are conducted in accordance with a court order issued under the law. However, this provision of the Law, in its part under dispute, also prescribes that these activities shall be

allowed if conducted in accordance with the law. The Court noted a possible implication of the provision of Article 55.1 of the Law, to the effect that whilst derogation from the prohibition of activities or use of devices which endanger or violate privacy and confidentiality of messages transmitted by telecommunication networks is permissible if conducted in line with a court decision, it may also be carried out in the absence of a court order if this possibility is envisaged by this or other legislation. The Court held that this possibility exceeded the limit of the derogation from the guaranteed right to inviolability of confidentiality of letters and other means of communication allowed by the Constitution. That part of the contested provision was accordingly in breach of the Constitution.

#### *Languages:*

English, Serbian.



#### *Identification:* SRB-2009-3-005

**a)** Serbia / **b)** Constitutional Court / **c)** / **d)** 25.06.2009 / **e)** IY- 216/2004 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), no. 60/2009 / **h)** CODICES (Serbian).

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

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

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

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

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

Political party, asset.

#### *Headnotes:*

The introduction of the obligation to give any income exceeding the legally-defined limit to charity organisations deprives the owner to a great extent of the ability to derive benefit from his or her property.

Charity itself cannot be a way of conduct ordered pursuant to some legal standard of the legislator. In order to donate to charity or to make a gift, there must be “freedom of legal imperative”. The decision to donate to charity is a free one; there is no legal obligation to do so and a person cannot be ordered to donate.

#### *Summary:*

The Constitutional Court was asked to assess the constitutionality of Article 5.6 and 5.7 of the Law on Financing of Political Parties (Official Gazette, nos. 72/03 and 75/03), hereinafter, the “Law”.

The contested Article 5.6 reads as follows:

“A political party may acquire property in the territory of the Republic of Serbia. The annual income of a political party from property which it owns may not exceed 20% of its overall annual income. A political party shall, within thirty days of submitting the annual statement of accounts in accordance with Article 16 of this Act, donate any income in excess of this percentage to one or more organisations engaged in charitable work”.

The petitioner suggested that when the legislature enacted Article 5.6 of this Law, it acted in breach of the provisions of the Constitution that guaranteed property rights and prescribed that all forms of property enjoy equal legal protection.

The Constitution safeguards private, commercial and public property and prescribes that all types of property enjoy equal legal protection (Article 86 of the Constitution), as well as peaceful tenure of a person's own property and other property rights acquired by law (Article 58.1 of the Constitution). No distinction is drawn between natural persons and legal entities as owners of property rights. The Constitution further prescribes that the right to property may be revoked or restricted only in the public interest, in a way established by the law and with compensation, which must be equal to or exceed its market value (Article 58.2 of the Constitution). Restrictions may be imposed by legislation on the use of property (Article 58.3 of the Constitution).

When it examined restrictions on property rights, as constitutionally-guaranteed rights, the Constitutional Court also took into account Articles 18 and 20 of the Constitution.

The Constitutional Court began its assessment of the constitutionality of Article 5.6 of the Law by determining the existence of a public interest that might justify the restriction of the constitutionally-guaranteed right to property; namely the issue of its legality. It took the view that, in this particular case, the public interest established on the grounds of the contested provision might be recognised as prevention of the financial superiority of one political party over another, and not as a political aim, so that the true aim of political parties would not be overridden by other objectives of an economic and commercial nature.

The Constitutional Court then proceeded to determine whether the restrictions imposed here on the right to property of political parties encroached on the essence of this right. It found the provision in question to be in breach of Articles 18 and 20.1 of the Constitution. The introduction of an obligation to give any income exceeding the legally-defined limit to charity organisations deprives the owner to a great extent of his or her ability to derive benefit from the property. This ability is one of the three aspects of property which comprise the essence of the right to property.

With regard to the proportionality of the restriction, the Constitutional Court found that the restriction of property, within the disputed provision, is excessive because the legitimate purpose the state (the legislator) sought to achieve by this solution could have been accomplished to the same extent by other means with a less severe impact on the right to property.

The type of deprivation of property contained in Article 5.6 is especially noteworthy as the owner is not deprived of his or her property on the grounds of some decision by an organ of state, but is ordered by legislation to deprive himself or herself of property for charity. The Constitutional Court was of the opinion that the legislature, in enacting this provision, went beyond the framework of its constitutional jurisdiction. The state cannot establish charity by law and order charitable activities; it can only set up legal frameworks for the carrying out of charitable activities in order to foresee the legal consequences of charity. Charity *per se* cannot be a way of conduct ordered pursuant to some legal standard of the legislator.

Moreover, the above provision is contrary to the principle of equality and prohibition of discrimination. Unequal legal treatment of persons in the same position, with no just reason for such legal inequality contravenes Article 21 of the Constitution and Article 1 Protocol 1 ECHR in relation to Article 14 ECHR. This is also reflected in the fact that

compulsory deprivation of certain property for charitable purposes is only valid for political parties. Other entities from the political or electoral sphere (which can include groups of citizens and movements) are not subject to this legal order, despite being in an equal position of political competition. Yet they are feasibly in a more powerful position in relation to property than certain political parties.

In view of the above, the Constitutional Court found Article 5.6 of the Law, which obliged a political party to deprive itself of certain property "for charity" to be in breach of the provisions of Articles 18, 20, 58 and 86 of the Constitution and the provision of Article 1 Protocol 1 ECHR. Although the aim of this restriction is justified, the restriction fails to meet the requirements established by the Constitution, and is accordingly impermissible. The general interest in the achievement of equal conditions for the activities of political parties, which should not base their positions on power in respect of property, but on competition of ideas, does not render the contested restriction admissible, since it departs from the essence of the constitutional provisions allowing for restrictions under certain explicitly prescribed conditions.

#### *Languages:*

English, Serbian.



#### *Identification:* SRB-2009-3-006

**a)** Serbia / **b)** Constitutional Court / **c)** / **d)** 09.07.2009 / **e)** IY- 68/2006 / **f)** / **g)** *Službeni glasnik Republike Srbije* (Official Gazette), no. 63/2009 / **h)** CODICES (Serbian).

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

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

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

Appeal, right / Judicial review, administrative decision.

### Headnotes:

The purpose of the constitutional guarantee of the right to an appeal or other legal remedy is to provide an effective legal remedy for anybody whose rights, obligations or legally-grounded interests have been affected by a decision.

A provision that the time period for submitting a request for review of a decision on certain employment rights begins to run from the date of adoption of the act rather than the date of its delivery to the employee does not provide equal protection to employed police officers before state bodies.

The legality of final individual acts deciding on a right, duty or legally grounded interest shall be subject to court review in an administrative dispute, unless another form of court protection has been envisaged by the law.

### Summary:

The Constitutional Court was asked to assess the constitutionality of Article 128 of the Law on Police (Official Gazette, no. 101/05), (hereinafter, the "Law").

Under this provision, a request for review of a decision may be submitted to the authority who adopted the act on the allocation and acquisition of professional titles, extraordinary promotion, early and extraordinary acquisition of a higher rank. Such requests must be submitted within fifteen days of the adoption of the act (paragraph 1) and a request for review will not delay the implementation of the decision. An act adopted upon a request for review of a decision may not be subject to administrative challenge (paragraph 2).

The petitioner challenged the compliance of Article 128.1 of the Law with Articles 22.2 and 122 of the Constitution 1990, on the basis that Article 128.1 of the Law had the potential to violate workers' rights to appeal or other legal remedy, given that a worker will, under normal circumstances, receive the individual act deciding on his or her right, fifteen days after the date of adoption of the act.

Various constitutional provisions were of relevance for the Court's review of the constitutionality of the disputed provisions. These included Article 18.1 and 18.2 of the Constitution, which provides for direct implementation of human and minority rights guaranteed by the Constitution (the law may prescribe the manner of exercising these rights only if this is explicitly provided in the Constitution or is necessary for the exercise of a specific right due to its

nature; in any case, the law shall under no circumstances influence the substance of the relevant guaranteed right). Other provisions of relevance were Article 21.1 to 21.3 of the Constitution (prohibition of discrimination and equality of all before the law), Article 36.2 of the Constitution (right to an appeal or other legal remedy against any decision on a person's rights, obligations or lawful interests) and Article 198.2 of the Constitution (the lawfulness of final individual acts deciding on a right, duty or legally grounded interest shall be subject to further court review in an administrative dispute, unless the relevant legislation specifies any other form of court protection).

In view of the above constitutional provisions, the Constitutional Court found that contested Article 128.1 of the Law was incompatible with the Constitution, the reason being that the purpose of the constitutional guarantee of the right to an appeal or other legal remedy is to objectively enable anyone affected by a decision on his or her right, obligation or legally grounded interest, to avail themselves of a legal remedy against such a decision. At the same time, given that Article 36.1 of the Constitution guarantees equal protection of rights before the courts and other state bodies, this means that anybody whose rights, obligations or legally grounded interests were decided upon by an act of a state body is entitled to lodge the prescribed legal remedy against such acts, under equal conditions. Given that a certain time period, which differs from case to case, has to elapse from the date of adoption of the individual act contestable by the legal remedy prescribed by Article 128.1 of the Law and the date of its delivery to the person concerned, the Constitutional Court held that the provision that the time period for submitting the request for review of the act deciding on certain employment rights begins to run at the date of adoption of the act rather than the date of its delivery to the employee, does not provide equal protection to employed police officers before state bodies. Given that the length of time between the adoption and delivery of the act depends to a considerable extent on the authority adopting the act, the Constitutional Court held that the contested provision violated one of the basic constitutional principles of human and minority rights and freedoms under Article 18.2 of the Constitution, which provides, *inter alia*, that the law may prescribe the manner of exercising the rights guaranteed by the Constitution, but it shall under no circumstances influence the substance of the guaranteed right. The reason for this is that the objective time limit for filing the request and the right of the person concerned to avail themselves of the right to use the prescribed legal remedy at all both directly depend on the time of delivery of the act under review.

Regarding the assessment of the constitutionality of Article 128.2 of the Law, which excludes the conduct of administrative dispute against the act adopted, based on the request for review of the decision, the Constitutional Court held that the contested provision of the Law did not comply with the provision of Article 198.2 of the Constitution, which states that the legality of final individual acts deciding on a right, duty or legally grounded interest shall be subject to court review in an administrative dispute, unless another form of court protection has been envisaged by the Law. Having analysed the provisions of the Law on Police in their entirety, the Constitutional Court determined that no other form of court protection was envisaged against final individual acts deciding on a right, duty or legally grounded interest. Since the Law on Police as a special law excludes the right to conduct an administrative dispute against an act adopted, based on the request for review of the decision relating to certain labour rights of police officers, and no other form of court protection has been envisaged by the Law, the Constitutional Court held that the contested provision of Article 128.2 of the Law was not in compliance with the constitutional principle of equal protection without discrimination under Article 21 of the Constitution, because police officers, as a category of civil servants, were put in a position unequal to that of other civil servants in the same legal situation.

#### Languages:

English, Serbian.



## Slovakia

### Constitutional Court

#### Important decisions

*Identification:* SVK-2009-3-002

**a)** Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 04.12.2007 / **e)** PL. ÚS 12/01 / **f)** / **g)** *Zbierka zákonov* n° 14/2008; *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), 1/2007; [www.concourt.sk](http://www.concourt.sk) / **h)** CODICES (Slovak).

*Keywords of the systematic thesaurus:*

2.3.3 Sources – Techniques of review – **Intention of the author of the enactment under review.**

2.3.6 Sources – Techniques of review – **Historical interpretation.**

3.16 General Principles – **Proportionality.**

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

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

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

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

*Keywords of the alphabetical index:*

Abortion-on-demand / Abortion, for health reasons / Abortion, byelaw / Child, unborn, protection / Woman, pregnant, right to privacy.

*Headnotes:*

Abortion on demand of a pregnant woman in the first 12 weeks of pregnancy is in conformity with the right to life (including the clause stating that human life is worthy of protection even before birth) set in the Constitution.

The byelaw (Ordinance of Ministry of Health) itself cannot state that abortion for genetic reasons is allowed up to 24 weeks of pregnancy because this issue should be covered by a law.



### Summary:

A group of MPs filed a claim in front of the Constitutional Court challenging the provisions of the Abortion Law, which allow abortion just on demand in the first 12 weeks of pregnancy. They argued that in the first 12 weeks of pregnancy there is no legal protection of human life. They stressed the importance of the right to life and insisted on the original intent of the legislator. Although right to life and right to privacy need to be balanced and there can be exemptions to the prohibition of abortion, this is not the case regarding abortion on demand, where a woman is not obliged to prove any threat to human rights.

The petitioners also challenged the provision of the byelaw, which allows abortion for genetic reasons up to 24 weeks of pregnancy, although the Law allows abortion only in the first 12 weeks of pregnancy.

The Constitutional Court initially stated that the Slovak Republic is a state governed by the rule of law and is ideologically neutral. The Court pointed out that its role is to review the challenged Law from the constitutional point of view, not to answer a variety of non-legal questions related to abortion. After stressing the principle of the unity of the Constitution, the Court said that the Abortion Law is also related to the right to privacy, freedom of conscience and the right to health.

The most important challenged provision, Section 4 of the Abortion Law, reads: "A woman's pregnancy may be terminated if she demands it in writing, if the pregnancy does not exceed 12 weeks and if her state of health does not prevent it."

It must be stressed that the Court reviewed just abortion-on-demand in the first 12 weeks of pregnancy, not the Abortion Law as such or other reasons for abortion.

The right to life is a crucial human right, is binding *erga omnes* and is directly applicable. It is a right that is applied both vertically and horizontally applicable and the State has a positive obligation to protect it. The question is therefore whether the subject of the right to life is only an already born human being or whether it includes unborn life.

Article 15.1 of the Constitution contains, in the first sentence, the right to life. The second sentence reads: "Human life is worthy of protection even before birth." (hereinafter, the "worth of protection clause"). There are two possible contradicting interpretations of the worth of protection clause. On the one hand, the worth of protection clause is legally irrelevant and on the

other hand it includes the subjective right to life of the unborn. The Court rejected both these interpretations. The worth of protection clause does not include the subjective right to life for several reasons: not only is the wording different from the right to life clause in the first sentence, but also Article 14 of the Constitution reads that every person shall be entitled to his or her rights (legal capacity) leaving no doubts that every person in Article 14 of the Constitution is only a living, born person. According to Article 15.4 of the Constitution, which is part of Article 15 of the Constitution, protecting right to life, no infringement of the rights set out in Article 15 of the Constitution occurs if someone has been deprived of life as a result of an act which is not criminal according to the law. If the worth of protection clause were considered a subjective right and Article 15.4 of the Constitution were applied, then the rights of a woman could not be balanced against the right to life of the unborn. This could mean not only the banning of abortion on demand, but also abortion for other reasons, which are not challenged. Balancing the right to life of the unborn and the right to life of a woman could lead to strong restrictions on abortion, and if there were an attempt to leave some reasons for abortion, then different categories of right to life could develop, which is not acceptable. It is not acceptable to develop a special kind of subjective right from the worth of protection clause, a kind of "weaker" right to life. This would also breach the principle of equality.

Nevertheless, the worth of protection clause has some legal relevance. The Court declared that the Constitution also contains objective values. The worth of protection clause may be considered an objective value, whereby this value is less specific than basic rights, so constitutional protection is lower. According to the Court, the legislator has a certain margin of appreciation when fulfilling the worth of protection clause. The right to privacy also includes the possibility for a woman to make decisions about her pregnancy, at least up to a particular stage of the pregnancy. The Court must consider whether the right to privacy and the constitutional value of the unborn life are properly balanced.

The Court took into consideration related international treaties and decisions of the European Court of Human Rights, Human Rights Committee and foreign courts of a constitutional type. There was also a review of foreign legal regulations on abortion. The Court concluded that all those arguments merely have supportive value.

If there was no protection of the unborn life during the first trimester, when abortion-on-demand is allowed, then there would be a contradiction with the worth of protection clause. The Court argued that this

protection should be viewed from the perspective of the whole Slovakian legal order. The unborn child is protected via the special protection of pregnant women under labour and criminal law. The Court accepts the opinion that the “life” of the foetus is intimately connected with, and cannot be regarded in isolation of, the life of the pregnant woman. The unborn child is also protected against its own mother’s will by the special four-step procedure including counselling at the doctor’s before the abortion. The Court also stated that the period of the first trimester is constitutionally acceptable. It is not arbitrary because, on the one hand, it is not too short for pregnant women to consider abortion and thus to fulfil the aim of the Law and, on the other hand, it is not too long to breach the constitutional value set in the worth of protection clause. In any case, the legislator has a certain margin of appreciation in this respect.

According to the petitioners, the original intent of the federal MPs, authors of the worth of protection clause, should be taken into consideration (after the dissolution of the Czech and Slovak Federative Republics, the Federal Charter of Human Rights was taken almost verbatim into the new Slovak Constitution). The aim of the worth of protection clause was to protect the unborn life from conception onwards. The Court stated that the historical method of interpretation has only a supporting role. The original intent of the MPs was not decisive, but the objective text of the Constitution was.

Therefore, following this argumentation, the Court rejected the petition to abrogate the challenged provision allowing abortion-on-demand in the first trimester.

According to Section 12 of the byelaw issued by the Ministry of Health, pregnancy may be terminated up to 24 weeks for genetic reasons. The petitioners also challenged this provision, because the Law allows abortion only up to 12 weeks. The Court stated that the Law allows both abortion on demand and abortion for health reasons. The Law itself does not put a time limit on abortion for health reasons. Therefore, Section 12 cannot be compared with the 12 week period, which is set in the Law solely for abortion-on-demand. The only question is whether the legal norm set in Section 12 could be set only in the byelaw, or whether it is *praeter legem*. The Court stated that the 24-week period cannot be considered insufficiently relevant to put in the Law and it is also not a technical question in an expert sense, which usually belongs in a byelaw. On the contrary, the period is very important, because it limits the right to privacy of pregnant women balanced against the worth of protection clause.

Therefore, according to the Court, the provision breaches Article 123 of the Constitution (Competence of a ministry to issue byelaws) and Article 2.2 of the Constitution (Principle of legality).

#### *Supplementary information:*

Five judges wrote dissenting opinions to the first part of the decision. In a joint dissenting opinion, three judges wrote that Article 15.1 of the Constitution implies that the unborn life has extraordinary constitutional value. The challenged provision itself and the rest of the legal order do not provide protection to the unborn life in the first trimester. The right to life as a core constitutional value of the unborn life has a quality which is not comparable with the right to privacy of a woman.

Another judge stressed that only abortion-on-demand in the first trimester is challenged, not the Abortion Law as a whole. He noted that counselling cannot be considered as part of the protection of unborn life, because women may demand abortion notwithstanding this. He considered the challenged provision as not conforming with Article 15.1 of the Constitution, because there is no legal or administrative protection of the unborn life in the first trimester.

The last judge wrote that there is no difference for the protective obligations of the legislator between the right to life clause and the worth of protection clause. Human life has equal value whether unborn or born. It is not acceptable to absolutise either the right to life or the right to privacy. According to the dissenter, unborn life in the first trimester is in a vacuum from the point of view of values and the absence of regulation. The right to privacy is exclusively preferred, which is not proportionate. Although there is no textual basis in Article 15 of the Constitution, the legislator arbitrarily differs unborn life before and after the 12<sup>th</sup> week. There is no protection of the unborn life in the first trimester.

#### *Languages:*

Slovak.



# Slovenia

## Constitutional Court

### Statistical data

1 September 2009 – 31 December 2009

The Constitutional Court held 23 sessions during the above period (13 were plenary and 10 were in Chambers). Of these, 2 were in civil chambers, 4 in penal chambers and 4 in administrative chambers. The statistics show that on 31 December 2009, there were 274 unresolved cases in the field of the protection of constitutionality and legality (denoted U-I- in the Constitutional Court Register) and 822 unresolved cases in the field of human rights protection (denoted Up- in the Constitutional Court Register). The Constitutional Court accepted 98 new U-I- and 482 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court resolved:

- 121 (Up-) cases in the field of the protection of constitutionality and legality of which the Plenary Court issued:
  - 47 judgments and
  - 74 decisions

Accordingly the total number of U- cases resolved was 121.

In the same period, the Constitutional Court resolved 37 (Up-) cases in the field of the protection of human rights and fundamental freedoms (19 judgments and 9 decisions issued by the Plenary Court, 2 judgments and 7 decisions issued by a Chamber of three judges).

Judgments are published in the Official Gazette of the Republic of Slovenia, whereas the decisions of the Constitutional Court are not generally published in an official bulletin, but are handed over to the participants in the proceedings.

However, the judgments and decisions are published and submitted to users:

- In an official annual collection (Slovenian full text versions, including dissenting/concurring opinions, and English abstracts);

- In the *Pravna Praksa* (Legal Practice Journal) (Slovenian abstracts, with the full-text version of the dissenting/concurring opinions);
- Since August 1995 on the Internet, full text in Slovenian as well as in English <http://www.us-rs.si>;
- Since 2000 in the JUS-INFO legal information system on the Internet, full text in Slovenian, available through <http://www.ius-software.si>;
- Since 1991 bilingual (Slovenian, English) version in the CODICES database of the Venice Commission.

### Important decisions

*Identification:* SLO-2009-3-006

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 07.12.2006 / **e)** U-I-60/06-200, U-I-214/06-22, U-I-228/06-16 / **f)** / **g)** *Uradni list RS* (Official Gazette), 1/2006 / **h)** Court's Official Annual Collection OdlUS XV, 84, *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

*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.**
- 4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status.**
- 4.7.4.3.6 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Status.**
- 5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law.**

*Keywords of the alphabetical index:*

Judge, material status / Judge, remuneration, reduction / Judge, salary, guarantee / Judge, independence.

*Headnotes:*

In accordance with the principle of the independence of judges (Article 125 of the Constitution), it is appropriate that judges' salaries be regulated only by law. Certain provisions of the Judicial Service Act and the Salary System in the Public Sector Act, which determine that judges' salaries be regulated by an

ordinance of the National Assembly, the collective agreement for the public sector, and a Government decree, as well as the provisions of the Ordinance on Officials' Salaries, which regulates judges' salaries as an executive regulation, were pronounced to be inconsistent with the above constitutional principle.

As no convincing reasons for the alleged disparities between the officials' salaries in the individual branches of power were demonstrated, the Ordinance on Officials' Salaries can also be found to be inconsistent with the principle of the separation of powers determined in Article 3.2 of the Constitution.

It is inconsistent with the constitutional principle of the independence of judges if the legislator only ensures judges protection against a reduction in their basic salary and if it allows additional instances of a reduction of judges' salaries to be determined by an ordinance of the National Assembly.

Statutory provisions which determine that state prosecutors' and state attorneys' salaries be regulated by an executive regulation, and the provisions of the Ordinance on Officials' Salaries which entail the implementation of such statutory authorisation are not inconsistent with the Constitution.

Statutory provisions which determine that state prosecutors' salaries be regulated by the collective agreement for the public sector are inconsistent with the principles of a state governed by the rule of law (Article 2 of the Constitution), as state prosecutors do not participate in the process of negotiating the collective agreement. Statutory provisions which determine that state prosecutors' salaries be regulated by a decree of the Government are inconsistent with the principle of legality (Article 120.2 of the Constitution).

### *Summary:*

The subject of review is the regulations governing the salary position of judges. The essential question in this particular case is that of the constitutional position of the judiciary and judges, and within these frameworks the question of determining the guarantees which are ensured by the Constitution in relation to the other two branches of power.

It must be underlined that the constitutional principle of the independence of judges, the bearers of which are judges, cannot be regarded as their privilege, but rather as an essential element for ensuring the protection of the rights of parties to judicial proceedings. The implementation of the principle of the independence of the judiciary is not only intended

for judges, but also and in particular for those needing judicial protection of their rights. In addition, the independence of judges is a prerequisite for their impartiality in concrete judicial proceedings and therefore for the credibility of the judiciary as well as the trust of the public in its work.

Only a norm which regulates judges' salaries entirely by a statutory Act is in line with the principle of the independence of judges. Insofar as judges' salaries are determined by an ordinance, the regulation is inconsistent with the principle of the independence of judges determined in Article 125 of the Constitution. Also the legislative provisions which leave the regulation of judges' salaries to Government decrees or to the collective agreement for the public sector are inconsistent with this constitutional principle.

Determining the salaries of civil servants or officials falls within the field of discretion of the legislator, provided that the constitutional rights of individuals are not interfered with. However, within the salary system of the highest public officials, only a few offices in the judicial branch of power are placed in the highest salary brackets. As no convincing reasons for such disparities were demonstrated, it can be concluded that the provision which determines salary brackets for individual offices in the judicial branch of power is inconsistent with Article 125 of the Constitution and with the principle of the separation of powers (Article 3 of the Constitution).

Protection against a reduction of the salary of an individual judge, if such is intended to ensure its stability and consequently the judge's independence, must be understood as protection against any interference which might cause a reduction of the judge's salary which the judge justifiably expected upon assuming office. Thus, it is not only judges' basic salaries that are protected against a reduction, but also all payments to which judges are entitled due to performing judicial office. The same applies in cases of possible payments to judges for work-related matters that do not form a fixed part of a judge's salary.

The review of the consistency of the regulation providing for supplemental payment of judges for work performance, with the principle of the independence of judges determined in Article 125 of the Constitution cannot be carried out due to the insufficiently determined and vague statutory provisions under challenge. Therefore, the contested statutory regulation is inconsistent with Article 2 of the Constitution.

The Constitution only makes explicit provision for the basic functions of state prosecutors. Their other powers are determined by the legislator, which also has to regulate the organisation and powers of state

prosecutors' offices. Thus, the Constitution does not ensure the same guarantees as follow from Article 125 of the Constitution for judges. Whilst the legislator may leave more detailed regulation of the rights and obligations of prosecutors to ordinances, it must regulate the basic contents of the regulation and determine the framework and guidelines for a more detailed executive regulation. In this particular case, these guidelines were respected. Therefore, the challenged regulation is not inconsistent with Article 87 (legislative powers of the National Assembly) or Article 2 of the Constitution (the principle of legality as an integral part of a state governed by the rule of law). The same reasoning applies to the contested provisions regulating the salaries of state attorneys, which are therefore also in line with the Constitution.

The regulation whereby additional payments to state prosecutors' salaries and the criteria for the work performance supplements are regulated by the collective agreement for the public sector is inconsistent with the principles of the rule of law under Article 2 of the Constitution. State prosecutors do not participate in the process of negotiating the collective agreement, which means that their interests are not represented. This is precisely why the legislator should not leave the regulation of state prosecutors' salaries to the collective agreement.

#### *Languages:*

Slovenian, English (translation by the Court).



#### *Identification:* SLO-2009-3-007

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 05.05.2009 / **e)** U-II-1/09 / **f)** / **g)** *Uradni list RS* (Official Gazette), 35/2009 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

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

4.7.15.1 Institutions – Judicial bodies – Legal assistance and representation of parties – **The Bar**.  
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

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

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

Bar, public service, function / Rights, judicial protection / Lawyer, fee / Legislative omission.

#### *Headnotes:*

If, in connection with the request to call a legislative referendum, the National Assembly deems that unconstitutional consequences could occur due to the suspension of the implementation of a law or due to a law not being adopted, it will ask the Constitutional Court to decide on the point. If a statutory regulation in force is unconstitutional and the newly adopted act remedies the existing problems in a constitutional manner, the possibility of its rejection at a referendum would suggest the lack of constitutionality still exists. The occurrence of unconstitutional consequences can be established in such cases.

The statutory regulation, which allows a situation where there might be an insufficient number of lawyers to ensure the exercise of the above human rights, as lawyers are entirely free to decide whether to be included in the list of lawyers, is inconsistent with Article 23.1 and the second indent of Article 29 of the Constitution. In order to ensure the right to judicial protection and the right to a defence in criminal proceedings, the legislator should envisage a mechanism which ensures the effective exercise of these human rights for all, even in cases where the number of lawyers on this list of lawyers does not suffice for such purposes.

Article 137 of the Constitution determines the independence of lawyers within the justice system. From it stems the obligation of the legislator to envisage the obligatory participation of the Bar Association in the legislative procedure of determining lawyers' fees. Article 42 of the Lawyers' Fees Act authorises the minister for justice to determine the manner of the participation of the Bar Association in the procedure for amending the law which regulates lawyers' fees. The Constitutional Court established that a so-called bare execution clause is inconsistent with the Constitution. The legislator had authorised a minister to issue an executive regulation without determining criteria as to the content, which would have clarified the role of the Bar Association in determining lawyer' s fees or changes thereto.

### Summary:

Under the Referendum and Public Initiative Act, the Constitutional Court has jurisdiction to decide upon a request from the National Assembly on whether unconstitutional consequences could occur due to the suspension of the implementation of a law or due to its rejection at a referendum. If the Constitutional Court establishes that the statutory regulation in force is unconstitutional and the adopted act remedies the existing unconstitutionality in a constitutional manner, its rejection at a referendum would point to the continued existence of a lack of constitutionality. The occurrence of unconstitutional consequences can be established in such cases. The purpose of the Court's decision is to prevent voters from adopting a decision at a referendum which would render it impossible to repeal an unconstitutional statutory regulation.

In the case at issue, the National Assembly asked the Court to decide whether such consequences could occur due to the suspension or rejection of the Act Amending the Lawyers Act (referred to here as LA-C), alleging that the regulation in force, laid down in the Lawyers Act (LA) and in the Lawyers' Fees Act (the LFA), does not ensure effective legal aid and mandatory representation in criminal proceedings, as lawyers may choose *ex officio* whether to be put on the list of lawyers and on the list of lawyers performing services within the scope of legal aid. At the same time, no appropriate guarantees exist for cases where the number of lawyers on the lists is not high enough to ensure the uninterrupted performance of these services.

It cannot be disputed that in order to ensure legal aid as an element of the right to effective judicial protection as well as to ensure the right to be defended by a lawyer in criminal cases, representation by a member of the Bar must be ensured. The statutory regulation allowing a lawyer to decide freely whether to be included on the list of lawyers and to propose to the Bar Association that he or she be struck from the list at any time does not regulate cases where there are not enough lawyers on the list to ensure uninterrupted provision of legal aid and representation *ex officio* in criminal proceedings. As the Court could not establish the existence of a constitutionally admissible aim for such interference with the right to judicial protection and the right to criminal defence, it pronounced the regulation inconsistent with the Constitution. The LA-C remedies this unconstitutional situation by determining that where the President of the competent court finds that there are not enough lawyers on the list to ensure the institution of representation *ex officio* and legal aid, a lawyer is

appointed by the court according to the alphabetical order of all lawyers listed in the register of lawyers who are part of the regional Bar Association in the territory of an individual district court.

Pursuant to the Constitution, the Bar is regulated by a statutory act, and under the LA, lawyers in the Bar exercise an independent profession. However, when regulating such profession by a statutory act, the legislator always runs into the constitutional requirement that the Bar is an "autonomous and independent" service. According to the regulation in force (Article 42 of the Lawyers' Fees Act) the Minister for Justice is competent to determine the manner of the participation of the Bar Association in the procedure for amending the law which regulates lawyers' fees. The Court established that such regulation is unconstitutional as the legislator authorised a minister to issue an executive regulation without determining criteria regarding their content in the statutory act. It also established that the LA-C remedies this unconstitutionality by determining that fees are determined by the Bar Association, after the prior consent of the Minister for Justice. This regulation cannot be alleged to be inconsistent with Article 137 of the Constitution. As regards the above-mentioned, the LA-C remedies such unconstitutionality in a manner which is consistent with the Constitution.

The Constitutional Court therefore established the existence of an unconstitutional gap in the Act. It accordingly proceeded to review the constitutionality of the LA-C to determine whether the constitutional difficulties that had been established could be remedied by the adopted act. It found that the solutions in this act are consistent with the Constitution. Therefore, the Constitutional Court established that the possible rejection of the LA-C at a referendum would cause unconstitutional consequences.

### Languages:

Slovenian, English (translation by the Court).



*Identification:* SLO-2009-3-008

a) Slovenia / b) Constitutional Court / c) / d) 10.09.2009 / e) Up-3663/07 / f) / g) *Uradni list RS* (Official Gazette), 77/2009 / h) *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

*Keywords of the systematic thesaurus:*

5.3.13.23.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to testify against spouse/close family.**

*Keywords of the alphabetical index:*

Fair trial / Offence, minor, review by court / Evidence, assessment / Evidence, assessment, fault / Evidence, witness.

*Headnotes:*

Taking evidence for the benefit of the defendant can be effective only if, during criminal or minor offence proceedings, the question of the defendant's responsibility is decided with the help of all available means of evidence appropriate for establishing the facts. This gives the defendant the opportunity to influence the findings of the Court concerning the legally relevant facts and places him or her on an equal footing with the opposing party.

There is no constitutionally admissible reason to prevent the defendant from proving a circumstance essential for deciding his or her responsibility for a minor offence if his or her responsibility is presumed. The court's refusal to accept exonerating evidence because a defendant could only prove a certain decisive fact by "documenting" his or her whereabouts, constitutes a non-admissible limitation over the choice of the means of evidence.

*Summary:*

The applicant was issued with a payment order for a minor offence under Article 52.6 of the Road Traffic Safety Act. He lodged a request for judicial protection against the payment order, but the Court dismissed this request as not substantiated. The Court justified its decision by the provision of the Act under which there is a presumption that the owner of a vehicle is responsible for a minor offence committed with the vehicle. It noted that the applicant had not presented any documents testifying as to his whereabouts, neither had he substantiated his claim with any

evidence. He was therefore unable to prove that he had not committed the minor offence himself.

The applicant argued that the Court had failed to consider all the evidence submitted and that it had arbitrarily and without giving reasons departed from the established case-law, which allows the establishment of facts by questioning the supposed perpetrator and witnesses in proceedings arising from a minor offence. He contended that the Court had decided in advance that written evidence was of higher evidentiary value than evidence obtained by questioning the alleged perpetrator and the witnesses. The applicant argued that the Court had placed him in an unconstitutional position in that he had no option but to testify against those nearest to him in order to exonerate himself. The applicant explained that he exercised the "legal beneficium" not to denounce, testify against, or otherwise expose those nearest to him to persecution in relation to the minor offence. He described this as a special reflection of the general principle prohibiting "compulsory self-incrimination" (Articles 21 and 2 of the Constitution), which also has an explicit legal basis.

The fundamental guarantees of a fair trial (Article 29 of the Constitution) must also be ensured to defendants in proceedings arising from a minor offence. It is essential for a fair trial that somebody whose rights, obligations, or legal interests are the subject of a judicial procedure, has adequate and sufficient possibilities to take a position regarding the factual and legal aspects of the case and that he or she is on an equal footing with the opposing party. As follows from the well-established constitutional case-law, in accordance with the principle of the free evaluation of evidence, the Court alone decides which evidence it will take and in what way the credibility of the evidence will be judged; however, it must take the evidence which is relevant from the perspective of substantive law and for which the defence has justified a sufficient degree of probability that it exists and is legally relevant. It is evident that the evidence submitted concerning the alibi is crucial. Therefore, the Court is obliged to check the alibi thoroughly, if the defence, when submitting the evidence, shows that the alibi is at least probable.

The applicant submitted exonerating evidence. He was trying to prove his alibi in the request for judicial protection by providing information concerning a person who could confirm that he was not present at the scene of the minor offence at the time it was committed. By stating that the applicant had not produced any document as to his whereabouts and had not produced any evidence supporting his claims, the Court clearly held that the applicant could

exonerate himself of the presumed responsibility only if he could submit documents demonstrating his whereabouts at the time the minor offence was committed. By adopting this stance, which represents a limitation on the means of evidence, the Court interfered with the applicant's right contained in the third indent of Article 29 of the Constitution.

The position of the Court that it would not allow the exonerating evidence because a defendant is able to prove a certain decisive fact only by "documenting" his or her whereabouts, entails a non-admissible limitation as regards the choice of the means of evidence. The judgment under challenge is based on an interpretation inconsistent with the right contained in the third indent of Article 29 of the Constitution. Therefore, the Constitutional Court decided to direct the repeal of the judgment and to refer the case to the First Instance Court for new adjudication.

#### *Languages:*

Slovenian, English (translation by the Court).



#### *Identification:* SLO-2009-3-009

a) Slovenia / b) Constitutional Court / c) / d) 10.09.2009 / e) Up-1391/07 / f) / g) *Uradni list RS* (Official Gazette), 82/2009 / h) *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

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

3.17 General Principles – **Weighing of interests.**  
5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**  
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

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

Media, journalist / Politician, defamation / Honour, respect, right.

#### *Headnotes:*

The positions the courts had adopted in the judgments under dispute and their decisions in the

civil proceedings did not limit the defendant's freedom of expression in an inadmissible way under Article 39.1 of the Constitution. Thus in weighing freedom of expression on the one hand and the right to personal dignity on the other, the courts did not determine the relation between the above-mentioned constitutional rights in such a way that freedom of expression was excessively limited. In carrying out their work, journalists enjoy a broad scope of protection of the right to freedom of expression, which is a result of their important role in society. If, however, journalists overstep the boundaries of the debate or issue which they are reporting by means of statements which encroach upon an injured party's personality rights to such an extent that it can no longer be claimed that they are in any way contributing to the open public discussion of matters important to society, they cannot argue that the role they are fulfilling in society means that their freedom of expression outweighs the interference with the injured party's personality rights.

#### *Summary:*

There was a clash in this particular case between the human rights of the plaintiff and those of the defendant. In response to a speech made by a deputy of the National Assembly, during the debate on the Registration of a Same-Sex Civil Partnership Act, in which he allegedly expressed by words and gestures a negative opinion regarding homosexuals, the defendant published a magazine article.

In the article it was, *inter alia*, written that the politician "accompanied his brilliant idea with a coffeehouse imitation which was probably supposed to clearly illustrate some orthodox understanding of a stereotypically feminised and phoney faggot, whereas it really turned out to be just in the normal range of a cerebral bankrupt who is lucky to be living in a country with such a limited pool of human resources that a person with his characteristics can even end up in the parliament, when in any normal country worthy of respect he could not even be a janitor in an average urban primary school."

The courts of first and second instance established that the magazine article was objectively offensive and that it attacked the plaintiff's personality and thereby interfered in an inadmissible way with his honour and reputation. Upon inspecting video recordings of the National Assembly session, it was established that in the speech in question, the plaintiff said: "Imagine a child in a school who is picked up by a father who greets him: "Ciao. I came to get you. Are you dressed yet?" and accompanied this statement with a hand gesture allegedly used to convey the idea of a homosexual man. The plaintiff also stated:



“...there is probably no one in the entire assembly room who would wish to have the fruit of their loins declare themselves to be for what we are voting on today by rights [sic]... In other words, not one of us would wish to have a son or a daughter who would declare themselves to be part of such a marriage.”

In the constitutional complaint the defendant stressed first and foremost that this particular magazine article is an expression of an opinion on an issue which is important to the public and that the plaintiff's speech was manifestly offensive to a certain, very sensitive group of people. Therefore, the journalist who was outraged by such speech wanted to express his disagreement and disapproval. The applicant also observed that the journalist did not express an opinion about the plaintiff as a person; it related to his conduct.

