Albania
Constitutional Court

Important decisions

Identification: ALB-2000-1-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 10.03.2000 / **e)** 11 / **f)** Treska v. the Minister of Justice / **g)** *Fletorja Zyrtare* (Official Gazette), 8 (2000), 352 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.13 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International conventions regulating diplomatic and consular relations.
2.2.1.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.
4.7.3 **Institutions** – Courts and tribunals – Decisions.
5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.

Keywords of the alphabetical index:

Diplomat / Vienna Convention of 1961 / Jurisdiction, immunity / Decision, court, execution.

Headnotes:

According to the Vienna Convention of 18 April 1961 on diplomatic relationships, diplomatic immunity from criminal, civil and administrative jurisdiction is constitutionally legal and does not infringe the fundamental right recognised by Article 142.3 of the Constitution.

In conformity with Article 122.2 of the Constitution, an international treaty ratified by law takes precedence over domestic laws that are not in conformity with it.

All state bodies are obliged to take the necessary measures for the execution of final court decisions.

Summary:

After having won a court case obliging the Ambassador of the Italian Republic to pay rent for land on which his residence is located, the applicants requested the execution of this court decision. However, in respect of the execution of a court decision in the field of civil law involving a public, foreign person, Article 526 of the Civil Procedure Code states that an authorisation issued by the Minister of Justice should first be obtained.

The applicant failed to obtain such an authorisation and submitted an application to the Constitutional Court alleging a violation of Article 142.3 of the Constitution, which stipulates that state bodies are obliged to execute court decisions.

The Constitutional Court referred to the Vienna Convention on diplomatic relationships, which was ratified by the Albanian state. According to Article 31.1.a of the Convention, diplomats enjoy jurisdictional immunity for actions relating to a private building (or its land) located in the territory of the receiving country, when he/she possesses it on behalf of the sending state and for the mission's purposes.

Article 122.2 of the Constitution stipulates that an international treaty takes precedence over domestic laws that are not in conformity with it. Consequently, the Constitutional Court considered that the application of Article 31.1.a of the Convention of Vienna was reasonable.

In the present case, the Constitutional Court held that the applicants' allegation, concerning the non-execution of court decisions, was contrary to Article 142.3 of the Constitution and not founded. According to this provision, no state body can dispute final court decisions. Every State body is obliged to take the necessary measures for the execution of court decisions. However, the relevant state bodies have no possibility to take these measures because they are prevented from doing so by the obligations that the Albanian State has undertaken under the Vienna Convention and in light of the Constitution.

Languages:

Albanian.

Identification: ALB-2000-1-002

a) Albania / **b)** Constitutional Court / **c)** / **d)** 21.03.2000 / **e)** 12 / **f)** Association “equality before law” / **g)** *Fletorja Zyrtare* (Official Gazette), no. 13 / **h)**.

Keywords of the systematic thesaurus:

1.6.6 **Constitutional Justice** – Effects – Influence on State organs.
3.16 **General Principles** – Weighing of interests.
5.2 **Fundamental Rights** – Equality.
5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.
5.3.37.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Property restitution / Compensation.

Headnotes:

A law providing the manner for the restitution of property to former owners against the payment of compensation to third parties infringes the constitutional principle of equality before law as recognised by Article 18.1 of the Constitution.

Summary:

In the framework of the political and economic changes that occurred after the 1990s, the new State took legal measures aimed at regulating the injustices suffered by some citizens during the communist regime. Law no. 7698 dated 15 April 1993 on the restitution of property to its former owners provided for the reestablishment of citizens' property rights over the properties unjustly nationalised by the communist state. The communist state took away some of these properties, more specifically dwelling houses, and sold them to other citizens. The law provided for the restitution of this kind of property to its former owners and foresaw in Article 10 the payment of compensation to the new owners.

The first paragraph of Article 10 of the law regulates the problem relating to houses that were transferred to third parties. The legislator decided that these houses should be restituted to the former owners and that the third parties would be paid compensation according to the sale price at the time of transfer. This compensation would be adjusted according to the level of inflation.

The approach taken by the legislator regarding the restitution of property to its former owners or their descendants should be seen in the context of the purpose of the law, which aims to regulate the injustices suffered by those citizens who were unjustly deprived of their property from 29 November 1944 onwards through nationalisation, confiscation, expropriation or any other means.

Article 181 of the Constitution imposes certain obligations upon state bodies in order to carry out a better regulation of these issues, by respecting the interests of the individuals expropriated by the communist regime.

Acting in this way, for the purpose of reaching a balance between the interests involved and not giving rise to new injustices, the State has undertaken to compensate third parties. However, the way this is resolved by Article 10.1 is not in conformity with the Constitution. By compensating third parties according to the sale price, adjusted in accordance with inflation, the law has not placed these two categories of individuals in an equal position. On the contrary, third parties are placed in a less favourable position as they would be unable to obtain another house. The rule relating to the amount of compensation is contrary to the principle of the equality of citizens before the law, as laid down in Article 18.1 of the Constitution. On this ground, the Constitutional Court decided to abrogate this part of Article 10 of the law as unconstitutional.

After making this abrogation, it is the duty of the legislative bodies to make the respective amendments to the provision of Article 10.1 of the law.

Two of the judges expressed a common dissenting opinion.

Languages:

Albanian.

Identification: ALB-2000-1-003

a) Albania / **b)** Constitutional Court / **c)** / **d)** 17.04.2000 / **e)** 17 / **f)** Muçi and Others / **g)** *Fletorja Zyrtare* (Official Gazette), no. 11 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
3.9 **General Principles** – Rule of law.
3.21 **General Principles** – Prohibition of arbitrariness.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.
5.3.13.18 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Equality of arms.

Keywords of the alphabetical index:

Trial *in absentia* / Lawyer, appointment / Lawyer, appeal procedure.

Headnotes:

The advocate of an accused tried *in absentia*, who is appointed according to the requirements of the law, enjoys all the rights of a compulsory defence, including the right to appeal against the court decision.

An appeal, which is presented by any of the advocates appointed according to the terms foreseen by the law, aims to protect the legal interests of the accused. On the contrary, denying the right to appeal infringes both the right of defence and the examination of the case by the Supreme Court.

The constitutional principle of defence during criminal proceedings is infringed if the advocate appointed by the families of the accused is not allowed to appeal against the court decision. This restricts the criminal trial to the courts of first instance, which is irregular.

The appointment of the advocates according to the ways and criteria foreseen by the law, and the recognition of their right of appeal, aim to protect the principle of a fair trial at all levels of jurisdiction, as stated in Article 1 Protocol 7 ECHR.

Summary:

The Plenary Session of the Supreme Court, by their decision no. 386 dated 29 July 1999, infringed the constitutional principles of “defence” and “fair trial”, which are guaranteed by Articles 31.ç and 42 of the Constitution, because they wrongly interpreted the provisions of the Criminal Procedure Code providing for the rights of the advocate during a criminal case where the accused was tried *in absentia*. According to Article 410.2 of the Criminal Procedure Code, the advocate is only allowed to appeal against the decision given *in absentia* when he or she is provided with a representative act issued according to the forms foreseen by law. Article 48 of the Criminal Procedure Code provides that an advocate for detained, arrested or imprisoned persons may be appointed by a family member through a statement made to the court, or through an act handed or sent to the advocate.

The Constitutional Court considered that the representative act was compiled in conformity with the requirements of the law and was based on Articles 48 and 410.2 of the Criminal Procedure Code. The Plenary Session of the Supreme Court wrongly interpreted the law. They thus infringed one of the fundamental rights of the citizens and at the same time carried out an unfair trial. The advocate of an accused tried *in absentia*, who is appointed according to the requirements of the law, enjoys all the rights during a compulsory defence, including the right to appeal against the court decision.

The reasoning of the Plenary Session decision stipulates that an accused tried *in absentia* does not forfeit the right of appeal, but he/she must first ask for the appeal period to be re-established. This reasoning is unfounded because it confuses the right of appeal with the right to ask for the reestablishment of the lost appeal period. Furthermore, it is contradictory and illogical, because it recognises the right of appeal, but does not settle a practical and legal way of its resolution. The accused tried *in absentia* would not able to realise both the right of appeal and the right to re-establish the appeal. This is why the law, in pursuance of the constitutional principle, places this duty on the advocate appointed in one of the ways foreseen by law. To accept the fact that the accused tried *in absentia* may realise the right of appeal through re-establishing the appeal period, when the law has guaranteed this right to the advocate appointed by his or her families, amounts to a denial of the right of appeal and restricts the trial only to the court of first instance, which makes the trial unfair.

The parties would be placed in unequal positions if the prosecutor's appeal were accepted and the

accused's right of appeal denied. Such an attitude is contrary to Article 6 ECHR and the practice of the European Court of Human Rights concerning the requirements of the "equality of arms". This concept means that each of the parties must be offered the possibilities for presenting their case according to terms and conditions that do not place either in an unfavourable position as compared to the other.

According to the approach adopted by the Supreme Court, in cases where the prosecutor appeals against the decision given by the court of first instance, not allowing the advocate to appeal would only increase the inequality between the parties participating in the trial. If the reasoning introduced by the Plenary Session were accepted, the advocate appointed by the families of the accused according to the law would not be allowed either to lodge an appeal or to participate during the hearing of the case in the other instances. This means that the judgement of the case in the Appeal and Supreme Courts would be made with the participation of only one party, infringing the important adversarial principle and at the same time the principle of a fair trial.

On the other hand, the argument that the acceptance of an appeal made by the advocate denies the families of the accused the right to exercise this right by themselves or through an advocate appointed by the accused, constitutes an incorrect and illogical reasoning that infringes the right of defence during the trial. The appeal, which is presented by any of the advocates appointed according to the terms foreseen by the law, aims to protect the legal interests of the accused. On the contrary, denying the right of appeal infringes both the right of defence and the examination of the case by the Supreme Court.

The appointment of advocates according to the ways and criteria foreseen by law, including advocates specially and simultaneously appointed as in this case, and their right to appeal against court decisions, aim to ensure a fair trial at all levels of jurisdiction, as laid down in Article 1 Protocol 7 ECHR and Article 14.5 of the International Covenant for Civil and Political Rights.

The decision of the Plenary Session of the Supreme Court recognises that the advocate is not allowed to appeal against the court decision, but does not mention whether this advocate is entitled to participate during the preliminary investigations or the judgement of the case in the court of first instance. Such an attitude is contradictory because in cases where the advocate appointed by the families of the accused is not allowed to appeal, the effects would extend from the very beginning and not only for the appeal against the court decision.

Infringement of the principle of a fair trial, which is foreseen by Article 42 of the Constitution, reflects itself in another aspect of the decision of the Plenary Session of the Supreme Court. Thus, the order of the decision is contrary to Article 441 of the Criminal Procedure Code, which foresees other ways for resolving the case than the dismissal of the judgement in the Supreme Court. Additionally, the decision of the Plenary Session of the Supreme Court does not mention what is to be done with the case under examination, such as how it should be closed. These requirements are foreseen by Article 441 of the Criminal Procedure Code, on which the decision is based. Furthermore, dismissal of the case in the Supreme Court leaves the concrete case relating to the guilt or innocence of the accused unresolved.

For the above-mentioned reasons, the Constitutional Court abrogated the decision of the Plenary Session of the Supreme Court on the grounds of unconstitutionality.

A dissenting opinion was delivered, holding that the right of appeal is an exclusive right of the accused and that only he/she is entitled to exercise it. Consequently, the advocate may not enjoy this right without being authorised to do so by the accused him or herself.

Languages:

Albanian.

Argentina
Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-2000-1-001

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 02.12.1999 / **e)** M.517.XXXIV / **f)** Manauta, Juan J y otros c/ Embajada de la Federación Rusa / **g)** *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), volume 322 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.8 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Vienna Convention on the Law of Treaties of 1969.
2.1.1.4.13 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International conventions regulating diplomatic and consular relations.
3.5 **General Principles** – Social State.
5.4.12 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Social justice, *in dubio pro iustitia sociali*, principle / Social security, conditions of non-transferability and indivisibility.

Headnotes:

Social security payments may only be refused with the greatest of prudence. It is the principle *in dubio pro justitia sociali* that governs the matter.

The failure by a diplomatic representation to pay the social security contributions due in respect of its employees, together with the absence of a complaint by the State that should receive them, does not constitute a derogation from this obligation provided for by Article 33.3 of the Vienna Convention on Diplomatic Relations.

The fulfilment of obligations concerning employment in no way affects the normal functioning of the activities of a diplomatic representation.

Summary:

The applicants – press employees and the heads of the artistic and cultural directorate at the Russian embassy – had brought an action for damages against the Russian Federation, on the basis of the latter's failure to fulfil its obligations regarding the pension scheme and family allowances. The Appeal Court having allowed the action, the Russian Federation lodged an exceptional review procedure (*recurso extraordinario*) with the Supreme Court.

The Court held that the dispute came under its jurisdiction insofar as it concerned interpretation of the Vienna Convention on Diplomatic Relations.

It held that Article 33.3 of this convention was applicable, and that the defendant should therefore honour "the obligations which the social security provisions of the receiving state impose upon employers".

This provision, which should be interpreted in the light of Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, referred to domestic law. In this regard, the national Constitution amply recognised the right to social security benefits, under conditions of non-transferability and indivisibility (Section 14bis of the Constitution), in line with the example of the human rights treaties that had the same hierarchical status as the Constitution.

Furthermore, where the laws on old-age and other pensions were applicable to them, national legislation had expressly included staff who were employed in representations, as well as state-accredited diplomatic and consular staff, in accordance with the conventions and treaties in force.

The Court added that it had not been proved that the behaviour of the Argentina state and the Russian Federation constituted a persistent and unchanging practice deemed tantamount to law. The absence of a complaint by the Argentina state against the Russian Federation's failure to honour its obligations might simply reflect reasons linked to tradition, convention or courtesy, rather than to an awareness of a legal duty.

One judge gave a dissenting opinion, holding that the question did not come within the Court's jurisdiction.

Supplementary information:

The treaties and other human rights instruments mentioned which have the same hierarchical status as the national Constitution are as follows: the 1948

Universal Declaration of Human Rights (Articles 22 and 25); the 1966 International Covenant on Economic, Social and Cultural Rights (Article 9); the American Declaration of the Rights and Duties of Man (Article XVI) and the 1969 American Convention on Human Rights (Article 26).

In the penultimate paragraph of the summary, in addition to a case from its own case-law, the Court cited the Statute of the International Court of Justice (Article 38.1.b) and the latter's judgements: “Asylum” (Columbia/Peru), *Reports* 1950, p. 276/277); “North Sea Continental Shelf” (*Reports* 1969, p. 44); “Rights of Nationals of the United States of America in Morocco” (*Reports* 1952, p. 200) and “Military and Paramilitary Activities in and against Nicaragua” (*Reports* 1986, p. 14).

Languages:

Spanish.

Identification: ARG-2000-1-002

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 03.02.2000 / **e)** P.324.XXXI / **f)** Palópoli, Hugo Daniel c/ Buenos Aires, Provincia de s/ acción declarativa / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), volume 323 / **h)**.

Keywords of the systematic thesaurus:

5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
5.4.12 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Veterinarian Society / Provident fund, mandatory affiliation.

Headnotes:

If a person pays contributions to a provident scheme in respect of his or her salaried employment, it is unconstitutional that he or she should be obliged at the same time to contribute to the provident scheme of a professional association, even though he or she does not carry out other professional activities.

Summary:

The law provided for mandatory affiliation to the provident fund for all professional veterinarians registered with the veterinarian society. By the mere fact of registering, professionals were expected to pay contributions, whether or not they practised.

The applicant considered that this obligation to contribute during a period when he had occupied only one remunerated position was unconstitutional, particularly as his employment obliged him to contribute to another scheme.

The Supreme Court ruled that, since it had not been proven that during the period concerned the applicant had carried out activities other than his salaried employment, the obligation to contribute to the provident fund of his profession resulted in an overlapping of contributions, forbidden by Section 14bis of the Constitution.

Languages:

Spanish.

Identification: ARG-2000-1-003

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 15.02.2000 / **e)** O.109.XXXIV / **f)** Operto, Francisco Eduardo c/ Comuna de Lehman / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), volume 323 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.5.12 **Constitutional Justice** – Jurisdiction – The subject of review – Court decisions.
1.5.2 **Constitutional Justice** – Decisions – Reasoning.
1.6.1 **Constitutional Justice** – Effects – Scope.
3.16 **General Principles** – Weighing of interests.
3.19 **General Principles** – Reasonableness.

5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Reasoning.

Keywords of the alphabetical index:

Federal complaint / Federal question, inconsequential.

Headnotes:

The provision in the code of procedure that authorises the Supreme Court to reject an exceptional review procedure (*recurso extraordinario*) simply by referring to this provision is not in breach of the Constitution.

Summary:

Article 280 of the national Code of Civil and Commercial Procedure had been challenged on the grounds that it was unconstitutional. The provision specifies that the Supreme Court has discretion, merely by referring to this provision, to reject an exceptional review procedure, owing to insufficient federal grounds or when the questions raised are inconsequential (*cuestiones insubstanciales o carentes de trascendencia*).

The Court maintained that, under Section 117 of the national Constitution, it exercised its appellate jurisdiction with such regulations and exceptions as Congress prescribed, and that the disputed provision was not unreasonable.

It indicated that Article 280 enables the Court to carry out more effectively its obligation to do justice by monitoring constitutionality. In order to perform this task as effectively as possible, it is essential to set aside inconsequential federal matters.

This article also enables the Court to exercise its exceptional jurisdiction in important cases, notwithstanding formal obstacles that prevent the submission of cases to this court since, in cases whose gravity extends beyond the facts and persons directly involved, the Court's jurisdiction to settle these disputes (which have major institutional consequences) cannot be ruled out on the grounds that the parties concerned have not observed certain formalities.

