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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

Guidelines
for the presentation of contributions
to the *Bulletin on Constitutional Case-Law*
and CODICES

The *Guidelines for the presentation of contributions to the Bulletin on Constitutional Case-law and CODICES*¹ should facilitate the production of these publications. The Secretariat of the Venice Commission would be grateful to liaison officers if they could follow these guidelines when preparing their contributions. This would greatly contribute to speeding up the production of the Bulletin and the CODICES database.

Format

Liaison officers should send their contributions to the Secretariat using in electronic form (e-mail). Please note that if a Court does not send its contributions in electronic form, these have to be manually retyped by the Secretariat, a procedure which slows down the production of the Bulletin considerably. Liaison officers should always send their contributions along with the full text of the judgments in the original language, and in other languages, if available (by e-mail).

Respecting presentation norms

Précis are processed automatically by computer macros (programmes) in order to be fed into the CODICES database. It is therefore important to respect the norms for writing zone titles, keywords of the Systematic Thesaurus and the Alphabetical Index (slashes, spacing etc.); these elements will otherwise not properly be recognised by the macros. The same applies to citations of constitutions, where links to the texts of the corresponding article are established automatically (see Zone 5 "Summary" below).

Drafting

Liaison officers should take into account that *précis* in respect of one country will almost certainly be read by users in another country. *Précis* should therefore be drafted using simple terms and short sentences. An explanation for legal concepts used in the *précis* that are particular to the liaison officer's country should be provided, if possible.

Liaison officers can follow the editing and translation process of their contributions and consult the contributions of other courts on either the restricted Interim Bulletin site: <http://www.venice.coe.int/JU/Bulletin> or on the CODICES website: www.codices.coe.int under « *Précis* being processed ».

Statistics

Statistics should cover all decisions handed down during the reference period, not only the decisions selected by the liaison officers for publication in the *Bulletin*. **These statistics should be sent to the Secretariat regardless of whether or not *précis* were sent by the liaison officer in that period.**

Should liaison officers not be able to produce statistics three times a year, they may send them for the entire year with their contribution to issue 3 of the Bulletin, i.e. the reference period of September to December.

The format for the statistics should be presented in is at the discretion of the liaison officer and may follow the structure of the statistics used at the Court.

¹ Liaison officers or correspondents from courts linked to the Venice Commission by an agreement with a regional body (e.g. ACCPUF, SACJF) contribute to the CODICES database. Liaison officers from courts the country of which has member or observer status with the Venice Commission also contribute to the Bulletin.

ZONES

The *précis* should be presented *in chronological order*, using the following eight zones:

Zone 1 “Identification:”

Zone 2 “Keywords of the Systematic Thesaurus:”

Zone 3 “Keywords of the Alphabetical Index:”

Zone 4 “Headnotes:” (*Leitsätze, Massime*) (key legal principles that emerge from the case)

Zone 5 “Summary:” (explanation of the legal reasoning, of the factual circumstances, etc.)

Zone 6 “Supplementary information:” (optional)

Zone 7 “Cross-references:” (optional)

Zone 8 “Languages:”

Title of zones

- in lowercase with a capital letter at the beginning
- immediately followed by a colon “:”
- no numbers in front of the titles
- if zones 6 or 7 are not used, the title of the zone should be omitted.

Please do not use footnotes and do not enter any formatting codes, page breaks, etc., except for italics because *précis* are formatted automatically. In Word, do not use any style other than “Normal”.

The titles of zones 3 and 8 are always in the plural form, even if there is only one “keyword” or one “language”.

Please do not use abbreviations. They might be familiar to readers in your country, but unknown to readers of the Bulletin from another country. If the use of abbreviations cannot be avoided, then please introduce it in brackets following the first occurrence in the *précis* of the full wording: e.g. “Administrative Disputes Act (hereinafter, the «ADA»)”.

Précis should not exceed a total of 1200 words (zones headnotes, summary, supplementary information and cross-references included).