Article 39.1 of the Constitution guarantees freedom of expression of thought, freedom of speech and public appearance, and freedom of the press and other forms of public communication and expression. As is the case regarding other human rights, the right to freedom of expression is not unlimited. Under Article 15.3 of the Constitution, human rights and fundamental freedoms are limited only by the rights of others. The right to freedom of expression often clashes with rights to personality and privacy (Article 35 of the Constitution), to which the right to the protection of honour and reputation also belongs. The Constitutional Court has already held that journalists must be particularly careful when implementing the right of the public to be informed, with reference to which they act as representatives of the public. They must ensure that information is true, clear, and unambiguous.

The Constitutional Court held that the positions of the courts in the challenged judgments and their decisions in the civil proceedings did not limit the defendant's freedom of expression in an inadmissible way. Thus in weighing up the freedom of expression on the one hand and the right to personal dignity on the other, the courts did not determine the relationship between the above constitutional rights in such a way as to impose an excessive limitation on the freedom of expression. The courts held that the defendant's article did not constitute a serious criticism of the plaintiff's work as a National Assembly deputy, but gave a negative value judgment of him, his abilities, and personal characteristics.

The Constitutional Court held that the freedom of expression of journalists is protected, provided they act within the framework of performing their “mission”. The limits to this framework must be decided in each individual case. An issue may be important to society

and the statement of the injured party may be inappropriate, provocative, and even offensive. Nonetheless, the response to it can be exaggerated and may exceed the framework of the protection of the right to freedom of expression. This also applies to journalistic reporting.

The Constitutional Court was of the view that this article, in terms of its substance, but not its form, did not contribute to people being informed. Neither did it contribute to a socially important and sensitive public discussion on the position of homosexuals. The Constitutional Court therefore dismissed the complaint.

#### *Languages:*

Slovenian, English (translation by the Court).



# South Africa

## Constitutional Court

### Important decisions

*Identification:* RSA-2009-3-013

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 30.09.2009 / **e)** CCT 42/09; [2009] ZACC 25 / **f)** Minister for Justice and Constitutional Development v. Mqabukeni Chonco and 383 Others / **g)** [www.constitutionalcourt.org.za/Archimages/13874.PDF](http://www.constitutionalcourt.org.za/Archimages/13874.PDF) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

4.4.3.2 Institutions – Head of State – Powers – **Relations with the executive powers.**

4.4.3.3 Institutions – Head of State – Powers – **Relations with judicial bodies.**

4.6.10.2 Institutions – Executive bodies – Liability – **Political responsibility.**

*Keywords of the alphabetical index:*

Accountability, determination / Head of State, pardon, grant, delay / Pardon, legal nature / Political offence, politically motivated offence, pardon / Powers, administrative.

*Headnotes:*

In exercising the constitutional power to grant a pardon, the President may invoke assistance from Cabinet members and government departments, but accountability for the exercise of the power remains exclusively with the President.

*Summary:*

I. Mr Mqabukeni Chonco and 383 other prisoners (the applicants) applied to the President of the Republic of South Africa to be pardoned for crimes which they allege were committed for political gain. As Head of State, the President is empowered, by Section 84.2.j of the Constitution, to grant such pardons. The Minister for Justice and Constitutional Development (the Minister) received all the applications for pardon. This was in accordance with the practice whereby pardon applications are received, processed and

commented on within the Department of Justice and Constitutional Development in preparation for the President's final decision. However, after four years and numerous attempts by the Inkatha Freedom Party – an opposition party – to ensure that the applications for pardon were considered, no decision had been made.

In a speech in Parliament in September 2005, then-President Mbeki said that he was waiting for the Minister and her department to process the applications. The applicants then brought proceedings in the High Court seeking to hold the Minister accountable for failing in her constitutional obligation to process the pardon applications with diligence and without delay. The applicants succeeded in the High Court and the Supreme Court of Appeal on the grounds that the steps taken by the Minister constituted a 'preliminary executive function', since it was an act required to lay the foundation for the ultimate decision made by the President.

The Minister appealed to the Constitutional Court arguing that the effect of the judgments was that the powers conferred on the President were transferred to the Minister as a member of the National Executive. This resulted in the fusing of the obligations of the President as Head of State with the obligations of the President as head of the national executive.

The question to be answered by this Court was whether this preliminary process created constitutional obligations for the Minister as the relevant member of the national executive in terms of Section 85.2.e of the Constitution.

II. The Court held that Section 84.1 of the Constitution confers upon the President a set of auxiliary powers, in addition to the principal decision-making power, to assist him or her in fulfilling the powers, functions and obligations placed on the President by Section 84.2. The power to request assistance via the preliminary process employed was an auxiliary power of the President as Head of State.

What separates the exercise of powers and functions under Section 84 from those under Section 85 is that the former are performed exclusively by the President, the latter, collectively by the President and members of the Cabinet. It could not be stated that collective action had occurred or would occur. As with his unrestricted power to initiate the preliminary process, the President had the power to make a final decision that need not bear any reference to the recommendation made during the preliminary process. Were the preliminary process to be considered a collective action, the result would be

that a failure to take preliminary action would prevent the President from exercising a function and power accorded solely to him, thereby frustrating his powers as Head of State. The President must accordingly retain the sole power to remove his instructions, bypass the process initiated by him or transfer the preliminary consideration elsewhere.

Consequently, the Court found that the applicants had sued the incorrect party to obtain the relief they sought. However, it was noted that unacceptable delays had occurred in processing the applications for pardon. It was understandable that the applicants initiated litigation, and the Minister appeared to be the correct party to pursue, since the President had stated that he would consider the appropriateness of a presidential pardon only once the Minister had completed the preliminary process. The Minister was therefore ordered to pay the applicants' legal costs.

#### *Supplementary information:*

Legal norms referred to:

- Articles 84, 85 and 237 of the Constitution, 1996.

#### *Cross-references:*

- *The Affordable Medicines Trust and Others v. Minister of Health and Others*, *Bulletin* 2005/1 [RSA-2005-1-002];
- *S v. Makwanyane and Another*, *Bulletin* 1995/3 [RSA-1995-3-002];
- *Azanian Peoples Organisation (AZAPO) and Others v. President of the Republic of South Africa and Others*, *Bulletin* 1996/2 [RSA-1996-2-014];
- *Du Toit v. Minister for Safety and Security and Another*, *Bulletin* 2009/2 [RSA-2009-2-011];
- *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others*, *Bulletin* 1999/2 [RSA-1999-2-005];
- *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*, *Bulletin* 2000/1 [RSA-2000-1-003];
- *Fedsure Life Assurance Ltd and Others v. Greater Johannesburg Transitional Metropolitan Council and Others*, *Bulletin* 1999/1 [RSA-1999-1-001];
- *President of the Republic of South Africa and Another v. Hugo*, *Bulletin* 1997/1 [RSA-1997-1-004];
- *Biowatch Trust v. Registrar, Genetic Resources and Others*, *Bulletin* 2009/2 [RSA-2009-2-006].

#### *Languages:*

English.



#### *Identification: RSA-2009-3-014*

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 07.10.2009 / **e)** CCT 64/08; [2009] ZACC 26 / **f)** Vuyile Jackson Gcaba v. Minister for Safety and Security and Others / **g)** <http://41.208.61.234/uhtbin/cgiisirs/20091215082335/SIRSI/0/520/J-CCT64-08> / **h)** [2009] 12 *Butterworths Labour Law Reports* 1145 (CC); CODICES (English).

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

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

4.7.1.3 Institutions – Judicial bodies – Jurisdiction – **Conflicts of jurisdiction.**

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

Administrative act, judicial review, legal basis / Constitutional Court, decision, binding effect / Court, civil, jurisdiction / Employment, public-sector appointment / Labour Code, application, in public employment relation / Labour, dispute, competent court.

#### *Headnotes:*

The failure by the state to promote and appoint a public sector employee does not, generally, amount to administrative action. The public nature of the employer is not dispositive of the issue and does not convert the conduct into an administrative act. A public sector employee therefore does not have a cause of action based on the right to fair administrative action. The employment dispute falls to be determined by the principles of labour law and should be adjudicated by the Labour Court.

#### *Summary:*

I. The applicant, Mr Gcaba, held the position of station commissioner in the South African Police Service (SAPS). When the position was upgraded, he

applied, and went through the interview process, but he was not appointed. He subsequently sought to review the decision not to promote him to station commissioner, a decision which he characterised as administrative action.

The High Court held that it lacked jurisdiction to hear the matter and dismissed Mr Gcaba's application on the ground that it was a labour-related dispute which fell within the exclusive jurisdiction of the Labour Court. The High Court noted that there were conflicting decisions of the Constitutional Court on the issue of the jurisdiction of the courts in labour matters relating to public sector employees.

II. On appeal, the Constitutional Court recognised that two of its apparently conflicting decisions on this issue as well as the preceding jurisprudence of the Supreme Court of Appeal and other courts resulted in differences of opinion in subsequent judgments on the jurisdiction of the High Court and the Labour Court, especially with regard to disputes between public sector employees and their employers. This judgment is the most recent authority on the proper interpretation of the relevant provisions of the Constitution, the Labour Relations Act, 1995 (LRA) and the Promotion of Administrative Justice Act, 2000 (PAJA).

The Court unanimously held that the same conduct may threaten different rights and give rise to different causes of action in law, often to be pursued in different courts. The constitutional and legal order is one coherent system for the protection of rights. Legislation must not be interpreted to exclude or unduly limit rights. However, when the Constitution itself recognises rights in different specific areas of law, and mandates the legislature to specifically create tailor-made rules and structures for those areas, these should be utilised.

Generally, employment and labour relationship issues do not give rise to administrative action claims. This is implicit in that the Constitution recognises the distinct rights to fair labour practices in Section 23 of the Constitution, which regulates the employment relationship between employer and employee, and just administrative action in Section 33 of the Constitution, which deals with the relationship between the bureaucracy and citizens. When the conduct of the state as employer has no direct consequences for other citizens, it will not amount to administrative action. The failure to promote and appoint Mr Gcaba was not administrative action. If his case were heard by the High Court, he fail for not being able to make out a case for the relief he sought, namely review of an administrative decision.

The Court emphasised the special dispute resolution mechanisms created by the LRA and held that the Labour Court has exclusive jurisdiction over matters that the LRA prescribes should be determined by it. The provision should be given content to protect the special status of the Labour Court.

The Court held that the LRA does not destroy causes of action in respect of matters which may well be heard by the High Court and it should not be interpreted to do so. Where a remedy lies in the High Court, the LRA should not be read to mean that it no longer lies there. Constitutional rights may always be enforced in the High Court. In the event of the Court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim only under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustain a cause of administrative action that is cognisable by the High Court, should thus approach the Labour Court.

The judgment also touches briefly on the issue of precedent and the exceptional circumstances wherein a court may depart from precedent.

#### *Supplementary information:*

Legal norms referred to:

- Sections 23, 33 and 169 of the Constitution, 1996;
- Sections 157, 173, 191 of the Labour Relations Act 66 of 1995.

#### *Cross-references:*

- *Chirwa v. Transnet Limited and Others* [2007] ZACC 23; 2008 (3) *Butterworths Constitutional Law Reports* 251 (CC); 2008 (4) *South African Law Reports* 367 (CC);
- *Fedlife Assurance Ltd v. Wolfaardt* 2002 (1) *South African Law Reports* 49 (SCA);
- *Fredericks and Others v. MEC for Education and Training, Eastern Cape and Others* [2001] ZACC 6; 2002 (2) *Butterworths Constitutional Law Reports* 113 (CC); 2002 (2) *South African Law Reports* 693 (CC);

- *Makhanya v. University of Zululand* [2009] ZASCA 69; [2009] *All South African Law Reports* 146 (SCA);
- *Nonzamo Cleaning Services Cooperative v. Appie and others* [2008] 9 *Butterworths Labour Law Reports* 901 (Ck); 2009 (3) *South African Law Reports* 276 (Ck).

#### Languages:

English.



#### Identification: RSA-2009-3-015

a) South Africa / b) Constitutional Court / c) / d) 08.10.2009 / e) CCT 21/09; [2009] ZACC 27 / f) *Bothma v. Els and Others* / g) <http://41.208.61.234/uhtbin/cgiisirs/20091215082925/SIRSI/0/520/J-CCT21-09> / h) CODICES (English).

#### Keywords of the systematic thesaurus:

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

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

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

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

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

#### Keywords of the alphabetical index:

Child, rape, gravity / Child, rape, pervasiveness / Child, rape, trial, delay, justification / Prosecution, criminal, delayed / Prosecution, private / Rape, allegation / Sexual offence against children, special nature / Trial within reasonable time, meaning / Trial within reasonable time, remedy.

#### Headnotes:

The nature of the offence and the effect of the offence on the victim are important factors in determining whether there has been an unreasonable delay to justify a permanent stay of prosecution, particularly in cases of sexual offences against children. Even though evidence may be irretrievably lost, the trial prejudice that this would cause is not necessarily insurmountable and the accused's rights to a fair trial are still protected by the presumption of innocence.

#### Summary:

I. In December 2007, the applicant, Ms Ptrue Bothma, instituted a private prosecution against Mr Petrus Arnoldus Els after the Director of Public Prosecutions declined to prosecute on behalf of the state. The prosecution was based on allegations of repeated rapes between 1968 and 1970, starting when Ms Bothma was thirteen years old.

In February 2009, Mr Els applied to the Northern Cape High Court for a permanent stay of prosecution on the basis that his right to a fair trial in terms of Sections 35.3.d and 35.3.i of the Constitution would be infringed, especially his right to trial without unreasonable delay and to adduce and challenge evidence. The High Court granted the stay as it held that the unreasonable delay, for which it regarded the applicant as being fully culpable, would result in irreparable trial prejudice and would deny the respondent his constitutional right to a fair trial.

The applicant approached the Constitutional Court arguing that the High Court did not have due regard to the gravity and pervasiveness of the crime of child rape, and to its lasting consequences for her as a victim. In particular, in holding that she had been culpable for the long delay, the High Court failed to pay due regard to the impact of traumatic bonding between herself and Mr Els, who was a family friend considerably older than herself. In addition, Ms Bothma submitted that only a trial court would be able to determine, on all the facts, whether Mr Els' constitutional rights had been infringed.

Mr Els countered that the decision of the High Court was correct. He argued that the delay was unreasonable and that the prejudice arising from the length of time between the alleged offence and the prosecution has infringed his right to a fair trial, and impacted negatively on his ability to mount an adequate defence because potential witnesses had died and material evidence had disappeared.

II. Writing for a unanimous Court, Justice Sachs noted that Mr Els was not technically yet an “accused person” for the purposes of Section 35.3.d and 35.3.i of the Constitution. While Section 35.3 of the Constitution did not deal expressly with pre-trial delay, the question was not whether Mr Els’ rights in terms of Section 35.3.d of the Constitution had been infringed, but rather whether his right to a fair trial in a broader sense would be irreparably violated as a consequence of the delay. The right to a fair trial should not be anchored exclusively in Section 35.3.d of the Constitution but, in this instance, the delay is an element in determining the overall substantive fairness of the trial were it to commence.

The Court further held that the High Court failed to give appropriate weight to the nature of the offence. Had the High Court considered this, it could not have concluded that Ms Bothma’s explanations were unpersuasive and that she had been solely responsible for the lateness.

Finally, the Court held that the High Court had been incorrect in assuming that because some of the evidence had been irretrievably lost, trial prejudice would be insurmountable. Any prejudice Mr Els might suffer because of the delay would not be irreparable and his right to a fair trial would be protected by the presumption of innocence. Accordingly, it could not be said in advance that the trial court hearing the matter would be prevented by the delay from ensuring that he had a fair trial.

The appeal therefore succeeded and the decision of the High Court staying the prosecution was set aside.

#### *Supplementary information:*

Legal norms referred to:

- Sections 35.3.d, 35.3.i, 35.3.j, 12 and 39.1.a of the Constitution, 1996;
- Sections 7.2.a, 9.1.b and 18.f of the Criminal Procedure Act 51 of 1977.

#### *Cross-references:*

- *The State v. Coetzee and Others, Bulletin* 1997/1 [RSA-1997-1-002];
- *Wild and Another v. AP Hoffert NO and Others, Bulletin* 1998/2 [RSA-1998-2-003];
- *Sanderson v. Attorney-General, Eastern Cape* [1997] ZACC 18; 1997 (12) *Butterworths Constitutional Law Reports* 1675 (CC); 1998 (2) *South African Law Reports* 38 (CC);

- *Van Zijl v. Hoogenhout* 2005 (2) *South African Law Reports* 93 (SCA); [2004] 4 *All South African Law Reports* 427 (SCA);
- *The State v. Cornick and Another* 2007 (2) *South African Criminal Law Reports* 115 (SCA); [2007] 2 *All South African Law Reports* 447 (SCA);
- *The State v. Baloyi, Bulletin* 1999/3 [RSA-1999-3-011];
- *Masiya v. Director of Public Prosecutions and Others, Bulletin* 2007/2 [RSA-2007-2-006].

#### *Languages:*

English.



#### *Identification: RSA-2009-3-016*

a) South Africa / b) Constitutional Court / c) / d) 08.10.2009 / e) CCT 39/09; [2009] ZACC 28 / f) *Lindiwe Mazibuko and Others v. City of Johannesburg and Others* / g) [www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACC/2009/28.html&query=mazibuko](http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACC/2009/28.html&query=mazibuko) / h) CODICES (English).

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

1.1.4.3 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Executive bodies.**  
 1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**  
 1.6.7 Constitutional Justice – Effects – **Influence on State organs.**  
 3.3 General Principles – **Democracy.**  
 3.4 General Principles – **Separation of powers.**  
 3.17 General Principles – **Weighing of interests.**  
 3.20 General Principles – **Reasonableness.**  
 4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities.**  
 4.14 Institutions – **Activities and duties assigned to the State by the Constitution.**  
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**  
 5.2.2 Fundamental Rights – Equality – **Criteria of distinction.**  
 5.3.24 Fundamental Rights – Civil and political rights – **Right to information.**

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

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

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

Constitutional complaint, limits of review / Constitutional complaint, subsidiarity / Constitutionality, variation over time / Cost, award / Court, verification of the constitutionality of laws / Executive, powers to initiate legislation / Fundamental right, core / Fundamental right, implementation / Policy decision, reviewability / Procedural unconstitutionality, allegations / Subsidiarity, principle / Water, supply / Policy, definition, procedure / Democracy, participative.

###### *Headnotes:*

Rights will be enforced by courts in at least the following ways:

1. the courts will require the State to take steps where it has taken none;
2. where the government's adopted measures are unreasonable the courts will require steps to be reasonable (a measure will be clearly unreasonable if it makes no provision for those most desperately in need);
3. the courts will order unreasonable limitations or exclusions to be removed; and
4. the courts will require the State to constantly review its policies to ensure that socio-economic rights are progressively realised.

National government should clearly set the standards it wishes to achieve and inform citizens. The government must be able to substantiate its choices. Thus, if the process is flawed or the information gathered is inadequate, the citizenry can seek relief in the courts. In the absence of a challenge to the standards set by the government, it will be difficult for a litigant to succeed with a challenge to the policy giving effect to the standards. This raises the issue of whether a challenge to the standard can succeed where the standard set by the State provides a minimum for the achievement of the right. This matter was not decided.

###### *Summary:*

I. This case considers the interpretation of the right to have access to sufficient water (enshrined in Section 27.1.b of the Constitution, and reiterated in Section 11 of the Water Services Act). It arose from a project initiated by the City of Johannesburg and

piloted in Phiri, Soweto, in early 2004 to address the severe problems of water losses and non-payment for water services. It involved installing pre-paid water meters (which allow for the flow of water only if sufficient credit has been purchased) to charge consumers for the use of water in excess of the free basic water allowance of 6 kilolitres per household per month.

Mrs Mazibuko and four other residents of Phiri (the applicants) raised two constitutional challenges. The first was that the City's Free Basic Water policy, in terms of which 6 kilolitres of water are provided monthly for free to all households in Johannesburg, was in conflict with Section 27 of the Constitution in that 6 kilolitres of water per month was not "sufficient water". The second challenge addressed the lawfulness of installing pre-paid water meters in Phiri.

II. On the constitutionality of the Free Basic Water policy, Justice O'Regan, writing for a unanimous Court, held that Section 27.1.b, read with Section 27.2, does not require the State to provide sufficient water on demand, but rather requires it to take reasonable legislative and other measures progressively to realise this right. The drafters of the Constitution did not expect that the State would be able to furnish citizens immediately with all the basic necessities of life.

In keeping with its previous jurisprudence, the Court rejected the argument that it should quantify the content of the right to sufficient water. This argument was similar to a "minimum core" argument and stood to be rejected. First, the content of the right will vary over time and will be context-dependent. Therefore, fixing a quantified amount is rigid and counter-productive. This is why "reasonableness" is at the centre of the enquiry into the fulfilment of the right because it permits a flexible assessment of the right in its context. Second, it is usually democratically inappropriate for the Court to dictate what the achievement of the right entails and what steps should be taken by the government in ensuring progressive realisation of that right. The Court is also institutionally ill-placed to make such policy decisions. The legislature and executive, as democratically appointed and accountable bodies, should usually determine budgets, targets, programmes and promises.

The policy of providing 6 kilolitres of free water per household per month was found to be reasonable under both Section 27 of the Constitution and Section 11 of the Water Services Act. The Court also held that the installation of the pre-paid water meters was lawful.

The Court, finally, held that socio-economic litigation requires the state to look critically at, and to justify, its policies. This fosters participative democracy and holds the government accountable between elections. On this basis no order of costs was made.

#### *Supplementary information:*

Legal norms referred to:

- Sections 9.1, 9.3, 27.1.b and 27.2 of the Constitution, 1996;
- Sections 1, 3, 9, 11 of the Water Services Act 108 of 1997;
- Section 4 of the Promotion of Administrative Justice Act 3 of 2000;
- Sections 4, 8.2 and 95.i of the Local Government: Municipal Systems Act 32 of 2000.

#### *Cross-references:*

- *Harksen v. Lane NO and Others*, *Bulletin* 1997/3 [RSA-1997-3-011];
- *Government of the Republic of South Africa and Others v. Grootboom and Others*, *Bulletin* 2000/3 [RSA-2000-3-015];
- *Minister of Health and Others v. Treatment Action Campaign and Others*, *Bulletin* 2002/2 [RSA-2002-2-013].

#### *Languages:*

English.



#### *Identification: RSA-2009-3-017*

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 09.10.2009 / **e)** CCT 43/09; [2009] ZACC 30 / **f)** Leon Joseph and Others v. City of Johannesburg and Others / **g)** <http://41.208.61.234/uhtbin/cgiirsi/20091209102114/SIRSI/0/520/J-CCT43-09> / **h)** CODICES (English).

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

4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities**.  
4.15 Institutions – **Exercise of public functions by private bodies**.

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

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:*

Accountability, principle / Administration, good, principle / Administrative act, judicial review / Administrative act, validity / Prior notice, reasonable / Administrative procedure, fairness / Contract, public law / Decision, administrative, opportunity to be heard / Electricity, supply, payment / Fairness, procedural, principle / Housing, tenant, right / Municipality, public utility, fee, collection / Notice, right / Public authority, special legal relationship / Service, essential / Service, provider, responsibility / Tenant, right.

#### *Headnotes:*

A public service provider is obliged to give notice of an electricity cut-off to electricity users even when they are not in a direct contractual relationship with it.

#### *Summary:*

I. The applicants were tenants in Ennerdale Mansions, an apartment block in Johannesburg. Their landlord contracted with City Power, a parastatal owned by the City of Johannesburg, for the supply of electricity to the building. The applicants paid the landlord for their electricity and had no direct contractual relationship with City Power. Despite the fact that the majority of the applicants had paid their electricity contributions to the landlord as part of their rental, the landlord owed City Power approximately R400 000 in unpaid rates and service charges. As a result, City Power disconnected the electricity supply to the building. It gave no prior notice to the individual tenants, though the landlord had been put on notice.

The applicants contended that this termination amounted to unfair administrative action as City Power was obliged, under Section 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), to provide them with pre-termination notice and an opportunity to make representations. However, the requirements of procedural fairness established in Section 3 of PAJA apply only to decisions that have “materially and adversely” affected the “rights” of individuals. Given that the tenants had no contractual relationship with City Power, the primary issue in the Constitutional Court was whether the applicants had any rights outside the bounds of contractual privity that City Power’s decision adversely affected.



II. The Court held that when City Power supplied electricity to Ennerdale Mansions, it did so in fulfilment of the constitutional and statutory duties of local government to provide basic municipal services to all persons living in the city. When the applicants received electricity, they did so by virtue of their corresponding public law right to receive services. Accordingly, in depriving them of a service which they were already receiving as a matter of right, City Power was obliged, in terms of Section 3 of PAJA, to act in a procedurally fair manner before taking a decision which would materially and adversely affect that right.

The Court held that, on the facts of the case, procedural fairness required that the applicants be provided with 14 days' pre-termination notice in the form of a physical notice placed in a prominent position in the building. Implicit in affording pre-termination notice is that users of the municipal service may approach the City, within the notice period, to challenge the proposed termination or to tender arrangements to pay the arrears.

#### Supplementary information:

Legal norms referred to:

- Sections 1, 10, 26, 27, 33, 36, 152, 153 and 195 of the Constitution, 1996;
- Sections 1 and 3 of the Promotion of Administrative Justice Act 3 of 2000;
- Sections 4.2, 50, 51 and 73 of the Local Government: Municipal Systems Act 32 of 2000; and
- Section 9.1.a.iii of the Housing Act 107 of 1997.

#### Cross-references:

- *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)*, *Bulletin* 2001/1 [RSA-2001-1-006];
- *Mkontwana v. Nelson Mandela Metropolitan Municipality and Another, Bissett and Others v. Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v. MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality and Amici Curiae)*, *Bulletin* 2004/2 [RSA-2004-2-009];
- *Premier, Mpumalanga, and Another v. Executive Committee, Association of State-Aided Schools, Eastern Transvaal*, *Bulletin* 1998/3 [RSA-1998-3-011];

- *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others*, *Bulletin* 2009/2 [RSA-2009-2-007];
- *Walele v. City of Cape Town and Others* 2008 (6) *South African Law Reports* 129 (CC); 2008 (11) *Butterworths Constitutional Law Reports* 1067 (CC).

#### Languages:

English.



#### Identification: RSA-2009-3-018

a) South Africa / b) Constitutional Court / c) / d) 09.10.2009 / e) CCT 53/09; [2009] ZACC 29 / f) Minister for Justice and Constitutional Development v. Dingaana Hendrik Nyathi and Others / g) [www.constitutionalcourt.org.za/Archimages/13885.PDF](http://www.constitutionalcourt.org.za/Archimages/13885.PDF) / h) CODICES (English).

#### Keywords of the systematic thesaurus:

1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation.**  
 1.6.6.1 Constitutional Justice – Effects – Execution – **Body responsible for supervising execution.**  
 4.6.10.1.1 Institutions – Executive bodies – Liability – Legal liability – **Immunity.**  
 4.10.8 Institutions – Public finances – **Public assets.**  
 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**

#### Keywords of the alphabetical index:

Constitutional Court, decision, disregard / Constitutional Court, decision, execution, method / Court, law, interference, minimum / Draft legislation, lapse / Enforcement of judgment, law / Execution, movables / Execution, proceedings, legal basis / Execution, stay, unconstitutionality / Immunity, from execution / Interim order / Judgment, right to execution.

*Headnotes:*

The Constitutional Court may extend the period of the suspension of an order of constitutional invalidity of legislation where this is just and equitable. The Court granted an extension but found it necessary to grant an interim order enabling debtors to enforce money judgments against the state during this period, first, to protect judgment creditors against the continued infringements of their rights and, second, to avoid legal uncertainty.

*Summary:*

The Minister for Justice and Constitutional Development applied to extend the suspension of an order of invalidity made in *Nyathi v. MEC for Health, Gauteng and Another*, 2008 (5) *South African Law Reports* 94 (CC). The Constitutional Court there declared Section 3 of the State Liability Act 20 of 1957 to be invalid as it prohibited the state's judgment creditors from executing against or attaching state assets for the satisfaction of judgment debts sounding in money. The original order of invalidity was suspended for 12 months to allow Parliament to enact legislation for the effective enforcement of judgment debts against the state.

On 31 August 2009 the Court made an order suspending the declaration of invalidity for an additional two years. In that order the Court invited the parties to the matter as well as the Minister for Finance and other interested parties to make written submissions as to why the Court should not order an interim solution pending the enactment of remedial legislation so as to allow for a tailored attachment and execution procedure against state movable assets.

The Minister for Finance submitted that judgment creditors should be able to approach the national or provincial treasury for satisfaction of their judgment debts. The amount paid by treasury would then be set off against the budget allocation of the relevant department. These submissions together with some submissions of the *amici curiae* and the intervening party were incorporated into proposed interim order the Court released on 31 August 2009. That order allowed for the attachment of state movable property if the relevant treasury failed to pay the outstanding debt. All parties were able to comment on the proposed procedure. Their comments were accounted for in the Court's judgment.

Writing for a unanimous Court, Justice Mokgoro held that in view of the fact that pending legislation had already been published for public comment and that the public participation process had already begun,

an order of extension should be granted to allow the process to be completed. A suspension period of two years was granted in view of the complexity of the issues and the extensive public debates anticipated.

The effect of the Court's interim order is that where the relevant provincial treasury fails to satisfy the judgment debt within the period prescribed the attachment and execution of movable state assets is permitted.

*Supplementary information:*

Legal norms referred to:

- Sections 1.c, 165.3-165.5, 195.1 of the Constitution, 1996;
- Section 3 of the State Liability Act 20 of 1957;
- Sections 154 and 155 of the Municipal Finance Management Act 56 of 2003.

*Cross-references:*

- *Nyathi v. MEC for Department of Health, Gauteng and Another*, *Bulletin* 2008/2 [RSA-2008-2-007];
- *Zondi v. MEC, Traditional and Local Government Affairs, and Others*, *Bulletin* 2005/3 [RSA-2005-3-013];
- *Ex Parte Minister of Social Development and Others* [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC).

*Languages:*

English.

*Identification: RSA-2009-3-019*

a) South Africa / b) Constitutional Court / c) / d) 14.10.2009 / e) CCT 12/09; [2009] ZACC 31 / f) Abahlali BaseMjondolo Movement SA and Another v. Premier of the Province of KwaZulu-Natal and Others / g) [www.constitutionalcourt.org.za/Archimages/13897.PDF](http://www.constitutionalcourt.org.za/Archimages/13897.PDF) / h) CODICES (English).

*Keywords of the systematic thesaurus:*

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

4.8.2 Institutions – Federalism, regionalism and local self-government – **Regions and provinces.**

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

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

5.4.13 Fundamental Rights – Economic, social and cultural rights – **Right to housing.**

*Keywords of the alphabetical index:*

Competence, legislative / Competence, shared / Discretion, excessive / Housing, eviction, arbitrariness, protection / Housing, policy / Legislation, provincial, precedence / Housing, occupier, unlawful, eviction, obligation to evict / Property, illegally occupied / Province, legislative competence / Property, owner, civil obligations.

*Headnotes:*

It is impermissible for provincial legislation to eliminate or limit the procedures in national legislation which give effect to the constitutional protection against arbitrary evictions.

*Summary:*

I. The Abahlali baseMjondolo Movement of South Africa (Abahlali), an organisation representing thousands of people living in informal settlements, launched an unsuccessful challenge in the High Court against the validity of the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act (the Slums Act), a provincial statute.

On appeal in the Constitutional Court, the primary issue was the constitutionality of Section 16 of the Act. The section authorised the KwaZulu-Natal Member of the Executive Committee for Housing (the MEC) to issue a notice compelling owners of unlawfully occupied property to bring eviction proceedings against the unlawful occupiers within a specified time. If the owners did not comply with the notice the local government would then assume the duty to bring eviction proceedings.

II. The majority of the Court (per Deputy Chief Justice Moseneke) held that Section 16 was unconstitutional as it undermined the protection against arbitrary eviction afforded by Section 26.3 of the Constitution read with the national legislation giving effect to this right. First, the majority held that Section 16 removed

the discretion of owners and municipalities to institute eviction proceedings as the MEC's notice compelled them to bring eviction proceedings even where they knew that these proceedings would be unsuccessful. This eroded the protection against the arbitrary institution of eviction proceedings. Second, the section was in conflict with national legislation which requires that evictions may only take place as a last resort and after meaningful engagement. Finally, the MEC's power to issue notices was held to be overbroad and irrational as these notices could be issued even where the unlawful occupiers were not living in slum conditions. As a result, this power was not rationally related to the purposes of the Slums Act and diminished the constitutional protection against arbitrary evictions.

The majority concluded that the constitutional invalidity of Section 16 could not be cured by reading in qualifications as this would unduly strain the text. Consequently, the section was struck down.

In a dissenting judgment, Justice Yacoob held that all the defects identified in the majority judgment could be cured by interpreting the statute in a manner that complied with the Constitution and national legislation. In addition, there was nothing unconstitutional about imposing a requirement on owners to bring eviction proceedings against unlawful occupiers, because neither national legislation nor the Constitution conferred a right on an owner to permit the unlawful occupation of property.

*Supplementary information:*

Legal norms referred to:

- Sections 26 and 237 of the Constitution, 1996;
- The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998;
- The Housing Act 107 of 1997;
- The National Housing Code.

*Cross-references:*

- *Ex parte* Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995, *Ex parte* Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995, *Bulletin* 1996/2 [RSA-1996-2-013];
- *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v. City of Johannesburg and Others*, *Bulletin* 2008/1 [RSA-2008-1-002];

- *Government of the Republic of South Africa and Others v. Grootboom and Others, Bulletin 2000/3 [RSA-2000-3-015].*

*Languages:*

English.



*Identification: RSA-2009-3-020*

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 14.10.2009 / **e)** CCT 40/09; [2009] ZACC 32 / **f)** Head of Department: Mpumalanga Department of Education and Another v. Hoërskool Ermelo and Another / **g)** <http://41.208.61.234/uhtbin/cgiisirs/20091217100239/SIRSI/0/520/J-CCT40-09A> / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**  
 5.2.2.10 Fundamental Rights – Equality – Criteria of distinction – **Language.**  
 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**  
 5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education.**

*Keywords of the alphabetical index:*

Authority to withdraw / Child, best interests / Education, school, language regime / Language, education / Language, teaching / Procedure, administrative / Education, school, language of instruction / Education, school, state, language policy, imposition.

*Headnotes:*

The Court set aside as unlawful a government official's intervention in changing a public high school's Afrikaans-only tuition policy, but observed that a school governing body, in deciding on the language policy for its school, must take into account the needs of the broader community in the light of the right to education enshrined in the Constitution. The Court therefore made an order requiring the government department to provide a report on the

steps taken to alleviate the shortage of space in English medium schools in the area while simultaneously requiring the governing body to reconsider its language policy in light of the Constitution.

*Summary:*

I. There had been a shortage of space in English medium high schools in the town of Ermelo for some time. Hoërskool Ermelo, an Afrikaans medium school which was at less than 50% capacity, refused to admit learners unless they were prepared to learn in Afrikaans. As a result, the Head of the Department of Education in Mpumalanga (the HoD) summarily withdrew the function of the school's governing body to determine the school's language policy and appointed an interim committee to perform this function. On the same day, the interim committee met and changed the language policy to parallel medium, requiring the school to teach learners in English and Afrikaans.

The school brought a review of the HoD's decision in the High Court on the grounds that he had exceeded his powers under the Schools Act. The High Court dismissed this application. This decision the Supreme Court of Appeal later reversed. It held that the HoD had acted unlawfully.

II. On appeal, the Constitutional Court confirmed this finding. It held that while the HoD was empowered to withdraw the governing body's function of determining the school's language policy, the Act did not authorise the HoD to appoint an interim committee for the sole purpose of changing the language policy. Consequently, the withdrawal of the governing body's function, the appointment of the interim committee and the subsequent alteration of the school's language policy were unlawful and were set aside.

The Court however held that the circumstances of the case necessitated making further orders that were just and equitable. Writing for a unanimous Court, Deputy Chief Justice Moseneke noted that the courts' remedial jurisdiction in constitutional matters requires making orders that directly address the underlying dispute, thus placing substance over form.

The Court observed that there were two reasons why the governing body should revisit its language policy. First, a school is obliged to exercise its power to select a language policy in a manner that takes into account the constitutional rights to education and to be taught in an official language of one's choice. A school cannot look solely to the interests of its current learners. Second, whilst the interim committee's adoption of the language policy was unlawful, the

underlying challenge relating to the scarcity of classroom places for learners wanting to be taught in English was likely to resurface in the new school year. At the very least, in reassessing its language policy, the school governing body must have regard to its dwindling enrolment. The Court thus required the governing body to report to it on the reasonable steps it had taken in reviewing its language policy and on the outcome of the review process.

Furthermore, the Court expressed dismay at the provincial education department's failure to ensure sufficient access to public schooling in the Ermelo area for learners who want to be taught in English. The Court concluded that it was just and equitable to make an order requiring the HoD to report to the Court on the likely demand for high school entry English places at the beginning of 2010 and setting out the steps taken to satisfy this likely demand.

#### *Supplementary information:*

Legal norms referred to:

- Sections 1, 2, 9, 29 and 31 of the Constitution, 1996;
- Sections 6, 20, 21, 22 and 25 of the South African Schools Act 84 of 1996;
- The Norms and Standards for Language Policy in Public Schools (Government Gazette 18546, GN 383, 09.05.1997).

#### *Cross-references:*

- *Hoërskool Ermelo and Another v. Head, Department of Education, Mpumalanga, and Others* 2009 (3) *South African Law Reports* 422 (SCA);
- *Minister of Education, Western Cape, and Others v. Governing Body, Mikro Primary School, and Another* 2006 (1) *South African Law Reports* 1 (SCA); 2005 (10) *Butterworths Constitutional Law Reports* 973 (SCA);
- *Premier, Mpumalanga, and Another v. Executive Committee, Association of State-Aided Schools, Eastern Transvaal, Bulletin* 1998/3 [RSA-1998-3-011];
- *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995, Bulletin* 1996/1 [RSA-1996-1-005];
- *Jaftha v. Schoeman and Others; Van Rooyen v. Stoltz and Others, Bulletin* 2004/2 [RSA-2004-2-010];

- *Mazibuko and Others v. City of Johannesburg and Others* [2009] ZACC 28; Case no. CCT 39/09, 08.10.2009.

#### *Languages:*

English.



# Spain

## Constitutional Court

### Important decisions

*Identification:* ESP-2009-3-009

**a)** Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 07.09.2009 / **e)** 184/2009 / **f)** Juan Torrijos Martínez / **g)** *Boletín oficial del Estado* (Official Gazette), 242, 07.10.2009; [www.boe.es/boe/dias/2009/10/07/pdfs/BOE-A-2009-16014.pdf](http://www.boe.es/boe/dias/2009/10/07/pdfs/BOE-A-2009-16014.pdf) / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**

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

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

*Keywords of the alphabetical index:*

Criminal procedure / Appeal procedure.

*Headnotes:*

A criminal court must in no circumstances convict at appeal a defendant who was acquitted at first instance unless he is given the opportunity to a public hearing, in the name of the right to a fair trial (Article 24.2 of the Constitution). Otherwise, this fundamental right is infringed even if the defendant does not expressly request a hearing.