The Court is not called upon to rule on the expediency or erroneous nature of judgments by lower courts, which would become impossible in practice and prevent it from concentrating on in-depth consideration of cases arising from federal and constitutional provisions.

Finally, the Court pointed out that merely citing Article 280 did not indicate confirmation or corroboration of the exactitude or expediency of the contested judgment, but simply that the Court had decided not to rule in the case in question because it had not found clear evidence indicating that there had been violation of the right to bring a case before a court or the right to a fair trial.

Three judges gave concurring opinions.

Supplementary information:

The cited text of Article 280 was introduced during a 1990 reform (Law 23.774).

Exceptional review procedure (*recurso extraordinario*) is the main appeal procedure by which the Court exercises supervision of the constitutionality and interpretation of federal laws.

Cross-references:

The Court referred to the case “Rodriguez v. Rodriguez de Schreyer y otros” of 02.02.1993, published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), vol. 316, p. 64.

Languages:

Spanish.

Identification: ARG-2000-1-004

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 15.02.2000 / **e)** T.70.XXXIV / **f)** Torres, Alejandro Daniel s/ adopción / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), volume 323 / **h)**.

Keywords of the systematic thesaurus:

1.3.5.12 **Constitutional Justice** – Jurisdiction – The subject of review – Court decisions.
2.1.1.4.12 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Convention on the Rights of the Child of 1989.
2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.

3.12 **General Principles** – Legality.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to family life.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Adoption, surname, change / *Res iudicata* / Jurisdiction in non-contentious matters.

Headnotes:

In non-contentious proceedings (in the present case, adoption), the procedural rules concerning the final court decision should be adapted to the substantive rules.

There are grounds for setting aside the judgment, which had already entered into force and had granted full adoption, and for replacing it with simple adoption, in the interests of the minor.

Summary:

At the request of the adoptive parent, the judges had granted full adoption of a minor. The judgment had not been challenged, but during the registration of the adoption, the adoptive parent had expressed the wish that the minor keep his original surname, something that was impossible under the full adoption system. The children's judge had also requested that the full adoption be changed to simple adoption. Since both requests had been rejected, an exceptional review procedure (*recurso extraordinario*) had been brought before the Supreme Court.

The Court ruled that the specific task of family courts was not to decide certain human problems by applying pre-determined formulae and models with no regard for the circumstances of the case.

It added that the adopted child, who was already 19 years old, had been known since childhood by the surname of his blood family. In addition, he had suffered serious physical and psychological effects from a subsequent accident. The Court therefore held that the loss of the link between the adopted person and his birth family and the change of surname would cause him serious identity problems, particularly bearing in mind the contact that he maintained with his mother.

The Court concluded that, although the judgment granting full adoption had not been challenged by the adoptive parent and by the children's judge, the dismissal of the requested alteration did not respect the interests of the minor as protected by national legislation and the 1989 Convention on the Rights of the Child, particularly as this alteration had the agreement of the adoptive parent, the adopted person and the children's judge.

The contested judgment should therefore be disregarded and simple adoption should be granted.

The judgment contains three concurring opinions.

Languages:

Spanish.

Armenia
Constitutional Court

Statistical data
1 January 2000 – 30 April 2000

25 referrals made, 25 cases heard and 25 decisions delivered:

- All cases concerned the compliance of international treaties with the Constitution.
- All international treaties were declared compatible with the Constitution.

Information on the significant undertakings of the Constitutional Court during the reference period 1 January 2000 – 30 April 2000

The Centre of Constitutional Law of the Republic of Armenia and the Lawyers Union organised the Republican Student Conference on "The Guarantees of Human Rights Protection in the Republic of Armenia".

Student unions and other students took part in the work of the conference during which about 50 reports were heard.

It is planned to publish a journal of reports and put them on the Internet with IATP Armenia support.

The Centre of Constitutional Law of the Republic of Armenia, the Lawyers Union, the Friedrich Ebert foundation, the Democracy and Human Rights National Centre, Lyceum "Anania Shirakatsi", supported by the Ministry of Education and Science, with the participation of "School Olympiad" NGO, sponsored by Anna Hovnanyan, organised the "Constitution and Law" programme for pupils and students.

The objective of the programme was to raise the legal conscience of young people, give them the necessary knowledge on human rights and liberties and human rights protection, to make them acquainted with the features of a legal and democratic state and to help them learn about the Constitution and the system of constitutional justice.

Seminars were held in Yerevan and all regions of the Republic to present the textbook "The state and the law" to pupils of 9-10 classes. One teacher from each school in the Republic also participated in the seminars.

About 18,000 pupils participated in the regional (Stepanakert – Republican) Olympiad and about 1,100 students were included in the institute Olympiad.

15 pupil teams, including one team from each region, and 4 student teams participated in the Republican tour of the Olympiad. The pupil teams were asked questions, on the answers to which the jury decided the 8 pupil teams which passed into the next round. Then four mock trials were organised, in which the student teams were the judges and the pupil teams played the roles of the applicant and respondent.

On the results of the trial the jury selected the best student team and the best applicant and respondent pupil teams. The best teams received diplomas and prizes.

After the President of the Constitutional Court Mr G. Harutunian had summarised the results, Archbishop Hovhan Terteryan made a speech.

There was no relevant constitutional case-law during the reference period 1 January 2000 – 30 April 2000.

Austria
Constitutional Court

Statistical data

Session of the Constitutional Court during March 2000

- Financial claims (Article 137 B-VG): 0
- Conflicts of jurisdiction (Article 138.1 B-VG): 2
- Review of regulations (Article 139 B-VG): 41
- Review of laws (Article 140 B-VG): 60
- Challenge of elections (Article 141 B-VG): 0
- Complaints against administrative decisions (Article 144 B-VG): 453
  (308 declared inadmissible)

Important decisions

Identification: AUT-2000-1-001

a) Austria / **b)** Constitutional Court / **c)** / **d)** 08.03.2000 / **e)** G 1/00 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.6.5.4 **Constitutional Justice** – Effects – Temporal effect – Postponement of temporal effect.
5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.
5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
5.3.10 **Fundamental Rights** – Civil and political rights – Rights of domicile and establishment.

Keywords of the alphabetical index:

Infant / Visa requirement / Immigration, quota system.

Headnotes:

A statute that exclusively links a child's right of residence during the first three months of its life with its mother's residence permit contradicts the constitutionally guaranteed right of equal treatment among foreigners.

Summary:

A complaint was lodged with the Court by a Chinese national who being born in Vienna on 29 September 1997 had (represented by his father) applied on 18 November 1997 for permission to establish his residence in Austria. His application was dismissed by the Minister of the Interior because the application had to be filed from abroad as his mother had entered the Federal territory on a tourist visa only, without permission to reside on Austrian territory (§ 14.2 Aliens Act – *Fremdengesetz*). Therefore the applicant could not claim a right granted in § 28.2 Aliens Act exempting children in their first three months of life from a visa requirement in so far as their mother has a residence permit or enjoys freedom from visa requirements or freedom of establishment.

The complainant alleged that his constitutionally guaranteed rights to private and family life as well as "the fundamental right of equality between man and woman" had been infringed, questioning in addition the constitutionality of the provision applied (§ 28.2). The Court undertook the *ex officio* review of the relevant provision, stating that the relevant law might lead to unequal treatment of the mother and father of a minor through differentiation based on gender having no objective justification.

The Federal Government argued that the intention of the law was to prevent abuse. A child of foreigners born in Austria, not being an Austrian citizen, should not be exempt from visa requirements and should not be regarded as established in Austria if both of the parents are nationals of a different country and if only the father is established lawfully with a residence permit. The application for permission to establish the primary residence of such a child – in contrast with a child whose mother has a right of residence – must be filed from abroad, as it must be registered in the immigration quota. As the whole Austrian immigration system is based on quotas, a change of the law would strongly destabilise this system.

The Court found, however, that the government's arguments failed to answer satisfactorily the Court's crucial question regarding unequal treatment evoked by the unconditional wording of the law. The Court held the view that there are cases in which a father has to take over entirely the care of an infant such as in the case of a mother's death or serious illness or any other similar situation endangering the well-being of the child. As the provision under review does not allow for any of these situations to be taken into account, it causes unequal treatment among

foreigners based on their sex. It was accordingly annulled (although the entry into force of the annulment was postponed for one year).

Languages:

German.

Identification: AUT-2000-1-002

a) Austria / **b)** Constitutional Court / **c)** / **d)** 09.03.2000 / **e)** G 2-4/00 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.6.5.4 **Constitutional Justice** – Effects – Temporal effect – Postponement of temporal effect.
2.3.6 **Sources of Constitutional Law** – Techniques of review – Historical interpretation.
2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.
5.3.38 **Fundamental Rights** – Civil and political rights – Linguistic freedom.
5.3.43 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.
5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

Elementary instruction, bilingual / School, primary / School, secondary.

Headnotes:

Elementary instruction in the Slovene language can no longer be considered to be guaranteed if the instruction in the Slovene language – although still compulsory – is given in just the same way as that of any other foreign language, all other classes (with the exception of religious instruction) are given in German.

Elementary schools have – among other tasks – the task of enabling pupils to have access to secondary education. Given the relationship between elementary schools and secondary schools it is a short step from there to see that elementary instruction means the instruction that enables pupils to enter secondary schools.

A law that provides the Slovene minority with their own secondary schools but restricts bilingual elementary instruction to the first three classes of elementary school contradicts the notion of elementary instruction.

Summary:

Several pupils had filed complaints with the Court against administrative decisions telling them that their applications to receive elementary instruction in the Slovene language in the fourth class of elementary school could not be granted because this was not provided for by § 16.1 of the Minority School Act of Carinthia. According to this provision such elementary instruction was only to be given in the first three classes of elementary school.

In its *ex officio* review of the above-mentioned provision the Court stated that the rights of minorities in the field of the educational system are laid down in the State Treaties of 1919 and 1955.

Pursuant to Article 68.1 of the State Treaty of St.-Germain-en-Laye 1919 (with the rank of a constitutional law) the Austrian Government is committed to providing cities and districts where there is a considerable proportion of Austrian nationals speaking a language other than German with adequate facilities to ensure that children are instructed in their own language in primary schools.

Article 7.2 of the State Treaty for the Re-Establishment of an Independent and Democratic Austria (State Treaty of Vienna 1955; with the rank of a constitutional law since 1964) entitles – among other minorities – Austrian nationals of the Slovene minority in Carinthia to elementary instruction in the Slovene language as well as to a proportional number of their own secondary schools.

After having examined thoroughly the wording of Article 7.2 as well as the minutes and reports of the deliberations of the allied State Treaty Commission, the Court concluded that the drafting history of the State Treaty 1955 shows clearly that there was no intention of reducing the rights of minorities granted compared with those laid down in the State Treaty of 1919.

As the documents gave no clear indication as to what was actually meant by the term “elementary

instruction", the Court found that past and current concepts of elementary school instruction comprised instruction in all four classes of elementary school and that in accordance with the role of elementary schools, namely to enable pupils to have access to secondary education, elementary instruction means instruction which prepares pupils for secondary schools.

The impugned provision, which provided for elementary instruction in the Slovene language only in the first three, but not in all four, classes of elementary school, restricted the constitutionally guaranteed rights of the Slovene minority, thus contradicting Article 7.2 of the State Treaty 1955.

Because of the organisational measures that would have to be taken in order to extend bilingual instruction to all of the four classes of elementary schools (in Carinthia), the Court ruled that the annulment will enter into force only at the start of the 2001/2002 school year.

Languages:

German.

Identification: AUT-2000-1-003

a) Austria / **b)** Constitutional Court / **c)** / **d)** 16.03.2000 / **e)** G 151/99, G 166/99, G 168/99 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.
5.3.13.26 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to have adequate time and facilities for the preparation of the case.

Keywords of the alphabetical index:

Criminal proceedings / Exceptional case / Time limit, extension.

Headnotes:

A provision stipulating a time-limit of four weeks for a plaintiff to lodge an appeal for a re-trial on procedural grounds *(Nichtigkeitsbeschwerde)* in general grants sufficient (reasonable) time. There is no general necessity for the legislator to provide for a possibility of extending of any period within which an appeal must be filed in criminal proceedings.

Article 6.3.b ECHR, however, guarantees that everyone charged with a criminal offence has the right to have adequate time and facilities for the preparation of his or her defence. Pursuant to Article 2 Protocol 7 ECHR, everyone is entitled to have his or her conviction or sentence reviewed by a higher tribunal. These procedural guarantees safeguarded by Article 6.3 ECHR must be granted in every single case, even extreme cases.

As § 285.1 of the Code of Criminal Procedure *(Strafprozeßordnung)* does not allow for any possibility of extending the period of four weeks within which an appeal for a re-trial on procedural grounds must be lodged, even in extreme cases, it is inconsistent with the above-mentioned constitutional guarantees.

Summary:

Several persons sentenced to long-term imprisonment (for fraud) by a judgment pronounced in June 1999 had notified the sentencing courts that they would lodge appeals for re-trials on procedural grounds. The written judgment was expected within the course of the first half of the year 2000.

Some of those sentenced by a court of first instance filed applications with the Court alleging that their rights had been directly infringed by the unconstitutionality of § 285.1 of the Code of Criminal Procedure, according to which they would be given only four weeks' time to draw up the notified appeals from the day on which the written judgment would be served. The applicants argued that their lawyers would then have to cope with about 100 000 pages of files recorded in the proceedings, about two million pages of seized documents, a database installed especially for the proceedings, more than 16 000 pages of recorded minutes of the (main) hearing and in addition a judgment expected to exceed 1000 pages. The lawyers would not be able to go through this

enormous amount of files in order to lodge the appeal within this time limit observing the required formality and listing all substantial reasons for the appeal.

The Court declared the applications admissible and duly substantiated on the grounds that the legislator must provide for an exception (in terms of a possible extension) of the four-week period in order to ensure the rights of the defence of plaintiffs involved in such extraordinary, voluminous cases. The Court annulled the relevant parts of the challenged law.

Languages:

German.

Azerbaijan
Constitutional Court

Introduction

The Constitutional Court of the Azerbaijan Republic was formed on 14 July 1998.

The question of the formation of the Court is regulated by Articles 86, 88, 95, 104, 107, 109, 125, 130, and 154 of the Constitution.

I. Basic texts

- Constitution of the Azerbaijan Republic (adopted on 12 November 1995)
- Law on the Constitutional Court (adopted on 21 October 1997)
- Civil Procedure Code came into force on 1 July 2000)

II. Composition and Organisation

1. Composition

The Constitutional Court consists of 9 judges. According to Articles 95 and 109 of the Constitution, the judges of the Constitutional Court are appointed by the National Assembly *(Milli Medjlis)* upon proposal by the President. The judges are appointed for a period of 10 years. After the expiration of his/her term of office a judge of the Constitutional Court may be re-appointed to the same post only once. The President and Vice-President of the Court are appointed by the President of the Azerbaijan Republic. According to Article 127.1 of the Constitution of the Azerbaijan Republic the judges of the Constitutional Court are independent and subject only to the Constitution and the Law on the Constitutional Court. Judges are irremovable during their term of office and enjoy immunity.

Candidates must be citizens of the Azerbaijan Republic, be at least 30 years of age and have a tertiary qualification and at least 5 years' professional experience in the legal field.

2. Structure

The Staff of the Constitutional Court is composed of the Constitutional Law Department; the Department for Control in the field of Administrative Law, Criminal Law, Criminal Procedure Law and Correctional Labour Law; the Department for Control in the field of Civil Law, Civil Procedure Law, Labour Law and Social Welfare; the International Law Department; the Department for International Relations and Generalization of Foreign Constitutional Control Practice; the Sector for the Organisation of Court Hearings and Execution of Court Decisions; the Section for the Examination of Complaints and Reception of Citizens; the Sector of Court Executors; the Logistics Department; the Personnel Section; the Library; the Clerks' Unit; the Computer Section; the Press Service; the Printing Unit; and the Xerox Unit.

III. Powers

According to the Constitution, the following questions fall within the competence of the Court:

a. the conformity of laws of the Azerbaijan Republic, decrees and orders of the President of the Azerbaijan Republic, decrees of the National Assembly of the Azerbaijan Republic, decrees and orders of the Cabinet of Ministers of the Azerbaijan Republic and normative legal acts of central bodies of executive power with the Constitution of the Azerbaijan Republic;

b. the conformity of decrees of the President of the Azerbaijan Republic, decrees of the Cabinet of Ministers of the Azerbaijan Republic and normative legal acts of central bodies of executive power with the laws of the Azerbaijan Republic;

c. the conformity of decrees of the Cabinet of Ministers of the Azerbaijan Republic and normative legal acts of central bodies of executive power with decrees of the President of the Azerbaijan Republic;

d. in cases provided for by law, the conformity of decisions of the Supreme Court of the Azerbaijan Republic with the Constitution and laws of the Azerbaijan Republic;

e. the conformity of acts of municipalities with the Constitution of the Azerbaijan Republic, laws of the Azerbaijan Republic, decrees of the President of the Azerbaijan Republic, decrees of the Cabinet of Ministers of the Azerbaijan Republic (and, in the Autonomous Republic of Nakhichevan, also with the Constitution and laws of the Autonomous Republic of Nakhichevan and decrees of the Cabinet of Ministers of the Autonomous Republic of Nakhichevan);

f. the conformity of interstate agreements of the Azerbaijan Republic that have not yet come into force with the Constitution of the Azerbaijan Republic; the conformity of intergovernmental agreements of the Azerbaijan Republic with the Constitution and laws of the Azerbaijan Republic;

g. the prohibition of political parties or other public unions;

h. the conformity of the Constitution and laws of the Autonomous Republic of Nakhichevan, decrees of the Parliament *(Ali Mejlis)* of the Autonomous Republic of Nakhichevan and decrees of the Cabinet of Ministers of the Autonomous Republic of Nakhichevan with the Constitution of the Azerbaijan Republic; the conformity of laws of the Autonomous Republic of Nakhichevan and decrees of the Cabinet of Ministers of the Autonomous Republic of Nakhichevan with the laws of the Azerbaijan Republic; the conformity of decrees of the Cabinet of Ministers of the Autonomous Republic of Nakhichevan with decrees of the President of the Azerbaijan Republic and decrees of the Cabinet of Ministers of the Azerbaijan Republic;

i. the settlement of disputes connected with the distribution of powers between legislative, executive and judicial bodies.