Zone 1 - Identification:

Zone 1 contains the identification number of the *précis*, e.g. “KOR-2012-1-007”, **(this number is attributed by the Secretariat in Strasbourg)**, and the references that are needed to identify the decision. It is divided into eight Sub-Zones:

- a) Country
- b) Name of the Court
- c) Chamber (if applicable)
- d) Date of decision given
- e) Number of the decision

- f) Title of the decision (if applicable)
- g) Official publications
- h) Non-official publications

Please separate the Sub-Zones a) to g) with a space, slash, space “ / ”; and end Sub-Zone h) with a full stop “.”. There is no line break between Sub-Zones a) to h).

Do not delete any of the Sub-Zones, even if they remain empty. In the following example, zone c) is empty:

Identification: FRA-2012-1-006

a) France / b) Constitutional Council / c) / d) 04.05.2012 / e) 2012-240 QPC / f) Mr Gérard D. (Definition of the offence of sexual harassment) / g) *Journal officiel de la République française - Lois et Décrets* (Official Gazette), 05.05.2012, 8015 / h) CODICES (English, French).

Date

Under d), only **one** date can be included. If the *précis* covers several decisions, use the date of the oldest decision. The date should be entered in the following sequence: day, month, year (DD.MM.YYYY) separated by a dot:

“d) 04.05.2012 / ” corresponds to a decision of 4 May 2012.

The first section, “04”, is always composed of two numbers, which indicates the day, the second one “05” indicates the month, May in this example, and the third one the year, indicated in full “2012”.

Decision number

The entry under e), of the decision or judgment number should be limited to this number only, not preceded by anything else, such as “Decision”, “Judgment” or “Number”. For example:

“e) 2 BvR 1464/11”

When reference is made to two or more decisions or judgments, they should be separated with a comma, e.g. “39692/09, 40713/09, 41008/09”. There should be no “and” before the last number.

Official publications

In Zone g), official publications, i.e. in the court's collection or else in the Official Gazette, are cited in the original language and in italics, followed in brackets by the type of publication (Official Gazette) or (Official Digest).

Example: g) *Magyar Közlöny (Official Gazette), 2012/48*

Non-official publications

Non-official publications in the last Sub-Zone h) are cited in the original language and in italics and are not translated. The full title of a publication shall be given, no abbreviations. References to academic works (not only complete re-publications of the case) may be included in this Sub-Zone.

Example: h) [2010] 3 *Weekly Law Reports* 223

If there are several publications, these should be separated by a semi-colon “;”. References to publications that appear once the contribution has been sent should nevertheless be communicated to the Secretariat so that they can be included in the CODICES database.

If you have transmitted the full text in electronic form to the Secretariat, the latter will add a reference to CODICES as a non-official publication in Zone h), e.g. “CODICES (Dutch, French, German)” a decision for which the full text will be available in CODICES in these three languages.

Example: Zone 1 for decision 2012-228/229 QPC of 6 March 2012 of the Constitutional Council of France, will be as follows:

Identification: FRA-2012-1-***

a) France / b) Constitutional Council / c) / d) 06.03.2012 / e) 2012-228/229 QPC / f) Mr Kiril Z. (Audiovisual recording of examinations and confrontations of persons implicated in criminal cases) / g) *Journal officiel de la République française - Lois et Décrets* (Official Gazette), 07.04.2012, 6414 / h) CODICES (English, French).

Zone 2 - Keywords of the systematic thesaurus:

The systematic thesaurus is subdivided into five chapters, like the branches of a tree (hence the branched, hierarchical structure of the Thesaurus).

Chapter 1 is the longest of the five chapters and covers the body of constitutional jurisdiction on the basis of which the decision is indexed (Constitutional Court, Supreme Court, Constitutional Council etc.). The keywords in this Chapter should only be used if a relevant procedural question is discussed by the Court. It should not be used to establish statistical data. The *Bulletin* reader or user of the CODICES database should only look for decisions indexed under this Chapter when the subject of the keyword is an issue discussed in the case. For this reason, liaison officers should only use this Chapter sparingly and are encouraged to index decisions starting in the reverse order of the Systematic Thesaurus' chapters, i.e. begin with Chapter 5, then move on to 4, then 3, etc.