The right to be heard at appeal is an integral part of the right to a fair trial, whatever the nature of the evidence which may need to be assessed by the judicial body entertaining the appeal.

A criminal court in no way transgresses the constitutional principle of due process under a judge's direct supervision ("*inmediación judicial*") when it convicts a defendant at appeal without having heard

him in a public hearing, if he simply pleads guilty on the facts established before the trial court.

*Summary:*

I. A separation agreement between spouses required a father to pay his underage daughter a sum of 300 euro per month. Although he had not paid this maintenance by the due date, the father had been acquitted on a charge of family desertion by the criminal court because there were doubts about the date of service of the judicial ruling fixing the maintenance, and furthermore given that it had not been possible to prove that ruling definite and final. In the appeal brought by the prosecution, the Court of Appeal (*Audiencia Provincial*) had found against the defendant, holding that the maintenance was laid down in the agreement which the spouses had signed by mutual consent, and that the subsequent judicial ruling was of no consequence in that regard. The Court of Appeal had in fact delivered its decision after noting the parties' written submissions, but without holding a public hearing.

II. In its Judgment no. 184/2009, the Constitutional Court set aside the decision delivered at appeal on the ground that the criminal court had not held a public hearing and was thus unable to hear the person charged with the offence of which he was finally convicted. In the same judgment, the Constitutional Court recalled the case-law of the European Court of Human Rights to the effect that where a court of appeal has before it questions of fact and of law and generally speaking the question of guilt or innocence, reasons of procedural fairness forbid it reaches a decision unless the court itself takes the defendant's statement if he claims not to have committed the offences charged, particularly if he was acquitted by the court of First Instance. Accordingly, the *Audiencia Provincial* should have given the defendant the opportunity to be heard.

Furthermore, in the legal use of his procedural rights, the defendant had not appeared at the hearing. Therefore, he was heard only by the examining court and by no other judicial body in the context of those proceedings. It thus behoved the court of appeal to secure the defendant's right to be heard before it found against him, the more so because no further appeal could be brought against that decision. The Constitutional Court also stressed that the defendant's not having requested any hearing by no means called into question his right to a defence, in so far as he had been acquitted at first instance and therefore had no reason to ask for a public hearing to be held.

On the contrary, the Constitutional Court in its judgment dismissed the assertion that the criminal court of appeal should have taken all the personal evidence for a second time in open court, such as statements by the witnesses or the defendant himself. While admittedly the right to a trial with all guarantees means that only the judicial body before which the personal evidence has been adduced is competent to assess that evidence (Constitutional Court Judgment no. 167/2002 of 18 September 2002), this is not applicable where the decisions delivered at first instance and at appeal conflicted only in the legal character of the facts attested at first instance. Consequently, in the instant case there had been no transgression of the principle of due process in so far as the conflict between the decisions of acquittal and conviction was confined to a purely legal question unrelated to the assessment of personal evidence.

#### Cross-references:

- Constitutional Court Judgment no. 167/2002 of 18.09.2002 and no. 120/2009 of 18.05.2009;
- Judgments of the European Court of Human Rights of 27.06.2000, *Constantinescu v. Romania* and of 10.03.2009, *Igual Coll v. Spain*.

#### Languages:

Spanish.



#### Identification: ESP-2009-3-010

**a)** Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 28.09.2009 / **e)** 195/2009 / **f)** Juan José Folchi Bonafonte / **g)** *Boletín oficial del Estado* (Official Gazette), 254, 21.10.2009; [www.boe.es/boe/dias/2009/10/21/pdfs/BOE-A-2009-16763.pdf](http://www.boe.es/boe/dias/2009/10/21/pdfs/BOE-A-2009-16763.pdf) / **h)** CODICES (Spanish).

#### Keywords of the systematic thesaurus:

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts**.  
 1.6.3.1 Constitutional Justice – Effects – *Effect erga omnes* – **Stare decisis**.  
 1.6.7 Constitutional Justice – Effects – **Influence on State organs**.

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**.

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

#### Keywords of the alphabetical index:

Criminal procedure / Criminal offence / Limitation period, suspension.

#### Headnotes:

The Constitutional Court case-law defining the extent and the substance of fundamental rights is binding on all public authorities.

The Supreme Court is the highest judicial body in all legal branches except as regards constitutional guarantees (Article 123 of the Constitution).

The discharge of the function of interpreting and applying the legislation in force rests solely with the ordinary courts and notably with the Supreme Court (Articles 117.3 and 123.1 of the Constitution). The Constitutional Court must not replace the other courts in performing this function. Conversely, it may set a limit to the ordinary courts' latitude to interpret the legislation. This limit derives from the requirements of the right to effective judicial protection in relation to the other fundamental constitutional rights and values at stake when the principle of limitation in respect of criminal offences is applied, especially the right to personal freedom (Articles 24.1 and 17 of the Constitution).

In accordance with the current Criminal Code, the limitation period in respect of criminal responsibility for lesser offences is suspended when proceedings are brought against the accused. Constitutional case-law holds that this statutory provision must be applied to the letter, and its terms are quite clear: it is imperative that proceedings should have been instituted and that they should have been brought by the person responsible for exercising the *ius puniendi* of the State, who is none but a judge as the legislation now stands.

Any interpretation of the law in force allowing the limitation period for a given offence to be automatically suspended after the lodging of a complaint, without any judicial intervention, does not respect the requirements of enhanced judicial protection of rights and does not take into account the

requirements associated with legal certainty, or the foundation of the limitation institution, or even the relevance of the right to personal freedom.

### Summary:

I. A lawyer had been sentenced by the *Audiencia Nacional* to two years of imprisonment for having committed an offence of unlawful appropriation in 1988. Although the statutory limitation period for this offence was five years, the *Audiencia Nacional* then the Supreme Court had both dismissed the limitation of the offence on the ground that the wronged enterprise had lodged a complaint on 8 January 1993, so that the limitation period had been suspended, holding that as a result the decision on the admissibility of the complaint delivered on 11 February 1994, after several appeals made against an initial decision of inadmissibility, made no difference whatsoever.

II. In its Judgment no. 195/2009, the Constitutional Court granted the applicant constitutional protection and set aside the Supreme Court's decision. The judgment contained a dissenting opinion.

Limitation as a cause of lapse of criminal responsibility is the state's self-actuated restriction or waiving of its *ius puniendi* owing to the passage of time. The limitation institution is part of a long, generally accepted historical tradition originating in constitutional principles and values such as the function of the penalty, the accused's right not to be under protracted threat of a criminal sanction, and the principle of legal certainty. Given that limitation is an institution not defined by the actual Constitution, the legislator has considerable latitude for instituting a system of law to govern it, without infringing the fundamental rights of defendants or complainants.

Ascertainment whether or not limitation applies in each case is in principle a question of compliance with the law which is within the jurisdiction of the ordinary courts. Their decisions may be reviewed by the Constitutional Court in the context of an application for constitutional protection in order to ensure that they afford proper judicial protection (Article 24.1 of the Constitution). The constitutional stipulations deriving from the duty to state reasons are more stringent in these cases, having regard to the importance of the constitutional values at stake in the application of criminal law: the judicial bodies must provide a reasoned statement of grounds whereby a coherent link is discernible between the decision taken, the statutory provision on which it is founded, and the ends which justify the institution of limitation.

The Criminal Code (whether the 1973 or the 1995 version) provides that the limitation period is suspended "when proceedings are brought against the culprit". According to the above-mentioned constitutional criteria, this statutory provision must be applied to the letter, and its terms are quite clear: it is imperative that proceedings should have been instituted and that they should have been brought by a judge who, as the legislation now stands, is alone in being able to exercise the *ius puniendi* of the state.

On the other hand, the interpretation of the law in force as meaning that the mere lodging of a complaint, without any judicial intervention, has the effect of suspending the limitation period, is not in keeping with the requirements of enhanced judicial protection of constitutional rights. This interpretation does not take into account the demands associated with legal certainty, or the foundation of the institution of limitation, or even the relevance of the right to personal freedom. Thus it deprives defendants of their means of defence. Moreover, it creates legal uncertainty and gives weight to a circumstance devoid of all relevance. Nor has this interpretation anything whatsoever to do with the foundation of limitation and the state's refraining from exercising *ius puniendi*, to the extent (as the legislation now stands) that its exercise is the preserve of the judicial bodies.

That was the conclusion reached by the Constitutional Court in its Judgment no. 63/2005 of 14 March 2005 in a case where the defendants had not been informed of the opening of, and the investigative steps in, proceedings against them for nearly two years between the date when the complaint was lodged and the date of the decision declaring it admissible. This criterion was moreover reaffirmed by the Constitutional Court in Judgment no. 29/2008 of 20 February 2008.

In the instant case, however, the criminal chamber of the Supreme Court had held that the mere lodging of the complaint had had the effect of suspending the limitation period for the offence, and added that its line of precedent remained fully applicable "notwithstanding Constitutional Court Judgment no. 63/2005".

True, the Supreme Court is the highest body in all branches of law, "except in matters concerning constitutional guarantees" (Article 123 of the Constitution). This subject matter, and more precisely the determination of the content and scope of fundamental rights, finally belongs, via the various constitutional procedures, to the Constitutional Court to whose practice it is imperative that all judicial bodies conform. The provisions of the 1985 Institutional Act on the Judiciary are consistent with



this logic in stipulating that all courts must interpret and apply the laws and regulations “in accordance with the constitutional provisions and principles and subject to the construction placed on them in the judgments of the Constitutional Court in all types of proceedings”, and that fundamental rights have binding force for judges and courts: “in accordance with the substance of each right which is proclaimed in the Constitution, judicial decisions can in no way restrict, interfere with or evade the application of their substance” (Sections 5.1 and 7.2).

The Constitutional Court by no means presumes to interpret Article 132.2 of the Criminal Code, or to specify the time at which proceedings should be deemed instituted against the culprit, for that would exceed the scope of its jurisdiction. The function of interpreting and applying the legislation in force is the sole province of the ordinary courts, in particular the Supreme Court. But established constitutional case-law sets a limit to the ordinary courts’ latitude for interpretation, owing to the requirements of the right to effective judicial protection in relation to the other fundamental rights and constitutional values involved when the principle of limitation is applied: stipulation of judicial intervention; mandatory minimum threshold imposed by the fundamental rights involved. Stating this limit amounts to exercising constitutional jurisdiction and thus comes fully within the sphere of competence of the Constitutional Court, given that it is a right eligible for constitutional protection.

In the judgment delivered in connection with this application for constitutional protection, the Constitutional Court declared that effective judicial protection had been impaired and stressed that the Supreme Court’s interpretation of criminal law in this regard was limited by the practice of the Constitutional Court. In so doing, given that in the instant case several judicial acts had been performed before the expiry of the limitation period in November 1993, the Constitutional Court set aside the Supreme Court’s decision dismissing the case for procedural defects, and referred the criminal proceedings back to the Supreme Court for it to determine whether the impugned acts (decision that the complaint was inadmissible, and revocation of that decision by the court of appeal which had prompted the continuation of the proceedings) sufficed to suspend the limitation period.

#### Cross-references:

Legal norms referred to:

- Criminal Code, 1995 (Article 132.2) and Criminal Code, 1973 (Article 114).

#### Languages:

Spanish.



#### Identification: ESP-2009-3-011

a) Spain / b) Constitutional Court / c) First Chamber / d) 28.09.2009 / e) 199/2009 / f) Wilson Adran John / g) *Boletín oficial del Estado* (Official Gazette), 254, 21.10.2009; [www.boe.es/boe/dias/2009/10/21/pdfs/BOE-A-2009-16767.pdf](http://www.boe.es/boe/dias/2009/10/21/pdfs/BOE-A-2009-16767.pdf) / h) CODICES (Spanish).

#### Keywords of the systematic thesaurus:

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

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

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

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

#### Keywords of the alphabetical index:

Arrest warrant / Trial *in absentia* / Extradition.

#### Headnotes:

The surrender to another country of a person sentenced *in absentia* to imprisonment, on the authority of a European arrest warrant not contingent on review of the sentencing decision, violates the right to a fair trial (Article 24.2 of the Constitution).

The defence counsel’s presence at the trial bears no comparison to the physical presence of the accused, even where the former is briefed by the latter. Presence at the hearing is what allows the fundamental right to a defence to be exercised.

Dismissal of allegations concerning the brutality undergone by a prisoner while being held in Romanian prisons, formulated non-specifically and without rational evidence or clues, does not violate the right to effective judicial protection.

*Summary:*

I. The *Audiencia Nacional* had consented to hand over a British national to Romania on the authority of a European arrest warrant, to serve a four year prison sentence for an offence of sexual exploitation of children. The proceedings at first instance and at appeal in Romania had been held in the absence of the accused, whose defence had been conducted by a lawyer whom he had briefed.

II. The Constitutional Court granted the defendant partial constitutional protection in order to secure his right to a trial with all guarantees, and set aside the procedural decision whereby the *Audiencia Nacional* had consented to hand him over to Romania. This judgment was purely declarative in so far as the delivery of the accused to the Romanian authorities preceded the Constitutional Court's delivery of judgment.

In this judgment, the Constitutional Court considered that surrendering the accused to another country on the authority of a European arrest warrant not contingent on possible review of the sentence imposed, violated his right to a trial with all guarantees, as previously in Judgment no. 91/2000 concerning an extradition to Italy. The presence at the trial of a lawyer briefed by the accused bore no comparison to the actual presence of the accused. Only physical presence at the trial permitted the exercise of the right to defend oneself.

The Constitutional Court dismissed the alleged violation of the right to effective judicial protection owing to insufficient grounding by the *Audiencia Nacional*. The allegations made by the accused concerning the risk of undergoing inhuman and degrading treatment in the event of being handed over to Romania were too general. Therefore, the accused had in no way substantiated the alleged facts.

III. In connection with this Constitutional Court judgment, two dissenting opinions were expressed. They disagreed that the existing precedent on extraditions could be applied in respect of European arrest warrants. These two dissenting opinions also contended that if the Spanish Constitutional Court had considered Framework Decision 2002/584/JHA contrary to procedural guarantees in allowing a person convicted in absentia to be handed over to another member state, it should have referred a preliminary question on validity to the Court of Justice of the European Communities. If, on the other hand, the Spanish Court held that the inadequate protection of the fair trial guarantees was confined to domestic law, it should have raised an internal question of

unconstitutionality concerning Act 3/2003, but in no event should have directly granted constitutional protection. Finally, these two dissenting opinions asserted that the accused had not been materially deprived of his means of defence in that his defence had been conducted in the context of the criminal proceedings by a lawyer of his choice, and he had elected not to appear either at the trial or at the appeal proceedings.

*Supplementary information:*

Act 3/2003 of 14 March 2003 on the European arrest warrant transposes Framework Decision 002/584/JHA in Spain.

*Languages:*

Spanish.



# Switzerland

## Federal Court

### Important decisions

*Identification:* SUI-2009-3-005

**a)** Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 12.03.2009 / **e)** 1C\_588/2008 / **f)** A. v. Federal Office of Justice / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 135 I 191 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Sentenced person, transfer to another country / Detention, conditions / Sentence, execution / Removal to another country.

*Headnotes:*

Convention on the Transfer of Sentenced Persons; Article 3 ECHR; Article 25.3 of the Federal Constitution; transfer to another country of a person sentenced in Switzerland.

Prior to requesting the transfer of a sentenced person, the Swiss authorities must ensure that there is no serious risk that he or she will be subjected to prohibited treatment (recital 2.2-2.3). In the light of the general conditions of detention in the state concerned (recital 2.4-2.6) and of the appellant's specific situation, in particular his state of health (recital 2.7), enquiries should be made as to the foreseeable conditions of detention and the possibility of receiving appropriate care (recital 2.8).

*Summary:*

A. is a Latvian national born in 1976. In 2003, the Court of First Instance sentenced him to 15 years' imprisonment and to be deported from Switzerland for murder, theft and violation of drug laws without the right to return to Switzerland for 12 years and ordered

him to continue undergoing psychotherapeutic treatment. The judgment was confirmed by the court of appeal. In 2004 a deportation order was issued by the relevant department.

In 2007, the Office for the Enforcement of Sentences of Vaud Canton applied to the Federal Office of Justice (OFJ) to have A. transferred to Latvia, pursuant to the additional protocol of 18 December 1997 to the Convention of 21 March 1983 on the Transfer of Sentenced Persons. It highlighted the fact that the only person with whom A. had any contact was his grandmother in Latvia. A. objected to his transfer, pointing out that he was a member of the Russian minority and had a very poor command of the Latvian language, that conditions of detention in Latvia were bad and that his transfer would destroy him as he would have no further psychological support.

The OFJ decided to ask Latvia to accept A.'s transfer so that he could serve the remainder of his sentence there. The Second Appeals Chamber of the Federal Criminal Court dismissed A.'s appeal on the grounds that it was impossible to reintegrate him properly in Switzerland and that Latvia, as a member state of the Council of Europe, must offer a minimum standard of human rights protection. A. lodged a public-law appeal asking the Federal Court to annul the Federal Criminal Court's judgment and the OFJ's deportation order. The Federal Court allowed the appeal and referred the case back to the OFJ for further investigation.

Under Article 25.3 of the Federal Constitution, no person may be removed by force to a state where he or she is threatened by torture, or another means of cruel and inhuman treatment or punishment. The same principle is reiterated in the federal law on international co-operation in criminal matters. The aim is to ensure that Switzerland does not assist in procedures which do not offer the person concerned a minimum standard of protection corresponding to that provided in democratic states, as stipulated in particular by the European Convention on Human Rights and UN Covenant II.

These principles also apply to transfer procedures. The Convention on the Transfer of Sentenced Persons is based essentially on humanitarian motives: the aim is both to ensure that sentenced persons do not suffer from being imprisoned far from their family and cultural background and to facilitate their social reintegration in their country of origin. With regard to sentenced persons subject to a deportation order, the Protocol is based on the consideration that reintegration is not possible in the country in which the person has been sentenced and should therefore

take place in the country of origin. Neither the Convention nor the Protocol is aimed at ensuring the best possible conditions of detention for sentenced persons. The requesting state should nevertheless consider whether there is any serious risk that they will be subjected to prohibited treatment in the country in which the sentence will be executed and not request that the sentence be executed there if there are real risks of such treatment. This is all the more important because – unlike in cases of extradition subject to conditions – the transfer procedure does not give the requesting state a right of scrutiny over the prisoner's situation and the requesting state cannot demand or obtain diplomatic guarantees from the requested state.

The Federal Criminal Court relied on two judgments delivered by the European Court of Human Rights and Amnesty International's 2008 report, which made no mention of torture or ill-treatment in Latvian prisons. It concluded that Latvia offered sufficient safeguards in the light of the aforementioned case-law.

The appellant, for his part, refers to the report drawn up on 13 March 2008 by the European Committee for the Prevention of Torture (CPT) following its visit to Latvia in 2004. This report refers to numerous shortcomings, in particular prison overcrowding, failure to comply with standards in respect of prisoners' living space, physical and psychological ill-treatment, verbal threats and attacks, insufficient lighting, ventilation and sanitary facilities, the totally unacceptable living conditions of patients at Riga prison hospital and the absence of psycho-social activities.

In the light of the CPT's report, it cannot be stated categorically that Latvian prisons offer sufficient guarantees of treatment in accordance with human rights. Further investigations would also appear necessary, given the specific situation of the appellant, who was allegedly subjected to sexual assaults during previous stays in Latvian prisons; he is also suffering from hepatitis C and needs psychotherapeutic treatment. It is therefore necessary to make sure that appropriate treatment can be provided, and to determine whether such treatment is conceivable in Latvian prisons.

Consequently, before deciding to transfer the appellant to Latvia, a full investigation should be made into the conditions of detention that are to be expected. It is also necessary to ensure that the requested state has been informed of the appellant's physical and mental state of health and that he will receive appropriate treatment while in detention. In the light of this information, the authorities will need to

determine whether the appellant could be reintegrated in Latvia at least as successfully as if he were deported from Switzerland after serving the remainder of his sentence there.

*Languages:*

French.



# “The former Yugoslav Republic of Macedonia” Constitutional Court

## Important decisions

*Identification:* MKD-2009-3-009

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 16.09.2009 / e) U.br.231/2008 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 117/2009, 25.09.2009 / h) CODICES (Macedonian, English).

*Keywords of the systematic thesaurus:*

3.3 General Principles – **Democracy.**

3.6 General Principles – **Structure of the State.**

4.7.9 Institutions – Judicial bodies – **Administrative courts.**

5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**

*Keywords of the alphabetical index:*

Administrative court, control / Administrative act, judicial review / Appeal, right.

*Headnotes:*

At issue here were provisions of the Law on Administrative Disputes, whereby appeals were only allowed against decisions of the Administrative Court brought at a public hearing held at the behest of one of the parties to the proceedings. The fact that appeals are only allowed in exceptional circumstances, not against all decisions pronounced by the Administrative Court, shows a selective and restrictive approach on the part of the legislator in the regulation of the right of appeal.

*Summary:*

A lawyer from Skopje asked for a constitutional review of that part of Article 39.2 of the Law on Administrative Disputes that reads “in Article 30.3 of this Law”. She suggested that it encroached on the constitutionally guaranteed right to appeal against

decisions of the Administrative Court, since it did not provide for judicial protection at second instance, as required by the Constitution. She also pointed out the lack of a specific chapter in the Law on legal remedies in proceedings for administrative disputes (procedure for judicial control of administrative acts), which gave rise to *lacunae legis*, contrary to the Constitution.

Under Article 39.2 of the Law on Administrative Disputes (Official Gazette no. 62/2006), an appeal may be lodged against judgments referred to in Article 30.3 of the Law. Article 30.3 also allows parties to propose the holding of public oral hearings for the reasons specifically defined in Article 30.2 of the Law.

The Court took as its starting point the fundamental values of the constitutional order of the Republic of Macedonia, namely the rule of law, the right to appeal against decisions made in first instance proceedings before a court, and judicial protection of the legality of the individual acts of state administration and other institutions performing public mandates.

The Court noted that Amendment XXI to the Constitution guarantees the right to an appeal irrespective of the type of court, the territory in which it enforces its competence or the type of disputes conducted before it. This right is accordingly always guaranteed when a decision is taken by a court in first instance proceedings. The right to appeal should not be perceived simply as a remedy. In order for it to be exercised fully, further regulation is needed over deadlines for lodging the appeal, the reasons for which it may be lodged and the court which is competent to decide upon it.

The Court took into account the subject matter of the Law on Administrative Disputes, which governs the rules of procedure under which the Administrative Court ensures court protection of the rights and interests of natural and legal persons when they are violated by various state institutions of state administration in the performance of their public mandates when deciding on rights and wrongs in individual administrative proceedings and in cases arising from minor infractions. These state institutions include the Government, other state bodies, the municipalities and the City of Skopje, organisations defined by law, and legal and other entities. The Court also noted the *modus operandi* and powers of the Administrative Court. It found that the Administrative Court was a first instance court within the court system, exercising judicial control of administrative acts. Thus it acts as a single, specialised court, exercising judicial power across the entire territory of the Republic of Macedonia. The

Court found that this factor was not sufficiently decisive to categorise the Administrative Court as a court whose decisions are not subject to review. Of note here is the fact that the Law itself defines the Administrative Court as a first instance court, as well as the fact that in certain cases, the Supreme Court may decide on appeals against Administrative Court decisions and on extraordinary remedies against the its judgments. As a result, under the current legal provisions, some of its decisions are subject to review through the possibility of lodging appeals and extraordinary remedies.

Article 39.2 of the Law only allows for appeal against judgments brought on public oral hearings. However, it makes no provision for the time limit for lodging the appeal, neither does it identify the competent court to decide upon the appeal.

The Constitutional Court further noted that the Administrative Court usually decides in closed session. Public hearings are only held as an exception, when acting as a court with full jurisdiction. However, the Administrative Court has a discretionary right to assess whether the conditions for holding a public verbal hearing have been met. It does not have to adopt a formal decision in this regard, and the parties do not have the right to request the review of such decisions by a higher court. This indicates a selective and restrictive approach on the part of the legislator with regard to the application of the norm that establishes the use of the constitutionally guaranteed right to appeal.

Administrative matters cover a wide variety of issues that are part of everyday life (property rights, land registry, urban planning and construction, water supply, economy, transportation and communications, lotteries, education, public procurements, elections, pensions and rights from retirement and disability insurance, health insurance, health-sanitary supervision and control, public contributions, taxes, customs duties, fees, status issues, passports, vehicles, weapons, industrial property and copyrights, banking matters, concessions, defence, working relations, excises, discharge from duty). In the context of the scope of the right to an appeal under Article 39.2 of the Law, administrative court decisions will, in many cases, mean a final decision on the exercise of the rights and obligations of citizens and legal entities. Whether such decisions will be subject to further court review through the appeal process will depend on the discretionary power of the Court to hold an oral public hearing. Only in those cases will its decision be subject to further court review.

The Constitutional Court concluded that the disputed Article of the Law contained certain deficiencies

which were out of line with the principle of the rule of law. The reasoning was that the right of appeal cannot be exercised restrictively by means of arbitrary norms that either do not cover the right properly or regulate it in a selective fashion. The principle of the rule of law also embraces the principle of legality, which obliges the legislator to formulate precise, unambiguous and clear norms that offer no scope for ambiguity. On the basis of the constitutional provision, the legislator is also obliged to define the right to an appeal in any case where this can serve as a correction of incorrect and unlawful decisions by first instance courts where final decisions are being made over citizens' rights, obligations and interests.

The Court accordingly found the Article in breach of Article 8.1.3 and Amendment XXI to the Constitution, and directed its partial repeal.

#### *Languages:*

Macedonian.



#### *Identification: MKD-2009-3-010*

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 16.09.2009 / e) U.br.261/2008 and U.br. 70/2009 / f) / g) / h) CODICES (Macedonian, English).

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

2.1.1.4.9 Sources – Categories – Written rules – International instruments – **International Covenant on Economic, Social and Cultural Rights of 1966.**  
 3.15 General Principles – **Publication of laws.**  
 3.19 General Principles – **Margin of appreciation.**  
 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**  
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**  
 5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health.**  
 5.5.1 Fundamental Rights – Collective rights – **Right to the environment.**

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

Prohibition / Public place, use / Health, protection.

*Headnotes:*

Certain provisions of the Macedonian Law on the Protection against Smoking, and the Law in its entirety were under dispute. It was found that they were not aimed at and did not represent a restriction on an individual's determination to smoke. Rather, they were directed at the protection of the life and health of others who might be put at risk by the irresponsible conduct of smokers. There was therefore no question of discrimination against smokers.

The provisions do not restrict freedom of trade and entrepreneurship, as enshrined in the Constitution. The legislator has a legitimate right to regulate certain aspects of social life and thus to introduce an outright ban on smoking in catering establishments, in order to protect human health.

*Summary:*

Two petitioners, by separate petition, challenged the constitutionality of lines 4, 6 and 7-a of Article 2, Article 3.2 and the entirety of the Law on the Protection against Smoking (“Official Gazette of the Republic of Macedonia”, nos. 36/1995, 70/2003, 29/2004, 37/2005, 103/2008 and 140/2008).

The first petitioner claimed that the Law did not contain a single measure for protection against detrimental consequences from smoking or for the preservation of the environment. It merely regulated the prohibition of smoking in public places, the prohibition of advertising cigarettes, and the prohibition on selling to persons under eighteen years of age. Therefore, the legitimate goals – the protection of health and of the environment – were not realised in the Law. The provisions under dispute restricted the right of smokers to free movement, assembly, socialisation and relaxation not only in public places in the fields of education, culture, health, state administration and sport, but also in catering which was not a public activity by its nature. He also claimed that the Law failed to regulate the possibility of designated space, especially outside the public sector, which could be used by smokers, as this was the only way to achieve the same goal, namely protection of the health of non-smokers, without violating the constitutionally guaranteed freedoms and rights of smokers and without subjecting them to humiliation and public discrimination.

The second petitioner argued that the Law violated lines 1, 3 and 7 of Article 8.1 and Articles 9, 11.1, 12.1, 51, 54.1, 54.3 and 55 of the Constitution,

because there had been five amendments and supplements since its enactment in 1995. This meant that it was neither precise nor constant. It was at odds with the Constitution, as there was no constitutional ground for its adoption, and it discriminated against smokers as it imposed heavy restrictions on their personal choices and forced them to respect its provisions through its penal clauses. The smoking ban and the penalties for failing to respect it could not satisfy the test of proportionality with the legitimate goal; a fair balance was not struck between individual and public interests.

The law has imposed a ban on smoking in public places with effect from 1<sup>st</sup> January 2010. Public places could include educational establishments, health and social institutions, sports and cultural facilities, public transport, establishments where food is produced, prepared, served, sold or consumed, internet cafes, bars, cafeterias, night bars, coffee bars, cabarets, disco clubs and beer-houses, communal rooms and spaces in housing blocks and other public premises such as halls, offices, factories, waiting rooms and corridors.

It introduced a ban on advertising tobacco products and the tobacco industry in public places, and banned the sale of cigarettes and tobacco to those under the age of eighteen in retail sales. It imposed a duty on cigarette manufacturers to print warning messages to the effect that smoking is harmful to health. It also dealt with the issue of inspection and supervision of its application and provided for fines for non-compliance.

The Court took, as its starting point, the fundamental values of the constitutional order of the Republic of Macedonia – ecological protection and development, and the right of citizens to live in a healthy environment. It also noted the universal obligation, set out in the Constitution, to promote and protect the environment and nature, the obligation of the state to provide conditions for the exercise of the right of citizens to a healthy environment, as well as the right of every citizen to health care, and their duty to protect and promote their own health and that of others.

In its analysis of the case, the Court also took note of international instruments, such as Article 12 of the International Covenant on Economic, Social and Cultural Rights (which defines the universal right to the highest standard possible of physical and mental health) the preamble to the Constitution of the World Health Organisation which states that the enjoyment of the highest health standard possible is one of the fundamental rights of each human irrespective of his race, religion, sex, belief, economic or social status,

and the World Health Organisation Framework Convention on Tobacco Control adopted in 2003.

Article 8 of the above Convention obliges contracting states to adopt and implement effective, legislative, executive, and/or other measures for ensuring protection against exposure to tobacco smoke in working premises, public transport, public premises and other public places as appropriate. The Framework Convention became part of the internal legal order of the Republic of Macedonia on its ratification by the Assembly of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia", no. 68/2006).

The Court did not accept the arguments of either petitioner. It noted that the conduct of the individual in smoking as a subjective choice cannot be brought into correlation with the principle of equality, freedom of conviction and respect and protection of the privacy and personal and family life, dignity and reputation. This is because the legislator did not include any provision in this Law to prohibit an individual from smoking; in other words, the legislator did not interfere with his or her personal choice over whether or not to smoke, but instead provided that anybody who does smoke must refrain from doing so in places where they could come into contact with others who do not smoke. This facilitates not only the health of the smoker, but also that of other citizens, which is a constitutional obligation.

The Court found that somebody who smokes has access to all places which the legislator has defined as public premises where smoking is banned. However, he or she needs to adjust their behaviour to that of other citizens who do not smoke in a way and under conditions determined by law and relating to all citizens in the same conditions.

The Court was of the opinion that the provisions under challenge and the Law in its entirety were not aimed at and posed no obstacle to an individual's choice to smoke. Their aim was the protection of the life and health of others (as higher values). This might be endangered by the irresponsible conduct of smokers. There was therefore no question of discrimination against smokers with regard to non-smokers. The provisions and Law did not contravene the principles of free market and entrepreneurship. The legislator has a legitimate right to regulate certain matters in social life and thus to deal with the issue of the outright ban on smoking in catering establishments in order to protect human health.

The Court also rejected, as unfounded, the argument that the law was not in line with the Constitution due to the many changes and supplements it had

undergone. The legislator is entitled to assess and take decisions on the need to adopt, amend and supplement legislation. The Constitutional Court's role is to assess the law's compliance with the Constitution, and not the expediency and the appropriateness of its adoption. The statements in the petition therefore went beyond the competence of the Constitutional Court under the Constitution.

The Court therefore found both petitions to be unfounded and did not deal with the question of the constitutionality of disputed provisions of the Law and the Law in its entirety.

*Languages:*

Macedonian.





# Turkey

## Constitutional Court

### Important decisions

*Identification:* TUR-2009-3-006

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 23.07.2009 / **e)** E.2006/166, K.2009/113 / **f)** Concrete Review of Law no. 6283 (The Law on Nursing) / **g)** *Resmi Gazete* (Official Gazette), 19.03.2010, 27526 / **h)** CODICES (Turkish).

*Keywords of the systematic thesaurus:*

5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law**.  
5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.

*Keywords of the alphabetical index:*

Employment, discrimination.

*Headnotes:*

Closure of the nursing profession to male candidates is discriminatory and contravenes the principle of equality.

*Summary:*

I. The Twelfth Chamber of the State Council asked the Constitutional Court to assess the compliance with the Constitution of Articles 1 and 3 of the Law on Nursing (Law no. 6283, 25 February 1954). Article 1 sets out the conditions one must fulfil in order to become a nurse. One of these conditions is that the candidate must be a woman. Article 3 stipulates that only Turkish women who have acquired the title of nurse in accordance with the provisions of this Law may exercise the profession of nursing. The Twelfth Chamber contended that these provisions of Law no. 6283 prevent males from being appointed as nurses and are accordingly in conflict with the principle of equality.

II. The Constitutional Court reiterated that the principle of equality requires the same treatment for those who are in the same position and different treatment for those who are in a different position. It ruled that men and women are in the same position in terms of exercising the nursing profession and there

is no objective reason to deny access to male candidates. The Court found Articles 1 and 3 of the Law on Nursing to be in breach of gender equality and contrary to Article 10 of the Constitution and annulled the relevant provisions unanimously.

*Languages:*

Turkish.



*Identification:* TUR-2009-3-007

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 08.10.2009 / **e)** E.2005/16, K.2009/139 / **f)** Concrete Review of Law no. 633 (The Act of the Establishment and Duties of the Directorate of the Religious Affairs) / **g)** *Resmi Gazete* (Official Gazette), 19.03.2010, 27526 / **h)** CODICES (Turkish).

*Keywords of the systematic thesaurus:*

5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship**.  
5.4.2 Fundamental Rights – Economic, social and cultural rights – **Right to education**.

*Keywords of the alphabetical index:*

Religion, secularism, principle / Religion, activity, freedom / Education, religious.

*Headnotes:*

The opening of Quran courses during the summer holidays under the supervision of the Ministry of Education (Directorate for Religious Affairs) for primary school students who have completed fifth grade, does not contravene the principle of secularism.

*Summary:*

I. The General Assembly of the Administrative Chambers of the State Council asked the Constitutional Court to assess the compliance with the Constitution of Supplementary Article 3 of the Act of the Establishment and Duties of the Directorate of Religious Affairs (Law no. 633, 22 June 1965). Supplementary Article 3 allows for the opening of

Quran courses during the summer holidays under the supervision of the Ministry of Education for primary school students who have completed fifth grade. The applicant argued that uninterrupted secular education is one of the aims of the principle of secularism enshrined in the Constitution and the purpose of the Act on the Unification of Education System (1924) which is a revolutionary law protected by the Constitution. The suggestion was made that the opening of courses to teach the recitation of the Holy Quran negatively affects the intellectual development of children, and is therefore contrary to the preamble and Articles 2, 42, 138 and 174 of the Constitution.

II. The Constitutional Court ruled that the principle of secularism requires impartiality by state organs in their treatment of different religious groups. Under Article 24 of the Constitution:

“Education and instruction in religion and ethics shall be conducted under state supervision and control. Instruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary schools. Other religious education and instruction shall be subject to the individual’s own desire, and in the case of minors, to the request of their legal representatives.”

The Court noted that the provision allows for the opening of summer courses to teach the recitation of the Holy Quran under the supervision of the Ministry of Education and participation in these courses is voluntary. It therefore found that the contested provision did not contravene the principle of secularism and dismissed the unconstitutionality claim. Judges Mrs Kantarcioğlu, Mr Erten, Mr Şat and Mrs Perктаş put forward dissenting opinions.

#### *Languages:*

Turkish.



#### *Identification:* TUR-2009-3-008

a) Turkey / b) Constitutional Court / c) / d) 08.10.2009 / e) E.2006/105, K.2009/142 / f) Concrete Review of Law no. 357 (The Law on Military Judges) / g) *Resmi Gazete* (Official Gazette), 08.01.2010, 27456 / h) CODICES (Turkish).

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

4.7.4.1.6.2 Institutions – Judicial bodies – Organisation – Members – Status – **Discipline**.  
4.7.11 Institutions – Judicial bodies – **Military courts**.

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

Judge, independence.

#### *Headnotes:*

The issuing of personal records on military judges by their superiors contravenes the principle of judicial independence.

#### *Summary:*

I. The First Chamber of the High Military Administrative Court asked the Constitutional Court to assess the compliance with the Constitution of Article 12 of Law no. 357 (The Law on Military Judges). Article 12 provides for the issue of two different records (officer records and professional records) about military judges by their superiors. These records constitute the basis for the promotion of military judges. The Chamber argued that the preparation of personal records about military judges by other military judges who work with them and the account that is taken of these records in their promotion may jeopardize the independence of their decision-making.

II. The Constitutional Court ruled that independence of the judiciary is an important element of the right to fair trial. Judges serving in military courts should be independent like other judges. Judicial independence cannot be impaired on the basis of military requirements. Other mechanisms exist to evaluate the judicial performance of military judges such as appellate review. The preparation of personal records about judges by their superiors is likely to impair the independence of their decision-making and contravenes the principle of judicial independence. The Court found the related parts of Article 12 of Law no. 357 to be in breach of Articles 9, 138, 139 and 145 of the Constitution and annulled the provision. Vice President Mr O. A. Paksüt, put forward a dissenting opinion.

#### *Languages:*

Turkish.



# Ukraine

## Constitutional Court

### Important decisions

*Identification:* UKR-2009-3-019

a) Ukraine / b) Constitutional Court / c) / d) 08.09.2008 / e) 19-rp/2009 / f) In the case arising from the constitutional petition of 59 People's Deputies concerning conformity with the Constitution of item 10 of the Resolution of the Cabinet of Ministers "Some Issues of Social Protection of the Individual Categories of Citizens" / g) *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 71/2009 / h) CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

4.6.2 Institutions – Executive bodies – **Powers**.  
5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension**.

*Keywords of the alphabetical index:*

Pension, amount.

*Headnotes:*

Decisions rendered by the Constitutional Court can have a prejudicial impact on the examination by courts of general jurisdiction of claims concerning legal relations which arose as a result of the legal force of the provisions later ruled to be unconstitutional.

*Summary:*

Fifty nine People's Deputies asked the Constitutional Court to assess the compliance with the Constitution of Item 10 of the Resolution of the Cabinet of Ministers on "Some Issues of Social Protection of the Individual Categories of Citizens" no. 530, 28 May 2008 (hereinafter, the "Resolution").