The Court considers constitutional cases based on petitions from the President of the Azerbaijan Republic, the National Assembly of the Azerbaijan Republic, the Cabinet of Ministers of the Azerbaijan Republic, the Supreme Court of the Azerbaijan Republic, the Prosecutor's Office of the Azerbaijan Republic and the Parliament of the Autonomous Republic of Nakhichevan.

According to Article 4 of the Law on the Constitutional Court, citizens of the Azerbaijan Republic may lodge petitions with the Constitutional Court via the Supreme Court. A similar provision is found in Article 352.2.1. of the Civil Procedure Code, which stipulates that if during trial an individual who is a party to the case considers that a law which is to be implemented or applied infringes his/her constitutional rights and freedoms, then he/she may lodge a petition with a view to verifying the conformity of the law with the Constitution. Such a petition should be lodged with the court which considers the case. The court shall refer it to the Supreme Court which shall

consider the possibility of submitting the case to the Constitutional Court.

IV. Nature and effects of decisions

Six judges constitute a quorum for sessions of the Constitutional Court. Each judge has the right to have a dissenting opinion. Such an opinion is subject to publication together with the decision.

The decision of the Constitutional Court is final and cannot be annulled, changed, or be subject to an official interpretation by any body or official.

Important decisions

Identification: AZE-2000-1-001

a) Azerbaijan **/ b)** Constitutional Court / **c) / d)** 23.02.2000 / **e)** 1/3 **/ f) / g)** *Azerbaycan* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
2.1.1.4.2 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Universal Declaration of Human Rights of 1948.
2.1.1.4.7 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Economic, Social and Cultural Rights of 1966.
5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
5.4.15 **Fundamental Rights** – Economic, social and cultural rights – Right to just and decent working conditions.

Keywords of the alphabetical index:

Holiday, right / Rest, right / Labour law / ILO Convention no. 132.

Headnotes:

Persons employed on the basis of a labour contract are guaranteed, in accordance with the law, a working day not exceeding 8 hours, days of rest and holidays including paid holidays not less than once per year and lasting not less than 21 calendar days (Article 37.2 of the Constitution).

A provision which makes the benefit of unused holidays dependent on the grounds for the termination of the employment contract contradicts the principle of equality.

Summary:

The Supreme Court requested the Court to examine the compliance with Article 37 of the Constitution of Article 143.1 of the Labour Code providing for unused holidays to be granted to employees at the termination of their contract, except in cases of dismissals under items “a” (cancellation of the employment contract by the employer where the enterprise is to be liquidated) and “g” (cancellation of the employment contract by the employer in cases of failure by the employee to fulfil his or her responsibilities or obligations under the contract) of Article 70 of the Labour Code.

According to Article 143.1 of the Labour Code, upon the termination of the employment contract of an employee who has not used up all his or her holiday entitlements, the unused holiday shall be granted to the employee at his or her request, and the last day of holiday shall be the date of his or her dismissal.

In accordance with Article 37.1 of the Constitution, everyone has the right to rest. The legislator, considering holiday as a kind of rest, provided in Article 113.1 of the Labour Code that holiday from work is the time of rest used by an employee at his or her own discretion, which includes a break from work for the purpose of normal rest, restoration of working capacity, protection and strengthening of health, and lasting not less than the time stipulated by the Code.

The Constitution entitles contractual employees to a holiday, which is a form of the right to rest.

The right of every employee to regular paid holidays is also reflected in Article 24 of the Universal Declaration on Human Rights, Article 7.d of the International Covenant on Economic, Social and Cultural Rights and Article 3 of the International Labour Organisation's Convention concerning Annual Holidays with Pay.

Nevertheless, contrary to the stated provisions, Article 143.1 of the Labour Code provides that the right to use holidays upon termination of a contract of employment depends on the grounds for the termination of the contract. Such a distinction does not comply with the principle of equality laid down in Article 25 of the Constitution.

The Court held that the restriction of the right of workers to holidays in the above-mentioned cases does not comply with the Constitution; nor does it comply with a number of provisions contained in national labour law and international instruments.

Languages:

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

Identification: AZE-2000-1-002

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 02.03.2000 / **e)** 1/4 / **f)** / **g)** *Azerbaycan* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.9 **General Principles** – Rule of law.
3.12 **General Principles** – Legality.
4.6.2 **Institutions** – Executive bodies – Powers.
4.6.7 **Institutions** – Executive bodies – Relations with the legislative bodies.
4.6.9.1.1 **Institutions** – Executive bodies – Territorial administrative decentralisation – Principles – Local self-government.
5.3.37 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Property law / Housing / Public utility, tariff.

Headnotes:

State power in the Azerbaijan Republic is organised on the basis of the principle of the separation of powers (Article 7.3 of the Constitution).

This separation is intended to preserve the guarantees of freedom with a view to preventing the replacement of democracy by autocracy. The principle aims to preclude the possibility of one of the branches of power usurping the powers of another.

Summary:

The Prosecutor's Office requested the examination of the conformity with the Housing Code, the Law on Privatisation of the Housing Fund and the Civil Code of the Mayor's Order concerning the regulation of tariffs on public utilities.

This Order considerably increased the rates for public utilities in Baku city. The new public utilities rates for dwelling premises (houses) the whole territory of Baku. The same rate is fixed for residential areas covered by the state and public housing fund as for premises (houses) on private property.

In accordance with the Constitution it is the Parliament *(Milli Medjlis)* that adopts general rules on property rights, including the legal regime governing state, private and municipal property, intellectual property and contractual rights.

The Mayor's Order, which sets down the legal regime governing property, thus contradicts the principle of the separation of powers laid down by the Constitution.

The Court therefore found the Order of the Mayor of Baku concerning the regulation of tariffs for public utilities to be null and void, as it contradicted Article 7.3 of the Constitution laying down the principle of the separation of powers.

Languages:

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

Identification: AZE-2000-1-003

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 09.03.2000 / **e)** 1/2 / **f) / g)** *Azerbaycan* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

2.3.5 **Sources of Constitutional Law** – Techniques of review – Logical interpretation.
4.10.8.1 **Institutions** – Public finances – State assets – Privatisation.

5.3.37 **Fundamental Rights** – Civil and political rights – Right to property.
5.3.37.4 **Fundamental Rights** – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Company, shares / Ownership, types.

Headnotes:

Within the limits prescribed by legislation, it is permitted for property to be jointly owned by individuals and legal entities on the basis of a mixed form of ownership (Article 4.2 of the Law on Enterprises).

The combination of these forms of property and their joint functioning is not excluded (Article 13 of the Constitution).

Summary:

The Supreme Court sought the interpretation of Article 6.1.2 of the Law on Enterprises, which provides that a company in which the controlling portion of shares belongs to state bodies is a company based on the rules governing state property.

The Constitutional Court defined the concept of a company, revealing its essential elements. According to Article 1 of the Law on Enterprises a company, irrespective of the property rules that apply to it, is an independently managed unit which is a legal entity formed in accordance with the Law on Enterprises, producing and selling its goods, carrying out its work and providing services with the purpose of satisfying public needs and of earning profits. The essential elements of a company are thus its structural and legal form as well as the nature of its ownership.

The ownership of a company determines whether it is subject to the rules governing state, private or municipal property. Its structural and legal form determine who (physical person or legal entity) has the right of possession or use of the company's property, as well as the structural and legal elements regarding the management of the property and the conditions of liability of the company's founders with regard to the obligations of the company.

The above is reflected in Article 6.1 of the Law on Enterprises. This Article stipulates that state-owned companies are based on the rules governing state property and have the state structural and legal form. State companies based on the rules governing state property may be either:

- companies which are owned entirely by the state; or
- companies of which the controlling portion of shares belongs to state bodies.

Under Article 6.1.2 of the Law, where a company is founded on the basis of more than one kind of ownership, the company can take on the structural and legal form of a joint-stock company. The concept of a controlling portion of the shares is set out in the second item of the appendix under number 11 of the Law on Confirmation of the State Program of Privatisation of State Property in the Azerbaijan Republic for the period from 1995 to 1998. This provides that restrictions on privatisation of state property can be established only by allowing for the exercise of the controlling portion of shares or blocking shares (respectively 51% or 25,5% of ordinary shares, with voting rights, in state property) or through the release of "golden shares".

According to the meaning of Article 6.1.2 of the Law on Enterprises, if 51% of the share capital of the company is state-owned, then the company is considered to be subject to the rules governing state property, although this does not exclude the possibility of there being other forms of ownership of shares in the company.

Article 4 of the Law on Enterprises states that there can exist companies of various kinds based on a mixed form of ownership. Article 4.2 of the Law specifies that within the limits prescribed by legislation, property may be jointly owned by individuals and legal entities of Azerbaijan Republic and other states, on the basis of a mixed form of ownership.

Article 13 of the Constitution, which provides for state, private and municipal forms of property, does not exclude the combination of these forms of ownership and their joint functioning. Under Article 15.1 of the Constitution, the development of an economy based on various forms of property in the Azerbaijan Republic aims towards the prosperity of the people. Thus, in Article 6.1.2 of the Law on Enterprises it is underlined that the fact that the controlling portion of the shares in a given company belongs to state bodies does not exclude other forms of ownership of shares in the company.

In connection with the above the Constitutional Court considered that it was also necessary to interpret Article 6.3 of the Law on Enterprises, according to

which the property of a state-owned company is the property of the Azerbaijan Republic.

Article 6.1.2 of the Law provides that the property of the companies of which 51% of the share capital is owned by the state and the rest is based on other forms of property is state property. However, similar provisions of the Law do not correspond to the types of property provided for in the Constitution.

The Statute on the Procedure of Transformation of State Companies into Joint-Stock Companies does not provide that the property of such companies belongs in general to the state. According to Article 7.7 of this Statute, the relevant body of the executive is liable for the activity of a joint-stock company founded as a result of the partial privatisation of a state company in proportion to the amount of state-owned share capital in the company. In this case other shareholders are liable for the activities of a company in proportion to the amount of their shares in the established fund.

Thus, where the controlling portion of shares in the company belongs to the state, the property corresponding to the proportion of the share capital owned by the state should be recognised as state property. Other shareholders in such a company have the right to exercise proprietary rights over the property falling within the limits of the shares they own.

Thus, the Constitutional Court decided that according to Article 6.1.2 of the Law on Enterprises, where the controlling portion of the company's shares (at least 51%) belongs to state bodies the company shall be recognised as one subject to the rules governing state property, although this does not exclude the presence in the company of other forms of ownership. The property corresponding to the proportion of state-owned share capital in a company in which the controlling portion of shares belongs to state bodies should be recognised as state property, as stipulated in Article 6.3 of the Law on Enterprises. Other shareholders in a company in which the controlling portion of shares belongs to state bodies are entitled to exercise proprietary rights over the property which falls within the limits of their shares.

Languages:

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

Identification: AZE-2000-1-004

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 14.04.2000 / **e)** 1/5 / **f)** / **g)** *Azerbaycan* (Official Gazette) **/ h)**.

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Residence, right of tenant to accommodate others.

Headnotes:

Everyone residing legally on the territory of the Azerbaijan Republic has the right to freedom of movement, to choose their place of residence and to leave the territory of the Azerbaijan Republic (Article 28.3 of the Constitution).

Nobody can be illegally deprived of a dwelling. The state provides for the construction of housing and takes special measures for the realisation of the right to housing (Article 43 of the Constitution).

A tenant has the right to accommodate other persons in his or her place of residence with the consent of his or her family members, without any restrictions.

Summary:

The Prosecutor's Office petitioned the Court to examine the conformity of the notion covered by the phrase "in accordance with the established procedure", contained in Article 54.1 of the Housing Code, with Articles 28, 43 and 71 of the Constitution.

Article 54.1 of the Housing Code provides that, in accordance with the established procedure, a tenant has the right to accommodate his or her spouse, children, parents, and other persons in his or her place of residence with the consent of the family members living with him or her. The contents of this provision are not clearly defined and do not indicate by what bodies and acts this procedure is to be established. The failure to indicate the normative act by which such a procedure is to be established allows state legislative and executive bodies to establish the procedure at their own discretion, which can lead to the violation of the constitutional rights of citizens to

housing, freedom of movement and choice of a residence.

The uncertainty of the specified provision leads to difficulties in its application by courts, a problem also examined in the explanation contained in item 7 of the Decision on the application of housing legislation by courts of the Republic adopted by the Plenum of the Supreme Court on 16 October 1992. This decision provided that the notion covered by the phrase “in accordance with the established procedure”, as a rule, had to be interpreted as meaning that the provision of accommodation was to be regulated in accordance with rules on the registration of passports. At the same time, in cases of an unreasonable refusal to register a passport, a court may recognise the right of a person to accommodate others in his or her place of residence. From this explanation it can be seen that the term “established procedure”, as a rule, should be interpreted in this context as meaning that the provision of accommodation was to be regulated in accordance with the rules on the registration of passports.

It should be noted that this decision of the Plenum was adopted in 1992 and the Constitution, which provides for the basic rights and freedoms of citizens, was adopted in 1995.

According to the requirements of Articles 28.3, 43 and 71.1 of the Constitution, the legislator in 1996, having rejected the regulations governing the registration of passports, adopted the Law on registration at the place of residence and accommodation.

Thus, in line with Articles 28, 43 and 71 of the Constitution, the Court emphasised that a tenant has the right to accommodate other persons in his or her place of residence with the consent of his or her family members, without any restrictions, and found the provision “in accordance with the established procedure”, contained in Article 54.1 of the Housing Code, to be null and void.

Languages:

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

Belgium
Court of Arbitration

Important decisions

Identification: BEL-2000-1-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 02.02.2000 / **e)** 13/2000 / **f)** / **g)** *Moniteur belge* (Official Gazette), 11.03.2000 / **h)**.

Keywords of the systematic thesaurus:

1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.
3.17 **General Principles** – General interest.
3.25.1 **General Principles** – Principles of Community law – Fundamental principles of the Common Market.
4.8.5.2.1 **Institutions** – Federalism and regionalism – Distribution of powers – Implementation – Distribution *ratione materiae*.
5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.1 **Fundamental Rights** – Equality – Scope of application.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.22 **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:

Broadcasting, freedom / Licence, broadcasting / Broadcasting, public broadcasting companies / Broadcasting, monopoly / Radio, private, commercial / Broadcasting, frequencies / Radio, terrestrial transmission / Competition / Freedom of establishment / Free movement of services.

Headnotes:

Regulations under which public broadcasting companies alone are entitled to broadcast over the air at nationwide level and private radio stations may operate only at local level are not incompatible with the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), considered separately or in conjunction with the principle of freedom of trade and industry, Articles 82 and 86.1 of the Constitution (formerly Articles 86 and 90.1) EC, and the principles of freedom of expression as enshrined in Article 10 ECHR and Article 19 of the Constitution, freedom of establishment, as enshrined in European Union law (Article 43 EC, formerly Article 52) and the free movement of services (Article 49 EC, formerly Article 59).

Summary:

A public limited company established under Luxembourg law, Radio Flandria, and other parties applied to the Court of Arbitration to set aside a Flemish Community decree of 7 July 1998 amending the decrees on radio and television broadcasting, which had been co-ordinated on 25 January 1995 (in the federal state of Belgium, the French, Flemish and German-speaking Communities have sole responsibility, by virtue of legally binding decrees, for all aspects of radio and television broadcasting except federal government broadcasts). The applicants complained about the Vlaamse Radio en Televisie-omroep's monopoly on terrestrial transmission radio broadcasting for the Flemish Community as a whole.

The Court accepted that a commercial radio station currently broadcasting Dutch-language radio programmes for the Flemish market via cable, using a Luxembourg broadcasting licence, was entitled to bring the action, since it was directly and adversely affected by provisions preventing it from broadcasting over the air to the Flemish Community as a whole. A number of other applicants were also able to show, as required by law, that the action was in their interests; however, two private listeners were not, as they were only indirectly affected by the provisions at issue. The Court also rejected other objections to admissibility raised by the Flemish government as the respondent.

As to the merits of the case, the Court found that the public broadcasting corporation's monopoly on terrestrial transmission radio broadcasting for the Flemish Community as a whole, and the ensuing difference in treatment between public and private radio stations broadcasting over the air, were not incompatible with Articles 10 and 11 of the Constitution with regard to the transmission range, especially in view of the limited number of frequencies available and the specific public service duties of public radio stations.