Chapter 1.1 deals with the structure of the Court in question, 1.2 covers the different applicants and 1.3 the jurisdiction of the Court. Sub-Chapter 1.3.5 deals with the enactment under review. The various procedural aspects before the Court are found in 1.4. Questions of procedural guarantees before lower-instance courts are found in Chapter 5.3.13 of the Thesaurus. If the type of decision to be made is at issue, Chapter 1.5 should be used. Finally, Chapter 1.6 deals with the effects of the decision.

Chapter 2 covers the sources of constitutional law. 2.1 deals with national and international sources (treaties, case-law, etc.), questions of hierarchy between sources are dealt with in 2.2 and the various techniques of interpretation in 2.3.

Chapter 3 covers the general principles of constitutional law, such as democracy (3.3) or the separation of powers (3.4). The principle of equality also appears in 3.21. It should be noted, however, that this keyword should only be used when the principle of equality is not applied to individuals, but to institutions (e.g. municipalities). In all other cases the keyword "equality" under Chapter 5.2 should be used.

Chapter 4 covers state institutions, notably the head of state (4.4), parliament (4.5), government (4.6) and courts other than the court with constitutional jurisdiction (4.7). Chapter 4.8 applies to states with a federal or regional structure. Chapter 4.9 deals with the various aspects of elections, followed by the institutions such as public finances (4.10), armed forces, police forces and secret

services (4.11), the Ombudsman (4.12) and other special categories. Chapter 4.17 deals with issues related to the institutions of the European Union.

Chapter 5 is subdivided in accordance with the two United Nations Covenants: Civil and Political Rights (5.3) and Economic, Social and Cultural Rights (5.4). Chapter 5.1 covers general questions such as the entitlement to rights (5.1.1) and the limitations on fundamental rights (5.1.4). Chapter 5.2 covers the principle of equality applied to individuals. Chapter 5.4 gathers together certain rights known as collective rights.

Footnotes

The footnotes are a very important element in all five chapters of the Thesaurus. They serve to explain the keywords and provide advice as to their correct use. In some cases they also contain cross-references to other keywords that should be used.

Indexing

Another very important element is the indexing of what the reader will see. It is usually the *précis* of the *Bulletin on Constitutional Case-Law* that are indexed. This means that only elements that appear in the *précis*-to-be-published should be indexed - not elements that only appear in the full text of the decision which have not been recopied into the *précis*. The rule should therefore be: if an element is important enough to be indexed in the Thesaurus, then include it in the *précis*.

Formal structure of the systematic thesaurus

As explained above, the systematic thesaurus displays the five chapters that it contains in an arborescent structure. The major branches of this "tree" are subdivided into ever finer branches, becoming ever more specific as it branches out.

Take for example the word "equality" applied as a fundamental right:

5. Fundamental Rights

5.2 Equality

- 5.2.2 Criteria of distinction
- 5.2.2.1 Gender
- 5.2.2.2 Race

When indexing, spell out the complete "**chain of keywords**" without omitting intermediate elements. For example, when indexing a decision that deals with discrimination based on gender:

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

If a term is missing in the chain that corresponds to the contents of a decision that you are indexing, then the chain of keywords in the Systematic Thesaurus may be shortened. For instance, in order to index a decision based on a criterion of distinction that is not given in the Thesaurus, such as an arbitrary date:

"5.2.2 Fundamental rights - Civil and political rights - Equality - Criteria of distinction."

In this case the criterion should be added to the list of keywords in the Alphabetical Index. However, as stated above, you should not make shortcuts within chains or mix keywords from different chains.

The “keyword chain” should always begin with a capital letter and end with a full stop “.”.

Examples of keyword chains

I. Wrong (shortcut of keyword chain):

5.3.13.15 **Fundamental Rights** – Impartiality – Civil and political rights.