Under Item 10 of the Resolution, the maximum pension rate (including increases, extra pension, directed financial assistance, stipends for meritorious service to Ukraine, indexation and other additional pension charges established by legislation) granted and re-calculated in accordance with the Customs

Code and legislation on the Civil Service, the National Bank, the Cabinet of Ministers, the Diplomatic Service, Service with Local Government Authorities, Judicial Examination, the Status and Social Protection of the Population Affected by the Chernobyl Catastrophe, State Support of Mass Media and Social Protection of Journalists, Scientific and Scientific Technical Activities, Pension Provision for Military Personnel, Persons Dismissed from Military Service and Certain Other Persons, Mandatory State Pension Insurance, Pension Provision, Parliamentary Resolution no. 379/95-BP, of 13 October 1995 on the Adoption of the Regulations on the Assistant Consultant to the People's Deputy should not exceed the twelve minimum rates of retirement pension, established by Article 28.1.1 of the Law on Mandatory State Pension Insurance. Pension granted or recalculated in accordance with the Law on the Prosecution Office, including increases, additional pension, targeted financial aid, pension for meritorious service to Ukraine, indexation and other pension charges established by the law should not exceed ten thousand hryvnas per month.

Ukraine is a law-based state; the legislative, executive and judicial powers exercise their authority within the limits established by the Constitution and in accordance with the laws. Legislation and other normative legal acts are adopted on the basis of the Constitution and shall conform to it (Articles 1, 6.2, 8.2 of the Constitution).

Under Article 19.2 of the Constitution, bodies of state power are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws.

Under Articles 113, 116 and 117 of the Constitution, the Cabinet of Ministers is guided in its activities by the Constitution, laws, and by presidential decrees and parliamentary resolutions adopted in accordance with the Constitution and laws. It ensures the execution of the Constitution and the laws and issues resolutions and orders within the limits of its competence.

Strict observance of the Constitution and laws by bodies of legislative, executive and judicial power ensures the realisation of the principle of the separation of powers and is a guarantee of their unity and an important prerequisite for stability, ensuring civil peace and welfare in the state (item 4.1 of the motivation part of the Decision of the Constitutional Court no. 4-rp/2008, 1 April 2008).

According to the Constitution, the basic aspects of social protection and the forms and types of pension provision are determined exclusively by law (Article 92.1.6 of the Constitution).

Under the Law on Mandatory State Pension Insurance, the conditions, standards and organisation of pension provision are covered by legislation on pension provision (Article 4.3.6). Determination and arrangements for the pension payment rate is established by this Law only, under Article 5.2.7. The provisions of the above Law do not include limitation of the maximum pension rate.

The Cabinet of Ministers is authorised to take measures to ensure human and citizens' rights and freedoms and to ensure the implementation of policy, also within the sphere of social security (Article 116.2, 116.3 of the Constitution). The Cabinet of Ministers is not empowered to establish pension rates.

In providing for a limited rate of pension provision for individual categories of citizens in item 10 of the Resolution, the Cabinet of Ministers encroached upon the exceptional competence of the legislator, contrary to Articles 6.2, 8.2, 19.2, 85.1.3 and 92.1.6 of the Constitution.

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2009-3-020

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 30.09.2009 / **e)** 23-rp/2009 / **f)** Case arising from the constitutional petition of citizen Holovan Ihor Volodymyrovych as to the official interpretation of provisions of Article 59 of the Constitution (case on the right to legal assistance) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 79/2009 / **h)** CODICES (Ukrainian).

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

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.**

5.3.13.23.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to testify against spouse/close family.**

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

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

Legal assistance, right.

#### *Headnotes:*

The constitutional provisions on the universal right to legal assistance should be understood as the possibility, guaranteed by the state, for any person to receive legal assistance freely and without discrimination to the extent and in the form that he or she needs, irrespective of his or her relationship with state bodies, local government authorities, citizens' associations, individuals and legal entities.

#### *Summary:*

Citizen Ihor Holovan asked the Constitutional Court for an official interpretation of Article 59.1 of the Constitution, which states that “everyone has the right to legal assistance” and Article 59.2 of the Constitution, whereby “the advocacy acts to provide legal assistance in deciding cases in courts and other state bodies”.

Under the Constitution, the state's main duty is to affirm and safeguard human rights and freedoms (Article 3.2 of the Constitution).

Chapter II of the Constitution not only specifies basic human and citizens' rights and freedoms, but also the respective constitutional and legal guarantees of its observance and protection, in particular the prohibition of the abolition of constitutional rights and freedoms (Article 22.2 of the Constitution), the impossibility of restricting constitutional human and citizens' rights and freedoms, apart from specific restrictions under martial law or in a state of emergency (Article 64 of the Constitution), the universal guarantee of judicial protection of a person's rights and freedoms, including the right to appeal to the court directly on the grounds of the Constitution, and the ability to use any lawful means to protect his or her rights and freedoms from violations and illegal encroachments (Articles 8.3, 55.2 and 55.5 of the Constitution).

The right to legal assistance, which is stipulated in Article 59 of the Constitution, plays an important role in safeguarding human and citizens' rights and freedoms in a democratic and law-based state. This right is one of the basic constitutional, inalienable human rights and has a general character.

Article 59.1 of the Constitution states that “everyone has the right to legal assistance”. “Everyone” in this context includes all persons without exception; foreigners and citizens alike. Realisation of the right to legal assistance is based on the observance of the principles of equality before the law and non-discrimination based on race, colour of skin, political, religious and other beliefs, social origin, property status, place of residence, linguistic and other characteristics (Articles 21, 24.1, 24.2 of the Constitution).

Furthermore, the realisation of the right to legal assistance may not depend on the status of the person and the nature of his or her legal relationships with other subjects of law. The universal right to legal assistance is, in essence, a guarantee for the execution and safeguard of the rights and freedoms of others, and this explains its social significance. One of its functions in society, which is of special note, is its preventive function. This not only facilitates the lawful realisation of rights and freedoms, but also aims to prevent potential violations or discriminations of human and citizens’ rights and freedoms by state bodies, local government authorities and their officials and officers.

Legal assistance is multi-faceted and can have different contents, scope and form. It can include consultations, explanations, drafting claims and appeals, references, petitions, complaints, representation (especially in courts and other state bodies), and protection against accusation etc. The choice of the form and the subject of such assistance depends on the will of the person seeking to receive it. At the same time, to the extent this is permitted by the relevant legislation, State bodies and their officials and officers are obliged to provide certain categories of person with legal assistance, especially in connection with the protection of the rights and freedoms of children, underage parents and protection against accusation.

The Constitutional Court specifies that the guarantee of the universal right to legal assistance within the context of Articles 3.2 and 59 of the Constitution places the state under the obligation to ensure that everyone has access to appropriate legal assistance. A corollary to such an obligation is the necessity to determine the methods of ensuring legal assistance in laws and other legal acts. However, not all relevant laws, especially procedural codes, contain norms aimed at the implementation of this right. This may lead to the limitation or narrowing of the contents and the scope of the universal right to legal assistance.

Furthermore, by guaranteeing the right to universal legal assistance, the state is not only fulfilling its

constitutional and legal duty, but is also observing its obligations under the provisions of the Universal Declaration of Human Rights, the European Convention on Human Rights, and the International Covenant on Civil and Political Rights.

Article 64 of the Constitution rules out any restrictions on the constitutional right to legal assistance. According to the Constitution, the provision “everyone has the right to legal assistance” (Article 59.1 of the Constitution) is a norm of direct effect (Article 8.3 of the Constitution). Even if this right is not envisaged by relevant laws or other legal acts, there can be no restrictions on its implementation. It also relates, in particular, to the right of a witness to receive legal assistance during cross-examination in a criminal trial and to those providing explanations to state bodies.

Under the Constitution, no adverse consequences should follow from a person’s refusal to testify or to explain anything about himself or herself, members of his or her family or close relatives in the degree determined by law (Article 63.1 of the Constitution). The Constitutional Court considers that every person, especially witnesses under examination in bodies of inquiry or preliminary investigations and those providing explanations to state bodies, should have a real possibility of obtaining legal assistance to prevent the potential violation of the right not to testify or to explain anything about himself or herself, members of his or her family or close relatives which may be used in a criminal trial for the proof of indictment of those mentioned above. The case-law of the European Court of Human Rights also confirms such a conclusion.

Article 59.1 of the Constitution does not contain any restrictions as to the circle of subjects of legal assistance or requirements as to their education. However, Article 59.2 of the Constitution provides that the advocacy acts to ensure the right to a defence against accusation and to provide legal assistance in deciding cases in courts and other state bodies.

Pursuant to the Law on Advocacy, advocacy is a voluntary professional public association which, according to the Constitution, exists to facilitate the protection of rights and freedoms and to represent the lawful interests of citizens, foreigners, stateless persons and legal entities in all bodies, enterprises, establishments and organisations (Articles 1 and 6).

Systematic analysis of Article 59 of the Constitution and the Law on Advocacy would suggest that the provision of Article 59.2, according to what “in Ukraine, the advocacy acts to provide legal assistance in deciding cases in courts and other state bodies”, is one of the constitutional guarantees, which

gives a witness the right to legal assistance from a lawyer during examination in bodies of inquiry or preliminary investigation or when providing explanations in state bodies. In this way, the state bears the responsibility for guaranteeing qualified legal assistance to persons in their legal relations with state bodies. This does not preclude a person from receiving such assistance from other subjects, except for restrictions provided for by law.

*Languages:*

Ukrainian.



*Identification:* UKR-2009-3-021

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 07.10.2009 / **e)** 25-rp/2009 / **f)** In the case arising from the constitutional petition of the Supreme Court concerning conformity with the Constitution of provisions of Article 49.1.2 and the second sentence of Article 51 of the Law on Mandatory State Pension Insurance / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 82/2009 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Pension, payment / Social protection.

*Headnotes:*

Parliament should look into bringing into line with the Constitution the provisions of other laws regulating pension payments to pensioners who permanently reside in the states with which Ukraine does not have a relevant agreement, as well as the need to enact legislation on restitution for monetary and moral damage caused to individuals and legal entities by acts and actions deemed to be unconstitutional.

*Summary:*

The Supreme Court lodged a constitutional petition expressing concerns over the constitutional compliance of Article 49.1.2 and the second sentence of Article 51 of the Law on Mandatory State Pension Insurance (hereinafter, the “Law”) concerning the suspension of pension payments to pensioners for the period of their permanent residence abroad in cases where Ukraine does not have an agreement on pension provision and where Parliament has not consented to the binding nature of an international agreement with such a state.

Ukraine is a social and law-based state where the human being, his or her life and health, honour and dignity, inviolability and security are recognised as the highest social values. Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the state. To affirm and ensure human rights and freedoms is the main duty of the state (Articles 1, 3 of the Constitution).

The constitutional provisions mentioned above are set out in Chapter II of the Constitution (Human and Citizens’ Rights, Freedoms and Duties). Thus, the right to social protection is related to fundamental rights and freedoms. This right is guaranteed by general mandatory state social insurance funded by insurance payments from citizens, enterprises, institutions and organisations, as well as from budgetary and other sources of social security (Article 46.2 of the Constitution). It is guaranteed by Article 22.2 of the Constitution, pursuant to which constitutional rights and freedoms are guaranteed and cannot be abolished.

The constitutional right to social protection also includes a right of citizens to pension provision in old age. Retirement pensions, pension for long service and its other forms, which are granted as a result of labour activity and earned through previous work, are one of the forms of social protection. It determines the contents and character of the state’s obligation towards those citizens who gained the right to pension provision.

Stipulating the right of every citizen to social protection without any exclusion at the constitutional level, the state implemented the provisions of Article 24 of the Constitution according to which citizens have equal constitutional rights and there must not be any restrictions based on race, colour, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics.

Furthermore, Ukraine guarantees care and protection of its citizens who are beyond its borders (Article 25.3 of the Constitution).

The right of citizens to social protection envisaged by the Constitution (Article 46 of the Constitution) is further developed in the Law and the Law on Pension Provision, which establish the order of pension calculation and payment. However, a special procedure of pension payment is provided for citizens who left the territory of the state for permanent residence. According to Article 49.1.2 and the second sentence of Article 51 of the Law, pension payment is suspended for the whole period of residence abroad of a pensioner unless otherwise provided by the international agreement for the binding nature of which Parliament gave its consent.

Exceptions are provided for citizens who live abroad and whose pension payments are granted as a result of occupational injury or disease. Pensions are paid in those circumstances, even if there is no international agreement (Article 92.2 of the Law on Pension Provision). At the same time, the state established an appropriate mechanism for the payment of such pensions (Resolution of the Cabinet of Ministers on the Order of Transfer of Pension Payments of Citizens who left for Permanent Residence to Other States no. 258, 6 April 1993). Such differentiation regarding separate categories of pensioners, who live outside Ukraine, at the legislative level, does not comply with the constitutional principles of citizens' social protection.

The disputed norms of the Law make the constitutional right to social protection dependant on the fact of Ukraine concluding an international agreement on pension provision with a respective state. In enacting them, the state violated the constitutional guarantees of social protection for all persons who have the right to pension payment in old age. It deprived the pensioners of this right at the legislative level, in cases where they chose another state for permanent residence with which Ukraine had not concluded an international agreement. In terms of the legal and social nature of pensions, the right of a citizen to pension provision may not be tied down to a condition such as permanent residence in Ukraine. Under the constitutional principles, the state is obliged to guarantee this right regardless of the place of residence of the person who was granted a pension, whether in Ukraine or abroad.

Based on the arguments mentioned above, Article 49.1.2 and the second sentence of Article 51 of the Law on the suspension of pension payment to pensioners for the period of their permanent residence abroad where they have gone to countries

with which there is no international agreement with Ukraine, contradict the constitutional prescriptions concerning affirmation and ensuring human rights and freedoms, the inadmissibility of restrictions on constitutional rights and freedoms restriction, equality of citizens' constitutional rights regardless of the place of residence, guaranteed care and protection to the citizens who stay beyond its borders, the right to social protection in old age (Articles 3, 24.1, 24.2, 25.3, 46.1, 64.1 of the Constitution).

At the same time, the Constitutional Court notes that recognition of the disputed provisions of the Law as unconstitutional affects only those pensioners who reside in countries with which Ukraine has not concluded an agreement. It does not preclude further regulation of the pensioners' social protection by means of concluding international agreements with these states and pension payments in accordance with the procedure established by the current international treaties.

Since the constitutional proceedings were initiated by the court of general jurisdiction in the context of the review of the particular case, the Constitutional Court noted that under Article 152.2 of the Constitution and Article 73.2 of the Law on the Constitutional Court, laws, other legal acts and their separate provisions, which are pronounced unconstitutional, lose their legal force from the date on which the Constitutional Court adopts the decision on their unconstitutionality.

Under Article 152.3 of the Constitution material or moral damage suffered by individuals or legal entities by acts or actions deemed to be unconstitutional will be compensated by the state according to the procedure established by law. Therefore, the state is under a positive obligation to pass appropriate laws to establish the order and conditions of such compensation.

In the course of the proceedings, it was found that legal acts, other than those disputed by the subject of the right to the constitutional petition, contained references to Articles 49 and 51 of the Law or stipulated that the pension provision of separate categories of citizens who reside beyond the borders is executed on the grounds of international agreements only. Such provisions may be found in Article 3 of the Law on the Fundamentals of Legislation on Mandatory State Social Insurance, Articles 1.3 and 92.2 of the Law on Pension Provision and Article 591.1 of the Law on the Status and Social Protection of Population Affected by the Consequences of the Chernobyl Catastrophe".

The Constitutional Court observed that as Article 49.1.2 and the second sentence of Article 51 of the Law did not comply with the Constitution, Parliament should take steps to bring these provisions into line with it.

Judge V. Shyshkin attached a dissenting opinion.

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2009-3-022

a) Ukraine / b) Constitutional Court / c) / d) 17.12.2009 / e) 32-rp/2009 / f) Case arising from the constitutional petition of 45 People's Deputies concerning conformity with the Constitution of provisions of Articles 127.2, 127.6, 128.5 of the Law on the Judicial System and the Decrees of the President on the State Judicial Administration and on the Regulation On the State Judicial Administration" / g) *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / h) CODICES (Ukrainian).

#### *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.**

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

President, powers / Judicial system, administration.

#### *Headnotes:*

The compliance with the Constitution of certain provisions of the Law on the Judicial System no. 3018-III, 7 February 2002, which dealt with the appointment and dismissal of the Head and the Deputy Head of the State Judicial Administration by the President and the President's approval of the Regulation on the State Judicial Administration.

#### *Summary:*

Forty-five People's Deputies asked the Constitutional Court to recognise as unconstitutional the provisions of Articles 127.2, 127.6 and 128.5 of the Law on the Judicial System no. 3018-III, 7 February 2002 (hereinafter the "Law") and Decrees of the President on the State Judicial Administration no. 780 of 29 August 2002 (Decree no. 780) and on the Regulation on the State Judicial Administration no. 182, of 3 March 2003 (Decree no. 182).

Under Article 6 of the Constitution, state power is exercised on the principle of the separation of powers. The legislative, executive and judicial powers exercise their authority within the limits established by the Constitution and in accordance with the laws.

The Constitution has the highest legal force, and laws and other normative legal acts are adopted on its basis and are to conform to it (Article 8.2 of the Constitution). Bodies of state power and local authorities and their officials are obliged to act only on the basis, within the limits of their authority, and in the manner envisaged by the Constitution and laws (Article 19.2 of the Constitution).

According to Article 106.1.31 of the Constitution, the President applies the powers prescribed by the Constitution, which bars him from performing other powers besides those set out in the Constitution. This has been repeatedly upheld in the case-law of the Constitutional Court.

In 2002, Parliament enacted the Law on the Judicial System, Article 152.2 of which states that the State Judicial Administration (hereinafter, the "SJA") is a central body of the executive power for the organisational support of the activities of the courts of general jurisdiction and other bodies and institutions within the judicial system. Under Article 127.2 and 127.6 of the Law, the President would appoint and dismiss the Head and the Deputy Heads of the SJA, and under Article 128.5 of the Law, the Regulation on the SJA had to be approved by presidential decree, upon the submission of the Prime Minister approved by the Council of Justice.

To ensure the smooth working of the Law, the President enacted Decrees no. 780 and no. 182, which established the SJA and approved the Regulation on the SJA.



The President's powers set out in Articles 127.2, 127.6, 128.5 of the Law were based on Article 106 of the Constitution of 28 June 1996 (in particular Article 106.1.10 and 106.1.15 of the Constitution), which allowed the President, upon the submission of the Prime Minister, to establish, reorganise and remove central bodies of the executive power, appoint the heads of such bodies and terminate their mandates.

The Law on Introducing Amendments to the Constitution no. 2222-IV, 8 December 2004 (which came into force on 1 January 2006) amended, *inter alia*, Articles 106 and 116 of the Constitution. Under the amended Article 106 of the Constitution, the President has no power to establish central bodies of the executive power and regulate their activities, nor to appoint and dismiss the heads of such bodies. According to the supplemented paragraphs 9.1 and 9.2 of Article 116 of the Constitution, the powers in question pertain to the Cabinet of Ministers which establishes, reorganises and removes, in accordance with the law, ministries and other central bodies of the executive power. To enable the operation of these provisions of the Constitution, the Law on the Cabinet of Ministers stipulates that ministries and other central bodies of the executive power are responsible before, accountable to and under the control of the Cabinet of Ministers; the Cabinet of Ministers appoints and dismisses, under the submission of the Prime Minister, the heads of central bodies of executive power which are not members of the Government (Article 22.2 and 22.9.1). Since the Head of the SJA is not a member of the Government, his or her appointment and dismissal falls within the remit of the Cabinet of Ministers.

Thus, the provisions of the Law concerning the President's powers as set out in Articles 127.2, 127.6 and 128.5 do not conform with Articles 8, 19, 106 and 116 of the Constitution.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2009-3-023*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 17.12.2009 / **e)** 33-rp/2009 / **f)** The case arising from the constitutional petition of the Parliament (*Verkhovna Rada*) of the Autonomous Republic of Crimea concerning conformity with the Constitution of Chapter II.1 – Final Provisions of the Law on Approving the Amendment to Article 22 of the Constitution of the Autonomous Republic of Crimea as to the term of office of the Parliament of the Autonomous Republic / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette) / **h)** CODICES (Ukrainian).

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

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**.

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

Parliament, authority.

#### *Headnotes:*

Concerns had arisen over the constitutional compliance of the phrase “that shall be held in 2010” from the first sentence of Chapter II.1 “Final Provisions” of the Law on Approving the Amendment to Article 22 of the Constitution of the Autonomous Republic of Crimea regarding the Term of Office of the Parliament (*Verkhovna Rada*) of the Autonomous Republic of Crimea no. 1167-VI, 19 March 2009.

#### *Summary:*

The Parliament of the Autonomous Republic of Crimea asked the Constitutional Court for an assessment of the conformity with the Constitution of Chapter II.1 “Final Provisions” of the Law on Approving the Amendment to Article 22 of the Constitution of the Autonomous Republic of Crimea Regarding the Term of Office of the Parliament of the Autonomous Republic of Crimea no. 1167-VI, 19 March 2009 (hereinafter, the “Law”).

Chapter II.1 “Final Provisions” of the Law establishes that “the Law shall come into force from the date of its publication and shall be enforced from the date of appointing the next scheduled elections to the Parliament of the Autonomous Republic of Crimea that shall be held in 2010. The effect of the present Law shall not apply to deputies of the Parliament of the Autonomous Republic of Crimea of the fifth convocation”.

Ukraine is an independent, democratic, law-based and unitary state the sovereignty of which extends throughout its entire territory (Articles 1, 2.1, 2.2 of the Constitution).

The Autonomous Republic of Crimea, as an integral constituent part, decides on the issues within its jurisdiction, which are determined by the Constitution. Its Parliament adopts the Constitution of the Autonomous Republic of Crimea and introduces amendments to it, subject to the approval of the Parliament. The competence of the Autonomous Republic of Crimea includes arranging elections of deputies to the Parliament of the Autonomous Republic of Crimea (Articles 85.1.37, 134, 135.1 and 138.1.1 of the Constitution).

Under Article 94.5 of the Constitution a law enters into force within ten days of the date of its official enactment, unless the Law itself states otherwise, but not prior to the date of its publication.

Under the Constitution, bodies of state power (specifically legislative) are obliged to act only on the grounds, within the limits of their power and in the manner envisaged by the Constitution and the laws (Articles 6.2, 19.2).

In the first sentence of Chapter II.1 "Final Provisions" of the Law, the national Parliament indicated the year of regular elections to the Parliament of the Autonomous Republic of Crimea. This is a subject which falls within the remit of the Parliament of the Autonomous Republic of Crimea (Article 138.1.1 of the Constitution).

The Constitutional Court considers that, in designating the date of the conduct of elections to the representative body of the autonomy when adopting the Law, the national Parliament encroached on the authority of the Parliament of the Autonomous Republic of Crimea.

Therefore, the word combination "that shall be held in 2010" from the first sentence of item 1 of Chapter II "Final Provisions" of the Law contravenes Articles 6.2, 19.2, 85.1.37, 134, 135.1, 138.1.1 of the Constitution.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2009-3-024*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 22.12.2009 / **e)** 34-rp/2009 / **f)** Case arising from the constitutional petition of fifty-one People's Deputies concerning the official interpretation of the provisions of Articles 102, 103 and 116 of the Law on the Judicial System (case on the appointment of judges to administrative positions) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

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

4.7.4.1.2 Institutions – Judicial bodies – Organisation – Members – **Appointment**.

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

Judge, appointment / Judicial system, self-correction.

#### *Headnotes:*

With respect to the role of the Judges' Council in deciding upon appointments of judges to administrative positions in courts and their dismissal from these positions, Parliament was asked to execute without delay the Decision of the Constitutional Court no. 1-rp/2007, dated 16 May 2007, regarding legislative regulation of the appointments and dismissals of judges as chair and deputy chair of a court.

#### *Summary:*

Fifty-one People's Deputies sought an official interpretation from the Constitutional Court of the provisions of Articles 102, 103 and 116 of the Law on the Judicial System no. 3018-III, 7 February 2002 (hereinafter the "Law").

In its Decision no. 1-rp/2007, 16 May 2007, the Constitutional Court recognised as unconstitutional the provision of Article 20.5 of the Law, which stipulated that a chairperson and deputy chairperson of a court are appointed by the President. It recommended that Parliament should enact, without delay, a legislative regulation on the appointment and dismissal of a judge as a chairperson and deputy chairperson of a court (paragraphs 1 and 3 of the resolute part). No legislation has been passed hitherto to cover this issue.

The Constitution determines that state power is exercised on the basis of its division into the legislative, executive and judicial powers (Article 6.1 of the Constitution) and also determines the

mechanism for its exercise (Articles 6.2 and 19.2 of the Constitution). The Constitution established the principles of the organisation and activities of the judicial power and its interaction with the legislative and executive powers on the grounds of the constitutional system of checks and balances.

Parliament, as the sole body of legislative power, enacts legislation on the judicial system, judicial proceedings and the status of judges (Articles 75, 83.1.3 and 92.1.14 of the Constitution).

Under Article 92.1.14 of the Constitution, the judicial system is determined exclusively by law. The Law determines the legal principles of the organisation of judicial power and the administration of justice, the system of courts of general jurisdiction, the training requirements of the judiciary, the system and procedure for judicial self-regulation, the general procedure for the support of the activities of judges and other issues of the judicial system. Article 104 of the Law deals with meetings of judges, conferences of judges, the Congress of Judges, judges' councils and their executive committees as the organisational forms of judicial self-government. Under the Law, judicial self-regulation is an independent collective resolution by professional judges of issues pertaining to the internal activities of judges (organisational support for judges and their activities, social provision for judges and their families and other issues not directly connected with the administration of justice). See Article 102.1 and 102.2 of the Law.

The procedure of exercising judicial self-regulation is determined, in accordance with the Constitution, by the Law on the Status of Judges and other laws, as well as by regulations and charters adopted by the bodies of judicial self-regulation under the Law (Article 102.3).

The Law defines the Congress of Judges as the highest body of judicial self-regulation (Article 112.1) and the Judges' Council as a superior body of judicial self-regulation during the period between the Congresses of Judges (Article 116.1), and sets out the legal basis of their operations. Pursuant to Article 116.5.4 of the Law, the authorities of the Judges' Council include the resolution of issues concerning the appointment of judges to administrative positions of courts in cases and under the procedure prescribed by law. Therefore, the substance of this norm should be viewed in conjunction with the other norms of the Law, in particular Article 20.

Article 20.5 of the Law determines the authority of the Judges' Council to give recommendations as to the appointment of judges as chair or deputy chair of a court and their dismissal.

Thus, Article 116.5.4 of the Law, which stipulates that the Judges' Council decides upon the issues of appointment of judges to administrative positions within courts in cases and under the procedure prescribed by the Law, in conjunction with the first clause of Article 20.5 of the Law, should be understood as empowering the Judges' Council to decide whether or not to recommend the candidature of a particular judge seeking appointment as a chairperson or a deputy chairperson of a court.

The Constitutional Court found that such a recommendation is an obligatory part of the procedure for resolution of personnel issues envisaged by law. Hence, the body or official authorised to make the decisions over such an appointment or dismissal has no authority to resolve the relevant issues without such a recommendation. The appointment of a judge to the position of chair or deputy chair and his or her dismissal, under Article 20.5 (the first clause) and Article 116 of the Law will only be made upon the recommendation of the Judges' Council. Article 116.5.4 of the Law determines the advisory character of a decision of the Judges' Council in the process of the appointment of judges to administrative positions of courts by an official authorised body.

The recommendation to Parliament expressed in the Decision of the Constitutional Court no. 1-rp/2007, 16 May 2007 in a case on the dismissal of a judge from an administrative position concerning the necessity for legislative regulation of the appointment of a judge as chair or deputy chair of a court had not been fulfilled. This caused legal uncertainty (an omission in the Law). The Constitutional Court therefore deemed it necessary, under the terms of Article 70.2 of the Law on the Constitutional Court, to charge Parliament to resolve this issue without further delay.

Judges V. Shyshkin and A. Didkivsiy attached their dissenting opinion.

*Languages:*

Ukrainian.



# United States of America

## Supreme Court

---

### Important decisions

*Identification:* USA-2009-3-006

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 09.11.2009 / **e)** 09-144 / **f)** Bobby v. Van Hook / **g)** 130 *Supreme Court Reporter* 13 (2009) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Counsel, effectiveness, standard / Lawyer, guidelines, professional, standard / Death penalty, defence, standard.

*Headnotes:*

The constitutional right to a fair trial in criminal proceedings includes the right to effective assistance of defence counsel.

The constitutional guarantee of effective assistance of counsel ensures to a criminal defendant representation that does not fall below an objective standard of reasonableness in light of prevailing professional norms.

In determination of whether representation of a criminal defendant was satisfied the constitutional requirement of effective counsel, the objective standard of reasonableness necessarily is a general one because detailed rules for a defence attorney's conduct cannot satisfactorily take into account the variety of circumstances in a criminal proceeding or the range of legitimate decisions regarding the best representation of a criminal defendant.

Guidelines for conduct of defence counsel in criminal proceedings articulated by a professional organisation can be useful as "guides" as to what the objective constitutional standard of reasonableness entails, but only to the extent that they describe prevailing professional norms when the representation took place.

In determining the reasonableness of defence counsel's conduct in a capital criminal proceeding, professional guidelines may serve as evidence of what reasonably diligent attorneys would do, but not as inexorable commands with which all defence counsel must fully comply.

For assessment of whether conduct of defence counsel in a criminal proceeding satisfied constitutional fair trial requirement of effective counsel, professional standards may serve as guides to what reasonableness means, but not its definition.

*Summary:*

I. In 1985, Mr Robert Van Hook was found guilty of murder in a trial in a State of Ohio court. At the sentencing hearing, the defence called eight mitigation witnesses, and Mr Van Hook himself gave an unsworn statement. After weighing the aggravating and mitigating circumstances, the trial court imposed the death penalty.

The State of Ohio appellate courts affirmed the finding of guilt and the sentence. Subsequently, Mr Van Hook sought review in the federal courts pursuant to a *habeas corpus* petition. After several decisions in the U.S. District Court and Court of Appeals for the Sixth Circuit, the Court of Appeals in 2009 granted Mr Van Hook's petition on the ground that his lawyers performed deficiently in investigating and presenting mitigating evidence in the 1985 sentencing hearing, thereby violating his right to effective counsel under the fair trial guarantees in the Sixth Amendment to the U.S. Constitution. The Sixth Amendment, which is applicable to the States through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, states in relevant part: "In all criminal prosecutions, the accused shall...have the Assistance of Counsel for his defence." In making this decision, the Court of Appeals relied on guidelines, published by the American Bar Association (ABA) in 2003, for performance of defence counsel in death penalty proceedings. Those guidelines, 131 pages long, discuss in detail the duty of defence attorneys to investigate mitigating evidence in death penalty cases. The State of Ohio petitioned the U.S. Supreme Court for review of the Court of Appeals decision.

II. The Supreme Court granted the petition and reversed the Court of Appeals decision. In so doing, the Court cited its 1984 decision in *Strickland v. Washington*, in which the Court recognised that the Sixth Amendment entitles criminal defendants to the “effective assistance of counsel” – that is, representation that does not fall “below an objective standard of reasonableness” in light of “prevailing professional norms.” However, the Court ruled that the Court of Appeals erroneously relied on ABA guidelines “announced 18 years after Mr Van Hook went to trial.” Instead, the Court stated, the objective standard of reasonableness necessarily is a general one because detailed rules for a defence attorney’s conduct cannot satisfactorily take into account the variety of circumstances in a criminal proceeding or the range of legitimate decisions regarding the best representation of a criminal defendant. Regarding professional standards articulated by an organisation like the ABA, the Court said that they can be useful as “guides” as to what “reasonableness” entails, but only to the extent that they describe prevailing professional norms when the representation took place. The Court concluded that the Court of Appeals ignored this limiting principle on judicial use of professional standards: judging an attorney’s conduct in the 1980’s on the basis guidelines published 18 years later, “without even pausing to consider whether they reflected the prevailing professional practice at the time of the trial”, was erroneous.

Moreover, according to the Court, the Court of Appeals compounded the error by treating the ABA’s 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as “inexorable commands” with which all capital defence counsel must fully comply. This approach was not consistent with the instruction in *Strickland v. Washington* that ABA standards and similar pronouncements are “only guides” to what reasonableness means, not its definition. Thus, the Court stated that while the States are free to impose specific rules of their choosing to ensure that criminal defendants are adequately represented, the U.S. Constitution imposes only the one general requirement that defence attorneys make objectively reasonable choices.

The Court also addressed Mr Van Hook’s argument that his defence attorneys failed to provide effective counsel even under the professional standards prevailing at the time of his trial. After a detailed examination of the relevant facts, the Court concluded that his attorneys’ representation was effective under those standards. In addition, the Court determined, even if Mr Van Hook’s counsel performed deficiently by failing to perform an adequate investigation, he did not suffer any

prejudice as a result. This is because the evidence submitted in support of his *habeas corpus* petition, which the Court characterised as “minor additional details” which were not presented to the trial court, would not have made any difference in the result.

*Bobby v. Van Hook* was a *Per Curiam* decision of the Court, without identification of a particular Justice as the author of the Court’s opinion. Justice Alito wrote a concurring opinion. The vote in the decision was unanimous.

#### Cross-references:

- *Strickland v. Washington*, 466 *United States Reports* 668, 104, *Supreme Court Reporter* 2052, 80, *Lawyer’s Edition Second* 674 (1984).

#### Languages:

English.



# Court of Justice of the European Union

---

## Important decisions

*Identification:* ECJ-2009-3-008

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** Third Chamber / **d)** 14.06.2007 / **e)** C-422/05 / **f)** Commission of the European Communities v. Kingdom of Belgium / **g)** *European Court Reports* I-4749 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

3.26 General Principles – **Principles of Community law.**  
4.17.1.3 Institutions – European Union – Institutional structure – **Commission.**  
5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis.***

*Keywords of the alphabetical index:*

Action for failure to fulfil obligations, subject-matter, dispute, determination during the pre-litigation procedure / Transport, air, Community airport, noise-related operating restrictions.

*Headnotes:*

1. In an action under Article 226 EC, the letter of formal notice sent by the Commission to a Member State and the reasoned opinion issued by the Commission delimit the subject-matter of the dispute, so that it cannot thereafter be extended. The opportunity for the State concerned to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations. Consequently, the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure.

In that regard, an observation by the Commission that a Member State did not repeal national legislation regulating night flights of certain types of civil subsonic jet aeroplanes at the time when it transposed Directive

no. 2002/30 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports, and that, after the period prescribed for transposition, that national legislation was still in force, cannot constitute a new complaint, even if it was made only at the stage of the originating application. It is merely a finding of fact by the Commission that it may rely on in so far as the situation described may prove, first, that the situation had not changed since the expiry of the two-month period prescribed by the reasoned opinion and, second, that that national legislation was not a transitional measure intended to ensure continuity after the repeal of Regulation no. 925/1999 on the registration and operation within the Community of certain types of civil subsonic jet aeroplanes which have been modified and re-certificated as meeting the standards of Volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation, third edition (see paragraphs 25, 27).

2. Article 10.2 EC, Article 249.3 EC and Directive no. 2002/30 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports require that, during the period for transposition of that directive, Member States refrain from taking any measures liable seriously to compromise the result prescribed by that directive. They cannot therefore adopt, during that period, measures which, while pursuing the same objective, namely the reduction in the number of persons suffering from the harmful effects of aircraft noise, hinder the introduction of uniform operating restrictions throughout the Community.

The adoption by a Member State, during the transposition period of the directive, of legislation regulating night flights of certain types of civil subsonic jet aeroplanes, designed not to transpose the directive but to establish a regulatory framework harmonised at national level to reduce noise impact caused by aircraft based on the approach laid down in Regulation no. 925/1999, namely the establishment of operating restrictions on the basis of the engine by-pass ratio designed to prohibit definitively the operation of re-certificated civil subsonic jet aeroplanes, is liable seriously to compromise the result prescribed by Directive no. 2002/30.

In that regard, adoption of that national legislation to enter into force less than three months before the expiry date of the period prescribed for transposing the directive gives rise to unduly unfavourable treatment for certain categories of aeroplanes and has a lasting impact on the conditions of transposition and implementation of that directive in the

Community. By reason of the ban on the operation of various aeroplanes resulting from the application of that national legislation, the assessment of the noise impact provided for in the directive cannot take into account the noise produced by all aeroplanes in accordance with the rules defined in Volume 1, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation and, therefore, the optimum improvement in noise management cannot be achieved in accordance with the provisions set out in the said directive (see paragraphs 63-65, 68).

### *Summary:*

In its judgment of 14 June 2007, the Court found that Belgium had infringed its obligations under Directive no. 2002/30/EC of 26 March 2002 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports.

This judgment is in line with the “Inter-Environnement Wallonie” precedent to the effect that during the time taken to transpose a directive, Member States should refrain from taking such measures as would seriously interfere with the achievement of the result prescribed by the directive.

In the instant case, the Royal Decree of 14 April 2002 prohibited takeoff and landing between 11 pm and 6 am for some aircrafts which, though fitted with noise abatement devices, were generally considered noisy. The aforementioned Directive no. 2002/30/EC, however, sought to apply a balanced approach in the European Union reconciling noise abatement policies with the demands of developing civil aviation. The ban on operating aircraft fitted with a noise abatement device was thus not systematically contemplated by the Directive, contrary to the provisions of the aforementioned Royal Decree.

The Court ruled firstly on the admissibility of the application. In that respect, it recalled its earlier decision on delimiting the subject-matter of the dispute in the context of infringement proceedings by the letter of formal notice and the reasoned opinion which had been addressed to the Member State. In the instant case, the Court observed that the Commission did not raise a new complaint by observing in its application that the Royal Decree had not been repealed after the expiry of the time limit for transposing the Directive. It therefore concluded that the application was admissible.

On the merits, the proceedings hinged on the dates in which the Royal Decree and the Community Directive had come into force. Specifically, it had to be ascertained whether the Royal Decree pre-dated the Directive’s entry into force. The Belgian Government in fact attempted to bring to bear an exemption prescribed by Article 7 of the Directive to the effect that operating restrictions already decided before the effective date of the Directive could remain in force. In that regard, the Court held that the Royal Decree had been promulgated and published after the Directive’s entry into force. The fact that it had been drawn up before then was immaterial for the purposes of the exemption under the aforesaid Article 7.

Next, the Court found that while the objective of the Royal Decree was indeed the same as that of the Directive, i.e. to mitigate the harmful effects of aircraft noise, Belgian legislation had lastingly affected the conditions of transposition of the Directive by prescribing unduly unfavourable treatment for a particular category of aircraft, contrary to the provisions of the Directive.

As the Royal Decree, in the Court’s view, had been adopted during the transposition of the Directive, Belgium had infringed its Community obligations according to the “Inter-Environnement Wallonie” precedent.

### *Cross-references:*

- CJEC, 18.12.1997, *Inter-Environnement Wallonie*, C-129/96, ECR. 1997 p. I-7411;
- CJEC, 29.09.1998, *Commission v. Germany*, C-191/95, ECR. 1998 p. I-5449, *Bulletin* 2001/1 [ECJ-2001-1-007].