The Court also found that the public broadcasting corporation's monopoly on regional radio broadcasts via terrestrial transmitters was not incompatible with Articles 10 and 11 of the Constitution, considered in conjunction with the principle of freedom of trade and industry and Articles 82 and 86.1 EC (formerly 86 and 90.1), which prohibit abuse of a dominant position. The Court held that freedom of trade and industry was not absolute and that, in certain cases, restrictions could be placed on the freedom of business enterprises to act according to their own discretion. With regard to the alleged infringement of Articles 10 and 11 of the Constitution in conjunction with the provisions of European law, the Court pointed out that it had consistently considered the constitutional principles of equality and non-discrimination to apply to all rights and freedoms, including those deriving from international treaties by which Belgium was bound. Having examined Articles 82 and 86 EC and the case-law of the European Court of Justice (*Inno*, 13/77; *Höfner and Elser*, C-41/90, *ERT*, C-260/89, *Corbeau*, C-320/91, *Sacchi*, 155/73 and *CBEM/CLT and IPB*, 311/84), the Court concluded that EU member states, for public service but not economic reasons, could exempt radio and television programmes, including those broadcast via cable, from competition requirements by conferring exclusive rights on one or more broadcasters. In the Court's view, the legislature issuing the relevant decree was not manifestly misguided in considering that if the "Vlaamse Radio en Televisie-omroep" was to perform its specific public service duties properly, all competition from national commercial radio stations broadcasting over the air should be excluded. In this connection, the Court referred to Article 16 EC (formerly 7D), and more specifically to Protocol no. 32 of 2 October 1997 on the system of public broadcasting in the member states.

The Court also rejected the third argument, which was the alleged infringement of Articles 10 and 11 of the Constitution, considered in conjunction with the principle of freedom of expression as enshrined in Article 10 ECHR and Article 19 of the Constitution, finding that freedom of expression could be subject to certain formalities, conditions, restrictions or sanctions provided for by the law as a necessary means, in a democratic society, of safeguarding the aims set out in the above-mentioned provisions. The Court found that, in this particular case, the legislature issuing the decree had established restrictions which pursued a legitimate aim and were

necessary in a democratic society, given the limited number of radio frequencies available.

Finally, the Court also rejected the fourth and fifth arguments, concerning the alleged infringements of Articles 10 and 11 of the Constitution, considered in conjunction with the principles of freedom of establishment as enshrined in European Union law (Article 43 EC) and the free movement of services (Article 49 EC).

Languages:

French, Dutch, German.

Identification: BEL-2000-1-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 21.03.2000 / **e)** 27/2000 / **f)** / **g)** *Moniteur belge* (Officiel Gazette), 26.05.2000 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Road traffic, offence / Number plate, vehicle / Road safety / Burden of proof.

Headnotes:

The “presumption” that the person in whose name a vehicle is registered was the perpetrator of an offence committed with the vehicle is not at variance with the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), considered separately or in conjunction with the principle of presumption of innocence as enshrined in Article 6.2 ECHR.

Summary:

In a number of criminal cases, the applicants denied committing highway code offences established on the basis of the number plates of their vehicles. Under the Traffic Police Act, if the driver is not identified when an offence is reported, the offence is presumed to have been committed by the person in whose name the vehicle is registered. The applicants requested a preliminary ruling by the Court of Arbitration on whether such a presumption was at variance with Articles 10 and 11 of the Constitution, considered in conjunction with Article 6.2 ECHR.

The Court found that the provision at issue was informed by the desire to improve road safety; consequently, the burden of proof, which in principle was placed on the prosecuting authorities (the State Counsel’s Office), had been lightened. This legal provision therefore established differential treatment by departing from the principle of placing the burden of proof on the prosecuting authorities. In the Court’s view, however, this was justified by the impossibility, in a field in which countless offences were committed and were often only observed fleetingly, of otherwise establishing the offender’s identity with any degree of certainty. Since it was possible under the legislation at issue to adduce refuting evidence “by any legal means”, there was no unjustified infringement of the principle of presumption of innocence as enshrined in Article 6.2 ECHR.

Supplementary information:

See European Court of Human Rights, *Salabiaku*, 07.09.1988, Series A, no. 141-A.

See also *Bulletin* 1999/2 [FRA-1999-2-006].

Languages:

French, Dutch, German.

Identification: BEL-2000-1-003

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 21.03.2000 / **e)** 31/2000 / **f)** / **g)** *Moniteur belge* (Official Gazette), 22.04.2000 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.1.4.7 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Economic, Social and Cultural Rights of 1966.
3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.
5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of opinion.
5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Sect / Anthroposophy / *"Steiner"* movement / Council of Europe, Parliamentary Assembly, recommendation.

Headnotes:

Setting up a sects observatory is not incompatible with Articles 10 and 11 of the Constitution (the principles of equality and non-discrimination), considered in conjunction with Articles 19, 22, 24 and 27 of the Constitution (freedom of worship and expression; privacy; freedom of education; freedom of association), Articles 8, 9 and 10 ECHR (privacy; freedom of thought, conscience and religion; freedom of expression) and Articles 18 and 19 of the International Covenant on Civil and Political Rights (freedom of thought, conscience and religion; freedom of expression).

Summary:

An anthroposophical movement (the "Steiner" movement) applied to the Court to set aside the Act of 2 June 1998 setting up a centre to provide information and advice on harmful sectarian organisations and an administrative unit to co-ordinate efforts to combat harmful sectarian organisations. The act's aim is to monitor the phenomenon of sects and their practices. It applies to "harmful sectarian organisations", in other words "any group with a philosophical or religious function, whether real or supposed, which, in its organisation or practices, engages in unlawful, harmful activities, causes harm to individuals or society or infringes human dignity".

After rejecting a number of objections to the admissibility of the complaint (for example, the Cabinet, as the respondent, argued that the applicant was not entitled to request the setting aside of the act because its scope was limited to "harmful" sectarian organisations, whereas the Court accepted that the applicant was entitled to bring the action as the "Steiner" movement was classified as a sect in certain official documents and by certain sections of the media), the Court examined the substance of the act at issue, focusing in particular on the preparatory documents. Accordingly, the Court found that the act sought to give effect to a recommendation by a parliamentary commission of enquiry and a recommendation by the Council of Europe Parliamentary Assembly.

The Court did not uphold the applicant's claim that the contested act would introduce discriminatory, preventive supervision, whereas penalties for illegal activities could only be issued retroactively and only groups with a philosophical or religious function would be affected. The act did not actually give the new centre any powers regarding advance monitoring and prevention of the expression of opinions and did not require authorisation before an association of any kind was formed. With regard to the restriction of the act to harmful groups with a philosophical or religious function, the Court noted: "It is precisely the philosophical or religious nature, whether real or supposed, of these organisations which appears to make them attractive to a proportion of the population. This explains the particular concern which the act in question sets out to address." The safeguards laid down in the act itself mean that there is no additional interference with the protection of privacy: personal data can only be processed by the centre in connection with tasks prescribed by law.

Supplementary information:

See also Council of Europe Parliamentary Assembly Recommendations 1178 (1992) on sects and new religious movements and 1412 (1999) on illegal activities of sects.

Languages:

French, Dutch, German.

Identification: BEL-2000-1-004

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 06.04.2000 / **e)** 42/2000 / **f)** / **g)** *Moniteur belge* (Official Gazette), 20.05.2000 / **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.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.1.4.7 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Economic, Social and Cultural Rights of 1966.
4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Right to strike.
5.4.9 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Right to strike, conditions, exercise / Police, restriction to strike.

Headnotes:

A law under which the exercise by police officers of the right to strike is conditional on prior consultation and certain authorities are empowered to order police officers exercising or wishing to exercise their right to strike to continue or resume working for a specific period in which they have essential duties to perform does not conflict with the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), considered separately or in conjunction with Articles 5, 6, 4, 31 and 32 of the European Social Charter (the right to strike) and Article 11 ECHR (freedom of association).

Summary:

Under Section 126 of the Act of 7 December 1998 on the organisation of an integrated police force, police officers may only exercise the right to strike if the strike has been announced in advance by an approved trade union and a discussion on the issue that has prompted the intended strike has been held with the relevant authorities. Furthermore, certain authorities (the Minister of the Interior, following consultation with, or jointly with, the Minister of Justice where the federal and local police are concerned, and with the mayor or police council where the local police are concerned) may nevertheless force police officers to continue or resume working.

The leader of an inter-occupational trade union and a municipal police officer who was a trade union delegate requested the Court to set aside the Act of 7 December 1998 in its entirety. However, since the objections they raised only applied to Section 126 of the act, their complaint was deemed admissible in respect of this section only. The Court acknowledged that the applicants were entitled to bring a case against a provision which restricted the conditions under which the right to strike and trade union rights could be exercised by municipal police officers.

With regard to the merits of the case, however, all the arguments were rejected, including those which relied on the European Social Charter and Article 11 ECHR. The Court noted firstly that the provision did not empower the relevant authorities to deprive police officers entirely of the right to strike. It held that there was no need to state whether freedom of association, including the right to form and join trade unions to defend one's interests, as enshrined in Article 11 ECHR, provided a guarantee of the right to strike. Lastly, it pointed out that under the second paragraph of this article, Article 31 of the European Social Charter and Article 8.2 of the International Covenant on Economic, Social and Cultural Rights, restrictions on freedom of association in general and the right to strike in particular were possible in certain cases and under certain conditions. In this particular case, given the specific need for police officers to be readily available for duty, the contested restriction of the right to strike was consistent with the need, in a democratic society, to ensure respect for the rights and freedoms of others and to uphold law and order.

Languages:

French, Dutch, German.

Bosnia and Herzegovina
Constitutional Court

Important decisions

Identification: BIH-2000-1-001

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c) / d)** 20.01.2000 / **e)** U 1/99 / **f)** / **g)** *Službene Novine Fed. BiH* (Official Gazette of the Federation of Bosnia and Herzegovina), no. 41/99 / **h)**.

Keywords of the systematic thesaurus:

1.1.4.2 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.
1.3.4.10 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of the constitutionality of enactments.
1.5.4.3 **Constitutional Justice** – Decisions – Types – Finding of constitutionality or unconstitutionality.
1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
1.6.5.3 **Constitutional Justice** – Effects – Temporal effect – *Ex nunc* effect.

Keywords of the alphabetical index:

Constitutional Court, decisions, execution.

Headnotes:

In Article 59 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina it is established that the Constitutional Court, in a decision declaring an act unconstitutional under Article VI.3.a of the Constitution, may grant to the body that adopted the act a period of three months within which the act must be brought into line with the Constitution. If the incompatibility is not eliminated within the said period, the Court shall declare, in a decision, that the incompatible provisions cease to be valid on the day of publication of that decision in the Official Gazette of Bosnia and Herzegovina.

Summary:

The Constitutional Court of Bosnia and Herzegovina established with Decision no. U1/99 dated 14 August

1999 (*Bulletin* 1999/3 [BIH-1999-3-003]), that some Articles of the Law on the Council of Ministers and the Ministers of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, no. 4/97) were inconsistent with the Constitution of Bosnia and Herzegovina.

The Parliamentary Assembly was given a three-month period from the date of publication of this decision in the Official Gazette to amend the Law so as to bring the provisions into line with the Constitution of Bosnia and Herzegovina.

The period determined in the decision elapsed on 28 December 1999 and the Parliamentary Assembly failed to comply with the decision within this period.

Hence, on 20 February 2000 the Court adopted a new decision. In this decision the Court specified which parts of Articles 3, 7, 19, 28 and 29 of the law were in conflict with the Constitution and declared, pursuant to Articles 26 and 59 of the Rules of Procedure, that these provisions as well as the other provisions mentioned in its decision of 14 August 1999 shall cease to be valid on the day of publication of this decision in the Official Gazette.

Cross-references:

Decision U1/99 of 14 August 1999 was published in *précis* form in *Bulletin* 1999/3 [BIH-1999-3-003].

Languages:

Bosniac, Croatian, Serb, English.

Identification: BIH-2000-1-002

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 30.01.2000 / **e)** U 5/98 / **f)** / **g)** *Slugžbeni List Fed. BiH* (Official Gazette of the Federation of Bosnia and Herzegovina), no. 11/2000 / **h).**

Keywords of the systematic thesaurus:

1.2.1.1 **Constitutional Justice** – Types of claim – Claim by a public body – Head of State.
1.3.4.3 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between central government and federal or regional entities.
1.3.5.3 **Constitutional Justice** – Jurisdiction – The subject of review – Constitution.
1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.1.4.8 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Vienna Convention on the Law of Treaties of 1969.
2.3.8 **Sources of Constitutional Law** – Techniques of review – Systematic interpretation.
3.8 **General Principles** – Territorial principles.
4.8.1 **Institutions** – Federalism and regionalism – Basic principles.
4.8.4 **Institutions** – Federalism and regionalism – Budgetary and financial aspects.
4.8.5.2.1 **Institutions** – Federalism and regionalism – Distribution of powers – Implementation – Distribution *ratione materiae*.
4.8.5.5 **Institutions** – Federalism and regionalism – Distribution of powers – International relations.
4.10.5 **Institutions** – Public finances – Central bank.

Keywords of the alphabetical index:

Extradition, powers / Asylum, powers / Boundary, definition / Border, definition / Constitutional autonomy, relative / Representation, international / Ambassador, nomination / Monetary policy, powers.

Headnotes:

The constitutionally established jurisdiction of the Constitutional Court of Bosnia and Herzegovina covers the Entity's constitutions, since according to Article VI.3.a of the Constitution the Constitutional Court has exclusive jurisdiction to review whether any provision of an Entity's constitution or law is consistent with the Constitution of Bosnia and Herzegovina. On 29 and 30 January 2000, the Court declared with a partial decision some provisions or parts of provisions of the Constitutions of the Republika Srpska and of the Federation of Bosnia and Herzegovina null and void on the ground that they were not in conformity with the Constitution of Bosnia and Herzegovina.

Summary:

On 12 February 1998 Mr Alija Izetbegovic, Chair of the Presidency of Bosnia and Herzegovina, requested the Constitutional Court of Bosnia and Herzegovina to evaluate the constitutionality of some

provisions of the Constitutions of the Federation of Bosnia and Herzegovina ("the Federation Constitution") and of the Republika Srpska ("the RS Constitution").

The Court found that the request was admissible, since it was submitted by the Chair of the Presidency, who is among the institutions entitled to refer disputes to the Constitutional Court under Article VI.3.a of the Constitution of Bosnia and Herzegovina.

According to Article 31 of the Vienna Convention on the Law of Treaties it is necessary to clarify the terms used in the Constitution of Bosnia and Herzegovina by interpreting them in the context of the entire General Framework Agreement for Peace (signed in Paris on 14 December 1995). It followed from an analysis of these texts that there was a consistent terminology, according to which "border" and "boundary" are given different meanings: Article III of the General Framework Agreement refers to "the boundary demarcation between the two Entities", but the term "border" is used in Article X when referring to frontiers between states. In such circumstances, the use of a different terminology in the RS Constitution cannot be considered consistent with the Constitution of Bosnia and Herzegovina and Article 2.2 of the RS Constitution was declared unconstitutional in so far as the term "border" is used in the wrong context.

According to Article III.1.g of the Constitution of Bosnia and Herzegovina, the institutions of Bosnia and Herzegovina are responsible for international and inter-Entity criminal law enforcement.

Article 6.2 of the RS Constitution, as supplemented by Amendment XXX, refers to citizenship, exile and extradition. The Court found that there is no doubt that extradition of persons against whom the authorities of another state are proceeding for an offence or who are wanted by the said authorities to carry out a sentence or detention order is covered by the term international law enforcement. Article 6 of the RS Constitution thus regulates a matter which lies within the responsibility of the institutions of Bosnia and Herzegovina. The Court must, therefore, conclude that the words "or extradited" Article 6.2 of the RS Constitution are inconsistent with the Constitution of Bosnia and Herzegovina.

With regard to the challenged provision of Article 44.2 of the RS Constitution, the Entities cannot regulate the "asylum policy", since according to Article III.1.f of the Constitution of Bosnia and Herzegovina asylum policy and regulation are responsibilities of the institutions of Bosnia and Herzegovina.

With regard to the protection of fundamental rights in the RS Constitution, the question arises whether the Constitution of Bosnia and Herzegovina can be interpreted as prohibiting provisions in the Entity constitutions that are more favourable to the individual.

It is generally recognised in federal states that component entities enjoy "relative constitutional autonomy" granting their constitutions the right to regulate matters in such a way that they do not contradict the wording of the constitution of the respective state. The same principle can be seen as an inherent principle underlying the entire structure of the Constitution of Bosnia and Herzegovina.

Moreover, Article 53 (the former Article 60) ECHR provides that the protection granted by the European Convention on Human Rights is only a minimum protection and that States are not prevented by the Convention from granting the individual more extensive or favourable rights and freedoms. The same principle must apply to the interpretation of the Constitution of Bosnia and Herzegovina, which indeed makes the European Convention on Human Rights directly applicable in Bosnia and Herzegovina and grants it priority over all other law.

It follows from what has been stated that the Entities are free to provide for a more extensive protection of human rights and fundamental freedoms than required under the European Convention on Human Rights and the Constitution of Bosnia and Herzegovina. Amendment LVII, item 1, to the RS Constitution is therefore not in conflict with the Constitution of Bosnia and Herzegovina.

The Court found that the Entities have a right to establish representations abroad as long as this does not interfere with the power of Bosnia and Herzegovina to be represented as a State. Moreover, the Entities may propose their own candidates to be elected as ambassadors and other international representatives of Bosnia and Herzegovina; however such proposals must be regarded as nothing more than proposals and cannot restrict the right of the Presidency of Bosnia and Herzegovina to appoint either the persons proposed by the Entities' institutions or persons who have not been proposed by them.

Hence the contested provisions of Articles 80 and 90 of the RS Constitution concerning the power to appoint and recall heads of missions of Republika Srpska in foreign countries and the establishment of missions abroad are in conformity with the Constitution of Bosnia and Herzegovina.

With regard to the contested provisions of Article 98 of the RS Constitution the Court found that since the power for issuing currency and for monetary policy through Bosnia and Herzegovina is given by Article VII of the Constitution of Bosnia and Herzegovina to the Central Bank of Bosnia and Herzegovina, there is no power left in this respect for the Entities under Article III.3 of the Constitution of Bosnia and Herzegovina.