Correct:

5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Impartiality.

II. Wrong (joinder of two keyword chains):

5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Independence – Impartiality.

Correct:

5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Independence.

5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Impartiality.

III. Wrong (invention of keyword):

5.3.31 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation – Libel.

Correct:

5.3.31 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

And add the use of a separate keyword “Libel” in the alphabetical index.

Zone 3 - Keywords of the Alphabetical Index:

The Alphabetical Index is used to index concepts that are not found in the Systematic Thesaurus, but that only cover constitutional law issues. The role of the Alphabetical Index is therefore to index other branches of law (civil, criminal etc.) as well as to refine or narrow down a keyword of the Thesaurus (see the "libel" example above). It is used especially to index legal keywords, but may also cover factual matters such as "housing" or "forest".

Liaison officers are free to add new keywords to the Alphabetical Index. However, before doing so, they should look through the Alphabetical index and see whether they can use one of the existing keywords.

Avoid using plural forms for the keywords of the Alphabetical Index, where possible.

Avoid the repetition of keywords of the Systematic Thesaurus. However, elements that appear in the footnotes of the Thesaurus may be used in the Alphabetical Index.

Keywords may consist of more than one word, but their total length must not exceed 80 characters including spaces between words. The keywords should be separated by a space, slash, space " / " and begin with a capital letter. The list of keywords should end with a full stop ".".

The most important element of the keyword should be placed first followed by a comma. Prepositions at the end of such inverted keywords should be deleted:

Example: "Administration of local communities" becomes

"Local community, administration" (*the keywords are inverted to place the most important element first; the preposition "of" is deleted and the keyword is singular*)

These rules will not apply to composite terms designating a well-defined legal concept.

Example: "Free movement of persons" is correct.

Some keywords are used to group topics that belong together e.g. media, election, education, housing. Therefore do not use "Radio, licence" but "Media, radio, licence".

Zone 4 - Headnotes:

Zone 4 contains a short summary with the headnotes (*Leitsätze, Massime*), key legal principles that emerge from the case. They should not contain extracts from the decision, but a summary of the main contents. Each legal issue considered in the decision should be summarised in one paragraph. This information should be abstract and **not contain any reference to the particular facts of the case**. Consequently, there should be no mention of "The Constitutional Court decided that ...". The main legal elements of the case should be briefly presented in the form of full sentences. A mere enumeration of points raised should find its place in the Systematic Thesaurus or in the Alphabetical Index.

As a general rule, headnotes should indicate the content of legal norms (e.g. "freedom of expression"). Their citation (e.g. "Article 3 of the Constitution") may be added. For this citation, see "Zone 5 - Summary" below.

Example: "The right to respect for one's private and family life, guaranteed under Article 22 of the Constitution and Article 8 ECHR, is not absolute."

Please note that for example, Article 8 of the European Convention on Human Rights is drafted as follows in the *précis*: Article 8 ECHR. If a mere reference to the Convention is made without referring to an Article in particular, the whole name of the Convention should be spelled out.

Zone 5 - Summary:

This Zone should briefly describe the main facts of the case, the procedure followed, details on who appealed to the Court; what the law under scrutiny dealt with; the arguments put forward by the petitioner; the Court's assessment of the petitioner's arguments; the reasons given by the Court for its decision, including what factors it considered to be decisive in the case and why the decision was taken, and, if available, information on dissenting opinions. Additional information on the legal reasoning (*ratio decidendi*) behind the decision can be given without, however, repeating the headnotes.

The whole *précis* must not exceed 1200 words (this limit applies to the total of the zones headnotes, summary, supplementary information and references).

Liaison officers are encouraged, when appropriate, to systematically separate the cases into I. facts (including case history) and II. arguments and conclusion of the Court (see for example, EST-2009-2-007 in the appendix). A Section III may be included for dissenting and concurring opinions, which should not appear in Zone 6 – Supplementary information (see below).