### *Languages:*

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



*Identification:* ECJ-2009-3-009

a) European Union / b) Court of Justice of the European Communities / c) Grand Chamber / d) 18.07.2007 / e) C-119/05 / f) Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA, formerly Lucchini Siderurgica SpA / g) Reports I-06199 / h) CODICES (English, French).

*Keywords of the systematic thesaurus:*

2.2.1.6.4 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – **Secondary Community legislation and domestic non-constitutional instruments.**

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

3.26.2 General Principles – Principles of Community law – **Direct effect law.**

4.7.3 Institutions – Judicial bodies – **Decisions.**

*Keywords of the alphabetical index:*

Community law, primacy / Aid, recovery / *Res judicata*, national, community law, primacy.

*Headnotes:*

1. It is for the national courts to interpret, as far as it is possible, the provisions of national law in such a way that they can be applied in a manner which contributes to the implementation of Community law.

In that regard, a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation.

Consequently, Community law precludes the application of a provision of national law which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission which has become final (see paragraphs 60-63, operative part).

*Summary:*

Under the terms of Italian Law no. 183 of 2 May 1976 relating to special intervention measures for the Italian *Mezzogiorno*, the Lucchini company had submitted an application for assistance in order to

modernise some of its steel-making plants. The Italian authorities had informed the Commission of the plan to grant aid, in accordance with the provisions of the third code of ECSC aid to the steel industry then in force (Commission Decision no. 3484/58/ECSC of 27 September 1985) and granted Lucchini a subsidy on a provisional basis pending the Commission's decision as to its compatibility.

However, the aid in question was declared incompatible with the common market by a Commission decision of 20 June 1990. Before this decision supervened, Lucchini, still not having received the aid granted, brought proceedings against the Italian authorities before the Rome Civil and Criminal Court to establish its right to payment.

Notwithstanding the decision on incompatibility reached in the meantime, Lucchini won its case before the Italian courts by a ruling which became final in the absence of an appeal in cassation. As the aid remained unpaid despite the ruling, the Civil and Criminal Court of Rome enjoined the competent authorities to pay the sums claimed by the Lucchini company.

The Commission subsequently invited the Italian authorities to recover the aid in question. The Italian Ministry of Industry complied with this request and finally revoked the decree granting the aid to Lucchini.

It was precisely the objection to this decision to revoke the aid that prompted the Court to rule, in the context of a preliminary referral, on the question whether *res judicata* force, established in Italian law by Article 2909 of the Civil Code, precluded the recovery of state aid declared incompatible with the common market.

The Court held that a national provision establishing *res judicata* force could not impede the recovery of such aid. In so doing, the EU judge relied on the primacy of Community law, carrying the obligation for national courts to refrain from applying any provision of national law contrary to the provisions of Community law.

*Languages:*

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.





*Identification:* ECJ-2009-3-010

**a)** European Union / **b)** Court of First Instance / **c)** Grand Chamber / **d)** 12.09.2007 / **e)** T-36/04 / **f)** API v. Commission / **g)** *European Court Reports* II-3201 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

European Community, institution, right of public access to documents / Procedure, disclosure by parties of their own written submissions.

*Headnotes:*

1. The examination required for the purpose of processing a request for access to documents under Regulation no. 1049/2001 regarding public access to European Parliament, Council and Commission documents must be specific in nature. First, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception. Such application may, in principle, be justified only if the institution has previously assessed, firstly, whether access to the document would specifically and actually undermine the protected interest and, secondly, in the circumstances referred to in Article 4.2 and 4.3 of that regulation, whether there was no overriding public interest in disclosure. Further, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. Consequently, the examination which the institution must undertake in order to apply an exception must be carried out in a concrete manner and must be apparent from the reasons given for the decision. That examination must, moreover, be carried out in respect of each document covered by the request.

A concrete, individual examination is in any event necessary where, even if it is clear that a request for access refers to documents covered by an exception, only such an examination can enable the institution to

assess the possibility of granting the applicant partial access under Article 4.6 of Regulation no. 1049/2001.

The obligation for an institution to undertake a concrete, individual assessment of the content of the documents covered in the application for access is an approach to be adopted as a matter of principle, as regards all the exceptions mentioned in Article 4.1 to 4.3 of Regulation no. 1049/2001, whatever the field to which those documents relate.

However, the application of that approach as a matter of principle does not mean that such an examination is required in all circumstances. Such an examination may not be necessary where, owing to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted. Such a situation could arise, for example, if certain documents were:

- i. manifestly covered in their entirety by an exception to the right of access or, conversely;
- ii. manifestly accessible in their entirety, or, finally;
- iii. had already been the subject of a concrete, individual assessment by the Commission in similar circumstances (see paragraphs 54-58).

2. As regards the exception to the general principle of access to documents relating to the protection of court proceedings, provided for in the second indent of Article 4.2 of Regulation no. 1049/2001 regarding public access to European Parliament, Council and Commission documents, it should be recalled, first, that it follows from the broad definition of the notion of document, as set out in Article 3.a of that regulation, and from the wording and the very existence of the exception relating to the protection of court proceedings, that the Community legislature did not intend to exclude the institutions' litigious activities from the public's rights of access, but that it provided, in that regard, that the institutions are to refuse to disclose documents relating to court proceedings where such disclosure would undermine the proceedings to which those documents relate.

Second, the Commission's pleadings before the Community judicature fall within the scope of the exception relating to the protection of court proceedings, in that they relate to a protected interest.

Third, the fact that the scope of that exception covers all documents drawn up solely for the purposes of specific court proceedings, and in particular pleadings lodged by the institutions, cannot, in itself, justify application of the exception invoked. The exception based on protection of the public interest in the context of court proceedings cannot be interpreted as

obliging the Commission to refuse access to all documents which it has drafted solely for the purposes of such proceedings.

Fourth, the purpose of the exception for the protection of court proceedings is primarily to ensure observance of the right of every person to a fair hearing by an independent tribunal, which constitutes a fundamental right under Article 6 ECHR and which forms an integral part of the general principles of Community law which the Community judiciary enforces, drawing inspiration from the constitutional principles common to the Member States and from the guidelines supplied, in particular, by the European Convention for the Protection of Human Rights, and to ensure the proper course of justice. That exception therefore covers not only the interests of the parties in the context of court proceedings, but more generally the proper conduct of those proceedings (see paragraphs 59-61, 63).

3. In the application of Regulation no. 1049/2001 regarding public access to European Parliament, Council and Commission documents, in principle, it is on account of the nature of the information contained in the documents to which access is sought that their disclosure may undermine a protected interest. However, given the specific nature of the interests that the exception for the protection of court proceedings seeks to protect, namely to ensure observance of the right of every person to a fair hearing by an independent tribunal and the need to ensure the proper course of justice, and since the documents to which access has been requested are the pleadings submitted by the Commission in pending cases to which it is a party, it cannot be ruled out that non-disclosure may be justified for a certain length of time for reasons independent of the content of each document sought, provided that those reasons justify the need to protect the documents in question in their entirety.

In that context, like the other parties to the proceedings, the Commission must be able to present and debate its position free from all external influences, especially since the position which it defends is in principle designed to ensure the proper application of Community law. Because of the nature of the interests that the exception for the protection of court proceedings seeks to protect, the fulfilment of such an objective requires that the Commission's pleadings not be disclosed before it has had an opportunity to debate them before the court at the hearing and that the Commission therefore be entitled to exclude public access to them, because of the possible pressure on its agents to which a public debate triggered by their disclosure could give rise, and it is not necessary, for this purpose, that it carry out a concrete assessment of their content.

Thus, since the proceedings to which the pleadings to which access has been requested relate have not yet reached the hearing stage, the refusal to disclose those pleadings must be considered to cover all aspects of the information contained therein. On the other hand, after the hearing has been held, the Commission is under an obligation to carry out a concrete assessment of each document requested in order to ascertain, having regard to the specific content of that document, whether it may be disclosed or whether its disclosure would undermine the court proceedings to which it relates (see paragraphs 63, 73-75, 81-82).

4. The parties' pleadings are in principle confidential as regards their treatment by the Community judiciary. Article 20.2 of the Statute of the Court of Justice, which is also applicable to the Court of First Instance by virtue of Article 53 of the Statute, requires only that the pleadings be communicated to the parties and to the institutions of the Communities whose decisions are being disputed. In addition Article 16.5.2 of the Rules of Procedure of the Court of Justice and the second subparagraph of Article 24.5.2 of the Rules of Procedure of the Court of First Instance provide with respect only to the parties to a case that copies of the pleadings may be obtained, and Article 5.3.3 of the Instructions to the Registrar of the Court of First Instance makes access by third parties to procedural documents subject to the existence of a legitimate interest which must be properly justified.

Those provisions do not, however, prohibit parties from disclosing their own pleadings. The principle is that parties are free to disclose their own written submissions, apart from exceptional cases where disclosure of a document might adversely affect the proper administration of justice.

Nor do those provisions require the institutions to follow, as regards the application of the rules concerning access to documents, the approach of the court before which the case to which the pleadings requested relate is pending. It cannot therefore be accepted, in the absence of specific provisions laid down to that effect, that the scope of application of Regulation no. 1049/2001 regarding public access to European Parliament, Council and Commission documents may be restricted on the ground that those provisions of the Rules of Procedure do not govern access of third parties and that they are applicable as a *lex specialis*.

The only procedural provisions which prohibit the parties from disclosure are Article 56.2 of the Rules of Procedure of the Court of Justice and Article 57 of the Rules of Procedure of the Court of First Instance, which provide that the oral proceedings in cases heard in camera are not to be published (see paragraphs 87-90).

5. With respect to the overriding public interest, as referred to in the last line of Article 4.2 of Regulation no. 1049/2001 regarding public access to European Parliament, Council and Commission documents, which is capable of justifying the disclosure of a document which undermines the protection of court proceedings, it is for the institution concerned to strike a balance between the public interest in disclosure and the interest which is served by a refusal to disclose, in the light, where appropriate, of the arguments put forward by the party requesting access.

That overriding public interest must, as a rule, be distinct from the principles of freedom of the press and transparency which underlie that regulation. However, the fact that a party requesting access does not invoke a distinct public interest does not automatically imply that it is unnecessary to weigh up the interests at stake. The invocation of those same principles may, in the light of the particular circumstances of the case, be so pressing that it overrides the need to protect the documents in question.

However, that is not the case where the documents to which access is requested are the pleadings submitted by the Commission before the Community Courts in pending cases to which it is a party. First, the possibility for members of the public to receive information concerning pending cases is guaranteed by the fact that each action, from the time that it is lodged, is the subject of a notice in the Official Journal, which is also transmitted by internet on the Eur-Lex website and the website of the Court of Justice, stating, in particular, the subject-matter of the dispute and the forms of order sought in the application, as well as the pleas in law and main arguments put forward. Moreover, the Report for the Hearing, which contains a summary of the parties' arguments, is made public on the day of the hearing, during which, moreover, the parties' arguments are debated in public.

Second, the objective pursued through the application of the exception relating to the protection of court proceedings is primarily to prevent all external influences on the proper conduct of those proceedings. However, the interest in the protection of that objective is necessary irrespective of the content of the pleadings requested, since it is an interest the protection of which is necessary for the proper course of justice. Furthermore, such a restriction is not absolute, in that it covers all the pleadings to which access has been refused only until the date of the hearing (see paragraphs 94, 97-100).

6. In the application of Regulation no. 1049/2001 regarding public access to European Parliament, Council and Commission documents, the purported need to protect arguments which will, if appropriate,

be used in proceedings which are still pending cannot constitute a reason for refusing access to pleadings relating to a case which has already been closed by a judgment of the Court of First Instance, in the absence of any specific statement of reasons showing that their disclosure would undermine the pending court proceedings.

The content of the pleadings of a Community institution concerning a case which has been closed by a judgment of the Court of First Instance has been made public in the form of a summary by means of the Report for the Hearing, debated at a hearing, and also reproduced in the judgment of the Court. The arguments involved are thus already in the public domain, at least in summary form. Moreover, a mere link between two or more cases, whether they have the same parties or the same subject-matter, cannot in itself justify a refusal of access; otherwise, there would be a manifest inversion of the relationship between the principle of free access to the documents of the institutions and the exceptions to that principle, as set out in Regulation no. 1049/2001 (see paragraphs 106, 110, 141).

7. The pleadings submitted by the Commission in proceedings under Article 226 EC, in so far as they refer necessarily to the results of the investigations carried out by the Commission in order to establish the existence of an infringement of Community law, are closely related to the opening of the infringement proceedings in connection with which they were submitted and therefore relate to investigations within the meaning of Article 4.2.3 of Regulation no. 1049/2001 regarding public access to European Parliament, Council and Commission documents.

In that regard, the preservation of the objective of infringement proceedings, namely an amicable settlement of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, may justify refusal of access to documents drawn up in connection with those proceedings under the exception relating to the protection of the purpose of investigations. It cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with Treaty obligations may continue during the court proceedings and up to the delivery of the judgment. Such a justification applies to the pleadings submitted by the Commission, irrespective of the content of each document requested, where they contain the same type of information and where the infringement to which they relate is contested by the Member State concerned. Those pleadings are manifestly covered in their entirety by the relevant exception to the right of access.

By contrast, the purpose of attaining an amicable settlement is no longer relevant after the delivery of judgments finding the existence of the infringements in respect of which the Commission's investigations were carried out. Once the Court has found that a Member State has failed to fulfil its obligations under the Treaty that State is required to take the measures to comply with that judgment, and such a result cannot depend on the outcome of the negotiations in progress with the Commission. Moreover, to accept that the various documents relating to investigations are covered by the exception provided for in the third indent of Article 4.2 of Regulation no. 1049/2001 until the follow-up action to be taken has been decided, even in the case where a fresh investigation leading potentially to the bringing of an action on the basis of Article 228.2 EC is necessary, would make access to those documents dependent on uncertain events, namely non-compliance by the Member State concerned with the judgment of the Court establishing the infringement and the bringing of an action under Article 228.2 EC, which falls within the discretion of the Commission. In any event, they are uncertain and future events, which depend on the speed and diligence of the various authorities concerned. Such an approach would be contrary to the objective of guaranteeing the widest possible public access to documents emanating from the institutions, with the aim of giving citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers (see paragraphs 121-123, 126, 135-136, 139-140).

### Summary:

The "*Association de la presse internationale*" judgment comes within the ambit of a well-established body of case-law on public access to the documents of the institutions governed by Regulation no. 1049/2001.

In the instant case, the *Association de la Presse Internationale* (API), an association bringing together foreign journalists with the aim of helping its members keep their countries of origin informed about the European Union, had asked the Commission to be granted access to all the written submissions made by the Commission in a number of cases issued or still pending before the jurisdictions. The Commission granted access to some of the documents requested. However, the API met with the Commission's refusal in the case of the documents relating to proceedings still pending or concerning infringement of obligations.

It was to challenge the Commission's decision denying it access to some of the requested documents that the API brought an annulment action before the Court of First Instance.

As justification for its refusal to disclose these documents, the Commission firstly contended that some of them concerned cases in which the judgment on the merits had not yet been delivered. Therefore, to disclose the documents in question would, it claimed, impair its position as defendant, as well as the serenity of the debate. In that respect, it relied on Article 4.2.2 of Regulation no. 1049/2001 making an exception to the general principle of access to documents where disclosure would interfere with the protection of court proceedings. The Court recalled firstly that the Commission was required to make a concrete appraisal of the content of each document to which access was requested. This appraisal was superfluous, however, where the documents were manifestly covered by an exception to the right of access. In the instant case, the Court concluded that the Commission had not erred in law by not carrying out a concrete assessment of the content of the documents in question. Since the hearing in the cases at issue had not yet taken place at the date of the decision to withhold the documents, the Commission was plainly obliged to deny access to them.

The Commission also invoked the exception of protection of court proceedings to justify its refusal to disclose its written submissions concerning a case which had been disposed of, but in respect of which an action for damages had been brought. The Commission in fact envisaged reiterating its arguments, submitted in that case, in the still pending action for damages. The Court dismissed this pleading on the ground that the requested documents concerned closed proceedings where a public hearing had been held, so that the Commission's arguments were already in the public domain.

Lastly, the Commission invoked the exception of safeguarding the aims of court proceedings for its refusal to disclose its written submissions in the cases concerning non-fulfilment of obligations known as "Open Skies". Here the Commission claimed that, since the Member States had not yet complied with the judgments in question, a fresh referral to the Court remained conceivable. The Court dismissed this claim on the ground that investigation proceedings to substantiate the infringements had been completed and had ended in their ascertainment by the Court. Thus the documents at issue were no longer covered by the exception invoked, concerning the protection of the aims of court proceedings.

The Commission's decision was therefore partially annulled.

*Supplementary information:*

An appeal was brought: Case C-514/07 P, *Kingdom of Sweden v. Commission of the European Communities and Association de la presse internationale ASBL (API)*, case pending.

*Cross-references:*

- TPI, 08.11.2007, *Bavarian Lager v. Commission*, T-194/04, ECR p. II-4523;
- CJEC, 18.12.2007, *Sweden v. Commission*, C-64/05 P, ECR p. I-11389.

*Languages:*

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

*Identification:* ECJ-2009-3-011

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** Fourth Chamber / **d)** 11.10.2007 / **e)** C-443/06 / **f)** Erika Waltraud Ilse Hollmann v. Fazenda Pública / **g)** *European Court Reports* I-08491 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

1.4.10.7 Constitutional Justice – Procedure – Interlocutory proceedings – **Request for a preliminary ruling by the Court of Justice of the European Communities.**

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

*Keywords of the alphabetical index:*

European Community, Court of Justice, jurisdiction, limits / Community law, principles, equal treatment, nationality, discrimination.

*Headnotes:*

Although it is not for the Court to rule on the compatibility of national rules with the provisions of

Community law in proceedings brought under Article 234 EC, since the interpretation of such rules is a matter for the national courts, the Court does have jurisdiction to supply the latter with all the guidance as to the interpretation of Community law necessary to enable them to rule on the compatibility of such rules with the provisions of Community law (see paragraph 18).

Article 12 EC applies independently only to situations governed by Community law for which the Treaty lays down no specific rules of non-discrimination. The Treaty lays down in Article 56 EC, in particular, a specific rule of non-discrimination in relation to the free movement of capital (see paragraphs 28-29).

*Summary:*

The capital gains tax system in force in Portugal since 1988 has limited the basis of assessment for capital gains tax purposes applied to immovable property only for persons resident in Portugal. Mrs Hollmann, a German national resident in Germany, had inherited a property situated in Portugal. Having decided to sell it, she requested the benefit of the favourable provisions of the Portuguese fiscal legislation in force at the time. When the government refused, she lodged an appeal in the Portuguese courts.

This case, the subject of a referral for a preliminary ruling under Article 234 EC, led the Court to reiterate its case-law on the admissibility of references for preliminary rulings. The Portuguese Government and the Commission challenged the admissibility of the appeal on the grounds of the formulation of the question by the referring court. The question in fact related directly to the compatibility of a provision of Portuguese law with Community law, particularly Article 12 EC, whereas, in accordance with settled case-law, it was not for the Court to issue a ruling on this matter, under Article 234 EC.

Substantively, the question of the independent application of Article 12 to the facts of the case was raised.

The Court, having reformulated the question, concluded that the reference for a preliminary ruling was admissible. It also stated that Article 12 EC, relating to the principle of non-discrimination on grounds of nationality, was not applicable to this case, since its independent application could be envisaged only in the absence of specific provisions setting out the principle, which did not apply to the present case.

*Languages:*

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

*Identification:* ECJ-2009-3-012

**a)** European Union / **b)** Court of First Instance / **c)** Judge in Chambers / **d)** 15.11.2007 / **e)** T-215/07 R / **f)** Beniamino Donnici v. European Parliament / **g)** *European Court Reports* II-4673 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

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

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

4.9.1 Institutions – Elections and instruments of direct democracy – **Competent body for the organisation and control of voting.**

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

4.17.1.1 Institutions – European Union – Institutional structure – **European Parliament.**

*Keywords of the alphabetical index:*

Interim measure, application, suspension / Interim measure, condition, grant / European Parliament, member, credentials, limits / European Parliament, member, meaning.

*Headnotes:*

An application for suspension of operation cannot, in principle, be envisaged against a negative administrative decision, since the grant of suspension could not have the effect of changing the applicant's position.

However, a decision of the European Parliament carrying out a verification of an applicant's credentials as a Member of the European Parliament and, following that verification, declaring his mandate invalid cannot be described as a negative measure.

Granting suspension of operation of that decision would bring about a change in the applicant's legal situation, since it would have the effect of maintaining the advantageous provisional situation enjoyed by him, during which he would continue to take his seat in Parliament and on its bodies, enjoying all the rights attaching thereto (see paragraphs 33, 35-36).

Parliament has no fundamental jurisdiction to ensure compliance with Community law, either generally or, more particularly, in the context of elections. On the contrary, Parliament's power of verification is, at least *prima facie*, limited, by the introduction of a dual restriction.

First, the fact that the Parliament 'shall take note' of the results declared officially by the Member States seems to mean that the Parliament's role is merely to take note of the declaration, already made by the national authorities, of the persons elected, that is, of a pre-existing legal situation arising exclusively from a decision of those authorities, which highlights the Parliament's total lack of discretion in the matter. It therefore appears that, in this context, the Parliament is precluded from calling in question the actual regularity of the national measure concerned and from refusing to take note of it, if it considers that there is an irregularity.

Secondly, the Parliament's special power to rule on disputes arising at the time of the verification of credentials is also restricted *ratione materiae* only to disputes which may arise out of the provisions of the 1976 Act concerning the election of representatives to the European Parliament other than those arising out of the national provisions to which the Act refers (see paragraphs 71-73, 75-76).

Article 6 of the 1976 Act relates only to the Members of the Parliament, who must be able to exercise their rights and powers independently, not to elected candidates whose credentials have not yet been verified by the Parliament, in accordance with Article 12 of the 1976 Act. The Parliament's validation of the mandate of such a person, in the procedure to verify his credentials, is an essential prerequisite for Article 6 of the 1976 Act to become applicable to him. The situation of an elected candidate cannot be assimilated to that of a Member of the Parliament for the purposes of applying Article 6 (see paragraphs 77, 79, 81).

Any irregularity that might affect the official proclamation of the election results by the national authority with competence in the matter cannot in any way affect the legality of the Parliament's decision concerning the verification of the credentials of the elected candidates. Where a national measure forms

part of a Community decision-making procedure and, by virtue of the division of powers in the field in question, is binding on the Community decision-taking authority and therefore determines the terms of the Community decision to be adopted, any irregularity that might affect the national measure cannot affect the validity of the decision of the Community authority.

It is for the national courts, where appropriate after obtaining a preliminary ruling from the Court of Justice pursuant to Article 234 EC, to rule on the lawfulness of the national electoral provisions and procedures (see paragraphs 91-93).

Serious and irreparable harm, one of the criteria for establishing urgency, constitutes the first element in the comparison carried out in assessing the balance of interests. More particularly, that comparison must lead the judge hearing the application for interim measures to examine whether the possible annulment of the act in question by the Court giving judgment in the main action would make it possible to reverse the situation that would have been brought about by its immediate implementation and conversely whether suspension of the operation of that act would be such as to prevent its being fully effective in the event of the action being dismissed on the merits.

Where the specific interests involved are evenly matched, the more general interests, which argue for the grant or refusal of suspension of operation, take on a special significance.

In that regard, the Member State concerned by a decision of the European Parliament invalidating the mandate of one of its members for lack of credentials undeniably has an interest in having its electoral legislation respected by the Parliament, since, pursuant to Article 8 of the 1976 Act, electoral procedure is governed by national provisions in each Member State. It is true that the Parliament's general interest in the maintenance in force of its decisions may be weighed against that interest. However, that latter interest cannot prevail over the balance of the interests involved. Also, even though the Parliament may invoke its power to disregard the electoral results communicated by the Member State concerned where it considers those results to be contrary to the 1976 Act, the fact remains that it may exercise that power only in rare and therefore exceptional cases, since it is reasonable to assume that, as a general rule, the Member States will fulfil their obligation under Article 10 EC to adapt their electoral law to the requirements of the 1976 Act (see paragraphs 106, 109-110, 113).

### *Summary:*

In an order of 15 November 2007, the judge hearing the application for interim measures ordered the suspension of operation of a decision of the European Parliament on the verification of the credentials of a Member of the Parliament.

The facts underlying the case stemmed from the election of Italy's representatives to the European Parliament, at the time of the June 2004 elections. Mr Donnici, Mr Occhetto and Mr Di Pietro all stood as candidates in the European elections, on a list which obtained two seats. Mr Occhetto, who, in the light of the election results, would have been declared elected, immediately withdrew his candidacy. Mr Di Pietro, for his part, decided to take his seat in the European Parliament, but withdrew in 2006 to take his seat in the national parliament. Mr Occhetto then immediately said that he wished to reclaim the seat left vacant by Mr Di Pietro. In view of his previous withdrawal, this seat should have gone to Mr Donnici. As Mr Occhetto had nevertheless been declared elected by the Italian authorities, Mr Donnici applied to the Italian administrative courts for annulment of this declaration.

His application, dismissed by the court of first instance, was accepted by the Italian Council of State, which took the view that withdrawal from the election constituted an irrevocable declaration. Following this judgment, the Italian authorities declared Mr Donnici's election, and this declaration was communicated to the European Parliament, which took note thereof. Mr Occhetto then requested the European Parliament to confirm his mandate and not to validate that of Mr Donnici. The Parliament accepted his request in a decision of 22 May 2007.

It was precisely against this decision that Mr Donnici requested suspension of operation, pending a decision on the merits of the case.

Taking the view that the conditions necessary for the grant of a suspension of operation were satisfied, the judge allowed the applicant's claim.

### *Supplementary information:*

Has been the subject of an appeal on points of law: Order of the President of the Court dated 13.01.2009, *Occhetto and Parliament v. Donnici*, C-15/08 P(R) and C-512/07 P(R), not yet published in the Official Journal. The order confirms the suspension of operation of the decision of 22 May 2007.

*Languages:*

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.

*Identification:* ECJ-2009-3-013

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 11.12.2007 / **e)** C-438/05 / **f)** International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP OÜ Viking Line Eesti / **g)** Reports I-10779 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

5.1.2 Fundamental Rights – General questions – **Horizontal effects.**  
 5.3.6 Fundamental Rights – Civil and political rights – **Freedom of movement.**  
 5.3.10 Fundamental Rights – Civil and political rights – **Rights of domicile and establishment.**  
 5.4.10 Fundamental Rights – Economic, social and cultural rights – **Right to strike.**  
 5.4.11 Fundamental Rights – Economic, social and cultural rights – **Freedom of trade unions.**

*Keywords of the alphabetical index:*

Community law, principles / Right to take collective action / Trade union, action, collective.

*Headnotes:*

On a proper interpretation of Article 43 EC, collective action initiated by a trade union or a group of trade unions against a private undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, does not in principle fall outside the scope of that article.

Article 43 EC applies not only to the actions of public authorities but extends also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services. Since working conditions in the

different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, limiting application of the prohibitions laid down by that Article to acts of a public authority would risk creating inequality in its application.

Since the organisation of collective action by trade unions must be regarded as covered by the legal autonomy which those organisations, which are not public law entities, enjoy pursuant to the trade union rights accorded to them, inter alia, by national law, and since those collective actions are inextricably linked to the collective agreement which the trade unions are seeking to conclude, those collective actions fall, in principle, within the scope of Article 43 EC (see paragraphs 33-37, 55, operative part 1).

The right to take collective action, including the right to strike, is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, to which, moreover, express reference is made in Article 136 EC, and Convention no. 87 concerning Freedom of Association and Protection of the Right to Organise, adopted in 1948 by the International Labour Organisation, and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted in 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union.

Although that right, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, it is to be protected in accordance with Community law and national law and practices.

In that regard, even if the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, the exercise such rights does not fall outside the scope of the provisions of the Treaty and must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality.



It follows that the fundamental nature of the right to take collective action is not such as to render Article 43 EC inapplicable to such an action, initiated against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment (see paragraphs 43-47).

Article 43 EC is such as to confer rights on a private undertaking which may be relied on against a trade union or an association of trade unions.

The abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy. Moreover, the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down. Furthermore, the prohibition on prejudicing a fundamental freedom laid down in a provision of the Treaty that is mandatory in nature applies in particular to all agreements intended to regulate paid labour collectively (see paragraphs 57-58, 66, operative part 2).

Article 43 EC is to be interpreted to the effect that collective actions which seek to induce a private undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitute restrictions within the meaning of that article.

Such collective action has the effect of making less attractive, or even pointless, the exercise by an undertaking of its right to freedom of establishment, inasmuch as it prevents that undertaking from enjoying the same treatment in the host Member State as other economic operators established in that State. Similarly, such collective action, seeking to prevent ship-owners from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, must be considered to be at least liable to restrict an undertaking's exercise of its right of freedom of establishment.

Those restrictions may, in principle, be justified by an overriding reason of public interest, such as the

protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective (see paragraphs 72-74, 90, operative part 3).

### *Summary:*

In order to meet the challenge of direct competition by Estonian vessels, which had lower wage costs, the Finnish firm Viking, which operated ferries between Tallinn and Helsinki, wished to register in Estonia one of its ferries previously flying the Finnish flag. Opposed to this plan, a trade union representing Finnish seafarers (FSU, the Finnish Seamen's Union) threatened the firm with strike action, with the aim of forcing Viking to conclude a collective agreement providing that, when a change of flag took place, Finnish law would continue to apply. An international federation of trade unions representing transport sector workers (ITF, International Transport Federation), to which the FSU was affiliated, also issued a circular requiring its members not to negotiate with Viking, on pain of sanctions. This case was brought before the British courts, the ITF having its headquarters in London, in order to have the action of the FSU and ITF declared contrary to Article 43 EC.

It was in this context that the Court of Appeal of England and Wales put to the Court a number of preliminary questions relating to the interpretation of Article 43 EC in respect of the rights of workers and trade union organisations to take collective action.

The referring court essentially asked the Court whether this action fell outside the scope of Article 43 EC. The next question that arose was that of the horizontal direct effect of the provisions of Article 43 EC, i.e. their application in relations between private parties. The final question was that of whether the collective action of the trade union organisations concerned constituted a restriction on freedom of establishment which could be justified.

The Court first stated that such action in principle falls within the scope of Article 43 EC. It then confirmed the right to take collective action, including the right to strike, as a fundamental right which is an integral part of the general principles of Community law, while specifying that the exercise of this right must be reconciled with the requirements relating to freedom of establishment. The Court also stated that Article 43 EC produces a horizontal direct effect, meaning that it confers rights which can be raised against not only the authorities of a member State, but also certain private parties, such as, in this case, a trade union or

an association of trade unions. After noting that the collective action at issue did constitute a restriction of freedom of establishment, the Court concluded that such restrictions may in principle be justified for an overriding reason of public interest, such as the protection of workers, and left it to the national courts to determine whether, in this case, such action is proportionate and necessary in order to attain the objective pursued.

#### Cross-references:

- To be compared with the judgment of the Court (Grand Chamber) of 18.12.2007, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet e.a.*, C-341/05 Reports p. I-11767.

#### Languages:

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



#### Identification: ECJ-2009-3-014

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 11.12.2007 / **e)** C-161/06 / **f)** Skoma-Lux sro v. Celní ředitelství Olomouc / **g)** *European Court Reports* I-10841 / **h)** CODICES (English, French).

#### Keywords of the systematic thesaurus:

1.4.10.7 Constitutional Justice – Procedure – Interlocutory proceedings – **Request for a preliminary ruling by the Court of Justice of the European Communities.**  
3.15.2 General Principles – Publication of laws – **Linguistic aspects.**

#### Keywords of the alphabetical index:

European Union, accession / European Community, legislation, not translated, unenforceable.

#### Headnotes:

Article 58 of the Act concerning the conditions of accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded precludes the obligations contained in Community legislation which has not been published in the Official Journal of the European Union in the language of a new Member State, where that language is an official language of the Union, from being imposed on individuals in that State, even though those persons could have learned of that legislation by other means.

The principle of legal certainty requires that Community legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them, which may be guaranteed only by the proper publication of that legislation in the official language of those to whom it applies. In addition, it would be contrary to the principle of equal treatment to apply obligations imposed by Community legislation in the same way in the old Member States, where individuals have the opportunity to acquaint themselves with those obligations in the Official Journal of the European Union in the languages of those States, and in the new Member States, where it was impossible to learn of those obligations because of late publication. Observing fundamental principles of that kind is not contrary to the principle of effectiveness of Community law since the latter principle cannot apply to rules which are not yet enforceable against individuals. The approach which allows an act which has not been properly published to be enforceable in the name of the principle of effectiveness would be *contra legem* and result in individuals in the Member State concerned bearing the adverse effects of a failure by the Community administration to comply with its obligation to make available to those individuals, on the date of accession, the entire *acquis communautaire* in all the official languages of the Union.

Moreover, the fact that the party concerned is an international trader which must know the content of the customs requirements is not sufficient to make Community legislation which has not been properly published in the Official Journal of the European Union enforceable against an individual.

Similarly, although Community legislation is indeed available on the internet and individuals are using this means more and more frequently to acquaint themselves with it, making the legislation available by such means does not equate to a valid publication in the Official Journal of the European Union in the absence of any rules in that regard in Community law. Moreover, although various Member States have adopted electronic publication as a valid form, it is the subject of legislation or regulations which organise it in detail and set out exactly when that publication is valid. Accordingly, as Community law now stands, the Court cannot consider that form of making Community legislation available to be sufficient for it to be enforceable. The only version of a Community regulation which is authentic, as Community law now stands, is that which is published in the Official Journal of the European Union, such that an electronic version predating that publication, even if it is subsequently seen to be consistent with the published version, cannot be enforced against individuals (see paragraphs 38-42, 45-46, 48-51, operative part 1).

In holding that a Community regulation which is not published in the language of a Member State is unenforceable against individuals in that State, the Court is interpreting Community law for the purposes of Article 234 EC.

The provisions of the first sentence of Article 254.2 EC, of Articles 2 and 58 of the Act concerning the conditions of accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, and of Articles 4 and 5 of Regulation no. 1 determining the languages to be used by the European Economic Community do not affect the validity of a regulation applicable in the Member States in which it has been properly published. In addition, the fact that that regulation is not enforceable against individuals in a Member State in the language of which it has not been published has no bearing on the fact that, as part of the *acquis communautaire*, its provisions are binding on the Member State concerned as from its accession. The purpose and effect of interpreting those provisions in conjunction with one another is to delay the enforceability of the obligations which a Community regulation imposes on individuals in a Member State until those individuals can acquaint themselves with it in an official manner which is completely unambiguous (see paragraphs 57-61, operative part 2).

In the context of an order for reference concerning the interpretation of a provision of Community law, the Court may, exceptionally, in application of the general principle of legal certainty inherent in the Community legal order, decide to restrict for any person concerned the right to rely upon a provision, which it has interpreted, with a view to calling in question legal relations established in good faith. However, if the question at issue is not that of limiting the temporal effects of a judgment of the Court concerning the interpretation of a provision of Community law, but that of limiting the effects of a judgment finding a Community act not published in the language of a Member State unenforceable in that State's territory, that State is not obliged under Community law to call into question the administrative or judicial decisions taken on the basis of such rules where those decisions have become definitive under the applicable national rules.

By virtue of an express provision of the EC Treaty, namely Article 231 EC, the Court may, even though an act is unlawful and deemed never to have been adopted, decide that some of its legal consequences shall nevertheless lawfully take effect. The same requirements of legal certainty dictate that the same should apply to national decisions taken pursuant to provisions of Community law which have not become enforceable in some Member States because they were not properly published in the Official Journal of the European Union in the official language of the States concerned, with the exception of any of those decisions which had been the subject of administrative or judicial proceedings at the date of the judgment.

It would be otherwise only in exceptional circumstances where administrative measures or judicial decisions, particularly of a coercive nature compromising fundamental rights, have been taken, which, within those limits, is a matter for the competent national authorities to determine (see paragraphs 67-73).

### Summary:

In its *Skoma-Lux* judgment, the Court issued a ruling as to the consequences of the failure to publish a Community regulation properly in the Official Journal of the European Union. It also specified its case-law in respect of the limitation of the temporal effects of its judgments.

In this particular case, *Skoma-Lux*, which operates in the wine importing sector, was fined for infringing customs regulations. The Czech customs authorities accused the company of having submitted inaccurate information about the customs classification of the red

wine imported by it, thereby breaching not only the provisions of the Czech customs law in force prior to the accession of the Czech Republic to the Union, but also Regulation no. 2454/93 laying down provisions for the implementation of the Community Customs Code.

Accusing the customs authorities of having imposed a penalty on it in application of a Community regulation not applicable to it, in the absence of publication in the Czech language on the date of the offence, Skoma-Lux applied for annulment thereof to the Czech Regional Court, which decided to stay the proceedings and refer three questions to the Court for a preliminary ruling. The referring court essentially asked the Court whether failure to publish a Community regulation in one of the official languages of the Union had the effect of rendering this act null and void vis-à-vis the applicant, and consequently inapplicable in its dispute with the Czech customs authorities.

According to the Court, failure to publish a regulation properly, i.e. in the instant case non-publication in the OJEU in one of the official languages of a member State, does not affect the validity of that act, but does make it unenforceable against individuals in that member State. The argument that the act at issue had been drawn to the attention of individuals through publication in the Czech language on the Internet is inadmissible.

The Court further dismissed the Czech Government's proposal to limit the temporal effects of its judgment. It stated on this occasion that Community law does not require the national authorities to call into question administrative or judicial decisions which have become final, when these have been taken on the basis of Community provisions which have not become enforceable on the territory of a member state, in the absence of proper publication. The situation could differ in two cases: when the decisions at issue have been the subject of proceedings at the date on which the judgment is issued, or when they are of a coercive nature.

#### *Cross-references:*

- CJEC, 06.03.2007, *Meilicke e.a.*, C-292/04, ECR p. I-1835.

#### *Languages:*

Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovakian, Slovenian, Spanish, Swedish.



# European Court of Human Rights

## Important decisions

*Identification:* ECH-2009-3-005

a) Council of Europe / b) European Court of Human Rights / c) Chamber / d) 27.01.2009 / e) 67021/01 / f) Tatar v. Romania / g) *Reports of Judgments and Decisions of the Court* / h) CODICES (French).

*Keywords of the systematic thesaurus:*

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**  
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**  
 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**  
 5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health.**

*Keywords of the alphabetical index:*

Precaution, principle / Pollution, control / Environment, risk, information / Environment, impact assessment / Measure, protective / Health, risk.

*Headnotes:*

The existence of a substantial, serious risk to welfare imposes on the State an obligation to adopt reasonable and adequate measures to protect home life and the right to a healthy environment.

The State has positive obligations to carry out adequate environmental impact assessments, to put a stop to a potentially dangerous activities after an accident and to disclose adequate information.

Precautionary principle: even in the absence of scientific or technical certainty, States must not delay in adopting effective and proportionate measures to avert the risk of permanent damage to the environment.