Hence, the challenged provisions of Article 98 of the RS Constitution must be declared unconstitutional.

Moreover, the Court found that Article 76.2 of the RS Constitution is also not in conformity with the Constitution of Bosnia and Herzegovina, because the Central Bank is vested with the exclusive responsibility to make legislative proposals in the field of "monetary policy" as referred to above.

According to Article VI.3.a of the Constitution of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina has "exclusive jurisdiction", when serving as a protective mechanism in "any dispute". Moreover, Article 75 of its Rules of Procedure allows for preliminary measures to be granted by the Court, and therefore there is no room left for unilateral measures to be taken by institutions of the Republika Srpska. The Court thus found that Article 138 of the RS Constitution, as modified by Amendments LI and LXV, is unconstitutional.

With regard to the contested provisions of Amendment VII to Article II.A.5 of the Federation Constitution, the Constitutional Court found that the wording of this amendment simply refers to the citizenship requirements prescribed by Article I.7.a and I.7.d of the Constitution of Bosnia and Herzegovina. This contested provision must, therefore be considered to be in conformity with the Constitution of Bosnia and Herzegovina.

With regard to the power to appoint heads of diplomatic missions in the Federation of Bosnia and Herzegovina, as it has already been stated above, Article V.3.b of the Constitution of Bosnia and Herzegovina vests the power to appoint them in the hands of the Presidency of Bosnia and Herzegovina without limits to its decision-making Therefore, the Court found that the provisions of Article IV.B.7.a.i and IV.B.8. of the Federation Constitution clearly contradict the Constitution of Bosnia and Herzegovina since the contested provisions, unlike those of the RS Constitution, vest the power to make such an appointment in the President of the Federation.

Languages:

Bosniac, Croatian, Serb, English.

Bulgaria
Constitutional Court

Statistical data
1 January 2000 – 30 April 2000

Number of decisions: 2

Important decisions

Identification: BUL-2000-1-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 29.02.2000 / **e)** 03/99 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), no. 18 of 07.03.2000 / **h)**.

Keywords of the systematic thesaurus:

1.3.4.7.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Restrictive proceedings – Banning of political parties.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
3.1 **General Principles** – Sovereignty.
3.8.1 **General Principles** – Territorial principles – Indivisibility of the territory.
4.5.11.4 **Institutions** – Legislative bodies – Political parties – Prohibition.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

National security, protection / Territorial integrity / Political party, programme.

Headnotes:

A party which supports separatism and the violation of national sovereignty and the territorial integrity of the state is unconstitutional.

Summary:

Proceedings were initiated by 61 members of the National Assembly.

The contested party was founded in 1998 in the town of Gotse Delchev and was registered by means of Sofia Municipal Court Decision no. 48 of 12 February 1999.

The Constitutional Court considers that the "O.M.O. – Ilinden" – PIRIN party is not a newly founded party, appearing for the first time on the political scene, but the successor to a previous party.

The evidence shows that the party's activities are centred on the region of Pirin. The contested party considers that this part of the country is not part of Bulgaria. In the party's opinion, it is a foreign territory which has been granted to Bulgaria for provisional administration under an international treaty. The party's activities are run along these lines and include efforts to separate the territory in question from Bulgaria.

This is also shown by the party's calls for autonomy, which is expressly prohibited by Article 2.1 of the Constitution. The same conclusion has to be drawn from the maps of Macedonia which the party publishes and disseminates, its definition of the region of Pirin as a part of Macedonia, its interpretations of the Balkan war and the Bucharest Treaty of 1913 and – more than anything else – its threat to separate the region of Pirin from the Bulgarian state if its demands are not met. When a threat like this is made by a party leader it cannot be dismissed as mere words. It is a genuine threat which reflects the stance of the party itself. It is supported by other members of the party leadership.

The aforementioned actions constitute an activity aimed at undermining the territorial integrity of the state in the meaning of Article 44.2 of the Constitution. Each action in itself constitutes such an activity.

This provision of the constitution is designed to safeguard a fundamental value, namely the territorial integrity of the Republic of Bulgaria, which Article 2.2 of the Constitution declares to be inviolable. It is sufficient for an activity to be directed against Bulgaria's territorial integrity, as in the instant case, for it to be possible to refer to this article.

A political party which declares a part of Bulgarian territory to be foreign and engages in activities aimed at its separation is unconstitutional.

The Constitutional Court considers it necessary to stress that the notion of unconstitutionality in this case is in keeping with Article 22.2 of the International Covenant on Civil and Political Rights and Article 11.2 ECHR. The clauses in question state that the exercise of the right to freedom of association may only be restricted where such restrictions are necessary in the interests of national security, as is the case here. There is no doubt that an activity directed against the territorial integrity of the Republic of Bulgaria constitutes a threat to its national security.

In view of the foregoing, the Constitutional Court declared the political party "the Unified Organisation of Macedonians – Ilinden – Party for the economic development and integration of the population" ("O.M.O. – Ilinden" – PIRIN) unconstitutional.

Languages:

Bulgarian.

Canada
Supreme Court

Important decisions

Identification: CAN-2000-1-001

a) Canada / **b)** Supreme Court / **c)** / **d)** 13.01.2000 / **e)** 26682 / **f)** Arsenault-Cameron v. Prince Edward Island / **g)** *Canada Supreme Court Reports*, [2000] 1 *S.C.R.* 3 / **h)** Internet: http://www.lexum.umontreal.ca/doc/csc-scc/en/index/html; 181 *Dominion Law Reports* (4th) 1; 249 *National Reporter* 140; 70 *Canadian Rights Reporter* (2d) 1; [2000] *S.C.J.* no. 1 *(QuickLaw)*.

Keywords of the systematic thesaurus:

5.1.1 **Fundamental Rights** – General questions – Entitlement to rights.
5.3.38 **Fundamental Rights** – Civil and political rights – Linguistic freedom.
5.3.43 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.
5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

Education in minority language, right / Educational facility / Minority language school, location.

Headnotes:

When, in a specific area, the numbers of children of parents holding minority language educational rights under the Constitution warrant the provision of minority language instruction, that instruction should take place in facilities located in the community where those children reside.

Summary:

The individual appellants hold minority language educational rights under Section 23 of the Canadian Charter of Rights and Freedoms. They made a request to the French Language Board for the establishment of a French school for grades 1 to 6 in the Summerside area. The pre-registration results

met the minimum requirement set out in the *School Act* Regulation, and the Board made a conditional offer of French first language instruction in Summerside. The Minister of Education conceded that the children of Section 23 right holders living in the Summerside area were entitled to educational instruction in the French language and that the number of children warranted the provision of the instruction out of public funds, but he refused to approve the Board's offer and instead offered to maintain transportation services to an existing French language school in Abrams Village. The average bus ride from the Summerside area to the existing French language school was 57 minutes. He also rejected the Board's subsequent proposal to provide French language instruction in Summerside through the existing French language school in Abrams Village. The appellants initiated proceedings against the provincial government seeking a declaration of their right to have their children receive French first language instruction at the primary level in a facility situated in Summerside. The Prince Edward Island Supreme Court, Trial Division, granted the declaration but the Appeal Division set aside that judgment. The Supreme Court of Canada restored the judgment of the Trial Division.

Under Section 23.3 of the Charter, a province has a duty to provide official minority language instruction where the numbers warrant it. The relevant number is somewhere between the known demand and the number of students who could potentially take advantage of the service. Since Section 23 favours community development and links the right to instruction to the area where the conditions for the exercise of that right are present, calculation of the relevant number is not restricted to the existing school boundaries. When a minority language board exists, the area is to be defined on a case-by-case basis and is within the minority's exclusive powers of management and control, subject to objective provincial norms and guidelines consistent with Section 23.

Identifying what is required by Section 23 involves a determination of the appropriate services, in pedagogical terms, for the number of students involved and an examination of the costs of the contemplated service. Educational services provided to the minority need not be identical to that provided to the majority. Substantive equality under Section 23 requires that official language minorities be treated differently, if necessary, according to their particular circumstances and needs, in order to provide a standard of education equivalent to that of the official language majority. Here, by using objective standards, which assess the needs of minority language children primarily by reference to the pedagogical needs of majority language children, the Minister failed to take into account the special requirements of the Section 23 rights holders. Further, although travel arrangements may, in some circumstances, meet the requirements of Section 23, the Minister also failed to recognize that the Section 23 children were faced with a choice between a locally accessible school in the majority language and a less accessible school in the minority language, a choice which would have an impact on the assimilation of the minority language children. Furthermore, a school is the single most important institution for the survival of the official language minority, which is itself a true beneficiary under Section 23. It was conceded by the Minister that financial considerations were not an issue in this case.

Management and control are critical to the enjoyment of Section 23 rights, and, where numbers warrant the creation of facilities, the representatives of the official language community have the right to a degree of governance of these facilities. The right of management and control is independent of the existence of a minority language board. At the upper end of the sliding scale of rights, where a minority language board is required, it will have both the powers of management granted by the legislature and any further powers conferred by Section 23. Although the Minister is responsible for making educational policy, his discretion is subordinate to the Charter, including the remedial aspect of Section 23, the specific needs of the minority language community and the exclusive right of representatives of the minority to the management of French language instruction and facilities. Within the parameters of Section 23, regulation of the board's powers is permissible. The government should have the widest possible discretion in selecting the institutional means by which its Section 23 obligations are to be met. The province has a legitimate interest in the content and qualitative standards of educational programs for the official language communities and it can impose appropriate programs in so far as they do not interfere with the legitimate linguistic and cultural concerns of the minority.

In the present case, the French Language Board had an obligation to offer French language instruction where numbers warrant and to determine the location of the required classes or facilities, subject to the approval of the Minister. The Minister's decision not to offer services in Summerside was unconstitutional because the offer of classes or a facility came within the exclusive right of management of the minority and met with all provincial and constitutional requirements. The Minister's discretion was limited to verifying whether the Board had met provincial

requirements; he had no power to substitute his own criteria or decision. The Minister had failed to give proper weight to the effect of his decision on the promotion and preservation of the minority language community in Summerside and had not given proper recognition to the role of the French Language Board in this regard.

Languages:

English, French (translation by the Court).

Croatia
Constitutional Court

Important decisions

Identification: CRO-2000-1-001

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 19.01.2000 / **e)** U-I-496/1998 / **f)** / **g)** *Narodne novine* (Official Gazette), 11/2000 / **h)**.

Keywords of the systematic thesaurus:

3.21 **General Principles** – Prohibition of arbitrariness.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2 **Fundamental Rights** – Equality.
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.

Keywords of the alphabetical index:

Residence, refusal / Housing, legal basis.

Headnotes:

The constitutional freedom to move freely and to choose a residence is violated by a law which provides that the right of residence shall be refused if a citizen in a particular place does not have a particular permanent accommodation, and also may be refused if he/she does not produce, at the request of a competent authority, evidence of employment or another permanent source of income.

Summary:

The Court repealed several provisions of the Law on Permanent and Temporary Residence of Citizens which stated that a condition for permanent residence in a place was a secured permanent accommodation, which included ownership of a dwelling place, a tenancy agreement or another valid legal basis for lodging. Without proof that these conditions existed, the application for permanent residence was refused and could also have been refused if the applicant failed to submit, upon a request by the competent

body, evidence of employment or another source of permanent income.

The Court stated that freedoms and rights may only be restricted by law in order to protect the freedoms and rights of others, public order or public morality and health and held that the fact that a citizen does not have a secured permanent accommodation in the place in which he or she wishes to apply for permanent residence does not threaten these values. Concerning employment or another source of permanent income, in connection with which the competent body could refuse residence, the Court found that the disputed provision of the law gave no scope or limits for administrative authority on the grounds of which the right may or may not be refused.

The disputed provisions were repealed as unconstitutional in view of Articles 32, 14 and 3 of the Constitution (freedom of movement, equality before the law, principle of equal rights as one of the highest values of the constitutional order).

Languages:

Croatian, English.

Identification: CRO-2000-1-002

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 26.01.2000 / **e)** U-I-902/1999 / **f)** / **g)** *Narodne novine* (Official Gazette), 14/2000 / **h)**.

Keywords of the systematic thesaurus:

4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
4.6.10.1 **Institutions** – Executive bodies – Sectoral decentralisation – Universities.
5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Scientific freedom.

Keywords of the alphabetical index:

University, autonomy / University, supervising authority / Teaching staff, appointment.

Headnotes:

The constitutional provision which guarantees autonomy to universities and independence in their organisation and work is violated by the provisions of a law which authorise the Minister of Science and Technology to determine in detail the conditions for studies concerning the number and structure of teaching staff, space and equipment, necessary financial resources and the carrying out of educational programmes.

The authority of the Ministry of Science and Technology to approve the capacities of each higher educational institution is not constitutional. In addition, the authority of the Governing Council to select from among candidates for the position of rector those which it proposes to the Senate instead of presenting the names of all candidates is unconstitutional. The autonomy of universities is also violated by the provisions which provide that members of the Governing Council are appointed by the founder and that the appointment of a dean is approved by the Governing Council which also requires the rector's opinion on the issue.

Summary:

The disputed Law on Higher Educational Institutions was reviewed from the point of view of Articles 67, 68 and 16 of the Constitution (autonomy of universities, freedom of scientific, cultural and artistic creativity, constitutional restriction of freedom and rights). The Court held that university autonomy means autonomy in relation to bodies outside universities and the autonomy of each university towards other universities. It also covers the autonomy of each faculty within a university and the autonomy of all persons dealing with a certain subject within the scientific system. Certain restrictions on this autonomy exist due to the fact that universities are dependant on certain subjects as founders of universities, their supporters and bodies which supervise professionally their functioning.

The subject of review concerned all provisions of the Law on the organisation, functioning and government of higher educational institutions, the appointment of teaching staff and the competence of various bodies in this connection, and the normative function of universities, including the university's statute.

Supplementary information:

The effects of the decision were postponed until 1 August 2000.

According to the acts regulating institutions in general, and universities in particular, a public institution may be founded by the Republic of Croatia, a municipality, a county and the City of Zagreb, a natural or legal person if it is expressly provided by law and by units of local self-government.

All the four universities which currently exist in Croatia were founded by the Republic. They were established by an Act of parliament and their founder is the parliament. The relevant law allows the possibility for domestic and foreign natural and legal persons to found universities but until now no such universities have been established.

Languages:

Croatian.

Identification: CRO-2000-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 26.01.2000 / **e)** U-I-1156/1999 / **f)** / **g)** *Narodne novine* (Official Gazette), 14/2000) / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.15 **General Principles** – Proportionality.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Entrepreneurship / Tobacco, sale, restrictions.

Headnotes:

A law which prohibits a previously legal economic activity or introduces restrictions on it, without leaving a reasonable period of time during which the affected subjects might adjust to the newly established conditions of business, is unconstitutional.

There is no proportionality between the legitimate aim and the measures undertaken to ensure that aim if constitutional rights are restricted to a greater extent than necessary.

Summary:

In the Law on the Use of Tobacco Products (which came into force on 8 December 1999) the Court repealed a provision according to which the sale of tobacco products from vending machines was prohibited from 1 January 2000. The Court held that the restriction of entrepreneurial freedoms and ownership rights, although undertaken towards a legitimate aim (protection of health), violated constitutional rights when it is obvious that there does not exist reasonable proportionality between the aim and the manner and extent of the restriction of an individual's rights and freedoms. The disputed prohibition meant the withdrawal of vending machines which make it impossible to control whether tobacco products are sold to minors.

Article 17 of the Constitution of the Republic of Croatia deals only indirectly with the principle of proportionality, providing that during a state of war or an immediate threat to the independence and unity of the State, or in the event of severe natural disasters, individual freedoms and rights guaranteed by the Constitution may be restricted, but the extent of such restrictions shall be adequate to the nature of the danger.

The Court ruled that if the Constitution expressly requires the implementation of the principle of proportionality under extraordinary circumstances, then this principle should be even more valid under “ordinary” circumstances in the country. The disputed provisions impose on entrepreneurs an excessive burden which could only be offset by prescribing a reasonable period of time, long enough for the entrepreneurs to adjust to the new conditions of business, or, alternatively, by providing a right to compensation.

Supplementary information:

The grounds for the decision were not only the provisions of Articles 3, 48, 49, 50 and 54 of the Constitution (inviolability of ownership, protection of ownership, entrepreneurial freedom, restrictions of property rights and of the exercise of entrepreneurial freedom, right to work, freedom of work) but also Article 1 Protocol 1 ECHR.

One judge delivered a dissenting opinion, stating that the relationship between human rights and freedoms

and other constitutionally protected values, namely public health, are solved by the Constitution itself (Articles 16 and 50 of the Constitution).

According to Article 16 of the Constitution freedoms and rights may be restricted, among other reasons, in order to protect health. According to Article 50 of the Constitution, entrepreneurial freedom and property rights may exceptionally be restricted (by law only) in order to protect health. These provisions lead to the conclusion that the protection of health by the Constitution is valued more highly than the protection of entrepreneurial freedom and property rights and that therefore the Constitution itself establishes an inequitable balance between them in favour of the protection of health. The application of the principle of proportionality in such a case gives an inadmissible relativistic quality to constitutional provisions. Repealing the disputed provisions on the prohibition of the sale of tobacco products from vending machines not only does not establish an "equitable balance" between entrepreneurial freedom and the protection of health but by giving exclusive priority to the protection of entrepreneurial freedom establishes their relationship in a way diametrically opposite to Articles 16 and 50 of the Constitution.

Languages:

Croatian, English.

Identification: CRO-2000-1-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 03.02.2000 / **e)** U-I-884/1997, U-I-920/1997, U-I-929/1997, U-I-956/1997, U-I-453/1998, U-I-149/1999 / **f)** / **g)** *Narodne novine* (Official Gazette), 20/2000) / **h)**.