Harmonising citations is very important because it allows the automatic creation of links from the *précis* to the relevant texts. The following rules should be followed:

1. Quoting legal texts

You should not repeatedly cite your Constitution or your Court in full throughout the text as in most cases it is clear from the context which Constitution or Court you are referring to, e.g. not "the Constitutional Court of the Republic of XY" or "the Constitution of XY" but rather "the Constitutional Court" and "the Constitution". Should there be a possibility of confusion with other Constitutional Courts or Constitutions, then please cite them accordingly. You should also not refer to "our" Court or "our Constitution". Since the *précis* will become part of CODICES, you should not refer to "now" in time, but rather to "at the time of the decision".

When quoting a legal text, you should use the standard formula: e.g. "the Law on the Protection of Personal Data (hereinafter, the "Law")". The same should apply to quoting a State body, e.g. "the Ministry of Foreign Affairs (hereinafter, the "Ministry")".

2. Quoting in the original language

If you wish to use the name of a national institution in the original language, cite it at the first occurrence in the *précis* between brackets and in Italics preceded by the generic term of this institution (e.g. "Parliament (*Nationalrat*)". In the following citations within the same *précis*, please use the generic term only (e.g. "Parliament"). The titles of laws should not appear in the original language.

3. Quoting of articles

When you cite articles, do not use the abbreviation "Art.". Please, write "Article" in full.

On the other hand, sub-divisions of articles should be referred to in the following way:

"Article 3.2.a" rather than "Article 3, section 2, sub-section a"

"According to Article 1.3" rather than "according to Article 1 ~~item~~ paragraph 3"

Only the citation of specific sentences remains in full, for example:

"Second Sentence of Article 1.3.3 of the Constitution".

For legal texts, in particular internal legislation, which do not use articles, "Section" or the symbol "§" can be used: (*Note that in French "section" or "§" will be translated as "article"*):

Example: « § 194.2 of the Procedural Code of the Canton of Bern ».

A series of Articles shall be referred to in the following form:

"Articles 17, 32, 69 and 117 of the Constitution".

References to articles of the Convention for the Protection of Human Rights and Fundamental Freedoms, its Protocols and articles of the Treaty establishing the European Union should be made using the abbreviations "ECHR" "Protocol ECHR" and "EC":

"Article 6.3 ECHR", "Article 1 Protocol 1 ECHR", or "Article 177 EC".

Do not use the prepositions "of the" before "ECHR" but "ECHR" only.

Make sure that you spell out the name of the Convention (i.e. not ECHR) if you are referring to it without mentioning a specific article, for instance:

"The main responsibility for the effective implementation of the European Convention on Human Rights and its Protocols falls upon the states."

Zone 6 - Supplementary information:

Zone 6 contains additional information, which in contrast to Zone 5, is not part of the decision itself. Separate opinions are part of the decision and should appear in Zone 5-Summary. Zone 6 is optional and may be used to put the reported cases in context, for example by using such entries as "as a consequence of this decision, the Law on ... has been amended" or "settled case-law". Liaison officers might also wish to give information about the general political context of a decision.

Zone 6 may also be used to set out the articles of the Constitution or other legislation referred to in the decision.

Example: "Legal norms referred to:

Articles 3, 5, 6 and 80 of the Constitution".

Please do not use abbreviations for the legislation.

Zone 7 - Cross-references:

Zone 7 can be used for cross-references to decisions of the same court or other courts, whether published or not.

If a decision has been published in the Bulletin, it should be cited in the following way:

Example: "no. 94-354 DC, 11.01.1995, *Bulletin* 1995/1 [FRA-1995-1-003]".

Bulletin 1995/ was the first Bulletin to use identification numbers and the use of page numbers was discontinued. Using square brackets [] for cross-references will ensure that a link is automatically established in the CODICES database.

The name of publications should appear in italics.

Following the *Special Bulletin on Co-operation between Constitutional Courts*, it was deemed important to make a number of clarifications in order to harmonise the Cross-references and differentiate between certain courts.