*Summary:*

I. At the material time the applicants lived in the town of Baia Mare, in a residential area near an extraction facility and Săsar Pond that formed part of the mining concession of the Aurul company. The company used a process in which gold and silver was extracted from low-grade ore by spraying it with sodium cyanide. An environmental impact assessment was carried out in 1993 in order to obtain an environmental compliance certificate. Baia Mare was described as an industrial town that had already suffered pollution as a result of intensive industrial activity, particularly in the mining industry. In their analysis of the effects of sodium cyanide on health, the specialists from the institute that carried out the assessment said that there was no risk of poisoning provided the relevant norms were complied with and there were no accidents, but expressed uncertainty about the impact of the process on the environment. The specialists' findings were based on the aforementioned economic and social advantages and on the fact that the activity could not influence "to any significant extent the current characteristics of the region". In 1998 the Ministry of Labour and the Ministry of Health authorised Aurul to use sodium cyanide and other chemical substances in the extraction process. In 1999 the municipality of Baia Mare authorised the company to carry on its activity subject to obtaining an environmental compliance certificate. The certificate was issued in December 1999 and Aurul then officially started up its activity. Copies of two reports of November and December 1999 on the public debate on the question of compliance were produced to the Court. At the first debate, questions were asked about the health and environmental dangers of the process, but the organisers do not appear to have given any answers. The second report indicated that the representatives of the environmental protection authority had assured participants that there was no evidence that any particles remained in suspension in the atmosphere. No environmental impact assessment was presented during the debates.

On 30 January 2000 a large quantity of polluted water containing sodium cyanide and other substances was leaked into various rivers and travelled 800 kilometres in 14 days crossing several borders. Various reports were drawn up including one by the Task Force Baia Mare in December 2000 at the request of the European Union Environment Commissioner. The accident had a significant impact on the environment and the socio-economic situation.

In 2000, following the accident, the first applicant lodged a series of complaints with various administrative authorities concerning the risks to

which he and his family were being exposed by Aurul's use of sodium cyanide in the extraction process. He received a number of replies including one from the Ministry of the Environment informing him that the company's activities did not constitute a health hazard and that the technology was also used in other countries. The first applicant also lodged criminal complaints. In 2001 the county court prosecutor ruled that there was no case to answer in respect of the accident of 30 January 2000 as no offence had been committed under the Romanian Criminal Code. In 2002 the Supreme Court of Justice declined jurisdiction to hear the case and dismissed the complaints. In two orders of 2002 the public prosecutor at the Supreme Court of Justice transferred the first applicant's complaints to the public prosecutor at the court of appeal for investigation. The first applicant lodged a fresh complaint in 2005 concerning the danger the extraction process constituted to the health and safety of the population, but no order was made. Meanwhile, in 2002 the county court prosecutor started an investigation into the accident of his own motion. The public prosecutor at the Supreme Court of Justice overturned the order of 2001 discontinuing the proceedings and ordered the public prosecutor at the court of appeal to re-examine the case. In 2002 the public prosecutor at the court of appeal found that Aurul's managing director had no case to answer as the accident had been caused by force majeure owing to adverse weather conditions. In 2003 the chief public prosecutor at the Supreme Court of Justice overturned that order and invited the public prosecutor to resume the proceedings.

A second environmental impact assessment was carried out in 2001 at Aurul's request by the Cluj Environmental and Health Centre, the Bucharest Institute for Public Health, the Bucharest Institute of Research and Development for Industrial Ecology and the Cluj-Napoca Medicine and Environmental Office.

Meanwhile, in December 2001, the National Agency for Mineral Resources drew up a rider to the initial licence changing the name of the licence holder to S.C. Transgold S.A. Three compliance certificates were issued to that company by the Ministry of the Environment.

In 1996 the second applicant developed the first symptoms of asthma. The applicants said that his condition deteriorated in 2001 on account of the pollution caused by Aurul.

In their application to the Court, the applicants complained that the State had failed to protect their right to respect for their private and family life.

II. The Court examined the complaint under Article 8 ECHR.

The Court considered that the findings of the official reports and environmental assessments indicated that the pollution caused by the plant's activity may have resulted in a deterioration in the local population's quality of life and, in particular, had affected the applicants' welfare and deprived them of the enjoyment of their home, so affecting their private and family life.

The existence of a substantial, serious risk to the applicants' health and welfare imposed on the State an obligation to adopt reasonable and adequate measures to protect their right to respect for their private life and home and, more generally, their right to the enjoyment of a healthy and safe environment. The authorities had been under that obligation both before the commencement of the plant's operations and after the accident of January 2000.

Under Romanian law, the right to a healthy environment was protected by the Constitution. Further, States were advised by the precautionary principle not to delay in adopting effective and proportionate measures to avert the risk of serious irreversible damage to the environment in the absence of scientific or technical certainty. There was, however, nothing in the case file to indicate that the Romanian authorities had debated the risks which the industrial activity entailed for the environment and for the health of the local population. Further, the risk to the environment and to the welfare of the local population had, in the applicants' case, been foreseeable. In addition to the domestic legislative machinery that had been set up by the law on the protection of the environment, specific international regulations existed which the Romanian authorities could have applied. They had, however, failed to carry out a satisfactory prior assessment of the possible risks entailed by the activity or to take adequate measures to protect the applicants' right to respect for their private life and home and, more generally, to the enjoyment of a healthy and safe environment.

As regards the State's positive obligations under Article 8 ECHR, the public's right to information was of primary importance. In that connection, there had been a failure to comply with the domestic regulations on public debates as the participants in the debates, which had taken place in November and December 1999, were not given access to the findings of the study that had served as the basis for the issue of the compliance certificates to the company or to any other official information on the subject.

As to the events after the accident in January 2000 the material before the Court indicated that the authorities had not put a stop to the industrial activity concerned and that the same processes had remained in use. The domestic authorities' positive obligation to ensure effective respect for private and family life had also continued, and indeed increased, after the accident. As a result of the health and environmental effects of the environmental accident as noted in the international assessments and reports, the applicants along with other the inhabitants of Baia Mare must have been in a state of anxiety and uncertainty. This had been compounded by the inertia of the national authorities, who were under a duty to provide proper detailed information on the past, present and future effects of the accident on their health and the environment, and on the preventive measures and support that would be available to populations at risk of like incidents in the future. The situation had been made worse by the fear induced by the continuation of the activity and risk of a possible recurrence of the accident in the future.

The first applicant had set a number of administrative and criminal procedures in motion without success in an attempt to establish the potential risks to which he and his family had been exposed by the accident of January 2000 and to bring those responsible to account. The material before the Court indicated that, in that same context, the domestic authorities had failed to comply with their duty to provide the requisite information to the local population and, in particular, the applicants. The applicants had been unable to establish what measures if any had been taken to avoid similar accidents or what action they should take in the event of further accident. Consequently, the respondent State had not discharged its obligation to safeguard the applicants' right to respect for their private and family life within the meaning of Article 8 ECHR. There had therefore been a violation of Article 8 ECHR.

#### Cross-references:

- *Airey v. Ireland*, Judgment of 09.10.1979, Series A, no. 32;
- *Powell and Rayner v. the United Kingdom*, Judgment of 21.02.1990, Series A, no. 172;
- *A. v. France*, Judgment of 23.11.1993, Series A, no. 277-B;
- *De Moor v. Belgium*, Judgment of 23.06.1994, Series A, no. 292-A;
- *López Ostra v. Spain*, Judgment of 09.12.1994, Series A, no. 303-C;

- *Guerra and others v. Italy*, Judgment of 19.02.1998, *Reports of Judgments and decisions* 1998-I;
- *McGinley and Egan v. the United Kingdom*, Judgment of 09.06.1998, *Reports* 1998-III;
- *Hatton and others v. the United Kingdom* [GC], no. 36022/97, ECHR 2003-VIII;
- *Taşkin and others v. Turkey*, no. 46117/99, ECHR 2004-X;
- *Moreno Gómez v. Spain*, no. 4143/02, ECHR 2004-X;
- *Oneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII;
- *Fadeyeva v. Russia*, no. 55723/00, ECHR 2005-IV;
- *Ledyayeva, Dobrokhotova, Zolotareva and Romashina v. Russia*, nos. 53157/99, 53247/99, 53695/00 and 56850/00, 26.10.2006;
- *Giacomelli v. Italy*, Judgment of 02.11.2006, ECHR 2006-XII;
- *Surugiu v. Romania*, no. 48995/99, 20.04.2004;
- *Budayeva v. Russia*, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20.03.2008.

#### Languages:

English, French.





## **Systematic thesaurus (V20) \***

\* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

### **1 Constitutional Justice<sup>1</sup>**

#### **1.1 Constitutional jurisdiction<sup>2</sup>**

1.1.1	Statute and organisation	
1.1.1.1	Sources	
1.1.1.1.1	Constitution	
1.1.1.1.2	Institutional Acts	
1.1.1.1.3	Other legislation	
1.1.1.1.4	Rule issued by the executive	
1.1.1.1.5	Rule adopted by the Court <sup>3</sup>	
1.1.1.2	Independence	
1.1.1.2.1	Statutory independence	
1.1.1.2.2	Administrative independence	
1.1.1.2.3	Financial independence	
1.1.2	Composition, recruitment and structure	
1.1.2.1	Necessary qualifications <sup>4</sup> .....	264
1.1.2.2	Number of members	
1.1.2.3	Appointing authority .....	414
1.1.2.4	Appointment of members <sup>5</sup>	
1.1.2.5	Appointment of the President <sup>6</sup>	
1.1.2.6	Functions of the President / Vice-President	
1.1.2.7	Subdivision into chambers or sections	
1.1.2.8	Relative position of members <sup>7</sup>	
1.1.2.9	Persons responsible for preparing cases for hearing <sup>8</sup>	
1.1.2.10	Staff <sup>9</sup>	
1.1.2.10.1	Functions of the Secretary General / Registrar	
1.1.2.10.2	Legal Advisers	
1.1.3	Status of the members of the court	
1.1.3.1	Term of office of Members	
1.1.3.2	Term of office of the President	
1.1.3.3	Privileges and immunities	
1.1.3.4	Professional incompatibilities	
1.1.3.5	Disciplinary measures	
1.1.3.6	Remuneration	
1.1.3.7	Non-disciplinary suspension of functions	
1.1.3.8	End of office	
1.1.3.9	Members having a particular status <sup>10</sup>	
1.1.3.10	Status of staff <sup>11</sup>	

<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.

<sup>11</sup> (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

1.1.4	Relations with other institutions	
1.1.4.1	Head of State <sup>12</sup>	
1.1.4.2	Legislative bodies	
1.1.4.3	Executive bodies .....	<b>602</b>
1.1.4.4	Courts .....	<b>611</b>
<b>1.2</b>	<b>Types of claim</b>	
1.2.1	Claim by a public body	
1.2.1.1	Head of State	
1.2.1.2	Legislative bodies .....	232
1.2.1.3	Executive bodies	
1.2.1.4	Organs of federated or regional authorities	
1.2.1.5	Organs of sectoral decentralisation	
1.2.1.6	Local self-government body	
1.2.1.7	Public Prosecutor or Attorney-General .....	32
1.2.1.8	Ombudsman	
1.2.1.9	Member states of the European Union	
1.2.1.10	Institutions of the European Union	
1.2.1.11	Religious authorities	
1.2.2	Claim by a private body or individual .....	276
1.2.2.1	Natural person .....	106
1.2.2.2	Non-profit-making corporate body .....	250, 378
1.2.2.3	Profit-making corporate body	
1.2.2.4	Political parties	
1.2.2.5	Trade unions	
1.2.3	Referral by a court <sup>13</sup> .....	143, 283, 390, 429
1.2.4	Initiation ex officio by the body of constitutional jurisdiction .....	261
1.2.5	Obligatory review <sup>14</sup>	
<b>1.3</b>	<b>Jurisdiction</b> .....	<b>326</b>
1.3.1	Scope of review .....	118, 276, 339, 429
1.3.1.1	Extension <sup>15</sup> .....	283
1.3.2	Type of review	
1.3.2.1	Preliminary / <i>ex post facto</i> review	
1.3.2.2	Abstract / concrete review .....	32, 53
1.3.3	Advisory powers .....	<b>559</b>
1.3.4	Types of litigation	
1.3.4.1	Litigation in respect of fundamental rights and freedoms .....	32, <b>602</b>
1.3.4.2	Distribution of powers between State authorities <sup>16</sup> .....	<b>628</b>
1.3.4.3	Distribution of powers between central government and federal or regional entities <sup>17</sup>	
1.3.4.4	Powers of local authorities <sup>18</sup>	
1.3.4.5	Electoral disputes <sup>19</sup> .....	<b>642</b>
1.3.4.6	Litigation in respect of referendums and other instruments of direct democracy <sup>20</sup> .....	326
	1.3.4.6.1 Admissibility	
	1.3.4.6.2 Other litigation	
1.3.4.7	Restrictive proceedings	
	1.3.4.7.1 Banning of political parties	
	1.3.4.7.2 Withdrawal of civil rights	
	1.3.4.7.3 Removal from parliamentary office	
	1.3.4.7.4 Impeachment	

<sup>12</sup> Including questions on the interim exercise of the functions of the Head of State.

<sup>13</sup> Referrals of preliminary questions in particular.

<sup>14</sup> Enactment required by law to be reviewed by the Court.

<sup>15</sup> Review *ultra petita*.

<sup>16</sup> Horizontal distribution of powers.

<sup>17</sup> Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

<sup>18</sup> Decentralised authorities (municipalities, provinces, etc.).

<sup>19</sup> For questions other than jurisdiction, see 4.9.

<sup>20</sup> Including other consultations. For questions other than jurisdiction, see 4.9.

1.3.4.8	Litigation in respect of jurisdictional conflict	
1.3.4.9	Litigation in respect of the formal validity of enactments <sup>21</sup>	
1.3.4.10	Litigation in respect of the constitutionality of enactments	
1.3.4.10.1	Limits of the legislative competence	
1.3.4.11	Litigation in respect of constitutional revision	
1.3.4.12	Conflict of laws <sup>22</sup>	
1.3.4.13	Universally binding interpretation of laws	
1.3.4.14	Distribution of powers between Community and member states	
1.3.4.15	Distribution of powers between institutions of the Community	
1.3.5	The subject of review	
1.3.5.1	International treaties .....	23, 342, <b>499</b>
1.3.5.2	Community law	
1.3.5.2.1	Primary legislation .....	<b>499</b>
1.3.5.2.2	Secondary legislation	
1.3.5.3	Constitution <sup>23</sup> .....	249, <b>552</b>
1.3.5.4	Quasi-constitutional legislation <sup>24</sup> .....	<b>496</b>
1.3.5.5	Laws and other rules having the force of law.....	32, 390, <b>523</b>
1.3.5.5.1	Laws and other rules in force before the entry into force of the Constitution.....	28
1.3.5.6	Decrees of the Head of State	
1.3.5.7	Quasi-legislative regulations	
1.3.5.8	Rules issued by federal or regional entities .....	<b>552</b>
1.3.5.9	Parliamentary rules	
1.3.5.10	Rules issued by the executive	
1.3.5.11	Acts issued by decentralised bodies	
1.3.5.11.1	Territorial decentralisation <sup>25</sup>	
1.3.5.11.2	Sectoral decentralisation <sup>26</sup>	
1.3.5.12	Court decisions .....	49, <b>544</b>
1.3.5.13	Administrative acts	
1.3.5.14	Government acts <sup>27</sup>	
1.3.5.15	Failure to act or to pass legislation <sup>28</sup> .....	59, <b>605</b>
1.4	<b>Procedure</b> .....	<b>356</b>
1.4.1	General characteristics <sup>29</sup>	
1.4.2	Summary procedure.....	23, 141
1.4.3	Time-limits for instituting proceedings	
1.4.3.1	Ordinary time-limit	
1.4.3.2	Special time-limits	
1.4.3.3	Leave to appeal out of time	
1.4.4	Exhaustion of remedies.....	<b>511</b>
1.4.5	Originating document	
1.4.5.1	Decision to act <sup>30</sup>	
1.4.5.2	Signature	
1.4.5.3	Formal requirements	
1.4.5.4	Annexes	
1.4.5.5	Service	

<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.

<sup>29</sup> Including language issues relating to procedure, deliberations, decisions, etc.

<sup>30</sup> For the withdrawal of proceedings, see also 1.4.10.4.

1.4.6	Grounds	
	1.4.6.1	Time-limits
	1.4.6.2	Form
	1.4.6.3	<i>Ex-officio</i> grounds
1.4.7	Documents lodged by the parties <sup>31</sup>	
	1.4.7.1	Time-limits
	1.4.7.2	Decision to lodge the document
	1.4.7.3	Signature
	1.4.7.4	Formal requirements
	1.4.7.5	Annexes
	1.4.7.6	Service
1.4.8	Preparation of the case for trial	
	1.4.8.1	Registration
	1.4.8.2	Notifications and publication .....105
	1.4.8.3	Time-limits
	1.4.8.4	Preliminary proceedings
	1.4.8.5	Opinions
	1.4.8.6	Reports
	1.4.8.7	Evidence .....90
		1.4.8.7.1 Inquiries into the facts by the Court
	1.4.8.8	Decision that preparation is complete
1.4.9	Parties .....517	
	1.4.9.1	<i>Locus standi</i> <sup>32</sup>
	1.4.9.2	Interest .....276
	1.4.9.3	Representation
		1.4.9.3.1 The Bar
		1.4.9.3.2 Legal representation other than the Bar
		1.4.9.3.3 Representation by persons other than lawyers or jurists
	1.4.9.4	Persons or entities authorised to intervene in proceedings
1.4.10	Interlocutory proceedings	
	1.4.10.1	Intervention
	1.4.10.2	Plea of forgery
	1.4.10.3	Resumption of proceedings after interruption
	1.4.10.4	Discontinuance of proceedings <sup>33</sup>
	1.4.10.5	Joinder of similar cases
	1.4.10.6	Challenging of a judge
		1.4.10.6.1 Automatic disqualification .....481
		1.4.10.6.2 Challenge at the instance of a party .....105, 481
	1.4.10.7	Request for a preliminary ruling by the Court of Justice of the European Communities .....242, 429, 641, 646
1.4.11	Hearing	
	1.4.11.1	Composition of the bench .....105
	1.4.11.2	Procedure
	1.4.11.3	In public / in camera
	1.4.11.4	Report
	1.4.11.5	Opinion
	1.4.11.6	Address by the parties
1.4.12	Special procedures	
1.4.13	Re-opening of hearing	
1.4.14	Costs <sup>34</sup>	
	1.4.14.1	Waiver of court fees
	1.4.14.2	Legal aid or assistance
	1.4.14.3	Party costs .....378

<sup>31</sup> Pleadings, final submissions, notes, etc.

<sup>32</sup> May be used in combination with Chapter 1.2 Types of claim.

<sup>33</sup> For the withdrawal of the originating document, see also 1.4.5.

<sup>34</sup> Comprises court fees, postage costs, advance of expenses and lawyers' fees.

1.5	<b>Decisions</b>	
1.5.1	Deliberation	
1.5.1.1	Composition of the bench	
1.5.1.2	Chair	
1.5.1.3	Procedure	
1.5.1.3.1	Quorum	
1.5.1.3.2	Vote	
1.5.2	Reasoning	
1.5.3	Form	
1.5.4	Types	
1.5.4.1	Procedural decisions	
1.5.4.2	Opinion	
1.5.4.3	Finding of constitutionality or unconstitutionality <sup>35</sup>	
1.5.4.4	Annulment	
1.5.4.4.1	Consequential annulment	
1.5.4.5	Suspension	
1.5.4.6	Modification	
1.5.4.7	Interim measures	
1.5.5	Individual opinions of members	
1.5.5.1	Concurring opinions	
1.5.5.2	Dissenting opinions	
1.5.6	Delivery and publication	
1.5.6.1	Delivery	
1.5.6.2	Time limit	
1.5.6.3	Publication	
1.5.6.3.1	Publication in the official journal/gazette	
1.5.6.3.2	Publication in an official collection	
1.5.6.3.3	Private publication	
1.5.6.4	Press	
1.6	<b>Effects</b>	<b>539</b>
1.6.1	Scope	184
1.6.2	Determination of effects by the court	559
1.6.3	Effect erga omnes	262, 262
1.6.3.1	<i>Stare decisis</i>	181, 611
1.6.4	Effect inter partes	
1.6.5	Temporal effect	
1.6.5.1	Entry into force of decision	
1.6.5.2	Retrospective effect ( <i>ex tunc</i> )	
1.6.5.3	Limitation on retrospective effect	
1.6.5.4	<i>Ex nunc</i> effect	
1.6.5.5	Postponement of temporal effect	
1.6.6	Execution	539
1.6.6.1	Body responsible for supervising execution	605
1.6.6.2	Penalty payment	
1.6.7	Influence on State organs	602, 611
1.6.8	Influence on everyday life	
1.6.9	Consequences for other cases	
1.6.9.1	Ongoing cases	
1.6.9.2	Decided cases	
2	<b>Sources</b>	
2.1	<b>Categories</b> <sup>36</sup>	
2.1.1	Written rules	
2.1.1.1	National rules	475

<sup>35</sup> For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

<sup>36</sup> Only for issues concerning applicability and not simple application.

	2.1.1.1.1	Constitution.....	32
	2.1.1.1.2	Quasi-constitutional enactments <sup>37</sup> .....	48
2.1.1.2		National rules from other countries	
2.1.1.3		Community law .....	18, <b>615</b>
2.1.1.4		International instruments.....	59
	2.1.1.4.1	United Nations Charter of 1945	
	2.1.1.4.2	Universal Declaration of Human Rights of 1948	
	2.1.1.4.3	Geneva Conventions of 1949 .....	431
	2.1.1.4.4	European Convention on Human Rights of 1950 <sup>38</sup> .....	8, 18, 22, 26, 119 324, 364, <b>471, 481, 482, 539</b>
	2.1.1.4.5	Geneva Convention on the Status of Refugees of 1951	
	2.1.1.4.6	European Social Charter of 1961	
	2.1.1.4.7	International Convention on the Elimination of all Forms of Racial Discrimination of 1965.....	18
	2.1.1.4.8	International Covenant on Civil and Political Rights of 1966	
	2.1.1.4.9	International Covenant on Economic, Social and Cultural Rights of 1966 .....	166, <b>539, 618</b>
	2.1.1.4.10	Vienna Convention on the Law of Treaties of 1969.....	190
	2.1.1.4.11	American Convention on Human Rights of 1969	
	2.1.1.4.12	Convention on the Elimination of all Forms of Discrimination against Women of 1979	
	2.1.1.4.13	African Charter on Human and Peoples' Rights of 1981	
	2.1.1.4.14	European Charter of Local Self-Government of 1985	
	2.1.1.4.15	Convention on the Rights of the Child of 1989 .....	151, 166, <b>482</b>
	2.1.1.4.16	Framework Convention for the Protection of National Minorities of 1995 .....	44
	2.1.1.4.17	Statute of the International Criminal Court of 1998	
	2.1.1.4.18	Charter of Fundamental Rights of the European Union of 2000 .....	23, <b>538</b>
	2.1.1.4.19	International conventions regulating diplomatic and consular relations	
2.1.2		Unwritten rules	
	2.1.2.1	Constitutional custom	
	2.1.2.2	General principles of law.....	29, 190
	2.1.2.3	Natural law	
2.1.3		Case-law	
	2.1.3.1	Domestic case-law	
	2.1.3.2	International case-law	
	2.1.3.2.1	European Court of Human Rights .....	119, 177, 178, 234, 243, 324 364, <b>471, 481, 482</b>
	2.1.3.2.2	Court of Justice of the European Communities	
	2.1.3.2.3	Other international bodies	
	2.1.3.3	Foreign case-law	
2.2		<b>Hierarchy</b>	
	2.2.1	Hierarchy as between national and non-national sources	
	2.2.1.1	Treaties and constitutions	
	2.2.1.2	Treaties and legislative acts.....	5, <b>487</b>
	2.2.1.3	Treaties and other domestic legal instruments	
	2.2.1.4	European Convention on Human Rights and constitutions	
	2.2.1.5	European Convention on Human Rights and non-constitutional domestic legal instruments .....	324
	2.2.1.6	Community law and domestic law	
	2.2.1.6.1	Primary Community legislation and constitutions .....	<b>499</b>
	2.2.1.6.2	Primary Community legislation and domestic non-constitutional legal instruments	
	2.2.1.6.3	Secondary Community legislation and constitutions	

<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.

2.2.1.6.4	Secondary Community legislation and domestic non-constitutional instruments .....	636
2.2.2	Hierarchy as between national sources .....	111, 253
2.2.2.1	Hierarchy emerging from the Constitution	
2.2.2.1.1	Hierarchy attributed to rights and freedoms .....	564
2.2.2.2	The Constitution and other sources of domestic law .....	121, 552
2.2.3	Hierarchy between sources of Community law	
2.3	<b>Techniques of review</b> .....	291
2.3.1	Concept of manifest error in assessing evidence or exercising discretion	
2.3.2	Concept of constitutionality dependent on a specified interpretation <sup>39</sup> .....	18, 65, 261, 262
	.....	262, 376
2.3.3	Intention of the author of the enactment under review .....	588
2.3.4	Interpretation by analogy .....	192, 196
2.3.5	Logical interpretation	
2.3.6	Historical interpretation .....	32, 54, 588
2.3.7	Literal interpretation .....	54, 376, 498
2.3.8	Systematic interpretation .....	34, 54, 376, 385, 538
2.3.9	Teleological interpretation .....	376, 498
3	<b><u>General Principles</u></b>	
3.1	<b>Sovereignty</b> .....	30, 145, 158, 311, 326, 499, 559
3.2	<b>Republic/Monarchy</b>	
3.3	<b>Democracy</b> .....	23, 97, 140, 147, 154, 157, 484, 493, 602, 617
3.3.1	Representative democracy .....	54, 285, 499
3.3.2	Direct democracy .....	145, 326
3.3.3	Pluralist democracy <sup>40</sup>	
3.4	<b>Separation of powers</b> .....	6, 97, 111, 118, 121, 123, 143, 161, 249, 276, 283, 331
	.....	90, 404, 410, 466, 539, 549, 554, 604
3.5	<b>Social State</b> <sup>41</sup> .....	14, 156, 292, 304, 493
3.6	<b>Structure of the State</b> <sup>42</sup> .....	564, 617
3.6.1	Unitary State	
3.6.2	Regional State	
3.6.3	Federal State .....	249, 552
3.7	<b>Relations between the State and bodies of a religious or ideological nature</b> <sup>43</sup> .....	79, 81, 158, 301
3.8	<b>Territorial principles</b>	
3.8.1	Indivisibility of the territory .....	156
3.9	<b>Rule of law</b> .....	9, 36, 41, 49, 51, 110, 111, 123, 273, 385, 398, 496, 509, 523, 543, 591
3.10	<b>Certainty of the law</b> <sup>44</sup> .....	18, 41, 92, 123, 157, 190, 262, 273, 280, 316, 341, 345, 390, 398
	.....	476, 493, 498, 514, 523, 539, 542, 556, 591, 636

<sup>39</sup> Presumption of constitutionality, double construction rule.

<sup>40</sup> Including the principle of a multi-party system.

<sup>41</sup> Includes the principle of social justice.

<sup>42</sup> See also 4.8.

<sup>43</sup> Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

<sup>44</sup> Including maintaining confidence and legitimate expectations.

3.11	<b>Vested and/or acquired rights</b> .....	15, 59, 154, 345, <b>535, 538, 548</b>
3.12	<b>Clarity and precision of legal provisions</b> .....	13, 14, 17, 18, 35, 56, 65, 134, 135, 154, 291, 376 ..... 385, 388, 394, <b>493, 514, 538, 548, 591</b>
3.13	<b>Legality</b> <sup>45</sup> .....	26, 29, 40, 53, 119, 152, 287, 390, 394, 429, <b>531, 538</b>
3.14	<b>Nullum crimen, nulla poena sine lege</b> <sup>46</sup> .....	17, 18, 28, 92, 154, 157, 270, 324, 429, <b>556</b>
3.15	<b>Publication of laws</b> .....	280, 335, 414, 416, <b>618</b>
	3.15.1 Ignorance of the law is no excuse .....	90
	3.15.2 Linguistic aspects .....	<b>648</b>
3.16	<b>Proportionality</b> .....	22, 29, 41, 51, 56, 57, 69, 106, 110, 151, 152, 160, 201, 246, 268, 270 ..... 273, 303, 339, 369, 372, 394, <b>478, 497, 531, 539, 564, 588</b>
3.17	<b>Weighing of interests</b> .....	18, 74, 96, 102, 106, 148, 152, 183, 257, 297, 322, 387 ..... 393, <b>528, 529, 531, 538, 539, 596, 602</b>
3.18	<b>General interest</b> <sup>47</sup> .....	51, 53, 57, 83, 106, 107, 154, 259, 273, 297, 319, 387, 394, 396, <b>539, 547</b>
3.19	<b>Margin of appreciation</b> .....	22, 57, 68, 106, 154, 166, 201, <b>539, 588, 618</b>
3.20	<b>Reasonableness</b> .....	22, 68, 96, 102, 106, 376, <b>602</b>
3.21	<b>Equality</b> <sup>48</sup> .....	23, 94, 285, 335, 429, <b>539</b>
3.22	<b>Prohibition of arbitrariness</b> .....	81, 135, 330, 339, 379, 390, <b>469, 496, 606</b>
3.23	<b>Equity</b>	
3.24	<b>Loyalty to the State</b> <sup>49</sup>	
3.25	<b>Market economy</b> <sup>50</sup> .....	107, 111, 121, 396, 398
3.26	<b>Principles of Community law</b> .....	197, <b>634</b>
	3.26.1 Fundamental principles of the Common Market .....	242
	3.26.2 Direct effect <sup>51</sup> .....	427, 429, <b>636</b>
	3.26.3 Genuine co-operation between the institutions and the member states .....	427, <b>499</b>
4	<b><u>Institutions</u></b>	
4.1	<b>Constituent assembly or equivalent body</b> <sup>52</sup> .....	276
	4.1.1 Procedure	
	4.1.2 Limitations on powers	
4.2	<b>State Symbols</b>	
	4.2.1 Flag	
	4.2.2 National holiday	
	4.2.3 National anthem	
	4.2.4 National emblem	

<sup>45</sup> Principle according to which sub-statutory acts must be based on and in conformity with the law.

<sup>46</sup> Prohibition of punishment without proper legal base.

<sup>47</sup> Including compelling public interest.

<sup>48</sup> Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

<sup>49</sup> Including questions of treason/high crimes.

<sup>50</sup> Including prohibition on monopolies.

<sup>51</sup> For 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.



4.2.5	Motto	
4.2.6	Capital city	
4.3	<b>Languages</b>	
4.3.1	Official language(s)	
4.3.2	National language(s)	
4.3.3	Regional language(s)	
4.3.4	Minority language(s).....	<b>491</b>
4.4	<b>Head of State</b>	
4.4.1	Vice-President / Regent	
4.4.2	Temporary replacement.....	<b>558, 559</b>
4.4.3	Powers.....	<b>628</b>
4.4.3.1	Relations with legislative bodies <sup>53</sup> .....	172, 174, <b>548</b>
4.4.3.2	Relations with the executive powers <sup>54</sup> .....	164, 414, <b>598</b>
4.4.3.3	Relations with judicial bodies <sup>55</sup> .....	331, <b>598</b>
4.4.3.4	Promulgation of laws.....	416
4.4.3.5	International relations.....	164, <b>550</b>
4.4.3.6	Powers with respect to the armed forces.....	170
4.4.3.7	Mediating powers	
4.4.4	Appointment	
4.4.4.1	Necessary qualifications	
4.4.4.2	Incompatibilities	
4.4.4.3	Direct/indirect election.....	402
4.4.4.4	Hereditary succession	
4.4.5	Term of office	
4.4.5.1	Commencement of office.....	<b>558</b>
4.4.5.2	Duration of office	
4.4.5.3	Incapacity	
4.4.5.4	End of office.....	<b>559</b>
4.4.5.5	Limit on number of successive terms	
4.4.6	Status	
4.4.6.1	Liability	
4.4.6.1.1	Legal liability	
4.4.6.1.1.1	Immunity	
4.4.6.1.1.2	Civil liability	
4.4.6.1.1.3	Criminal liability	
4.4.6.1.2	Political responsibility	
4.5	<b>Legislative bodies<sup>56</sup></b>	
4.5.1	Structure <sup>57</sup>	
4.5.2	Powers <sup>58</sup> .....	166, 172, 251, 264, 276, 404, <b>515, 554</b>
4.5.2.1	Competences with respect to international agreements.....	<b>499, 626</b>
4.5.2.2	Powers of enquiry <sup>59</sup> .....	308, 313
4.5.2.3	Delegation to another legislative body <sup>60</sup> .....	400, <b>539</b>
4.5.2.4	Negative incompetence <sup>61</sup>	
4.5.3	Composition	
4.5.3.1	Election of members.....	6, <b>489, 496, 642</b>
4.5.3.2	Appointment of members	
4.5.3.3	Term of office of the legislative body	

<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.

<sup>61</sup> Obligation on the legislative body to use the full scope of its powers.

	4.5.3.3.1	Duration .....	<b>496</b>
	4.5.3.4	Term of office of members	
	4.5.3.4.1	Characteristics <sup>62</sup>	
	4.5.3.4.2	Duration	
	4.5.3.4.3	End .....	232
4.5.4	Organisation <sup>63</sup>		
	4.5.4.1	Rules of procedure	
	4.5.4.2	President/Speaker	
	4.5.4.3	Sessions <sup>64</sup>	
	4.5.4.4	Committees <sup>65</sup>	
4.5.5	Finances <sup>66</sup>		
4.5.6	Law-making procedure <sup>67</sup> .....	145, 414, 416, <b>523</b>	
	4.5.6.1	Right to initiate legislation .....	163, 251
	4.5.6.2	Quorum .....	270
	4.5.6.3	Majority required .....	16, 291
	4.5.6.4	Right of amendment.....	54
	4.5.6.5	Relations between houses	
4.5.7	Relations with the executive bodies .....	6, <b>515</b>	
	4.5.7.1	Questions to the government.....	308, 313
	4.5.7.2	Questions of confidence	
	4.5.7.3	Motion of censure	
4.5.8	Relations with judicial bodies .....	331, 393, <b>549</b>	
4.5.9	Liability .....	250	
4.5.10	Political parties .....	5	
	4.5.10.1	Creation	
	4.5.10.2	Financing .....	160, <b>484</b>
	4.5.10.3	Role	
	4.5.10.4	Prohibition	
4.5.11	Status of members of legislative bodies <sup>68</sup> .....	6, 54, 250, 331	
4.6	<b>Executive bodies<sup>69</sup></b>		
	4.6.1	Hierarchy	
	4.6.2	Powers .....	92, 97, 111, 410, <b>623</b>
	4.6.3	Application of laws	
	4.6.3.1	Autonomous rule-making powers <sup>70</sup> .....	<b>588</b>
	4.6.3.2	Delegated rule-making powers .....	40, 121, 287, 345, 400, <b>564</b>
	4.6.4	Composition	
	4.6.4.1	Appointment of members .....	174, 404
	4.6.4.2	Election of members	
	4.6.4.3	End of office of members .....	92
	4.6.4.4	Status of members of executive bodies	
	4.6.5	Organisation.....	404
	4.6.6	Relations with judicial bodies .....	283
	4.6.7	Administrative decentralisation <sup>71</sup> .....	<b>465</b>
	4.6.8	Sectoral decentralisation <sup>72</sup> .....	398
	4.6.8.1	Universities .....	79, <b>544</b>

<sup>62</sup> Representative/imperative mandates.

<sup>63</sup> Presidency, bureau, sections, committees, etc.

<sup>64</sup> Including the convening, duration, publicity and agenda of sessions.

<sup>65</sup> Including their creation, composition and terms of reference.

<sup>66</sup> State budgetary contribution, other sources, etc.

<sup>67</sup> For the publication of laws, see 3.15.

<sup>68</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>69</sup> For local authorities, see 4.8.

<sup>70</sup> Derived directly from the Constitution.

<sup>71</sup> See also 4.8.

<sup>72</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.

4.6.9	The civil service <sup>73</sup> .....	81, 388, <b>476, 599</b>
4.6.9.1	Conditions of access	
4.6.9.2	Reasons for exclusion	
4.6.9.2.1	Lustration <sup>74</sup>	
4.6.9.3	Remuneration .....	281
4.6.9.4	Personal liability .....	<b>476, 554</b>
4.6.9.5	Trade union status .....	146
4.6.10	Liability	
4.6.10.1	Legal liability .....	385
4.6.10.1.1	Immunity .....	<b>605</b>
4.6.10.1.2	Civil liability	
4.6.10.1.3	Criminal liability	
4.6.10.2	Political responsibility .....	<b>598</b>
4.7	<b>Judicial bodies<sup>75</sup></b>	
4.7.1	Jurisdiction .....	8, 118, 250, <b>554</b>
4.7.1.1	Exclusive jurisdiction .....	261, 283, 360, <b>611</b>
4.7.1.2	Universal jurisdiction	
4.7.1.3	Conflicts of jurisdiction <sup>76</sup> .....	<b>599</b>
4.7.2	Procedure .....	8, 36, 143, 352, 412, <b>497</b>
4.7.3	Decisions .....	352, 412, <b>636</b>
4.7.4	Organisation	
4.7.4.1	Members	
4.7.4.1.1	Qualifications	
4.7.4.1.2	Appointment .....	135, 362, <b>630</b>
4.7.4.1.3	Election .....	418
4.7.4.1.4	Term of office .....	331, 424
4.7.4.1.5	End of office .....	362
4.7.4.1.6	Status .....	59, <b>591</b>
4.7.4.1.6.1	Incompatibilities	
4.7.4.1.6.2	Discipline .....	<b>622</b>
4.7.4.1.6.3	Irremovability	
4.7.4.2	Officers of the court	
4.7.4.3	Prosecutors / State counsel <sup>77</sup>	
4.7.4.3.1	Powers .....	250
4.7.4.3.2	Appointment .....	252, 254
4.7.4.3.3	Election	
4.7.4.3.4	Term of office	
4.7.4.3.5	End of office	
4.7.4.3.6	Status .....	<b>591</b>
4.7.4.4	Languages	
4.7.4.5	Registry	
4.7.4.6	Budget	
4.7.5	Supreme Judicial Council or equivalent body <sup>78</sup> .....	249, <b>549</b>
4.7.6	Relations with bodies of international jurisdiction	
4.7.7	Supreme court .....	249, 331, <b>611</b>
4.7.8	Ordinary courts	
4.7.8.1	Civil courts	
4.7.8.2	Criminal courts .....	<b>578</b>
4.7.9	Administrative courts .....	8, 283, <b>617</b>

<sup>73</sup> Civil servants, administrators, etc.

<sup>74</sup> Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

<sup>75</sup> Other than the body delivering the decision summarised here.

<sup>76</sup> Positive and negative conflicts.

<sup>77</sup> Notwithstanding the question to which to branch of state power the prosecutor belongs.