Keywords of the systematic thesaurus:

1.3 **Constitutional Justice** – Jurisdiction.
3.9 **General Principles** – Rule of law.
5.1.1 **Fundamental Rights** – General questions – Entitlement to rights.
5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.1.1.4 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Association, registration / Reciprocity, principle, restrictions / Presumption, positive.

Headnotes:

The fact that the Law on Associations only regulates associations which are legal persons should not lead to the conclusion that associations which do not have the status of a legal person may not exist, function and enjoy protection before the courts.

The Constitutional Court is not authorised to question whether particular models of transition have a purpose and are justified, but only whether legal provisions on transition violate the Constitution.

Summary:

Proposals to review the constitutionality of the Law on Associations stated that the law restricts freedom of association because it does not deal with associations which are not legal persons. This viewpoint was not accepted by the Court, which held that such associations are not prohibited in the legal system. In the legal system of Croatia there are entities based on association which are not legal persons, but which participate in legal transactions, have certain rights and liabilities and enjoy legal protection before courts (such as inhabitants of the same settlement, boards organised with a view to electrification or the building of a gas-main, trade-unions in institutions or editorial boards of publications). Forms of association that do not have the status of a legal person are not regulated by law, and therefore their foundation, internal organisation and termination depend on the free will of their members.

The Court used the same reasoning to repeal provisions in the law according to which associations cannot begin to function before they are registered. It ruled that an association may function before registration and without registration, but only as an association, not as a legal person. The Court also repealed provisions according to which a "union or community of associations" have the status of a legal person, as well as those according to which the association is fined if it does not report the foundation and activities of its constituent bodies within a prescribed time limit.

The provisions according to which a foreigner who has been granted permanent residence, a business

visa or prolonged residence may be a founder of an association in Croatia subject to the principle of reciprocity were also repealed. The Court ruled that restrictions based on the principle of reciprocity were not justified in such a case because there was no legitimate reason to link the freedom of association of foreigners and foreign legal persons with the behaviour of the state they belong to.

The Court found that the provision which regulates the contents of the basic legal act of an association restricts freedom of association, which presupposes freedom of internal organisation. Thus, the parts of the provision concerning membership dues, disciplinary responsibility and the composition, powers and manner of decision making of an association's bodies were repealed.

The Court also ruled that the presumption according to which an association shall be registered if the competent administrative body, in the prescribed time, does not pass a decision about its registration, is not unconstitutional and is in fact in favour of the association. This is an exception to the rule of general administrative procedure where a negative presumption is valid, i.e. the presumption that a party's request has been refused if no decision has been passed in the time period set down by the law.

The Court considered that the provisions of the Law concerning the transformation of former "social organisations" into associations were primarily of a political nature, and that the legislator was allowed to regulate the procedure of that transition and designate the bodies concerned.

Languages:

Croatian, English.

Identification: CRO-2000-1-005

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 03.02.2000 / **e)** U-I-131/1998 / **f)** / **g)** *Narodne novine* (Official Gazette), 20/2000) / **h)**.

Keywords of the systematic thesaurus:

3.15 **General Principles** – Proportionality.

4.7.2 **Institutions** – Courts and tribunals – Procedure.
5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
5.3.13.18 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Equality of arms.
5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of opinion.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.

Keywords of the alphabetical index:

Public person, media information.

Headnotes:

A legal provision which provides that urgent court procedure should apply to disputes concerning damages which are to be paid by a publisher who publishes information about an individual's personal or private life or other information which violates an individual's privacy, dignity, reputation, honour or some other constitutionally or legally protected personal right, must respect the principle of proportionality in comparison with other urgent court procedures, such as labour relations disputes, cases involving trespass, or family court cases, and should not put one party to the dispute in an unfavourable position.

Summary:

The disputed Law on Public Informing provided, in comparison with other laws regulating court procedure, for the most urgent procedure in the legal system for cases of compensation described above, which it has been statistically proven are mostly initiated by public figures and only exceptionally by ordinary citizens.

The disputed provisions prescribed that the first hearing must be held within 8 days from the day the lawsuit was filed with the court and that the second instance court must pass a decision on the appeal against the decision of the court of first instance within 30 days from the day the appeal was lodged. They also restricted the appellant's possibility of presenting new facts and evidence. The Court held that the legislator may in certain cases make provision for urgent court procedure, but that these cases have to respect the principle of proportionality in comparison with other cases which are deemed to

be more urgent and to comply with the principle of equality of arms. The disputed provisions were found to be unfavourable towards the defendant (publisher) while the plaintiffs were less affected. The provisions also restricted freedom of thought and expression of thought, especially in the press and other media.

Languages:

Croatian, English.

Identification: CRO-2000-1-006

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 03.02.2000 / **e)** U-I-638/1998 / **f)** / **g)** *Narodne novine* (Official Gazette), 20/2000 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
2.1.1.4.7 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Economic, Social and Cultural Rights of 1966.
3.4 **General Principles** – Separation of powers.
3.12 **General Principles** – Legality.
3.17 **General Principles** – General interest.
4.6.2 **Institutions** – Executive bodies – Powers.
4.6.11 **Institutions** – Executive bodies – The civil service.
5.1.4 **Fundamental Rights** – General questions – Emergency situations.
5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Right to strike.

Keywords of the alphabetical index:

Strike, public service / ILO Convention no. 87 / ILO Convention no. 98.

Headnotes:

The right to strike in the public service is unconstitutionally restricted if it is restricted by an act of the minister competent for air traffic.

Summary:

The Court repealed a provision of the Law on the establishment of Croatian air traffic control which laid down the powers of the minister competent for air traffic in case of strike, allowing him to determine the "necessary performance of air traffic". The provision was reviewed in light of the constitutional provision according to which the right to strike may be restricted in the armed forces, the police, the public administration and the public service in a manner specified by law. The Court held that the right to strike is a constitutional right which may only be restricted in the public service in the same way and to the same extent that other constitutional rights may be restricted, namely by law not by act of executive power, and only in order to protect the freedoms and rights of others, public order, public morality and health.

Supplementary information:

The decision was based not only constitutional provisions but also on provisions of the International Covenant on Economic, Social and Cultural Rights and Conventions 87 and 98 of the International Labour Organisation.

The legal effects of the decision were postponed for 60 days after its publication.

Languages:

Croatian.

Identification: CRO-2000-1-007

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 09.02.2000 / **e)** U-I-1094/1999 / **f)** / **g)** *Narodne novine* (Official Gazette), 22/2000) / **h)**.

Keywords of the systematic thesaurus:

4.7.9 **Institutions** – Courts and tribunals – Administrative courts.
5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.

5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.37 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Foreigner, right to acquire property / Administrative act, judicial review.

Headnotes:

The consent of the Minister of Foreign Affairs and of the minister responsible for immigration issues in the procedure for foreigners to acquire property rights in real estate is an administrative act with the consequence that it is subject to judicial supervision by the Administrative Court.

Summary:

According to the Law on ownership and other property rights foreign natural and legal persons may, under conditions of reciprocity and unless otherwise stipulated by law, acquire ownership of real estate in Croatia if the Minister of Foreign Affairs gives his consent, after securing the opinion of the Minister of Justice. Stateless foreign persons, who are emigrants from the former Socialist Federal Republic of Yugoslavia, or descendants of such persons, may acquire ownership of real estate in Croatia if the minister responsible for immigration gives his consent, after securing the opinion of the Minister of Justice. The consent of the ministers, according to the disputed provisions, did not constitute an administrative act. The Court ruled that the consent was such an act, as it was made by a body of government administration in an administrative procedure regulating the right to acquire ownership of real estate in Croatia, and as such was subject to judicial review by the Administrative Court.

Supplementary information:

In case U-I-657/1999 (*Narodne novine*, 121/1999) the same provisions were not found to be unconstitutional. Since according to the provisions of Article 52 of the Constitutional Act on the Constitutional Court of the Republic of Croatia the Court may review the constitutionality of a law even when the same law has already been reviewed by the Constitutional Court, the disputed provisions were reviewed again on the basis of new evidence that foreigners do not have the possibility of effective legal protection and were repealed.

Languages:

Croatian, English.

Identification: CRO-2000-1-008

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 23.02.2000 / **e)** U-I-985/1995, U-I-792/1998, U-I-1088/1998, U-I-123/1999 / **f)** / **g)** *Narodne novine* (Official Gazette), 29/2000) / **h)**.

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.
5.3.34 **Fundamental Rights** – Civil and political rights – Inviolability of communications.
5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.

Keywords of the alphabetical index:

Telephone tapping / Shelter, obligation to construct, exemption / Dismissal, proceedings, right to defend oneself.

Headnotes:

A provision of the Law on Internal Affairs which leaves the restriction of constitutional freedoms and rights to the discretionary assessment of the Minister, with only one subsequent condition, that the Minister must inform the President of the Republic of such a decision, is unconstitutional.

It is unconstitutional to work out in detail the compulsory building of shelters in a way which puts investors in an unequal position depending on whether a shelter was built by somebody else or whether the construction of the shelter would raise the cost of construction disproportionately.

In a dismissal procedure, an employee must be given an opportunity to defend his rights and interests.

Summary:

According to the disputed provisions:

1. the Minister of the Interior had the authority to issue a decree renouncing the principles of the inviolability of the confidentiality of letters and other means of communication if he found that it was necessary for the security of the state; his only obligation was to inform the President of the Republic of the decree and the reasons for it;

2. a local government police department had the authority to give an opinion that investors who have an obligation to build shelters may be exempted from this obligation;

3. employees in the police force who had been classified as "employees whose continuing work in a previous place of work would be against the interest of the forces" are denied the opportunity to give their view about the reasons and judgment of a superior and to defend themselves.

The disputed provisions were repealed.

Languages:

Croatian, English.

Identification: CRO-2000-1-009

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 01.03.2000 / **e)** U-III-324/1996 / **f)** / **g)** *Narodne novine* (Official Gazette), 28/2000) / **h)**.

Keywords of the systematic thesaurus:

4.7.4.1.1 **Institutions** – Courts and tribunals – Organisation – Members – Appointment.
5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Reasoning.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.

Keywords of the alphabetical index:

Judge, relief of duty / Venice Commission, advisers.

Headnotes:

It is unconstitutional to relieve a judge of his duty without enabling him to learn the reasons for the termination and thus enable him to defend his rights efficiently.

Summary:

The Court accepted the complaint of a judge who was not reappointed. The judge argued, among other reasons, that he had not been appointed because he belongs to a national minority, not for reasons of a professional or judicial nature.

In its decision U-III-188/1995, dated 29 March 1995 (*Narodne novine*, 22/1995, *Bulletin* 1995/1 [CRO-1995-1-008]) this Court stated its view that the decision not to appoint a judge need not be explained, that it was to be treated as a decision after a competition which names only candidates who have been appointed, while other participants in the competition have the right to inspect the competition materials and on the basis of reasons found in these materials are able to defend their rights. This presupposes that the competition materials contain specific reasons on which the decision was based. This especially refers to cases in which decisions are made about the appointment (or non-appointment) of candidates who are already judges, as in this case, because a decision not to re-appoint has as its consequence mandatory retirement and termination of employment. The Court ruled that to terminate someone's employment, and especially that of a judge who has exercised his functions for many years, without enabling him to learn the reasons for the termination, and to defend his rights, is unconstitutional.

The case was returned to the State Judicial Council for renewal of procedure.

Supplementary information:

This case, as well as case U-III-437/1996, in which decision was passed on 8 March 2000, was solved with international advisers, nominated by the Venice Commission and appointed by the Committee of Ministers of the Council of Europe, who participate in the proceedings of the Court when it is dealing with cases relating to the rights of minorities or of persons belonging to minorities. The advisers in these cases

were Mr Armando Marques Guedes, Mr Giorgio Malinverni and Mr Matthew Russell.

Languages:

Croatian, English.

Identification: CRO-2000-1-010

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 15.03.2000 / **e)** U-I-659/1994, U-I-146/1996, U-I-228/1996, U.I.508/1996, U-I-589/1999 / **f)** / **g)** *Narodne novine* (Official Gazette), 31/2000) / **h)**.

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
4.7.5 **Institutions** – Courts and tribunals – Supreme Judicial Council or equivalent body.

Keywords of the alphabetical index:

Judge, appointment / Judge, relief of duty.

Headnotes:

The State Judicial Council is a body which deals with the appointment of judges and the termination of their judicial duties whereas the presidents of courts are appointed for internal management and court administration and their position belongs to the realm of administrative rather than judicial functions.

The law regulating the functioning of a state body has to determine its scope and powers, to lay down the procedure according to which it will act and to determine the ways to control the functioning of this body.

Decisions on the disciplinary responsibility of judges and public attorneys are to be passed only by the State Judicial Council itself, not by its bodies of first and second instance.

Summary:

The Court, accepting proposals to review the constitutionality of the Law on the State Judicial Council, repealed seven provisions of the law. It also used its powers under Article 36 of the Constitutional Act on the Constitutional Court of the Republic of Croatia and decided to institute proceedings to review the constitutionality of all the provisions of the law dealing with presidents of courts.

Supplementary information:

The legal effects of the decision were postponed until 31 October 2000.

The Court in its reasoning also referred to the practice of the European Court of Human Rights, mentioning the following cases: *Sunday Times v. United Kingdom*, *Special Bulletin ECHR* [ECH-1979-S-001], *Silver & Others v. United Kingdom, Special Bulletin ECHR* [ECH-1983-S-002], and *Malone v. United Kingdom*, *Special Bulletin ECHR* [ECH-1984-S-007].

Languages:

Croatian, English.

Cyprus
Supreme Court

Summaries of important decisions of the reference period 1 January 2000 – 30 April 2000 will be published in the next edition, *Bulletin* 2000/2.

Czech Republic
Constitutional Court

Statistical data
1 September 1999 – 31 December 1999

- Judgments of the Plenum: 9
- Judgments of chambers: 55
- Other decisions of the Plenum: 1
- Other decisions of chambers: 712
- Other procedural decisions: 24
- Total: 801

Statistical data
1 January 2000 – 30 April 2000

- Judgments of the Plenum: 4
- Judgments of the chambers: 54
- Other decisions of the Plenum: 3
- Other decisions of the chambers: 793
- Other procedural decisions: 21
- Total: 875

Important decisions

Identification: CZE-2000-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 15.09.1999 / **e)** Pl. ÚS 13/99 / **f)** Compensation of judges / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
3.4 **General Principles** – Separation of powers.
3.9 **General Principles** – Rule of law.
3.11 **General Principles** – Vested and/or acquired rights.
4.7.4.1.3 **Institutions** – Courts and tribunals – Organisation – Members – Status.
5.3.36 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law.

Keywords of the alphabetical index:

Judiciary, independence / Judge, salary guarantees / Retroactivity, genuine.

Headnotes:

If it is the case, as stated in Article 2.1 of the Charter of Fundamental Rights and Basic Freedoms, that the Czech State is founded on democratic values, then it must be emphasised that one of the extraordinarily important democratic values is the independence of the judiciary. This principle includes a whole range of aspects which together should create the conditions necessary for courts to fulfil their roles and duties, in particular in the field of the rights and freedoms of the individual (Article 1 of the Constitution). Certain of these aspects can be entirely material in nature, even though all of these aspects naturally include material implications as well. This applies, for example, to remuneration, in relation to which Act no. 268/1998 Sb. on the Removal of the Additional Salary Instalment for the Second Half of 1998 represents in the Constitutional Court's view a breach of the "inalienable" right of judges to a salary that cannot be reduced. By this Act, the parliament in effect categorised judges as "state bureaucrats". Such a means of proceeding on the part of the legislature (which, moreover, has occurred repeatedly) is then in reality nothing more than the devaluation of one of the basic democratic principles: that of the independence of the judiciary.

Summary:

According to the Law on the Salary of State Officials ("State Salary Act"), state officials are paid twelve ordinary monthly salary instalments plus two additional instalments, one at mid-year and one at the end of the year. Just as it had done in 1997 as a budget cutting measure, in 1998 the Czech Parliament adopted Act no. 268/1998 ("the Act"), which deprived most state officials of their claim to the second additional salary instalment (the "fourteenth paycheque") for 1998. One ordinary court judge brought before the Prague Municipal Court an action seeking payment of his fourteenth paycheque for 1998. The Municipal Court suspended the action in order to refer to the Constitutional Court the question whether the cancellation of the fourteenth paycheque was in conflict with the Constitution due to its being a retroactive encroachment upon acquired rights.

The Constitutional Court determined first that the Act did not violate the prohibition of retroactivity. According to the State Salary Act, in any given year the right to the fourteenth paycheque accrues if the official has actually worked at least 90 days in the second half of the year and continues in the State's employ at least until 30 November. As the Act came into effect before 30 November 1998 (on 19 November 1998), the right to claim a fourteenth paycheque was revoked before it could accrue. Hence the Act was not retroactive. The Court saw no reason to change the position reflected in its established case-law, which draws a distinction between genuine and non-genuine retroactivity, the latter of which is permitted whereas the former is forbidden.

The Court focused rather on an argument not raised by the referring court, as in accordance with its established case-law it is entitled to do (it is limited to dealing with the statutory provisions cited, but not to the arguments made as to its unconstitutionality). It concentrated on the question whether the Act violated the principle of the independence of the judiciary. Referring to the principles of a state based on the rule of law, the separation of powers and the independence of the judiciary, the Court determined that the latter principle has several aspects, one of which is its material foundation in the area of remuneration. The Act infringed the judges' inalienable right not to suffer a reduction in salary and, what is more, by adopting the Act the parliament placed judges in the category of "state bureaucrats".