Please make sure that any cases referenced in the Summary of the *précis* are also included in the Cross-references section, where it should include the full details of the case (which should not appear in the Summary).

Please put in full the case number and date for references (i.e. the Court in question, if other than the contributing court).

The order of the Cross-References should be as follows:

- Court in question (your own Court)
- European Court of Human Rights
- European Court of Justice
- Other Courts

The format for each of these is as shown in examples below:

Constitutional Court:

- no. 2000-03-01, 30.08.2000, *Bulletin* 2000/3 [LAT-2000-3-004];
- no. 2004-18-0106, 13.05.2005, *Bulletin* 2005/2 [LAT-2005-2-005];
- no. 3-4-1-7-02, 15.07.2002, Constitutional Review Chamber of the Supreme Court of Estonia, *Bulletin* 2002/2 [EST-2002-2-006].

European Court of Human Rights:

- *Erkopic v. Croatia*, no. 51198/08, 25.04.2013;
- *Mader v. Croatia*, no. 56185/07, 21.06.2011;
- *Zdanoka v. Latvia [GC]*, no. 58278/00, 16.03.2006;
- *Sidabras and Dziutas v. Lithuania*; nos. 55480/00 and 59330/00, 27.07.2004, *Reports of Judgments and Decisions* 2004-VIII.

Court of Justice of the European Union:

- C-280/00, 24.07.2003, *Altmark Trans and Regierungspräsidium Magdeburg*, [2003] *European Court Reports* I-7747;
- T-46/97, 10.05.2000, *SIC-Sociedade Independente de Comunicação SA v. Commission of the European Communities*, [2000] *European Court Reports* II-02125.

Other Courts: [court name + case number + date + publications + bulletin citation]

- State Council of Liechtenstein, StGH 1996/6; 30.08.1996, *Bulletin* 1996/3 [LIE-1996-3-002];
- Federal Constitutional Court of Germany, *BVerfGE* 86, 133 <144>, 19.05.1992;
- Federal Court, Switzerland, Zbl. 1964, S.216, 11.09.1963.
- Constitutional Court of Slovenia, no. U-I-367/96, 11.03.1999, *Bulletin* 1999/1 [SLO-1999-1-003];
- Constitutional Court of the Czech Republic, no. US 53/2000, 27.02.2001, *Bulletin* 2001/1 [CZE-2001-1-005];
- Supreme Court of the United States, *Adler v. Board of Education of City of New York*, 03.03.1952;
- Constitutional Court of the Czech Republic, no. Pl. US 9/01, 05.12.2001, *Bulletin* 2001/3 [CZE-2001-3-017];
- Constitutional Council of France, no. 93-325 DC, 13.08.1993, *Bulletin* 1993/2 [FRA-1993-2-007];
- Constitutional Court of Italy, no. 28/1995, 19.01.1995, *Bulletin* 1995/1 [ITA-1995-1-003];
- Supreme Court of the Netherlands, no. 8152, 07.05.1993, *Bulletin* 1994/2 [NED-1994-2-005].

If there is only one court in "Other courts," then the name of the court in question should be given directly:

Constitutional Tribunal of Poland:

- no. K 39/97, 10.11.1998; *Bulletin* 1998/3 [POL-1998-3-018].

The name of the court should also be given on a separate line, if there are a significant number of cases from one court:

Constitutional Court of the Czech Republic:

- no. Pl. US 1/92, 26.11.1992, *Special Bulletin - Leading Cases 1* [CZE-1992-S-002];
- no. US 53/2000, 27.02.2001, *Bulletin* 2001/1 [CZE-2001-1-005];
- no. Pl. US 9/01, 05.12.2001, *Bulletin* 2001/3 [CZE-2001-3-017];
- no. II. US 568/06, 20.02.2007, *Bulletin* 2007/1 [CZE-2007-1-002].

Legal norms referred to should be included under *Supplementary information*:

- Articles 139 and 140a of the Constitution.