<sup>78</sup> For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

4.7.10	Financial courts <sup>79</sup>	
4.7.11	Military courts .....	184, <b>622</b>
4.7.12	Special courts	
4.7.13	Other courts	
4.7.14	Arbitration	
4.7.15	Legal assistance and representation of parties	
4.7.15.1	The Bar .....	<b>503, 593</b>
4.7.15.1.1	Organisation	
4.7.15.1.2	Powers of ruling bodies	
4.7.15.1.3	Role of members of the Bar.....	262
4.7.15.1.4	Status of members of the Bar	
4.7.15.1.5	Discipline	
4.7.15.2	Assistance other than by the Bar	
4.7.15.2.1	Legal advisers	
4.7.15.2.2	Legal assistance bodies	
4.7.16	Liability	
4.7.16.1	Liability of the State	
4.7.16.2	Liability of judges .....	59, 393
<b>4.8</b>	<b>Federalism, regionalism and local self-government</b>	
4.8.1	Federal entities <sup>80</sup>	
4.8.2	Regions and provinces.....	34, <b>606</b>
4.8.3	Municipalities <sup>81</sup> .....	173, 231, 285, 406, 408, <b>465, 498, 580, 602, 604</b>
4.8.4	Basic principles .....	23
4.8.4.1	Autonomy .....	56, 145, 168, 285, 288, 290, <b>465, 629</b>
4.8.4.2	Subsidiarity .....	<b>465, 552</b>
4.8.5	Definition of geographical boundaries	
4.8.6	Institutional aspects.....	290, <b>629</b>
4.8.6.1	Deliberative assembly.....	285
4.8.6.1.1	Status of members	
4.8.6.2	Executive	
4.8.6.3	Courts .....	31
4.8.7	Budgetary and financial aspects .....	31, 285, 288
4.8.7.1	Finance	
4.8.7.2	Arrangements for distributing the financial resources of the State .....	<b>465</b>
4.8.7.3	Budget.....	403
4.8.7.4	Mutual support arrangements	
4.8.8	Distribution of powers.....	243, 251, 252, 253, <b>465, 606</b>
4.8.8.1	Principles and methods.....	34, 168, 173, 288, <b>580</b>
4.8.8.2	Implementation	
4.8.8.2.1	Distribution <i>ratione materiae</i> .....	34, 249, 253, <b>465</b>
4.8.8.2.2	Distribution <i>ratione loci</i> .....	117, 285, 290, <b>465</b>
4.8.8.2.3	Distribution <i>ratione temporis</i> .....	<b>498</b>
4.8.8.2.4	Distribution <i>ratione personae</i>	
4.8.8.3	Supervision .....	123, 168
4.8.8.4	Co-operation	
4.8.8.5	International relations	
4.8.8.5.1	Conclusion of treaties	
4.8.8.5.2	Participation in international organisations or their organs	
<b>4.9</b>	<b>Elections and instruments of direct democracy<sup>82</sup></b> .....	83, 231
4.9.1	Competent body for the organisation and control of voting <sup>83</sup> .....	<b>642</b>

<sup>79</sup> Comprises the Court of Auditors in so far as it exercises judicial power.

<sup>80</sup> See also 3.6.

<sup>81</sup> And other units of local self-government.

<sup>82</sup> See also keywords 5.3.41 and 5.2.1.4.

<sup>83</sup> Organs of control and supervision.

4.9.2	Referenda and other instruments of direct democracy <sup>84</sup> .....	23, 145, 326
4.9.2.1	Admissibility <sup>85</sup> .....	
4.9.2.2	Effects .....	
4.9.3	Electoral system <sup>86</sup> .....	5
4.9.3.1	Method of voting <sup>87</sup> .....	
4.9.4	Constituencies .....	
4.9.5	Eligibility <sup>88</sup> .....	364
4.9.6	Representation of minorities .....	
4.9.7	Preliminary procedures .....	
4.9.7.1	Electoral rolls .....	
4.9.7.2	Registration of parties and candidates <sup>89</sup> .....	5, 364
4.9.7.3	Ballot papers <sup>90</sup> .....	
4.9.8	Electoral campaign and campaign material <sup>91</sup> .....	147
4.9.8.1	Campaign financing .....	
4.9.8.2	Campaign expenses .....	
4.9.9	Voting procedures .....	
4.9.9.1	Polling stations .....	
4.9.9.2	Polling booths .....	
4.9.9.3	Voting <sup>92</sup> .....	
4.9.9.4	Identity checks on voters .....	
4.9.9.5	Record of persons having voted <sup>93</sup> .....	
4.9.9.6	Casting of votes <sup>94</sup> .....	85, 140, 141
4.9.10	Minimum participation rate required .....	
4.9.11	Determination of votes .....	
4.9.11.1	Counting of votes .....	
4.9.11.2	Electoral reports .....	489
4.9.12	Proclamation of results .....	489, 642
4.9.13	Post-electoral procedures .....	
4.10	<b>Public finances<sup>95</sup></b> .....	
4.10.1	Principles .....	97, 102
4.10.2	Budget .....	102, 403
4.10.3	Accounts .....	
4.10.4	Currency .....	
4.10.5	Central bank .....	
4.10.6	Auditing bodies <sup>96</sup> .....	56, 548
4.10.7	Taxation .....	
4.10.7.1	Principles .....	288, 522, 523
4.10.8	Public assets <sup>97</sup> .....	56, 605
4.10.8.1	Privatisation .....	29, 107
4.11	<b>Armed forces, police forces and secret services</b> .....	
4.11.1	Armed forces .....	170, 337, 515, 531, 543
4.11.2	Police forces .....	147, 253, 257, 385, 529
4.11.3	Secret services .....	308, 313, 564

84

Including other consultations.

85

For questions of jurisdiction, see keyword 1.3.4.6.

86

Proportional, majority, preferential, single-member constituencies, etc.

87

For example, *Panachage*, voting for whole list or part of list, blank votes.

88

For aspects related to fundamental rights, see 5.3.41.2.

89

For the creation of political parties, see 4.5.10.1.

90

For example, names of parties, order of presentation, logo, emblem or question in a referendum.

91

Tracts, letters, press, radio and television, posters, nominations, etc.

92

Impartiality of electoral authorities, incidents, disturbances.

93

For example, signatures on electoral rolls, stamps, crossing out of names on list.

94

For example, in person, proxy vote, postal vote, electronic vote.

95

This keyword covers property of the central state, regions and municipalities and may be applied together with Chapter 4.8.

96

For example, Auditor-General.

97

Includes ownership in undertakings by the state, regions or municipalities.

4.12	<b>Ombudsman</b> <sup>98</sup> .....	161
4.12.1	Appointment .....	161
4.12.2	Guarantees of independence	
4.12.2.1	Term of office	
4.12.2.2	Incompatibilities	
4.12.2.3	Immunities	
4.12.2.4	Financial independence	
4.12.3	Powers .....	161
4.12.4	Organisation	
4.12.5	Relations with the Head of State	
4.12.6	Relations with the legislature .....	161
4.12.7	Relations with the executive.....	161
4.12.8	Relations with auditing bodies <sup>99</sup>	
4.12.9	Relations with judicial bodies	
4.12.10	Relations with federal or regional authorities	
4.13	<b>Independent administrative authorities</b> <sup>100</sup> .....	330
4.14	<b>Activities and duties assigned to the State by the Constitution</b> <sup>101</sup> .....	602
4.15	<b>Exercise of public functions by private bodies</b> .....	376, 604
4.16	<b>International relations</b> .....	23, 550, 554
4.16.1	Transfer of powers to international institutions.....	311, 326, 499
4.17	<b>European Union</b> .....	311
4.17.1	Institutional structure	
4.17.1.1	European Parliament .....	642
4.17.1.2	Council .....	196
4.17.1.3	Commission .....	634
4.17.1.4	Court of Justice of the European Communities <sup>102</sup>	
4.17.2	Distribution of powers between Community and member states.....	311, 326
4.17.3	Distribution of powers between institutions of the Community	
4.17.4	Legislative procedure	
4.18	<b>State of emergency and emergency powers</b> <sup>103</sup>	
5	<b><u>Fundamental Rights</u></b> <sup>104</sup>	
5.1	<b>General questions</b>	
5.1.1	Entitlement to rights .....	380
5.1.1.1	Nationals .....	543
5.1.1.1.1	Nationals living abroad .....	140
5.1.1.2	Citizens of the European Union and non-citizens with similar status	
5.1.1.3	Foreigners .....	149, 240, 279, 478, 486
5.1.1.3.1	Refugees and applicants for refugee status .....	486
5.1.1.4	Natural persons.....	285
5.1.1.4.1	Minors <sup>105</sup> .....	28, 32, 149, 200, 201, 601
5.1.1.4.2	Incapacitated .....	132, 134, 318

<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.

<sup>105</sup> For rights of the child, see 5.3.44.

	5.1.1.4.3	Detainees .....	42, 246, 287
	5.1.1.4.4	Military personnel	
	5.1.1.5	Legal persons	
	5.1.1.5.1	Private law .....	75
	5.1.1.5.2	Public law .....	332, <b>519</b>
5.1.2		Horizontal effects .....	18, <b>549, 644</b>
5.1.3		Positive obligation of the state .....	44, 59, 184, 186, 188, 247, 379, 393, 421
		.....	423, <b>524, 549, 602, 604, 608, 649</b>
5.1.4		Limits and restrictions <sup>106</sup> .....	15, 32, 104, 106, 111, 124, 137, 294, 297, 328
		.....	339, 372, 388, 398, <b>538, 539</b>
	5.1.4.1	Non-derogable rights .....	345, <b>578</b>
	5.1.4.2	General/special clause of limitation .....	<b>476, 478, 583, 585</b>
	5.1.4.3	Subsequent review of limitation .....	387
5.1.5		Emergency situations <sup>107</sup> .....	345
5.2		<b>Equality</b> .....	22, 25, 62, 69, 121, 243, 244, 268, 292, 303, 322, <b>480, 484, 508, 509</b>
	5.2.1	Scope of application	
	5.2.1.1	Public burdens <sup>108</sup> .....	262, <b>493</b>
	5.2.1.2	Employment .....	101
		5.2.1.2.1 In private law .....	9
		5.2.1.2.2 In public law .....	44, 135, <b>591, 621</b>
	5.2.1.3	Social security .....	156, 175, <b>539, 561</b>
	5.2.1.4	Elections <sup>109</sup> .....	5, 6, 83, 118, 160, 285, 364, <b>533</b>
5.2.2		Criteria of distinction .....	18, 248, 279, 332, <b>467, 503, 546, 602</b>
	5.2.2.1	Gender .....	240, 242, 335, 380, <b>621</b>
	5.2.2.2	Race .....	94
	5.2.2.3	Ethnic origin .....	44, 97, 322, <b>531</b>
	5.2.2.4	Citizenship or nationality <sup>110</sup> .....	5, 240, <b>486, 641</b>
	5.2.2.5	Social origin .....	156
	5.2.2.6	Religion .....	88, 158, 380
	5.2.2.7	Age .....	9, 166, 242, 255
	5.2.2.8	Physical or mental disability .....	134, 367
	5.2.2.9	Political opinions or affiliation	
	5.2.2.10	Language .....	<b>608</b>
	5.2.2.11	Sexual orientation .....	148, 357, 374, 382
	5.2.2.12	Civil status <sup>111</sup> .....	240
	5.2.2.13	Differentiation <i>ratione temporis</i> .....	<b>634</b>
5.2.3		Affirmative action .....	18, 94
5.3		<b>Civil and political rights</b>	
	5.3.1	Right to dignity .....	42, 68, 125, 303, 345, <b>596</b>
	5.3.2	Right to life .....	125, 184, 186, 188, 345, 393, 423, <b>526, 578, 588</b>
	5.3.3	Prohibition of torture and inhuman and degrading treatment .....	42, 178, 184, 186, 423
		.....	<b>556, 613, 615</b>
	5.3.4	Right to physical and psychological integrity .....	96, 125, 184, 186, 423, 424
	5.3.4.1	Scientific and medical treatment and experiments .....	151, 255
	5.3.5	Individual liberty <sup>112</sup> .....	99, 151, 178, 303, 316
	5.3.5.1	Deprivation of liberty .....	177, 184, 186, 188, 257, 279, 303, 369, <b>536, 611</b>

<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.

<sup>112</sup> This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

5.3.5.1.1	Arrest <sup>113</sup> .....	90, <b>582</b>
5.3.5.1.2	Non-penal measures .....	<b>480, 535</b>
5.3.5.1.3	Detention pending trial.....	42, <b>582</b>
5.3.5.1.4	Conditional release.....	<b>528</b>
5.3.5.2	Prohibition of forced or compulsory labour	
5.3.6	Freedom of movement <sup>114</sup> .....	188, <b>528, 531, 644</b>
5.3.7	Right to emigrate	
5.3.8	Right to citizenship or nationality.....	<b>486</b>
5.3.9	Right of residence <sup>115</sup> .....	<b>478, 514</b>
5.3.10	Rights of domicile and establishment.....	<b>467, 644</b>
5.3.11	Right of asylum	
5.3.12	Security of the person .....	57, 255, 337, 421
5.3.13	Procedural safeguards, rights of the defence and fair trial.....	18, 22, 90, 119, 128, 194, 244
	.....	421, <b>509, 560, 574, 611</b>
5.3.13.1	Scope	
5.3.13.1.1	Constitutional proceedings .....	46, 53
5.3.13.1.2	Civil proceedings .....	41, <b>497, 549</b>
5.3.13.1.3	Criminal proceedings.....	42, 113, 119, 180, 181, 183, 324, 332
	.....	348, 419, <b>477, 550, 553, 554, 601, 632</b>
5.3.13.1.4	Litigious administrative proceedings.....	13, 14, 17, 22, 330
5.3.13.1.5	Non-litigious administrative proceedings.....	<b>477, 536</b>
5.3.13.2	Effective remedy .....	8, 42, 72, 105, 192, 196, 262, 328, 330
	.....	423, 424, 427, <b>508, 579, 586, 605</b>
5.3.13.3	Access to courts <sup>116</sup> .....	11, 22, 31, 48, 72, 105, 123, 149, 184, 186, 235
	.....	261, 262, 277, 362, 383, <b>468, 484, 595</b>
5.3.13.3.1	<i>Habeas corpus</i> .....	28, 35, <b>555</b>
5.3.13.4	Double degree of jurisdiction <sup>117</sup> .....	11, 119, 270, 391, <b>610, 617</b>
5.3.13.5	Suspensive effect of appeal.....	330
5.3.13.6	Right to a hearing.....	8, 134, 149, 235, 337, 393
	.....	<b>511, 557, 604, 610, 613</b>
5.3.13.7	Right to participate in the administration of justice <sup>118</sup> .....	134, 235, 291, 367
5.3.13.8	Right of access to the file.....	<b>564</b>
5.3.13.9	Public hearings .....	36, 234, 391
5.3.13.10	Trial by jury .....	180, 342, <b>580</b>
5.3.13.11	Public judgments	
5.3.13.12	Right to be informed about the decision	
5.3.13.13	Trial/decision within reasonable time .....	184, 186, 348, <b>512, 601</b>
5.3.13.14	Independence .....	59, 178, 362, 418, 424, <b>481, 484</b>
5.3.13.15	Impartiality <sup>119</sup> .....	36, 61, 105, 113, 180, 418, <b>481, 484</b>
5.3.13.16	Prohibition of <i>reformatio in peius</i>	
5.3.13.17	Rules of evidence .....	28, 36, 181, 183, 194, 200, 257, 341, 391
	.....	394, 431, <b>549, 568, 574</b>
5.3.13.18	Reasoning .....	11, 42, 135, 342, 393, <b>469</b>
5.3.13.19	Equality of arms	
5.3.13.20	Adversarial principle.....	11, <b>610</b>
5.3.13.21	Languages .....	<b>484</b>
5.3.13.22	Presumption of innocence .....	18, 244, 328, <b>468, 475, 601</b>
5.3.13.23	Right to remain silent	
5.3.13.23.1	Right not to incriminate oneself .....	194, 431, <b>624</b>
5.3.13.23.2	Right not to testify against spouse/close family.....	<b>595, 624</b>

<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> This keyword covers the right of appeal to a court.

<sup>118</sup> Including the right to be present at hearing.

<sup>119</sup> Including challenging of a judge.



5.3.13.24	Right to be informed about the reasons of detention	
5.3.13.25	Right to be informed about the charges	119
5.3.13.26	Right to have adequate time and facilities for the preparation of the case	
5.3.13.27	Right to counsel	90, 183, 200, 257
		<b>553, 593, 613, 624, 632</b>
5.3.13.27.1	Right to paid legal assistance	262, <b>508, 524</b>
5.3.13.28	Right to examine witnesses	419
5.3.14	<i>Ne bis in idem</i>	30, 332, <b>471</b>
5.3.15	Rights of victims of crime	<b>601</b>
5.3.16	Principle of the application of the more lenient law	46, 197
5.3.17	Right to compensation for damage caused by the State	277, 424
5.3.18	Freedom of conscience <sup>120</sup>	88, 152, 158, 255, 259, <b>519, 618</b>
5.3.19	Freedom of opinion	<b>517</b>
5.3.20	Freedom of worship	81, 259, 301, <b>528, 621</b>
5.3.21	Freedom of expression <sup>121</sup>	18, 32, 77, 114, 137, 142, 147, 243, 319
		421, <b>484, 517, 529, 546, 598</b>
5.3.22	Freedom of the written press	32, 87, 114, 142, 319, 421
5.3.23	Rights in respect of the audiovisual media and other means of mass communication	32, 421, <b>546</b>
5.3.24	Right to information	32, 70, 137, 251, 378, <b>547, 549, 557, 602, 637</b>
5.3.25	Right to administrative transparency	
5.3.25.1	Right of access to administrative documents	<b>637</b>
5.3.26	National service <sup>122</sup>	<b>543</b>
5.3.27	Freedom of association	18, 304, 307, 339, <b>484</b>
5.3.28	Freedom of assembly	147, <b>517, 529</b>
5.3.29	Right to participate in public affairs	147, 326, 354
5.3.29.1	Right to participate in political activity	<b>467</b>
5.3.30	Right of resistance	
5.3.31	Right to respect for one's honour and reputation	87, 137
5.3.32	Right to private life	75, 104, 137, 142, 157, 246, 299, 316, 394
		<b>498, 549, 568, 588, 618, 649</b>
5.3.32.1	Protection of personal data	36, 38, 88, 142, 201, 281, 295, 318, 388, <b>547, 564</b>
5.3.33	Right to family life <sup>123</sup>	66, 104, 246, 266, 287, 299, <b>501, 505, 651</b>
5.3.33.1	Descent	148
5.3.33.2	Succession	374, 380
5.3.34	Right to marriage	294, 357
5.3.35	Inviolability of the home	
5.3.36	Inviolability of communications	65, 431, <b>549</b>
5.3.36.1	Correspondence	<b>564</b>
5.3.36.2	Telephonic communications	75, 246, <b>564, 568, 583</b>
5.3.36.3	Electronic communications	<b>564, 583</b>
5.3.37	Right of petition	<b>551</b>
5.3.38	Non-retrospective effect of law	26, 69, 341, 385, <b>496</b>
5.3.38.1	Criminal law	184, 186, 198, <b>562</b>
5.3.38.2	Civil law	26
5.3.38.3	Social law	
5.3.38.4	Taxation law	390, <b>493, 523</b>
5.3.39	Right to property <sup>124</sup>	26, 277, 316, 337, 341, 421, <b>538, 539, 585, 606</b>
5.3.39.1	Expropriation	62, 63, 93, 115, 154, 341, 396, <b>538, 570, 575</b>
5.3.39.2	Nationalisation	<b>570</b>
5.3.39.3	Other limitations	51, 110, 124, 273, 297, 328, 337, 387, <b>575, 585</b>
5.3.39.4	Privatisation	292, <b>570</b>

<sup>120</sup> Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

<sup>121</sup> This keyword also includes the right to freely communicate information.

<sup>122</sup> Militia, conscientious objection, etc.

<sup>123</sup> Aspects of the use of names are included either here or under "Right to private life".

<sup>124</sup> Including compensation issues.

5.3.40	Linguistic freedom	
5.3.41	Electoral rights .....	<b>496</b>
5.3.41.1	Right to vote .....	140, 141, 231, 285, 311, 364, 406, 408, <b>533</b>
5.3.41.2	Right to stand for election .....	5, 354, 364, 406, 408
5.3.41.3	Freedom of voting	
5.3.41.4	Secret ballot	
5.3.41.5	Direct / indirect ballot	
5.3.41.6	Frequency and regularity of elections	
5.3.42	Rights in respect of taxation.....	48, 51, 74, 244, 248, 261, 295 341, <b>493, 522, 523, 572</b>
5.3.43	Right to self fulfilment.....	57
5.3.44	Rights of the child.....	66, 143, 148, 166, 184, 243, 255 382, <b>482, 501, 505, 608</b>
5.3.45	Protection of minorities and persons belonging to minorities.....	44, 184
5.4	<b>Economic, social and cultural rights</b> .....	334, 335, <b>602</b>
5.4.1	Freedom to teach .....	243, <b>482</b>
5.4.2	Right to education .....	158, 243, 322, 398, <b>478, 482, 491, 608, 621</b>
5.4.3	Right to work .....	9, 175, 264, 395, <b>478, 535</b>
5.4.4	Freedom to choose one's profession <sup>125</sup> .....	124, 304
5.4.5	Freedom to work for remuneration.....	68, 121
5.4.6	Commercial and industrial freedom .....	18, 70, 106, 107, 111, 268, 398, <b>546</b>
5.4.7	Consumer protection.....	70, 107, 157, 251
5.4.8	Freedom of contract .....	18, 318
5.4.9	Right of access to the public service	
5.4.10	Right to strike .....	160, <b>644</b>
5.4.11	Freedom of trade unions <sup>126</sup> .....	146, 339, <b>644</b>
5.4.12	Right to intellectual property	
5.4.13	Right to housing .....	235, 379, <b>606</b>
5.4.14	Right to social security .....	14, 25, 130, 156, 175, 240, <b>542</b>
5.4.15	Right to unemployment benefits	
5.4.16	Right to a pension .....	130, 240, 280, <b>542, 623, 626</b>
5.4.17	Right to just and decent working conditions.....	99, 335, 372, 376, 395
5.4.18	Right to a sufficient standard of living .....	59, 379, <b>602</b>
5.4.19	Right to health .....	102, 106, 130, 156, 247, 350, 372, 398, <b>478, 542, 618, 649</b>
5.4.20	Right to culture .....	28, 37, <b>478</b>
5.4.21	Scientific freedom.....	79, <b>544</b>
5.4.22	Artistic freedom	
5.5	<b>Collective rights</b>	
5.5.1	Right to the environment.....	28, 34, 37, 401, 423, <b>618</b>
5.5.2	Right to development .....	387
5.5.3	Right to peace	
5.5.4	Right to self-determination	
5.5.5	Rights of aboriginal peoples, ancestral rights .....	184

<sup>125</sup>

This keyword also covers "Freedom of work".

<sup>126</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.

Page numbers of the alphabetical index refer to the page showing the identification of the decision rather than the keyword itself.

	Pages		Pages
Execution, extrajudicial .....	423	Animal, cruel treatment, prohibition .....	28
<i>Pacta sunt servanda</i> , principle .....	<b>487</b>	Annulment for unlawfulness, validity .....	273
Abortion, byelaw .....	<b>588</b>	Annulment, effect .....	15
Abortion, for health reasons .....	<b>588</b>	Appeal procedure .....	<b>610</b>
Abortion-on-demand .....	<b>588</b>	Appeal, deadline .....	72
Abuse of power .....	114	Appeal, evidence, direct .....	391
Access to justice, meaning .....	184	Appeal, facsimile .....	72
Accountability, determination .....	<b>598</b>	Appeal, requirements, formal .....	72
Accountability, principle .....	<b>604</b>	Appeal, right .....	<b>586, 617</b>
Accountant, public, status .....	<b>557</b>	Appeal, signature, handwritten, requirement .....	72
Act, individual, adopted as normative act .....	<b>496</b>	Appeal, time limit, expiry .....	11
<i>Actio popularis</i> .....	276	Appeal, written form .....	72
Action for failure to fulfil obligations, subject-matter, dispute, determination during the pre-litigation procedure .....	<b>634</b>	Approximation of laws and regulations .....	429
Administration, good, principle .....	<b>551, 604</b>	Armed forces, control, competence .....	170
Administration, public confidence .....	383	Armed forces, use within the country .....	337
Administrative act, judicial review .....	383, <b>579, 604, 617</b>	Armed forces, use, abroad .....	<b>515</b>
Administrative act, judicial review, legal basis .....	<b>599</b>	Arrest warrant .....	<b>613</b>
Administrative act, validity .....	<b>604</b>	Arrest, warrant .....	<b>514</b>
Administrative court, control .....	<b>617</b>	Assembly, freedom .....	<b>529</b>
Administrative court, jurisdiction .....	264	Assessment, impact, environmental, waiver .....	34
Administrative decision, definition .....	337	Audit .....	<b>548</b>
Administrative decision, judicial review .....	383	Authorities, discrimination, criminal responsibility .....	18
Administrative decision, withdrawal .....	330	Authority to withdraw .....	<b>608</b>
Administrative fine, fiscal omission .....	244	Authority, abuse .....	145
Administrative procedure, deadline .....	14	Authority, notion .....	<b>551</b>
Administrative procedure, fairness .....	<b>604</b>	Authority, public security .....	337
Administrative proceedings .....	291, <b>477</b>	Autonomy, personal, exercise .....	99
Adoption, age difference between adoptive parent and child .....	166	Bank, banking secrecy .....	<b>548</b>
Adoption, age limit .....	166	Bank, transaction, prohibition, suspicion of money laundering, remedy .....	328
Adversarial principle .....	367	Bar, public service, function .....	<b>593</b>
Age, retirement .....	9	Bias, judicial, risk .....	418
Agricultural worker, vulnerability .....	376	Bigamy, recognition .....	240
Aid, recovery .....	<b>636</b>	Blood transfusion, refusal .....	255
Aircraft, renegade, shooting down .....	345	Budget .....	<b>539</b>
Alcohol, sale .....	157, 398	Budget Act, right to legislative initiative .....	163
Alimony, amount .....	117, 334, 335	Budget control .....	<b>548</b>
Amendment, legislative .....	16, 46	Building permit .....	273
Amendment, legislative, effect retroactive .....	341	Burden of proof .....	18, <b>574</b>
Amnesty, function .....	385	Cabinet of Ministers .....	174
Amnesty, scope .....	385	Capacity, contractual .....	318
Animal, cruel treatment, cockfighting .....	37	Car, privacy, interest .....	181
		Car, private .....	110
		Censorship, punishment .....	32
		Child born out of wedlock, custody .....	<b>505</b>

Child, best interest .....	66, 143, 243, 255, 266, 382
Child, best interests .....	<b>505, 608</b>
Child, custody, parental .....	66
Child, guardian, designation .....	266
Child, mother, separation .....	266
Child, parental rights .....	266
Child, rape proceedings, in camera .....	143
Child, rape, gravity .....	<b>601</b>
Child, rape, pervasiveness .....	<b>601</b>
Child, rape, trial, delay, justification .....	<b>601</b>
Child, right of access .....	266
Child, sexual abuse .....	143
Child, unborn, protection .....	<b>588</b>
Child, visiting right .....	148
Child, visiting, right, procedure .....	266
Child, welfare .....	156
Childcare, allowance .....	156
Civil litigation, evidence, collection .....	75
Civil procedure .....	235, 367
Civil procedure, imprisonment .....	369
Civil proceedings, duration, excessive .....	<b>510</b>
Civil servant, authorities, special bond .....	<b>476</b>
Civil servant, compulsory retirement .....	388
Civil servant, dismissal, ground .....	385
Civil servant, rights and obligations .....	<b>554</b>
Civil servant, salary, disclosure .....	281
Civil-law proceedings, legal aid .....	<b>509</b>
Cohabitation, surviving partner, pension .....	25
Collective agreement .....	335, 339
Collective bargaining .....	160
Collective interest .....	339
Committee of inquiry, parliamentary .....	308
Community law, direct effect, individual rights, safeguard by national courts .....	427
Community law, primacy .....	<b>636</b>
Community law, principles .....	197, <b>644</b>
Community law, principles, equal treatment, nationality, discrimination .....	<b>641</b>
Community law, principles, right to effective judicial protection .....	427
Company, board, members .....	132
Compensation .....	303
Compensation, damages .....	277
Competence, legislative .....	<b>606</b>
Competence, legislative, limits .....	251, 253
Competence, shared .....	<b>606</b>
Competence, transfer to the European Union .....	326
Competition, economic, protection .....	121, <b>546</b>
Competition, fair .....	<b>546</b>
Competition, procedure, access to the file .....	194
Competition, procedure, means of proof .....	194
Competition, procedure, rights of the defence .....	194
Confession, lawyer, absence, validity .....	200
Confiscation .....	324
Conflict of rules .....	14
Constituency, disparities .....	<b>533</b>
Constitution, federal and regional .....	<b>552</b>
Constitution, federal, entity, relationship .....	34
Constitution, immutability, principle .....	<b>496</b>
Constitution, interpretation, by way of legislation .....	276
Constitution, material core .....	<b>496</b>
Constitution, revision, treaty, assent .....	23
Constitutional complaint .....	<b>517</b>
Constitutional complaint, limits of review .....	264, <b>602</b>
Constitutional complaint, subsidiarity .....	<b>602</b>
Constitutional control, federal entity, exception .....	339
Constitutional Court, decision, binding effect .....	<b>599</b>
Constitutional Court, decision, disregard .....	<b>605</b>
Constitutional Court, decision, execution, method .....	<b>605</b>
Constitutional Court, exclusive jurisdiction .....	339
Constitutional Court, judge, appointment .....	264
Constitutional Court, jurisdiction, equality principle, combination with ECHR .....	<b>480</b>
Constitutional Court, jurisdiction, law, enforcement measure .....	<b>480</b>
Constitutional Court, jurisdiction, limit .....	339
Constitutional Court, right to a fair trial, Article 6 ECHR, applicability .....	<b>481</b>
Constitutional justice, diffuse control .....	283
Constitutional law, constitutional control .....	<b>496</b>
Constitutional matter .....	270
Constitutionality, review .....	270, <b>529</b>
Constitutionality, variation over time .....	<b>602</b>
Construction, law .....	324
Contempt of court .....	61
Contract, employment, termination .....	175
Contract, public law .....	<b>604</b>
Convention on the status of refugees .....	<b>486</b>
Convention on the status of stateless persons .....	<b>486</b>
Conversation, recording .....	431
Corruption prevention .....	<b>564</b>
Cost, award .....	378, <b>602</b>
Costs, court, discretion .....	378
Counsel, effectiveness, standard .....	<b>632</b>
Court appearance .....	<b>468</b>
Court, administrative, control .....	249
Court, bench, composition, disclosure .....	105
Court, civil, jurisdiction .....	<b>599</b>
Court, judges giving an opinion on a draft standard which they must apply .....	<b>484</b>
Court, law, interference, minimum .....	<b>605</b>
Court, legislative lacuna, rectify .....	<b>486</b>
Court, ordinary, verification of the constitutionality of laws .....	348
Court, power .....	22
Court, proceeding .....	412
Court, verification of the constitutionality of laws .....	<b>602</b>
Crime against humanity, elements .....	198
Crime, heinous, elements .....	35
Crime, qualification .....	113
Criminal code .....	46, <b>477</b>
Criminal law, circumstance, mitigating .....	22
Criminal liability .....	<b>475</b>
Criminal offence .....	<b>611</b>
Criminal offence, essential elements .....	<b>471</b>
Criminal penalty, concept .....	244
Criminal procedure .....	342, <b>475, 578, 610, 611</b>
Criminal procedure, evidence, admissibility .....	181, 183

Criminal proceedings .....	412	Draft legislation, lapse.....	<b>605</b>
Criminal proceedings, charges, aggravation, defendant.....	119	Drink driving.....	<b>535</b>
Criminal proceedings, juvenile court, exclusion of parents .....	<b>501</b>	Driving licence, photograph mandatory .....	259
Criminal prosecution, within the European Union .....	<b>514</b>	Driving licence, withdrawal.....	<b>535</b>
Cross-examination, laboratory analyst.....	419	Drug, trafficking, prevention .....	328
Data, medical .....	<b>547</b>	Due process.....	418
Data, medical, confidentiality .....	388	Due process, fundamental elements .....	180
Data, personal, collecting, processing .....	<b>564</b>	Economic action, freedom .....	268
Data, personal, protection.....	<b>564</b>	Economic stability .....	<b>493</b>
Data, personal, retention, blanket and indiscriminate nature .....	201	Economy, state regulation .....	107
Death penalty.....	113, <b>580</b>	Education .....	<b>482</b>
Death penalty, defence, standard .....	<b>632</b>	Education, compulsory.....	243, <b>482</b>
Debt, imprisonment.....	369	Education, eligibility, publicly funded school system .....	<b>491</b>
Deceased, will, intestacy.....	380	Education, equality of children .....	<b>482</b>
Decentralisation .....	<b>465</b>	Education, financing, loan.....	69
Decision, administrative, judicial review.....	270	Education, freedom to organise, limits.....	<b>482</b>
Decision, administrative, opportunity to be heard .....	<b>604</b>	Education, home schooling.....	243
Decree, royal.....	123	Education, institution, autonomy .....	<b>544</b>
Defamation.....	46	Education, interests of the child .....	<b>482</b>
Defence, approval.....	<b>515</b>	Education, language .....	<b>482</b>
Defence, effective .....	<b>553</b>	Education, language, parents' freedom of choice.....	<b>491</b>
Defence, national .....	<b>543</b>	Education, level, oversight .....	<b>482</b>
Delegation of powers .....	168, 400	Education, parental freedom of choice .....	243
Democracy, defence .....	<b>484</b>	Education, primary .....	152
Democracy, participative.....	<b>602</b>	Education, private .....	243, <b>482</b>
Demonstration, authorisation .....	<b>529</b>	Education, private schools .....	<b>482</b>
Deportation, receiving state, assurances.....	178	Education, promotion, concept .....	69
Deportation, torture, risk .....	178	Education, quality.....	243, <b>482</b>
Derogation .....	<b>583</b>	Education, religious.....	158, <b>621</b>
Detainee, private visit, supervision .....	104	Education, respect for fundamental rights .....	<b>482</b>
Detainee, rights .....	42, 104, 246, <b>528</b>	Education, school, choice .....	243, 322, <b>482</b>
Detention pending trial .....	<b>555</b>	Education, school, examination, external .....	398
Detention, arrangement .....	246	Education, school, language of instruction .....	<b>608</b>
Detention, conditions .....	<b>555, 615</b>	Education, school, language regime.....	<b>608</b>
Detention, definition .....	257	Education, school, parents' freedom of choice .....	<b>482</b>
Detention, duration.....	<b>555</b>	Education, school, pupil, religious identity .....	322
Detention, judicial supervision .....	<b>528</b>	Education, school, state, language policy, imposition.....	<b>608</b>
Detention, order, reasons .....	42	Education, schooling, compulsory .....	<b>482</b>
Detention, perception.....	257	Effective remedy, right, scope.....	42
Directive, execution.....	18	Election, administration.....	146
Disability, discrimination.....	367	Election, association .....	146, <b>467</b>
Disabled person, right .....	367, <b>542</b>	Election, ballot, results .....	<b>489</b>
Disabled person, social assistance.....	<b>542</b>	Election, campaign.....	118
Discretion, excessive .....	<b>606</b>	Election, candidate.....	<b>489</b>
Discretionary power, scope.....	143	Election, candidate for election, approval and sponsoring.....	5
Discrimination of nationals .....	94	Election, candidate, citizenship of origin, obligation.....	5
Discrimination, definition .....	18	Election, candidate, nomination by political party, obligatory .....	5
Discrimination, incitement, prohibition .....	18	Election, Central Electoral Committee .....	<b>489</b>
Discrimination, indirect.....	367	Election, certificate of nationality at birth.....	5
Discrimination, place of residence .....	292	Election, citizen, residing abroad, vote, right.....	140, 141
Discrimination, positive, appropriate measures .....	367	Election, electoral barrier .....	<b>467</b>
Discrimination, prohibited grounds, list .....	18, 374	Election, error, impact, elected people, representation .....	85
Discrimination, spouse, polygynous marriage .....	380	Election, free choice.....	5
Divorce, proceedings, information, publication .....	142		
DNA, analysis, retention after acquittal.....	201		

Election, ineligibility .....	354	European Community, Court of Justice, jurisdiction, limits .....	641
Election, irregularity .....	<b>489</b>	European Community, Court of Justice, jurisdiction, validity of acts of EC institutions .....	242
Election, law, examination after expiry of electoral period .....	83	European Community, institution, right of public access to documents .....	<b>637</b>
Election, parliament .....	85	European Community, legislation, not translated, unenforceable .....	<b>646</b>
Election, polling method, ineligibility, conditions .....	5	European Court of Human Rights, case-law, evolution .....	<b>471</b>
Election, principle, public nature .....	85	European lawmaking procedures and treaty amendment procedures, participation of the Parliament .....	311
Election, proportional representation .....	232	European Parliament, member, credentials, limits .....	<b>642</b>
Election, public examinability .....	85	European Parliament, member, meaning .....	<b>642</b>
Election, report .....	<b>489</b>	European Union, accession .....	<b>646</b>
Election, scrutiny, public interest, decision on merits .....	83	European Union, common foreign and security policy, agreement .....	190
Election, seats, allocation .....	<b>533</b>	European Union, co-operation between Commission and Member States .....	190
Election, votes, counting, irregularities, relevance .....	<b>489</b>	European Union, co-operation, police and judicial, criminal matters .....	429
Election, voting computer, use, admissibility .....	85	European Union, Court of Justice, preliminary ruling, jurisdiction, co-operation, police and judicial, criminal matters .....	429
Electricity, supply, payment .....	<b>604</b>	European Union, European Court of Justice, preliminary question, excessive length of proceedings .....	348
Embryo, frozen, legal status .....	<b>526</b>	European Union, legal instrument transgressing the boundaries of its sovereign powers .....	311
Embryo, implantation .....	<b>526</b>	European Union, Member States, room for the political formation of living conditions .....	311
Employee, labour, economic and social conditions .....	376	European Union, membership, termination and suspension .....	326
Employment .....	335	European Union, police and judicial co-operation in criminal matters, effective judicial protection, right .....	196
Employment, conditions .....	376	European Union, Treaty of Lisbon .....	311
Employment, contract, termination, conditions .....	9	Evidence, admissibility .....	183, 431
Employment, discrimination .....	<b>621</b>	Evidence, admissibility, witness, cross-examination .....	419
Employment, ecclesiastical law, judicial treatment .....	81	Evidence, assessment .....	<b>595</b>
Employment, foreign worker, restriction .....	99	Evidence, assessment, fault .....	<b>595</b>
Employment, public-sector appointment .....	<b>599</b>	Evidence, evaluation .....	352
Employment, rest, right .....	268	Evidence, exclusionary rule .....	183
Employment, worker, conditions, collective settlement .....	335	Evidence, free evaluation, principle .....	391
Employment, working conditions .....	372	Evidence, illegally obtained .....	183, 431, <b>549</b>
Employment, working hours, change, impact .....	268	Evidence, illegally obtained, exclusion .....	257
Employment, working time, standard, exception .....	268	Evidence, new .....	235
Enactment .....	416	Evidence, value .....	<b>557</b>
Enactment, presidential, date .....	414	Evidence, witness .....	<b>595</b>
Energy law .....	107	Execution, movables .....	<b>605</b>
Energy, distribution, company, minimum capacity .....	297	Execution, proceedings, legal basis .....	<b>605</b>
Energy, gas, price, supply .....	111	Execution, stay, unconstitutionality .....	<b>605</b>
Energy, pricing, regulation .....	111	Executive power .....	<b>544</b>
Energy, sector .....	107	Executive, powers to initiate legislation .....	<b>602</b>
Energy, sector, regulation .....	111, 297, 396	Expropriation, <i>de facto</i> .....	387
Enforcement of judgment, law .....	<b>605</b>	Expropriation, compensation .....	63, <b>575</b>
Entrepreneur, equal status .....	121	Expropriation, compensation, amount .....	<b>570</b>
Environment, impact assessment .....	401, <b>649</b>	Expropriation, elements .....	387, <b>538</b>
Environment, impact, assessment .....	400		
Environment, protection .....	401		
Environment, risk, information .....	<b>649</b>		
Equality, categories of persons, comparison .....	<b>480</b>		
Equality, gender, insurance .....	242		
Equality, inequality, human rights of others, impact .....	268		
Equality, principle, tests .....	322		
Equality, professional .....	268		
<i>Erga omnes</i> effect .....	262		
Ethics in government .....	<b>547</b>		
European arrest warrant, surrender procedures between Member States .....	429		