Languages:

Czech.

Identification: CZE-2000-1-002

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 13.10.1999 / **e)** Pl. ÚS 30/98 / **f)** State financial contributions to political parties / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.3.1 **General Principles** – Democracy – Representative democracy.
3.3.3 **General Principles** – Democracy – Pluralist democracy.
3.17 **General Principles** – General interest.
4.5.11.2 **Institutions** – Legislative bodies – Political parties – Financing.

4.9.7.1 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material – Financing.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.

Keywords of the alphabetical index:

Political party, incentive to merge / Political party, equal treatment / Election campaign, financing, contribution from state / Political party, free competition.

Headnotes:

From the perspective of representative democracy, incentives for the merging of political parties may be introduced in statutory provisions governing elections only where there exist weighty reasons, for example, that the splintering of votes among a large number of political parties leads to excessive “overbreeding” of parties and thus becomes a threat to the functioning of the political system and to its capacity to act.

Conceptually, the principle of the free competition of political parties includes the state's obligation to respect the equal chance of all parties, and applies to legislation governing the conditions of this competition as well as the claims of participants. As this in effect concerns an application of the general principle of equality, any sort of intrusion by the legislature into these conditions must be governed by the general interest. The legislature is denied the right to treat parties differently unless there are exceptionally weighty reasons to do so. A percentage limitation for the payment of contributions for a political party's election expenditures may not be the product of arbitrariness or suitability judged only in relation to the interests of the established parties. The purpose of the contribution to election expenditures must not be to restrict the freedom of the electoral contest but rather to ensure its seriousness.

If modern representative democracies take into consideration the functioning of the parliamentary system and thus, to a limited degree, include incentives for political parties to merge in the system of the apportionment of seats, that does not mean that incentives to merge may take precedence over the principle of the free and unrestricted electoral competition of political parties. Free competition among them is a direct manifestation of the pluralistic nature of a democratic society, and it is precisely the protection of pluralism in political life which has primary significance for the very existence of a democratic society. Any direct or indirect limitation upon the equality of parties in the electoral competition must not have a differential impact upon, or give preferential treatment to, particular parties, or prevent the participation of political parties in the electoral contest itself. The cumulative effect of giving financial support only to certain parties results in a *de facto* financial sanction against the other parties.

Summary:

This case involved a challenge to § 85 of the Electoral Act, which lays down that the state shall provide a financial contribution to political parties, but only those that pass a minimum threshold of eligibility, receiving at least 3% of the votes cast in the election. Following the 1998 election, a party that did not attain that threshold nonetheless demanded payment of the contribution from the Ministry of Finance. Citing § 85 of the Electoral Act, the Ministry refused, so the party brought a constitutional complaint alleging that its individual constitutional rights had been violated and that the violation was caused by the fact that citing § 85 was unconstitutional. Hence, the Constitutional Court dealt first with the question whether citing § 85 was constitutional.

The Court analysed two conflicting aspects of competition between political parties. First, there is the requirement of equality and representativeness: there must be free electoral competition under equal conditions, offering an equal chance to all participants and leading to a composition of the elected body that reflects the variety of the voters' political preferences. Second, there is the functional requirement: the legislative body must be capable of adopting decisions on the basis of the formation of a political majority, an imperative that leads to the introduction of incentives for political parties to merge. The statutory regulation of all aspects of the electoral process, as well as the status of parties, must pay careful and balanced respect to both requirements. Limitations on equal representation are permissible only where the functioning of the elected body is threatened, and a 5% minimum threshold for entry into parliament is generally accepted in Europe as a limitation upon representativeness that is necessary in order to ensure that the elected body functions properly.

The Court noted that other European electoral systems set thresholds for eligibility for financial contributions to political parties, but considered that the constitutionality of any particular threshold must be judged by assessing the overall consequences of all incentives for parties to merge in a particular electoral system. The Court analysed two such incentives that it had already approved in two of its earlier decisions: the requirement of gaining 5% of the vote in order to enter parliament and the

requirement that before registration for an election parties must pay a security deposit, which is forfeited if they do not gain 5% of the vote. While the former acts to limit entry into parliament only after the electoral contest and has only an indirect effect on a party's choice whether to take part in an election, the latter places direct restrictions on a party's capacity to participate in elections, namely by imposing a financial sanction upon unsuccessful parties. The Court considered the 3% threshold requirement to be similar to security deposits as it places limits upon small parties by giving a subsequent financial preference only to more successful parties. Consequently, for small parties there is an accumulation of economic obstacles to participation in elections which does not exist in other European countries with a system of proportional representation.

The Court came to the conclusion that to tie the entitlement of political parties to a financial contribution to a requirement that they obtain at least 3% of the vote, in view of the breadth of the restriction as well as the existence of other restrictions, exceeds what is necessary to ascertain the seriousness of purpose of parties and encroaches upon the equal chances of political parties in the electoral contest. Due to the combined effect of these financial measures, participation in the election becomes for some parties an unaffordable luxury.

Languages:

Czech.

Identification: CZE-2000-1-003

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 23.11.1999 / **e)** Pl. ÚS 28/98 / **f)** Judicial review of disciplinary fines / **g)** / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
4.10.6 **Institutions** – Public finances – Auditing bodies.
5.2 **Fundamental Rights** – Equality.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

Disciplinary fine, review by court / Criminal charge.

Headnotes:

The denial of judicial protection in matters concerning the judicial review of administrative acts is permissible in the cases laid down by law, but is not allowed when decisions affecting fundamental rights are concerned. To deny judicial protection in such cases constitutes a violation of Article 36.2 of the Charter of Fundamental Rights and Basic Freedoms, which provides that “Unless a law provides otherwise, a person who claims that her rights were curtailed by a decision of a public administrative authority may turn to a court for review of the legality of that decision. However, judicial review of decisions affecting the fundamental rights and basic freedoms listed in this Charter may not be removed from the jurisdiction of courts.”

In the case of decisions imposing disciplinary fines, § 248.2.e of the Civil Procedure Code does not respect this guarantee because it denies the parties' right to have the decision of a public administrative organ reviewed by an independent and impartial court.

Summary:

The case was initiated by a complainant who had been fined 50 000 Kc by the Supreme Auditing Office (“the Office”) for his failure to fulfil a duty placed upon him by that office, but which the complainant believed was not a duty imposed by law. After appealing the fine to the President of the Office, he brought a court action against it.

Citing § 248.2.e of the Civil Procedure Code (“the Code”), the court determined it had no jurisdiction and dismissed the action. § 248 of the Code enumerates the exceptions to the general jurisdiction of ordinary courts to review administrative actions, and § 248.2.e includes among the exceptions from this jurisdiction “administrative decisions of a preliminary or procedural nature and decisions imposing disciplinary fines”.

The complainant submitted a constitutional complaint against this decision and at the same time requested that the Court annul that portion of § 248.2.e reading “decisions imposing disciplinary fines”, arguing that it

was in conflict with the right to judicial protection (Article 36.2 of the Charter of Fundamental Rights and Basic Freedoms) and to a fair trial (Article 6.1 ECHR).

Disciplinary fines are used in criminal, civil and administrative procedures to assist in ensuring the smooth course of the proceedings and the co-operation of the parties. This is equally true in auditing matters, where such co-operation is crucial to the successful carrying out of an audit.

As a sign of judicial restraint, so as to minimise its intrusion into the jurisdiction of ordinary courts, the Constitutional Court refused to consider whether either the audit itself or the duties that the Office imposed in pursuance thereof were proper. It limited itself to the issue of denial of justice – in other words, whether the lack of judicial review in such matters violates the Constitution.

The Court held that the imposition of disciplinary fines is capable of infringing basic rights, with the implication that a provision excluding the review of the imposition of such fines constitutes a violation of the above-mentioned Article 36.2 of the Charter of Fundamental Rights and Basic Freedoms. The Court did not consider other basic rights that might also be affected by this provision, but limited itself to a finding that § 248.2.e violated the right to equality of rights before public authorities, as guaranteed by Article 1 of the Charter of Fundamental Rights and Basic Freedoms, and the right to judicial protection as guaranteed by Article 6.1 ECHR. Although Article 6.1 ECHR does not generally apply to administrative matters, it applies to those that can be categorised under the concept of “civil rights and duties” or “criminal charge”. Disciplinary fines do not fall within the former category, as they concern public law “civic” duties, but they do come under the latter. It should be noted in this context that under the European Convention of Human Rights the concept of a “criminal charge” is not limited merely to procedures which the domestic law designates as criminal but also to accusations of unlawful activities. In this context, the question whether the measure is meant not merely to compensate, but also to serve as a preventive or repressive measure, must be considered, as must the severity of the measure. The Court concluded that disciplinary fines constitute sanctions for criminal conduct falling within the terms of Article 6.1 ECHR, so that § 248.2.e runs foul of Article 6.1 ECHR and is therefore unconstitutional.

Languages:

Czech.

Identification: CZE-2000-1-004

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 25.11.1999 / **e)** III. ÚS 304/99 / **f)** Right to counsel before courts / **g)** / **h)**.

Keywords of the systematic thesaurus:

4.7.8.2 **Institutions** – Courts and tribunals – Ordinary courts – Criminal courts.
5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
5.3.13.27 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to counsel.

Keywords of the alphabetical index:

Court, composition / Judge, definition / Tribunal, definition.

Headnotes:

Article 37.2 of the Charter of Fundamental Rights and Basic Freedoms guarantees to everybody in proceedings before public (state) authorities the constitutional right to assistance of counsel from the beginning of the proceedings; a further constitutional guarantee ensures that, in criminal proceedings, the accused shall have adequate time and facilities for the preparation of the case, including the right to the assistance of counsel (Article 40.3 of the Charter of Fundamental Rights and Basic Freedoms).

From these constitutional guarantees flows the conclusion that the right to defence arising from § 41.3 of the Criminal Procedure Code binds ordinary courts acting in the field of criminal law without exception. This applies regardless of the composition of the court (whether it consists of a single judge or a chamber) or the type of offence being tried, for even a judge deciding as a single judge hears and decides in the name of the state, which is sufficient, in the Constitutional Court's view, to ensure that the court has all the authority, as well as all the duties flowing from the procedural codes.

Summary:

In the complainant's criminal case, when he was questioned before a court which was to decide whether to place him in custody, his chosen counsel was not present and had not been informed of the scheduling of the hearing. The complainant's appeal against his placement in custody was rejected by the appellate court, which interpreted the provisions of the Criminal Procedure Code concerning an accused's remand in custody (§ 77.2) and right to counsel (§ 44.3) as not requiring that counsel be present for hearings concerning remand in custody. In particular, the Code requires that the "judge" decide on custody, whereas it provides that counsel is entitled to be present for all phases of the "procedure before the court" at which the defendant may be present. In the appellate court's view, the use of the term "court" refers to a chamber of judges, not a single judge. According to that view, a court must allow counsel to be present only for those phases of the proceedings which are held before a chamber, but not phases of the proceedings carried out before a single judge. The Constitutional Court rejected this interpretation, holding that the right to counsel as guaranteed by the Charter applies, without exception, to all phases of proceedings, regardless of the composition of the court.

The appellate court also found that the complainant had not requested the presence of his counsel and that the court was bound to inform counsel only where counsel was "reachable". The Court rejected this reasoning, noting that the trial court had not properly carried out its duty to instruct the accused (apprise him of his right to request counsel). As regards being "reachable", nothing in the case file indicated either that counsel had been unreachable or that the trial court had made any attempt to reach her.

Languages:

Czech.

Identification: CZE-2000-1-005

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 08.02.2000 / **e)** I. ÚS 156/99 / **f)** Freedom of expression and right to express one's view / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.15 **General Principles** – Proportionality.
3.16 **General Principles** – Weighing of interests.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Politician, defamation / Information, accurate, requirement.

Headnotes:

The freedom of expression and the right to express one's views is limited by the rights of others, whether these rights arise from the constitutional order of the republic or from other statutorily protected general societal interests or values. In addition, the right to express one's views may lose its constitutional protection on formal as well as on conceptual grounds, for even the form in which views are expressed is closely tied with the constitutionally guaranteed right. If published opinions deviate from the rules of propriety generally recognised in a democratic society, they lose the character of correct judgment (news report, commentary), and as such generally fall outside of the bounds of constitutional protection. Furthermore the freedom of expression, in principle, stands on an equal footing with the basic right to the protection of personal honour and good reputation, and it is primarily a matter for the ordinary courts, in consideration of the circumstances of each particular case, to weigh whether one of these rights was not given priority over the other.

It is necessary to consider whether published information can in principle be considered as truthful or not and each case of an alleged violation of the freedom of expression must be judged by taking into consideration all specific circumstances. Above all, the complete context in which the information was published cannot be overlooked.

In a particular case it is always necessary to review the degree of the alleged violation of the basic right to the protection of personal honour and reputation,

particularly in connection with the freedom of expression and the right to information, and with due consideration of the requirement of proportionality in the assertion of these rights (and their protection).

Whereas an infringement of the right to the protection of personal honour and reputation may occur even without any fault on the part of the perpetrator, nonetheless, not every publication of false information automatically represents an unjustified infringement of the right of personhood; such an infringement is found only if there exists a causal connection between the intrusion into a person's private life and the infringement of their right to personal honour and if in a specific case this intrusion exceeded the degree which can be tolerated in a democratic society.

It is necessary to respect certain specific features of the common periodic press, which is intended to inform the general public (in contrast, for example, with expert or professional publications), and which must in certain cases resort to a degree of simplification. It cannot be said that every simplification (or distortion) must necessarily, without more, lead to an infringement of the rights of personhood of the affected persons. Thus, it is almost impossible to insist upon absolute precision as to the facts and, in consequence, to place upon journalists requirements that they cannot meet. What is always important is that the overall tenor of particular information corresponds to the truth.

As the case law of the European Court of Human Rights indicates, in the case of a politician, due to his status as a public personality, there are broader limits to permissible criticism than those that apply in the case of private persons. In addition, it is necessary to distinguish very carefully between facts and personal assessments. The existence of facts can be proven, whereas the truthfulness of the evaluation made of those facts is not amenable to evidence. In relation to evaluative judgments, then, the requirement that their truthfulness be demonstrated cannot be met, and such a requirement itself violates the freedom of opinion.

Summary:

The complainants had published an article critical of a former entertainer and politician, PD, concerning a 1977 prosecution of him for the misappropriation of funds, a prosecution which was later dropped. The article cited statements by PD's former associates that he had close connections with regional Communist Party leaders and referred to the fact that dismissals of prosecutions at that time were "highly irregular", undoubtedly to suggest that he had collaborated with the former regime. He brought a court action claiming that the article was based on false assertions, so that his right to honour and good reputation had been violated. The ordinary courts found that he had suffered an unjustified encroachment upon this right, and ordered the complainants to publish an apology and to pay 25,000 Kc each in damages. The complainants lodged a constitutional complaint, and the Constitutional Court decided it was well founded.

In light of the general criteria concerning freedom of expression which it outlined in the opinion, the Court examined the three allegedly false assertions that the ordinary courts considered had unjustifiably intruded upon PD's right to personal honour and good reputation: (1) the authors' claim that they were members of a commission (when they were, in fact, not members) to add to the credibility of the views expressed in their article; (2) the assertion that PD had been charged with gaining 140,000 Kc for his own benefit, when in fact he had gained only 96,673 Kc for the benefit of a group; (3) the assertion that PD had close ties to the former leadership of the Regional Committee of the Communist Party and that the dismissal of his criminal prosecution was highly irregular. As for the first assertion, the complainants admitted it was a misstatement, but claimed it was not a material one. The Court considered that they had mechanically borrowed from another source, without attribution, an entire sentence, including the introductory phrase, "some of the information we at the commission received". While such action constitutes a professional error, it was not done for the purpose of misinforming or of adding to the authors' credibility. Since the commission in question had in fact received the information alluded to and the information was true, in the overall context of the article, the faulty formulation did not reach the degree of intrusion required for a finding of violation of the right to personal honour and good reputation.

Concerning the second assertion, the information contained therein cannot be characterised as false. PD had been prosecuted for the mentioned crime, and the prosecution's resolution dropping the charges stated that he had obtained funds but that intent to defraud could not be proved. The assertion simply reproduced this information. In any case, it cannot be justly expected of the general press that they, as a rule, print fuller, more detailed information. Moreover, the article conditioned the assertion with the term, "roughly". The article contained no assertion that the money had been exclusively for PD's benefit. The named sum does not constitute false, rather inexact, information. Only certain minor details can be designated as inexact, but not the overall tenor of the assertion.

In relation to the third assertion, its precise wording clearly indicates it is an evaluative judgement, not a statement of fact. The statement was to the effect that the authors cannot avoid the feeling that declarations concerning his close ties to the communist party leadership, made by former members of his group of entertainers, have some justification. The authors considered facts (the prosecution, the dismissal, declarations by associates concerning his ties to prominent communists), and on the basis of them they came to their own opinion that the assertions of associates had some justification and that the dismissal of the prosecution had been highly irregular. In such circumstances, the published evaluation cannot be considered incorrect or as deviating from the generally applicable principles of propriety, either as regards form or content.

Finally, the Court concluded that the ordinary courts had failed to respect the principle that constitutionally guaranteed fundamental rights must be balanced. Neither the information nor the personal opinions contained in the article at issue were of such a nature as to depart from the bounds of the protection of the constitutionally guaranteed freedom of expression and right to disseminate information. Thus, the conditions for placing restrictions on the freedom of expression were not met in this case as such restrictions cannot be considered necessary in a democratic society.

Cross-references:

Lingens v. Austria, 08.07.1986, Series A, no. 103; *Special Bulletin ECHR* [ECH-1986-S-003].