Zone 8 - Languages:

Zone 8 sets out all languages in which a decision is available, followed, if appropriate, by the mention "(translation by the Court)". References to published translations in Zone 1 h) are possible.

Example: "Croatian, English (translation by the Court), German (translation, see above zone h)".

APPENDIX

Identification: EST-2009-2-007

a) Estonia / b) Supreme Court / c) *En banc* / d) 08.06.2009 / e) 3-4-1-7-08 / f) Review of constitutionality of Articles 126.6, 129.1 and 129.2 of the Public Procurement Act / g) *Riigi Teataja* III (Official Gazette), 2009, 30, 218, www.riigikohus.ee / h) CODICES (English, Estonian).

Keywords of the systematic thesaurus:

- 1.3.1.1 Constitutional Justice - Jurisdiction - Scope of review - Extension.
- 2.2.1.6 Sources – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law.
- 3.12 General Principles - Clarity and precision of legal provisions.
- 4.6.6 Institutions - Executive bodies - Relations with judicial bodies.
- 4.7.1.1 Institutions - Judicial bodies - Jurisdiction - Exclusive jurisdiction.
- 4.7.2 Institutions - Judicial bodies – Procedure.
- 4.7.9 Institutions - Judicial bodies - Administrative courts.
- 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:

Public procurement, dispute, settlement, procedure / Constitutional justice, diffuse control / Legal aid / Law, constitutionality, doubt, constitutional review, obligatory / Judicial activism.

Headnotes:

The settling of disputes in the protest committee of the Public Procurement Office, which is an executive body, is not unconstitutional in itself, but the exclusion of administrative courts from the adjudication of such disputes does not meet the principle pursuant to which all court cases start in the courts of first instance, and restricts the constitutional competence of the judicial power.

Every court, when adjudicating a case, must review the constitutionality of applicable law, if relevant doubts have arisen. They must also do this at their own instigation, rather than wait to be prompted by parties to proceedings.

Summary:

I. On 7 March 2008 the protest committee of the Public Procurement Office (hereinafter, the "protest committee") upheld a complaint by a corporation AS KPK Teedeehitus (hereinafter, the "corporation"), but did not allow the application for the award of legal aid costs. The corporation filed an appeal with the Tallinn Circuit Court, requesting the repeal of the protest committee's decision to the extent that it failed to award the legal aid costs.

The Tallinn Circuit Court upheld the corporation's appeal in part, annulling the protest committee's decision to the extent that it did not satisfy the application by the corporation for the award of legal aid costs. The circuit court declared unconstitutional and did not apply Article 129.2 of the Public Procurement Act (hereinafter, the "PPrA"), to the extent that it makes no provision for somebody lodging a complaint to have recourse to the courts where the protest committee has turned down their application for the award of legal aid costs, and Article 126.6 PPrA to the extent that it does not allow for the award of legal aid costs incurred in proceedings before the protest committee when the complaint is upheld. The court delivered the judgment to the Supreme Court, thus initiating a constitutional review proceeding.

II. When examining the case referred to it by the Constitutional Review Chamber, the Supreme Court *en banc* had concerns that in addition to the provisions declared unconstitutional by the Tallinn Circuit Court, Article 129.1 PPrA could be unconstitutional too. The Supreme Court justified its "activism" by referring to the second sentence of Article 15.1 of the Constitution and Article 15.2 of the Constitution. It follows from these articles that courts, when adjudicating a case, must review the constitutionality of applicable law, if relevant doubts have arisen. They must also do so on their own initiative and not wait for parties to proceedings to prompt them. Consequently, a court adjudicating a case, as well as the Supreme Court as the court of constitutional review, is also competent to review the constitutionality of provisions the constitutionality of which has not been questioned by parties to the proceedings. Therefore, the Supreme Court must verify whether the request for constitutional review was submitted by a competent court, person or body. Within concrete norm control, it is the court which is entitled to adjudicate the main dispute that has the competence to initiate a constitutional review.