Expropriation, purpose.....	93, 115, 154, 387, 396
Expropriation, zoning plan .....	387
Extradition .....	<b>550, 613</b>
Extradition, competence .....	<b>554</b>
Extradition, detention .....	<b>582</b>
Extradition, guarantees .....	30
Extradition, national, possibility .....	<b>550</b>
Extradition, proceedings .....	<b>550, 554, 582</b>
Extradition, safeguard .....	<b>514</b>
Extradition, treaty .....	<b>550</b>
Extremism, right-wing .....	<b>484, 517</b>
Fair trial .....	<b>595</b>
Fair trial, language .....	<b>484</b>
Fair trial, translation of evidence .....	<b>484</b>
Fairness, principle.....	<b>538</b>
Fairness, procedural, principle .....	<b>604</b>
Family allowance .....	<b>522</b>
Family ties, break.....	266
Family, burdens, equalisation .....	334
Family, financial situation.....	334
Family, separation.....	117
Farm, private, protected.....	376
Fauna, protection .....	37
Federal jurisdiction.....	253
Federal law, scope.....	251
Federal state, entity, powers.....	23
Federal state, treaty, assent .....	23
Federation, constituent entity, equality of rights.....	339
Federation, constituent entity, territory.....	339
Fee.....	291
Fertilisation <i>in vitro</i> , consent, withdrawal .....	<b>526</b>
Fine .....	262
Fine, administrative.....	22
Fine, determination .....	157, 270
Fine, disciplinary .....	151
Fine, minimum .....	<b>477</b>
Fingerprint, retention, after acquittal .....	201
Foetus, legal status.....	<b>526</b>
Forced disappearance, continuous nature.....	186
Forced disappearance, crime, elements.....	186
Forced disappearance, investigation, obligation.....	184, 186
Foreign policy.....	326
Foreign policy, powers .....	164
Foreign, minor, expulsion.....	149
Foreigner, difference of treatment, detention.....	279
Foreigner, entry, residence .....	<b>478</b>
Foreigner, expulsion .....	279, <b>478</b>
Foreigner, freedom of movement.....	<b>478</b>
Forest, competence .....	34
Freedom of action, economic.....	<b>546</b>
Freedom of association, negative .....	339
Freedom of enterprise.....	268
Freedom of expression, aspects, individual, social.....	319, 421
Freedom of expression, censorship, preventive .....	142
Freedom of expression, collective .....	147
Freedom of expression, holder of rights .....	<b>546</b>
Fundamental right, core .....	<b>602</b>
Fundamental right, essence.....	97, 266
Fundamental right, essence, regulation.....	102
Fundamental right, implementation.....	<b>602</b>
Fundamental right, implementation by statute .....	380
Fundamental right, not open to restriction, limitation.....	<b>583</b>
Fundamental right, restriction, justification.....	268
Fundamental rights, conflicts, education, freedom to organise versus rights of the child .....	<b>482</b>
Fundamental rights, limitation .....	<b>555</b>
Gambling, regulation, competence .....	252
Gamete, implantation, consent, withdrawal .....	<b>526</b>
Geneva Convention of 1949 .....	198
German Democratic Republic (former) .....	303
Good faith, principle.....	190
Good faith, protection.....	69
Government, duty to direct the state.....	70
Government, duty to provide information.....	70
Government, head, appointment, method .....	174
Government, term of office, end .....	92
Governmental action, review of constitutionality .....	<b>536</b>
Guardianship, register, access .....	318
<i>Habeas corpus</i> , scope .....	28
Hatred, incitement.....	18
Head of State, continuity of discharge .....	<b>558</b>
Head of State, foreign policy, powers .....	164
Head of State, pardon, grant, delay.....	<b>598</b>
Health care, cost-free.....	350
Health insurance .....	307
Health insurance, obligation to contract.....	307
Health policy programme, government .....	247
Health protection .....	350
Health, insurance, basic rate .....	304
Health, insurance, change .....	304
Health, insurance, contract, obligation.....	304
Health, insurance, private .....	304
Health, insurance, private, reserves, portability (transfer).....	304
Health, mental.....	388
Health, protection.....	<b>618</b>
Health, reform .....	304
Health, risk .....	<b>649</b>
Heritage, cultural.....	380
Heritage, cultural, protection .....	28
HIV, medication, free .....	247
Home schooling .....	<b>482</b>
Homosexuality, couple.....	357
Homosexuality, partnership .....	374
Honour, respect, right .....	<b>596</b>
Hospital, psychiatric, confinement .....	134
Housing, access.....	379
Housing, construction, need .....	379
Housing, eviction.....	379, <b>498</b>
Housing, eviction, arbitrariness, protection .....	<b>606</b>
Housing, occupier, unlawful, eviction, obligation to evict.....	<b>606</b>
Housing, policy.....	<b>606</b>
Housing, rent control.....	277
Housing, tenant, right.....	<b>604</b>

---

Housing, unlawful occupation .....	379	Judge, assignment of a case to another judge .....	497
Human rights case, transfer from military to civilian court .....	184	Judge, Constitutional Court, lodge .....	481
Human rights defender, protection.....	188	Judge, Constitutional Court, opinion .....	481
Human rights violation, investigation, obligation ....	188	Judge, Constitutional Court, political sympathies.....	481
Human rights violation, state, tolerance .....	184, 186, 188, 421, 423, 424	Judge, Constitutional Court, professor.....	481
Human rights, defence, elements .....	423	Judge, criminal prosecution against, authorisation .....	393
Identity theft, prevention.....	259	Judge, dismissal .....	424
Immunity, from execution.....	605	Judge, duties.....	555
Immunity, judge, lifting .....	393	Judge, election, campaign, contribution, financial.....	418
Import duty .....	410	Judge, independence.....	135, 591, 622
Imprisonment, open scheme.....	360	Judge, independence, remuneration .....	59
Impunity .....	184, 186, 188	Judge, investigating .....	36
Income, national.....	13	Judge, material status.....	591
Indigenous community access to justice.....	184	Judge, qualifications .....	555
Information, access.....	383	Judge, removal .....	331, 497
Information, classified, protection .....	547	Judge, remuneration, reduction .....	591
Information, confidential, access.....	378	Judge, salary, guarantee .....	591
Information, denial, review, time-limit.....	383	Judge, suspension .....	59
Information, duty to provide .....	378	Judge, tenure, permanent, exception .....	424
Information, market-related, provision by the state .....	70	Judge, tenure, provisional.....	424
Information, reasonable access .....	383	Judgment, execution.....	41, 369
Information, request, specifically, requirement.....	378	Judgment, ground, reasoning, obligation.....	342
Information, restriction .....	549	Judgment, right to execution.....	605
Information, right.....	547	Judicial authority, principle of exclusive jurisdiction .....	554
Infrastructure, public, facilities.....	290	Judicial costs, <i>ad valorem</i> , constitutionality .....	31
Inheritance rights on intestacy .....	380	Judicial costs, ceiling .....	31
Inheritance, right .....	374	Judicial Council, act, judicial control .....	549
Inheritance, spouse, polygynous marriage .....	380	Judicial fee, <i>ad valorem</i> , constitutionality.....	31
Inheritance, statutory rules.....	374	Judicial fee, ceiling.....	31
Injunction, restraining order .....	316	Judicial personnel, stability, principle.....	497
Insolvency .....	132	Judicial protection .....	330
Insolvency proceedings, counsel, appointment .....	508	Judicial protection, effective, right.....	555
Insolvency proceedings, legal aid .....	508	Judicial review, administrative decision .....	588
Insurance, surveillance of insured person .....	394	Judicial review, principle .....	96
Insured person, obligation to provide information .....	394	Judicial review, scope .....	264
Intelligence service .....	308, 313	Judicial system, administration .....	628
Interim measure, application, suspension.....	642	Judicial system, self-correction .....	630
Interim measure, condition, grant .....	642	Judiciary, independence .....	249
Interim order.....	605	Judiciary, independence, guarantees .....	362
Internal legal acts, church, review by state courts .....	81	Judiciary, self government .....	549
International law, domestic law, relationship.....	487	Jurisdiction, dispute .....	117
Internment, judicial review .....	480	Jurisdiction, territorial .....	339
Internment, length .....	480	Jurisdictional dispute.....	339
Internment, mental illness .....	480	Jury, challenge, peremptory.....	180
Interpretation, erroneous, sufficiently serious .....	41	Jury, impartial, challenge .....	180
Interpretation, of the legal rules applicable to the facts of the case.....	41	Jury, reasoning, fair trial.....	342
Interpretation, purpose.....	376	Labour code .....	476
Investigation, criminal .....	553	Labour Code, application, in public employment relation.....	599
Investigation, effective, requirement .....	421, 423	Labour, dispute, competent court .....	599
Islam, muslim population, integration.....	152	Land, construction.....	154
Islam, rules on marriage .....	380	Land, ownership, act, challengeability .....	234
Judge, appointment .....	424, 630	Land, ownership, limitation .....	234
		Land, use, plan .....	465
		Language, education .....	608

---



Language, minority, constitutional guarantees .....	<b>491</b>	Legitimate expectations, protection .....	190
Language, teaching .....	<b>482, 608</b>	Legitimate purpose .....	<b>536</b>
Law, <i>travaux préparatoires</i> .....	<b>562</b>	Lessons, swimming, exemption .....	152
Law, applicable .....	117	Liability, administrative .....	<b>477</b>
Law, as a source of executive authority .....	121	Licence, alcohol, sale .....	157
Law, interpretation, principle, binding, universally .....	41	Licence, granting, requirement .....	111
Law, lacuna .....	<b>486</b>	Licence, refusal to grant .....	124
Law, national, application .....	197	Life insurance, premiums, age .....	242
Law, normative nature .....	<b>496</b>	Limitation .....	<b>468</b>
Law, organic .....	270	Limitation period, suspension .....	<b>611</b>
Law, partial annulment, remainder, enforceability .....	<b>523</b>	Local authority, finances .....	56
Law, precision .....	270	Local authority, law-making power .....	173
Law, quality .....	270	Local autonomy, implementation .....	<b>465</b>
Law, quality, foreseeable consequences .....	198	Local council, efficiency, requirement .....	285
Law, social context, change .....	385	Local government, finances .....	285
Law, version in force, determination .....	<b>523</b>	Local government, powers .....	<b>465</b>
Lawful judge, principle .....	<b>497</b>	Local self-government .....	231, <b>465</b>
Laws, conflict .....	101	Local self-government body, election .....	406
Lawyer, access, restriction, compelling reasons .....	200	Local self-government, competence .....	<b>580</b>
Lawyer, advertising, camouflaged .....	77	Local self-government, duties .....	168
Lawyer, competition, unfair .....	77	Local self-government, election .....	408, <b>498</b>
Lawyer, fee .....	<b>595</b>	Local self-government, law-making power .....	270
Lawyer, guidelines, professional, standard .....	<b>632</b>	Local self-government, right .....	285
Lawyer, legal fees, acceding territory (former GDR) .....	<b>503</b>	Local self-government, work, employee, remuneration, right .....	403
Lawyer, legal fees, dependent on law office location .....	<b>503</b>	Local services, organisational structure, choice, local autonomy .....	290
Lawyer, legal fees, reduced .....	<b>503</b>	<i>Locus standi</i> , appeal .....	<b>469</b>
Lawyer, office, electronic data, seizure .....	74	Maintenance, entitlement, spouse, polygynous marriage .....	380
Lawyer, professional secret .....	74	Manifestation, cultural, protection .....	28, 37
Lawyer, rating list .....	77	Marriage .....	25
Leave, unused, right to compensation .....	395	Marriage, double .....	240
Lecturer, institution, higher education, faculty, theology .....	79	Marriage, equality .....	357
Legal advice and assistance .....	<b>508</b>	Marriage, foreign, official permission, legitimate aim .....	294
Legal aid, absence .....	<b>524</b>	Marriage, polygynous, non-recognition .....	380
Legal aid, grant .....	<b>509</b>	Marriage, religious .....	380
Legal aid, right .....	<b>524</b>	Marriage, right, restriction .....	294
Legal assistance, free, right .....	262	Married couple .....	335
Legal assistance, lawyer .....	<b>524</b>	Maternity, protection .....	156
Legal assistance, right .....	<b>624</b>	Mayor, transitional period, powers .....	<b>498</b>
Legal person, criminal liability .....	332	Measure of a general nature .....	49
Legal person, criminal responsibility, act committed by a natural person .....	332	Measure, administrative, validity .....	110
Legal person, equality .....	121	Measure, arbitrary .....	59
Legal person, public law, immunity, criminal .....	18	Measure, coercive, non-punitive, criteria .....	110
Legal person, spoken word, privacy, right, entitlement .....	75	Measure, other than punishment .....	110
Legal protection, guarantee of equality .....	<b>509</b>	Measure, protective .....	<b>649</b>
Legislation, delegated .....	400	Media, audiovisual .....	<b>546</b>
Legislation, interpretation .....	376	Media, divorce proceedings, information, publication .....	142
Legislation, national, application, general .....	<b>552</b>	Media, journalism, restriction .....	421
Legislation, provincial, precedence .....	<b>606</b>	Media, journalist .....	<b>596</b>
Legislative omission .....	13, 14, <b>593</b>	Media, journalist, freedom of expression, limits .....	137
Legislative procedure .....	416	Media, journalist, refusal to give evidence, right .....	319
Legislature, discretionary power .....	270	Media, journalist, sources, disclosure .....	319
Legitimate aim .....	268, 270, <b>539</b>	Media, newspaper, distribution .....	114
Legitimate expectation .....	270, 273, 280, <b>542</b>	Media, press, written, freedom .....	137
		Medical profession .....	106, 151

Medical treatment, refusal.....	151	Parents, juvenile court, criminal proceedings, involvement.....	<b>501</b>
Mental disturbance, degree .....	134	Parents, unmarried, joint custody .....	<b>505</b>
Minister, retirement, compulsory provisional.....	81	Parliament, authority .....	<b>629</b>
Minor, consent .....	28	Parliament, committee .....	264
Minor, lawyer, assistance.....	200	Parliament, committee, inquiry.....	308
Minor, maturity, proof, right .....	255	Parliament, control by the people .....	6
Minor, protection .....	255	Parliament, decision.....	264
Minor, rape.....	28	Parliament, decision, motivation, obligation.....	393
Minor, sexual crime, victim.....	28	Parliament, elections.....	<b>496</b>
Minor, understanding, capacity .....	151	Parliament, free mandate, limits .....	331
Minority, discrimination, positive, appropriate measures .....	44	Parliament, injunction to the executive .....	6
Minors, minimum sentence .....	382	Parliament, member.....	331
Misdemeanour proceedings.....	270	Parliament, member, diplomatic passport.....	6
Money laundering, suspicion, prohibition of financial transaction.....	328	Parliament, member, duties .....	331
Monopoly .....	107	Parliament, member, incompatibilities .....	6
Monopoly, business .....	121	Parliament, member, salary .....	54
Municipality, election, equality .....	285	Parliament, parliamentary group .....	174
Municipality, financial independence .....	288	Parliament, powers .....	408
Municipality, property, audit .....	56	Parliament, right to information .....	308, 313
Municipality, public utility, fee, collection.....	<b>604</b>	Parliamentary committees, function.....	404
Municipality, resource, sufficiency, guarantee .....	285	Patient, agreement.....	151
Name, chain .....	299	Patient, informed consent .....	151
Name, choice, marriage .....	299	Patient, right.....	151
Name, double-barrelled, married couple.....	299	Penal responsibility, subjective .....	28
Names, law .....	299	Penalty .....	324
Names, multiple .....	299	Penalty, administrative .....	110
National bank, head, appointment .....	172	Penalty, classification.....	244
National Bank, head, dismissal.....	172	Penalty, determination .....	17, 22
National or ethnic community, special rights.....	44	Penalty, excessive .....	<b>556</b>
National Security Council.....	337	Penalty, maximum .....	22
National security, protection.....	170	Penalty, minimum .....	22
National service .....	<b>543</b>	Penalty, mitigation.....	22
Nationalisation .....	<b>570</b>	Penalty, nature .....	244
Non-retrospective effect of law .....	<b>562</b>	Pension .....	280
Norm control, concrete, purpose.....	53	Pension, amount .....	<b>539, 623</b>
Norm, interpretation, ambiguity.....	65	Pension, contribution .....	248
Normative act.....	15	Pension, determination, equality.....	25
Notice, right.....	<b>604</b>	Pension, disability .....	130
Nuclear power plant.....	107	Pension, payment .....	<b>626</b>
Oath, religious importance .....	88	Pension, reduction .....	<b>539</b>
Occupancy, right .....	379	Pension, solidarity, principle .....	248
Occupational injury, compensation .....	130	Pension, surviving spouse .....	25
Offence, administrative .....	110	Personal data.....	295
Offence, minor, review by court .....	<b>595</b>	Personality, general right .....	75
Ombudsman, law, <i>locus standi</i> , challenging.....	161	Personality, right .....	<b>478</b>
Ombudsman, powers .....	161	Plan, land-use .....	49
Organised crime, fight.....	345	Planning, urban, power, transfer.....	<b>465</b>
Orientation, sexual .....	148	Police custody, lawyer, access, restriction.....	200
Ownership, right, restriction .....	110	Police, administration, discretion, absence.....	57
Pardon, legal nature.....	<b>598</b>	Police, law on police .....	385
Parent and child, reforming the law .....	<b>505</b>	Police, laws regulating police.....	253
Parent, non-custodial, contact, <i>de facto</i> hindrance .....	66	Policy decision, reviewability.....	<b>602</b>
Parent, non-custodial, contact, arrangement .....	66	Policy, definition, procedure.....	<b>602</b>
Parent, rights, criminal law, constitutional requirements, conflict.....	<b>501</b>	Political conduct.....	250
Parental contact, joint consideration .....	266	Political crime, concept .....	30
Parental rights.....	<b>501, 505</b>	Political offence, politically motivated offence.....	385
		Political offence, politically motivated offence, pardon.....	<b>598</b>
		Political party, asset .....	<b>585</b>

Political party, hostility to human rights .....	<b>484</b>	Proceedings, defective, judge removal from case .....	<b>497</b>
Political party, public funding, campaign, access...	160	Proceedings, irregularity .....	356
Political party, racist .....	<b>517</b>	Proceedings, speeding up .....	<b>512</b>
Political party, registration .....	160	Proceedings, subsidiarity, Constitutional Court, principle .....	<b>511</b>
Political party, subsidy, withdrawal .....	<b>484</b>	Procreation, medically assisted .....	125
Politician, defamation .....	<b>598</b>	Professional practice.....	252, 254
Politician, misconduct .....	250	Professor, theology, renouncement, religion .....	79
Politician, privileged treatment .....	250	Professor, theology, transfer, new subject.....	79
Pollution, control .....	<b>649</b>	Prohibition .....	<b>618</b>
Polygamy .....	240	Property right, restriction.....	277
Power, vacuum, impossibility .....	<b>559</b>	Property, deprivation .....	62
Powers, administrative .....	<b>598</b>	Property, disposal, limitation .....	121
Precaution, principle .....	<b>649</b>	Property, illegally occupied .....	379, <b>606</b>
President, acting, qualifications .....	<b>559</b>	Property, interference .....	26
President, decree.....	414	Property, owner, civil obligations .....	<b>606</b>
President, elections.....	402	Property, protection.....	376
President, powers .....	<b>628</b>	Property, public, use .....	107
President, resignation, replacement .....	<b>558</b>	Property, right, restriction.....	110
President, term of office .....	402	Prosecution department, member.....	252, 254
Press, freedom, protection, scope .....	114	Prosecution, criminal, delayed .....	<b>601</b>
Preventive measure, annulment, amendment .....	330	Prosecution, private .....	<b>601</b>
Prime Minister, candidate, proposal.....	174	Prosecutor, charges, obligation to bring .....	119
Principle that penalties must be specific to the offender .....	244	Protection, environmental, competence.....	34
Prior notice, reasonable .....	<b>604</b>	Protection, legal, guarantee, equal .....	<b>508</b>
Prison rules .....	287	Protective measure .....	192
Prison sentence, determinate .....	177	Province, legislative competence.....	<b>606</b>
Prison sentence, indeterminate .....	177	Psychiatric establishment, internment .....	<b>480</b>
Prison, administration, powers, open scheme, placement, decision .....	360	Public authority, special legal relationship .....	<b>604</b>
Prison, compulsory labour .....	68	Public international law, principles .....	190
Prison, correspondence .....	287	Public place, use.....	<b>618</b>
Prisoner.....	364	Public procurement, dispute, settlement, procedure .....	283
Prisoner, deportation, legality .....	178	Public safety.....	337, <b>535</b>
Prisoner, family, communication .....	246	Public service .....	<b>551, 554</b>
Prisoner, rehabilitation .....	68	Public utility, determination, competence.....	115
Prisoner, remuneration for work.....	68	Publication, ban .....	87
Prisoner, rights, violation, remedy .....	42	Punishment, cruel and unusual.....	<b>556</b>
Prisoner, sentence, periodic review .....	177	Punishment, definition.....	<b>556</b>
Prisoner, treatment .....	<b>536</b>	Punishment, legal person, nature .....	332
Privacy, financial data, protection .....	36	Rape, allegation.....	<b>601</b>
Privacy, fiscal data, protection .....	36	Rape, child, cross-examination.....	143
Privacy, interest .....	181	Rape, qualification, sexual abuse, violent.....	35
Privacy, interest, abandonment .....	38	Ratification, procedure, decision-making .....	326
Privacy, right, minor, accused.....	32	Real estate, value .....	41
Privacy, spoken word.....	75	Recusal, judicial, conditions.....	418
Private international law, personal status .....	240	Refugee, recognised, right of residence .....	<b>486</b>
Privatisation, conditions .....	29	Regulation, issue, competence.....	40
Privatisation, limited to one region .....	292	Regulation, scope .....	40, 337, <b>572</b>
Privatisation, oversight.....	29	Regulation, scope, permissible .....	376
Privatisation, purpose .....	29	Rehabilitation .....	303
Privatisation, safeguards, judicial review .....	29	Relations, contractual .....	101
Procedural unconstitutionality, allegations.....	<b>602</b>	Religion, activity, freedom.....	<b>621</b>
Procedure, administrative .....	8, <b>608</b>	Religion, blood transfusion, refusal.....	255
Procedure, disclosure by parties of their own written submissions.....	<b>637</b>	Religion, church, sovereignty, ecclesiastical offices .....	81
Procedure, meticulous observance of constitutional issue.....	180	Religion, ecclesiastical law, application by state court .....	81
Proceedings, administrative .....	17	Religion, free exercise .....	380
Proceedings, appropriate.....	53	Religion, objection to having photograph taken .....	259
Proceedings, criminal.....	113		

Religion, religious conviction.....	152	Society, religious, state funding, administration, commissioning.....	301
Religion, religious feeling, respect .....	152	Solidarity principle.....	<b>539</b>
Religion, secularism, principle .....	<b>621</b>	Sources of constitutional law, Constitution, combination with ECHR .....	<b>480</b>
Religious community.....	<b>519</b>	Sovereignty, exercise, permanent .....	<b>559</b>
Religious community, right of self-determination .....	81	Standard, rule, regulation.....	<b>466</b>
Religious community, self-determination, right .....	79	State property, investment.....	107
Religious custom.....	380	State, duty to protect.....	121
Removal to another country.....	<b>615</b>	State, interest.....	53
Remuneration, gross.....	335	State, neutrality, religious and ideological creeds .....	301
Remuneration, temporary procedure .....	54	State, responsibility.....	96, 102
<i>Res judicata</i> , national, community law, primacy .....	<b>636</b>	State, security, external .....	30
Responsibility, authority .....	<b>554</b>	Stateless person, right of residence.....	<b>486</b>
Retail activity, regulation.....	<b>519</b>	Statement of reasons, foreign judgment .....	<b>560</b>
Retirement, compulsory.....	81	Statement of reasons, obligation, scope.....	<b>560</b>
Retirement, insurance scheme, survivor's pension, bigamy .....	240	Strike, political.....	160
Retirement, right .....	253	Strike, prohibition .....	160
Right and freedom, statutory limitation, requirement.....	<b>535</b>	Subsidiarity, principle.....	326, <b>465</b> , <b>602</b>
Right to a fair trial, court, power to take account of a mitigating circumstance .....	22	Sunday, secular character .....	268, <b>519</b>
Right to damages.....	<b>576</b>	Supreme Court, power to interpret Constitution, exclusive .....	276
Right to rehabilitation and compensation .....	424	Supreme Court, president, age limit, dismissal .....	331
Right to take collective action .....	<b>644</b>	Surtax, imposition .....	341
Right, subjective, protection .....	15	Suspension of rights .....	57
Rights of the Child.....	382	Tax.....	261
Rights of third parties, infringement .....	<b>547</b>	Tax consultant, professional secret .....	74
Rights of workers, protection .....	268	Tax law.....	253
Rights, judicial protection .....	<b>593</b>	Tax law, special contribution.....	<b>493</b>
Road traffic, offence.....	110	Tax, assessment, objection .....	48
Salary, aggregation.....	335	Tax, calculation .....	<b>523</b>
Salary, confidentiality .....	281	Tax, differentiation .....	<b>493</b>
Salary, increase, trade union, condition.....	335	Tax, income, calculation .....	<b>522</b>
Sanction, administrative.....	22, 110	Tax, municipal.....	288
Search and seizure, content of garbage bags .....	38	Tax, offence, surtax, standard of proof .....	341
Search, in car, evidence, admissibility .....	181	Tax, proceedings, burden of proof, scope .....	341
Search, incident to arrest.....	181	Tax, purpose.....	<b>493</b>
Secrecy, obligation, observation .....	74	Tax, real estate .....	51
Security guard, private, powers .....	376	Tax, retroactive, arbitrariness .....	390
Security, consideration.....	96	Tax, spouse .....	<b>522</b>
Security, national .....	<b>543</b>	Tax, value added .....	48
Security, social.....	175	Taxation .....	295, 410
Sentence, enforcement.....	<b>468</b>	Taxation, decision, review.....	51
Sentence, execution .....	<b>615</b>	Taxation, legal basis .....	51, <b>522</b>
Sentence, mandatory minimum, for minors .....	382	Taxation, principle of lawfulness .....	<b>523</b>
Sentenced person, transfer to another country.....	<b>615</b>	Telephone, tapping .....	75, <b>568</b>
Separation of powers .....	410	Tenant, right.....	<b>604</b>
Service, essential.....	<b>604</b>	Terrorism, fight.....	96, 192, 345, <b>531</b>
Service, provider, responsibility .....	<b>604</b>	Terrorism, prevention.....	328
Sexual offence against children, special nature.....	<b>601</b>	Testimony, challenge, evidence, admissibility.....	183
Shareholder, right .....	62	Testimony, forensic.....	419
Shop, closure .....	<b>519</b>	Time-limit, reasonableness .....	383
Smoking, ban .....	372	Trade union, action, collective .....	<b>644</b>
Social justice .....	114	Trade union, discrimination.....	18
Social protection .....	<b>626</b>	Trade union, freedom.....	339
Social security.....	14, 106, 156, 240, <b>542</b> , <b>561</b>	Trade, regulation.....	268
Social security, benefits, abuse .....	394	Traffic offence, fine .....	128
Society, religious, advancement, financial, by state .....	301	Transitional provision.....	<b>505</b>

---

Transport, air, Community airport, noise-related operating restrictions .....	<b>634</b>
Treatment, medical, refusal, religious grounds .....	255
Treatment, privileged .....	44
Treaty of Lisbon, act approving .....	311
Treaty, assent, federate entities .....	23
Treaty, constitutional requirements .....	<b>499</b>
Treaty, constitutional review, preventive .....	<b>499</b>
Treaty, effect in domestic law .....	<b>487</b>
Treaty, enactment .....	280
Treaty, European Union .....	23, <b>499</b>
Treaty, European Union, ratification, referendum, obligation .....	326
Treaty, international, validity .....	280
Treaty, ratification .....	23, 326, <b>499</b>
Trial <i>in absentia</i> .....	<b>613</b>
Trial within reasonable time, meaning .....	<b>601</b>
Trial within reasonable time, remedy .....	<b>601</b>
Truth, right to know .....	423
Unconstitutionality, declaration .....	387
Unemployment, benefit, right .....	175
Vagueness .....	316
Vagueness, statutory .....	376
Victim, report, scrutiny, obligation .....	421
Violence, domestic .....	316
Violence, presumption .....	28
Vote, relative weight .....	<b>533</b>
Water, supply .....	<b>602</b>
Weapon, acquisition, permit .....	57
Weapon, licence to carry, granting .....	57
Weapon, prohibition .....	57
Withdrawal, composition of the bench .....	<b>481</b>
Witness, cross examination .....	143
Witness, hearing, video recording .....	391
Woman, advancement of rights .....	335
Woman, married, discrimination .....	380
Woman, pregnant, right to privacy .....	<b>590</b>

---





**Sales agents for publications of the Council of Europe**  
**Agents de vente des publications du Conseil de l'Europe**

**BELGIUM/BELGIQUE**

La Librairie Européenne  
The European Bookshop  
Rue de l'Orme, 1  
BE-1040 BRUXELLES 20  
Tel: 32 (0)2 231 0435  
Fax: 32 (0)2 735 0860  
E-mail: [order@libeurop.be](mailto:order@libeurop.be)  
<http://www.libeurop.be>

Jean De Lannoy / DL Services  
Avenue du Roi 202 Koningslaan  
BE-1190 BRUXELLES  
Tel: 32 (0) 2 538 4308  
Fax: 32 (0) 2 538 0841  
E-mail: [jean.de.lannoy@dl-servi.com](mailto:jean.de.lannoy@dl-servi.com)  
<http://www.jean-de-lannoy.be>

**BOSNIA AND HERZEGOVINA/  
BOSNIE-HERZÉGOVINE**

Robert's Plus d.o.o  
Marka Marulića 2/v  
BA-71000, SÁRAJEVO  
Tel/Fax: 387 33 640 818  
E-mail: [robertsplus@bih.net.ba](mailto:robertsplus@bih.net.ba)

**CANADA**

Renouf Publishing Co. Ltd.  
1-5369 Canotek Road  
CA-OTTAWA, Ontario, K1J 9J3  
Tel: 1 613 745 2665  
Fax: 1 613 745 7660  
Toll-Free Tel: (866) 767-6766  
E-mail: [order\\_dept@renoufbooks.com](mailto:order_dept@renoufbooks.com)  
<http://www.renoufbooks.com>

**CROATIA/CROATIE**

Robert's Plus d.o.o  
Marasovičeva 67  
HR-21000, SPLIT  
Tel: 385 21 315 800 ,801, 802, 803  
Fax: 385 21 315 804  
E-mail: [robertsplus@robertsplus.hr](mailto:robertsplus@robertsplus.hr)

**CZECH REPUBLIC/RÉPUBLIQUE  
TCHÈQUE**

Suweco CZ s.r.o  
Klecakova 347  
CZ – 18021 PRAHA 9  
Tél: 420 2 424 59 204  
Fax: 420 2 848 21 646  
E-mail: [import@suweco.cz](mailto:import@suweco.cz)  
<http://www.suweco.cz>

**DENMARK/DANEMARK**

GAD, Vimmelskaftet 32  
DK-1161 KØBENHAVN K  
Tel.: +45 77 66 60 00  
Fax: +45 77 66 60 01  
E-mail: [gad@gad.dk](mailto:gad@gad.dk)  
<http://www.gad.dk>

**FINLAND/FINLANDE**

Akateeminen Kirjakauppa  
Keskuskatu 1  
PO Box 128  
FI-00100 HELSINKI  
Tel.: 358 (0) 9 121 4430  
Fax: 358 (0) 9 121 4242  
E-mail : [akatilas@akateeminen.com](mailto:akatilas@akateeminen.com)  
<http://www.akateeminen.com>

**FRANCE**

La Documentation française  
(diffusion/distribution France entière)  
124, rue Henri Barbusse  
FR-93308 AUBERVILLIERS CEDEX  
Tel.: 33 (0)1 40 15 70 00  
Fax: 33 (0)1 40 15 68 00  
E-mail: [commande@ladocumentationfrancaise.fr](mailto:commande@ladocumentationfrancaise.fr)  
<http://www.ladocumentationfrancaise.fr>

Librairie Kléber  
1 rue des Francs Bourgeois  
FR-67000 Strasbourg  
Tel: 33 (0) 3 88 15 78 88  
Fax: 33 (0)3 88 15 78 80  
E-mail: [librairie-kleber@coe.int](mailto:librairie-kleber@coe.int)  
<http://www.librairie-kleber.com>

**GERMANY/ALLEMAGNE  
AUSTRIA/AUTRICHE**

UNO Verlag GmbH  
August-Bebel-Allee 6  
DE-53175 BONN  
Tel.: (49) (0) 2 28 94 90 20  
Fax: (49) (0) 2 28 94 90 222  
E-mail: [bestellung@uno-verlag.de](mailto:bestellung@uno-verlag.de)  
<http://www.uno-verlag.de>

**GREECE/GRÈCE**

Librairie Kauffmann s.a.  
Stadiou 28  
GR-10564 ATHINA  
Tel.: (30) 210 32 55 321  
Fax: (30) 210 32 30 320  
E-mail: [ord@otenet.gr](mailto:ord@otenet.gr)  
<http://www.kauffmann.gr>

**HUNGARY/HONGRIE**

Euro Info Service  
Pannónia u. 58, PF. 1039  
HU-1136 BUDAPEST  
Tel.: 36 1 329 2170  
Fax: 36 1 349 2053  
E-mail: [euroinfo@euroinfo.hu](mailto:euroinfo@euroinfo.hu)  
<http://www.euroinfo.hu>

**ITALY/ITALIE**

Licosa SpA  
Via Duca di Calabria 1/1  
IT-50125 FIRENZE  
Tel.: (39) 0556 483215  
Fax: (39) 0556 41257  
E-mail: [licosa@licosa.com](mailto:licosa@licosa.com)  
<http://www.licosa.com>

**MEXICO/MEXIQUE**

Mundi-Prensa México  
S.A. De C.V.  
Rio Pánuco  
141 Delegacion Cuauhtémoc  
MX-06500 MÉXICO, D.F.  
Tel.: 52 (01) 55 55 33 56 58  
Fax: 52 (01) 55 55 14 67 99  
E-mail: [mundiprensa@mundiprensa.com.mx](mailto:mundiprensa@mundiprensa.com.mx)  
<http://www.mundiprensa.com.mx>

**NETHERLANDS/PAYS-BAS**

Roodveldt Import BV  
Nieuwe Hemweg 50  
NE-1013 CX AMSTERDAM  
Tel: 31 20 622 8035  
Fax: 31 20 625 5493  
Website: [www.publidis.org](http://www.publidis.org)  
E-mail: [orders@publidis.org](mailto:orders@publidis.org)

**NORWAY/NORVÈGE**

Akademika,  
PO Box 84, Blindern  
NO-0314 OSLO  
Tel.: 47 2 218 8100  
Fax: 47 2 218 8103  
E-mail: [support@akademika.no](mailto:support@akademika.no)  
<http://www.akademika.no>

**POLAND/POLOGNE**

Ars Polona JSC  
25 Obrońcow Street  
PL-03-933 WARSZAWA  
Tel.: 48 (0) 22 509 86 00  
Fax: 48 (0) 22 509 86 10  
E-mail: [arspolona@arspolona.com.pl](mailto:arspolona@arspolona.com.pl)  
<http://www.arspolona.com.pl>

**PORTUGAL**

Livraria Portugal  
(Dias & Andrade, Lda.)  
Rua do Carmo, 70  
PT-1200-094 LISBOA  
Tel.: 351 21 347 42 82 / 85  
Fax: 351 21 347 02 64  
E-mail: [info@livrariaportugal.pt](mailto:info@livrariaportugal.pt)  
<http://www.livrariaportugal.pt>

**RUSSIAN FEDERATION /  
FÉDÉRATION DE RUSSIE**

Ves Mir, 17b. Butlerova ul.  
RU – 101000 MOSCOW  
Tel: +7 495 739 0971  
Fax: +7 495 739 0971  
E-mail: [orders@vesmirbooks.ru](mailto:orders@vesmirbooks.ru)  
<http://www.vesmirbooks.ru>

**SPAIN/ESPAGNE**

Mundi-Prensa Libros SA  
Castelló, 37  
ES-28001 MADRID  
Tel.: 34 914 36 37 00  
Fax: 34 915 75 39 98  
E-mail: [libreria@mundiprensa.es](mailto:libreria@mundiprensa.es)  
<http://www.mundiprensa.com>

**SWITZERLAND/SUISSE**

Planetis Sàrl  
16 chemin des pins  
CH-1273 ARZIER  
Tel.: 41 22 366 51 77  
Fax: 41 22 366 51 78  
E-mail: [info@planetis.ch](mailto:info@planetis.ch)

**UNITED KINGDOM/ROYAUME-UNI**

The Stationery Office Ltd.  
PO Box 29  
GB-NORWICH NR3 1GN  
Tel.: 44 (0) 870 600 55 22  
Fax: 44 (0) 870 600 55 33  
E-mail: [book.enquiries@tso.co.uk](mailto:book.enquiries@tso.co.uk)  
<http://www.tsoshop.co.uk>

**UNITED STATES and CANADA/  
ÉTATS-UNIS et CANADA**

Manhattan Publishing Company  
468 Albany Post Road  
US-CROTON-ON-HUDSON,  
NY 10520  
Tel.: 1 914 271 5194  
Fax: 1 914 271 5856  
E-mail: [Info@manhattanpublishing.com](mailto:Info@manhattanpublishing.com)  
<http://www.manhattanpublishing.com>

**Council of Europe Publishing/Editions du Conseil de l'Europe**

FR-67075 Strasbourg Cedex

Tel.: (33) 03 88 41 25 81 – Fax: (33) 03 88 41 39 10 – E-mail: [publishing@coe.int](mailto:publishing@coe.int) – Website: <http://book.coe.int>