In the present case, which served as the basis of the constitutional review matter, it was Article 129.1 PPrA that gave the circuit court (as an appellate court) the competence to adjudicate the appeal against the decision of the protest committee. If this provision was unconstitutional and did not exist, the circuit court should have refused to accept the appeal and the appeal against the protest committee's decision should have been adjudicated by an administrative court instead. The Supreme Court expressed concerns over the conformity of Article 129.1 PPrA with the provisions on the organisation of the judicial system as established in Chapter XIII of the Constitution. These provisions describe the procedure for fair and effective protection of individual rights, the existence of which is one of the characteristics of a state based on the rule of law. The Supreme Court found that it had the obligation to examine this conformity.

The institutional framework for the resolution of public procurement disputes regulated by Council Directives 89/665/EEC of 21 December 1989 and 92/13/EEC of 25 February 1992 does not preclude a review of constitutionality of Article 129.1 PPrA. These directives leave member states with a wide margin of appreciation as to the choice of institutions competent to resolve public procurement disputes and the establishment of the review procedure. In exercising this right the legislator is bound by the Estonian Constitution. The legislation should, in addition to the EU law, be in conformity with the Estonian Constitution.

As to the constitutionality of Article 129.1 PPrA, the Supreme Court was of the opinion that it was in conformity with the procedural requirement arising from Article 104.2.14 of the Constitution, as it was passed by a majority of the membership of the Parliament, as is obligatory for procedural laws. The Court noted, however, that in the interests of clarity it would be preferable if this regulation were to be found directly in the legislation regulating court procedure.

However, Article 129.1 PPrA was in conflict with Article 149.1 and 149.2 of the Constitution and with the first sentence of Article 146 of the Constitution in conjunction with Article 4 of the Constitution. The obligation of the circuit courts to adjudicate public procurement disputes as a court of first instance is not in conformity with the constitutional status of circuit courts as appellate courts. Furthermore, this provision necessitates a review of protest committee decisions by way of appeal proceedings. The protest committee is not a court of first instance, but an administrative authority and not a part of the judicial system described in Article 148 of the Constitution. Its members are not appointed for life. Administrative proceedings conducted in the protest committee are not comparable to judicial proceedings as regards the procedural guarantees of parties to the proceedings. The exclusion of administrative courts from the adjudication of public procurement disputes does not meet the principle pursuant to which all court cases start in the courts of first instance. An Act which excludes administrative courts from the adjudication of concrete court cases, so that such cases are heard by an administrative agency instead, restricts the constitutional competence of the judicial power.

In view of the above the Supreme Court *en banc* declared Article 129.1 PPrA unconstitutional and invalid. Due to the unconstitutionality, the circuit court was not competent to review the appeal filed against the decision of the protest committee; neither was it competent to submit the request for constitutional review. In this situation the Supreme Court *en banc* could not review the request to review the constitutionality of the provisions declared unconstitutional in the judgment of the Tallinn Circuit Court.

III. Out of eighteen justices, five delivered two dissenting opinions. The five dissenting judges disagreed with excessive activism of the majority of the Supreme Court *en banc*. They found that the Supreme Court could not go beyond the provisions that are relevant to the adjudication of the case. By declaring Article 129.1 PPrA unconstitutional, the Supreme Court *en banc* ignored the requirement of relevance of provisions (which is not permissible from a procedural angle in the context of concrete norm control). The declaration of unconstitutionality and invalidity of Article 129.1 PPrA substantially damaged the interests and rights of the party in whose interests the constitutional review proceeding was initiated. The issue of legal aid costs in the protest committee, for the resolution of which the person had recourse to the court in the first place, remained unresolved.

Supplementary information:

The judgment also prompted discussion amongst legal writers.

It has resulted in public procurement disputes now being settled in four instances, as the provisions determining the protest committee of the Public Procurement Office as an obligatory pre-trial dispute resolution body remain in force.

Cross-references:

- Decision no. 3-4-1-5-08 of 26.06.2008 of the Constitutional Review Chamber, Bulletin 2008/2 [EST-2008-2-011].

Languages:

Estonian, English.