Oberschlick v. Austria (no. 2), 01.07.1997, *Reports* 1997-IV; *Bulletin* 1997/2 [ECH-1997-2-012].

Languages:

Czech.

Identification: CZE-2000-1-006

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 09.03.2000 / **e)** III. ÚS 471/99 / **f)** Opening of criminal proceedings / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
5.3.13.27 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to counsel.

Keywords of the alphabetical index:

Criminal procedure, respect.

Headnotes:

Only after a criminal prosecution is initiated may evidence be taken relating to facts for which the indictment was issued. In other words, should a court base its decision on evidence that was not taken in accordance with the appropriate procedures, or should certain factual circumstances which are significant for the decision not be supported by the evidence adduced, this constitutes a basic defect in the procedure and thus the acceptance of a manner of proceeding that is not only unlawful but without doubt also unconstitutional. It is by issuing an indictment that the principle of due and lawful process is respected, in particular the rule that nobody may be prosecuted otherwise than on grounds arising from statute and in the manner provided for by statute. The procedural conditions for a trial laid down in the relevant legal provisions (which, furthermore, must respect constitutional standards) provide limits which may not be exceeded and within which criminal proceedings must play out, especially as these bounds express the striving of a democratic society to carry out criminal procedures objectively, fairly, and under the same conditions for all.

Summary:

The complainant was found guilty of the crime of extortion. After unsuccessfully appealing his conviction before the appellate court, he submitted a constitutional complaint on the grounds that the testimony of three key witnesses (taken on 17 February and 2 March 1994) had demonstrably been taken before an indictment had been issued against the complainant (which occurred only on 5 August 1994). The rule was deviated from even though, in the situation, the requirements for such an exception, namely that the taking of the particular evidence in question cannot be repeated or put off, were not met. Although evidence taken in conflict with this rule is not lawful, the court nonetheless based its

decision upon this evidence. Of the three key witnesses, only one testified during the trial, and the earlier testimony of the other two was used in the trial. This testimony was used to convict the complainant. Naturally, such a means of proceeding is in sharp conflict with the applicable procedural codes. Demonstration of a defendant's guilt is possible only by ascertaining facts about which there is no doubt and in accordance with the procedural steps that the Criminal Procedure Code allows.

Of its own motion, the Constitutional Court found a further procedural defect in the proceedings before the ordinary courts, namely that the complainant had not been present at his appellate hearing. Although his legal counsel had excused his absence and requested that the hearing take place even without him present, the court should have taken into account the fact that the complainant faced a severe punishment (up to eight years) when it considered holding a hearing in his absence.

Languages:

Czech.

Identification: CZE-2000-1-007

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 29.03.2000 / **e)** II. ÚS 441/99 / **f)** Evidence in favour of or against the defendant / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Impartiality.
5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.

Keywords of the alphabetical index:

Criminal procedure, legality.

Headnotes:

When reviewing decisions of ordinary courts, the Constitutional Court is both authorised and obliged to ensure that these decisions did not impinge upon constitutionally guaranteed fundamental rights and basic freedoms. The role of the Constitutional Court is to ascertain whether evidence in favour of or against the defendant was presented in a manner ensuring a fair trial and to ensure that the trial was conducted in a lawful and constitutional manner. The Constitutional Court examines the legality of the evaluation of evidence by ordinary courts only when it discerns that in the proceedings before these courts constitutional principles relating to procedure were violated. These principles include the right of every accused to a lawful trial, which means that nobody may be prosecuted or deprived of liberty otherwise than on the grounds and in the manner provided for by law.

A trial cannot be considered lawful when ordinary courts failed to take steps, in accordance with the lawful procedure, to remove justified doubts as to facts capable of determining the defendant's guilt or innocence. For example, the trial court must elucidate, even on its own initiative, any circumstances tending equally to exculpate and incriminate the defendant.

Summary:

The complainant was convicted of rape and, after the appeal against his conviction was rejected, he brought a constitutional complaint alleging that he had been denied his right to judicial protection.

The Constitutional Court found, among others, the following defects in the procedure before the trial court.

It was argued that the victim was out of the city at the time of the alleged attack. Nonetheless, one crucial piece of evidence concerning the complainant's alibi was not dealt with properly, even though it could have removed doubts concerning the complainant's guilt. A witness testified concerning a letter alleged to support the truth of the alibi. Although the court asked the witness for a writing sample, it did not obtain an expert’s opinion on whether the letter was genuine and made no reference to it in the judgment. Accordingly, it failed in its duty under the Criminal Procedure Code to deal properly with the evidence and to clarify with equal care both incriminating and exculpatory circumstances.

A further witness, testifying concerning the complainant's assertion that he had not been in the city at the

time of the alleged rape, confirmed that he had been in the city. However, it was clear from the record that the witness was referring to some other events, and indeed he acknowledged that this was the case. Hence, the court could not be said to have undertaken a free assessment of the evidence, but rather its arbitrary assessment, and this constituted a violation of a judge's duty to evaluate the evidence in accordance with his private convictions, based on the careful consideration of all circumstances of the case, both individually and taken together.

In connection with other witnesses who were abroad, the court decided to proceed without their testimony and heard two other witnesses whose testimony was of a lesser evidentiary value. Thus, the court violated the principle that evidence of greater probative value may be replaced by less significant evidence only if there is no realistic possibility of obtaining the more significant evidence.

Finally, the court had rejected further evidence adduced by the complainant as manipulated and not credible, although the court had no concrete fact upon which to base its rejection of this evidence.

Languages:

Czech.

Identification: CZE-2000-1-008

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 05.04.2000 / **e)** Pl. ÚS 1/2000 / **f)** Constitutional justice – Types of claim / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.2.1.4 **Constitutional Justice** – Types of claim – Claim by a public body – Organs of regional authorities.
1.3.4.4 **Constitutional Justice** – Jurisdiction – Types of litigation – Powers of local authorities.
1.3.4.9 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of the formal validity of enactments.
1.3.4.10.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of the constitutionality of enactments – Limits of the legislative competence.
1.3.5.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law – Laws and other rules in force before the entry into force of the Constitution.
3.4 **General Principles** – Separation of powers.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.6.9.1.1 **Institutions** – Executive bodies – Territorial administrative decentralisation – Principles – Local self-government.

Keywords of the alphabetical index:

Parliament, administrative authority regional self-government / Roma.

Headnotes:

The adoption of the Constitution (Constitutional Act no. 1/1993 Sb.) affected above all the removal of the foundations of the old constitutional order, which had been a system of national committees built upon the Soviet model – from local through district and regional national committees up to the Czech National Council (as the "national committee of the highest level"), which were conceived of as a body of state administration and state power. According to Article 102 of Constitutional Act no. 143/1968 Sb., which was in effect until 31 December 1992, the Czech National Council was even designated the "supreme body of state power". This system was replaced by a state based on the rule of law and on the separation of powers – legislative, executive and judicial – of which the Parliament, composed of the Assembly of Deputies and the Senate, exercises solely legislative power and lacks any sort of executive or judicial power.

The sole executive competence of the Assembly of Deputies is its authority to take disciplinary action against its members and to decide whether to consent to their criminal prosecution. Also it performs further non-legislative functions, consisting in the power to set up an investigating commission for the investigation of matters of public interest, as well as the power to put parliamentary questions to the government and individual ministers. The Assembly of Deputies may not intrude in any way upon the executive power or upon the exercise of local self-government, with the exception of making proposals, recommendations, etc.

If the Constitutional Court were to reject a constitutional complaint on procedural grounds alone, on the basis that the act in question is null or quasi-legal, one which nobody is required to heed or to obey, and

the complaint therefore challenged what was in effect a non-existent legal act, it would not be fulfilling its duty as the guarantor of the constitutionality of the state based on the rule of law.

Summary:

The city council of Ústí nad Labem brought a constitutional complaint against the Assembly of Deputies, the lower chamber of the Parliament. The complaint was filed under § 72.1.b of the Constitutional Court Act, which provides for a special form of constitutional complaint whereby a representative body of a municipality or region can complain that the State has infringed their constitutionally guaranteed right to local self-government, as guaranteed by Article 8 of the Constitution.

The dispute began with the City Council's decision to authorise the construction, in a residential area, of a dividing wall, the ostensible purpose of which was to shield some residents from an allegedly noisy housing area in which the residents were mostly Roma. The decision was adopted pursuant to a statutory provision endowing municipalities with the authority to decide on construction permits. Due to the extensive international notoriety of the decision and the strong criticism to which it had been subject, the government had, to no avail, exerted pressure on the Council to change its decision.

Then in reference to the authority vested in it under §§ 62 and 62a of the Municipalities Act (giving the parliament authority to correct unjust measures), the Assembly of Deputies adopted a resolution annulling the Council decision.

In its complaint the Ústí nad Labem City Council requested the Constitutional Court both to void the parliamentary resolution annulling its decision to construct the wall and to annul §§ 62 and 62a, the statutory provisions on the strength of which the Assembly of Deputies had acted.

As the Constitutional Court's jurisdiction to review the constitutionality of the statutory provisions had been invoked in the context of an individual constitutional complaint, its power to do so was dependent on the admissibility of the complaint. Since the complainant asserted that the Assembly of Deputies had adopted the resolution in question on the basis of a non-existent authority (which would make it an *ultra vires* act and therefore null and void *ab initio*), before the Court was entitled to review those provisions, it had to resolve the difficult issue of whether it has authority to review a non-existent legal act. The Court held that it has authority to review an act that legally is non-existent. And on the basis of that finding, it held that it had the power to review the constitutionality of the statutory provisions in question.

In reviewing §§ 62 and 62a, which had been adopted prior to the present Constitution, the Court determined that they had regulated a power belonging to the parliament (then called the Czech National Council) under the previous constitutional order. That order differed markedly from the present one, notably in respect of the fact that the Czech National Council had been specifically designated the "supreme body of state power" and had been endowed with administrative authority in addition to its legislative authority. The introduction in the present Constitution of the separation of powers means that parliament is now limited to exercising legislative power. Accordingly, §§ 62 and 62a grant an authority which, under the present constitutional order, the parliament may not exercise. In fact, even if not explicitly, the 1993 Constitution had derogated from §§ 62 and 62a, so that since 1993 these provisions have been inapplicable even though they are still part of the legal order.

The Court noted that this was not an isolated, one-off decision, but that its significance exceeded the bounds of this case, as the Assembly of Deputies has continued to consider that it has the legal authority to annul measures adopted in the context of local self-government and had done so five times in the preceding three years.

The Constitutional Court emphasised that it was considering and deciding solely the constitutional law issue put to it concerning the authority of the Assembly of Deputies to annul a municipal decision. The fact that it found the parliamentary resolution to be unconstitutional cannot be taken as indicating approval of the municipal resolution.

Languages:

Czech.

Identification: CZE-2000-1-009

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 12.04.2000 / **e)** II. ÚS 559/1999 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.3.5 **Constitutional Justice** – Jurisdiction – The subject of review.
3.4 **General Principles** – Separation of powers.
3.10 **General Principles** – Certainty of the law.

Keywords of the alphabetical index:

Norm, absolute nullity, possibility for review.

Headnotes:

A legal act issued by a body not competent to issue it is an entirely null and void legal act – a non-act which creates obligations for nobody. In the normative world, it is non-existent, so that strictly speaking it is a non-norm, and cannot even be annulled.

No authority can be found in the national legal system for the issuing of a declarative judgment concerning a case of nullity. Nonetheless, legal practice and theory have led to the conclusion that, owing to the difficulty involved in interpreting acts that are null and void, it must be possible, in the interest of the effective supervision of legality, to contest even such legally non-existent norms.

An act, even if it is null and void, must, as a consequence of its infringement of constitutional competencies, be annulled, as the alternative state of affairs would create an undesirable and intolerable effect on the certainty of the law in a given society, particularly when the Parliament's competence is concerned. No body of state authority, even if one of the highest, may appropriate authority which does not fall within its competence. That would constitute a violation of the rule of law, and in particular of the principle that nobody may intrude upon the rights and freedoms of others, regardless of whether natural or legal persons are concerned or whether the matter involves local self-government, other than in pursuance of the protection of law, and only in the manner provided for by law.

Summary:

The facts of the case were summarised under Pl. ÚS 1/2000, [CZE-2000-1-008]. That case and this were connected in that this case arose out of the other one, in view of the need to resolve the constitutionality of applicable statutory provisions prior to making a determination of the specific case.

Languages:

Czech.

Denmark
Supreme Court

Important decisions

Identification: DEN-2000-1-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 13.12.1999 / **e)** I 377/1999 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 2000, 546.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.15 **General Principles** – Proportionality.
5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Criminal law / Deportation / Drug offences.

Headnotes:

Deportation for a period of 5 years of a 35-year-old Chilean, who had been living in Denmark since he was 14 and who had been convicted of several serious offences, did not contravene the principle of proportionality in Article 8 ECHR.

Summary:

The appellant – a 35-year-old Chilean citizen – had been living in Denmark with his parents and two half brothers since he was 14. The appellant had been married but was now divorced and he currently lived with his mother. He had no children. He spoke and wrote Spanish and in the last ten years he had visited relatives in Chile several times.

In this case, the appellant was sentenced to 5 months imprisonment for 6 cases of drug offences.

The appellant had previously been convicted several times for, *inter alia*, drug offences and robberies. Since 1986, when he was sentenced to 3 and a half years imprisonment for drug offences, he had received convictions sentencing him to imprisonment for a total of approximately 6 years.

Both the District Court and the High Court found that he should be deported for a period of 5 years. Considering the repeated convictions for drug offences, both courts found that the deportation was essential for social reasons and that it did not contravene Article 8 ECHR.

The Supreme Court upheld the decisions of the District Court and the High Court. The majority (3 judges) noted that the appellant had come to Denmark at the age of 14 years and that he had lived in Denmark for approximately 20 years. Beyond this, the appellant's primary attachment to Denmark consisted in his mother and two half brothers living in Denmark. The appellant spoke Spanish and he had maintained contact with his relatives in Chile. On these grounds, and considering his extensive and serious crimes, the majority found that deportation did not contravene the principle of proportionality in Article 8 ECHR.

A minority of two judges took into account that the appellant had committed his most serious crime in 1986. Since then he had – apart from a sentence of one and a half years imprisonment in 1995 – only been sentenced to a number of shorter terms of imprisonment during the 1990s. The minority considered that, taken as a whole, the appellant's attachment to Denmark was so strong that deportation founded on his past crime contravened the principle of proportionality in Article 8 ECHR.

Cross-references:

The Supreme Court has delivered four other judgements concerning deportation, which have been reported as précis in *Bulletin* 1999/1, [DEN-1999-1-002] and [DEN-1999-1-003], and *Bulletin* 1999/3 [DEN-1999-3-002] and [DEN-1999-3-004].

Languages:

Danish.

Estonia
Supreme Court

Important decisions

Identification: EST-2000-1-001

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 09.02.2000 / **e)** 3-4-1-2-2000 / **f)** Review of the rules for the use of transit vehicles area adopted by the Narva City Council / **g)** *Riigi Teataja III* (Official Gazette), 2000, no. 5, Article 45 / **h)**.

Keywords of the systematic thesaurus:

2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources.
3.12 **General Principles** – Legality.
4.6.9.1.1 **Institutions** – Executive bodies – Territorial administrative decentralisation – Principles – Local self-government.
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

Keywords of the alphabetical index:

Local government, competences / Border regime / Local tax.

Headnotes:

If a local government's legislation of general application regulating local issues is in conflict with law, the legislation shall be illegal despite the fact that it resolves local, rather than national, issues. Questions related to the border regime are national, not local, issues.

Summary:

Narva City Government issued a regulation approving rules for the use of transit vehicles area, and amendments thereto. These rules obliged every driver of a truck, an automobile or a bus to drive to the transit vehicles area and to observe the rules for the use of that area. The rules also laid down the procedure for exiting to the customs office and established priority for doing so.

The Legal Chancellor regarded these regulations to be in conflict with the Constitution and laws. He considered that the object of both regulations is the procedure for crossing state borders and authorising goods to be carried out of the country. According to the Legal Chancellor these are national rather than local issues.

Section 6.3 of the Local Government Organisation Act stipulates that in addition to the functions provided for in Sections 6.1 and 6.2 of the same Act, local governments regulate and organise local issues: 1) which are assigned to them by other acts; 2) which are not assigned by law to other persons for regulation and organisation. Narva City Government regulated the procedure for crossing the state border, which, in respect of the border regime, customs policy and customs organisation, is by law the competence of other bodies. Thus, the City Government acted contrary to the State Borders Act and Customs Act.

The Legal Chancellor also found that payment for crossing the border pursuant to conditions provided for by the regulations constituted a local tax of specific purpose. Local taxes, as well as the procedure and conditions for imposing such taxes, are established by the Local Taxes Act. The tax imposed by Narva City Government was not imposed on the basis of any law. Moreover, it was imposed *ultra vires*, as local taxes fall within the exclusive competence of a local council (not a local government).

Since Narva City Council did not bring the regulations into conformity with the Constitution and laws, the Legal Chancellor proposed that the Supreme Court declare the regulations invalid.

The Constitutional Review Chamber of the Supreme Court considered whether the regulations of the City Government dealt with local or national issues. The Legal Chancellor and the Minister of Justice maintained that the regulations regulate crossing the state border, which is a national issue, whereas Narva City Government claimed that organising transit traffic within the territory of a city is a local issue, which a local government is competent to regulate.

The Court noted that according to the Constitution, local governments "shall operate independently pursuant to law" (Article 154.1 of the Constitution). This means that a local government may, without a special authorisation by law, decide on every issue which is not a national issue. However, the notion "pursuant to law" stipulates the requirement of legality, i.e. a local government must resolve issues in accordance with law. If a local government's

legislation of general application regulating local issues is in conflict with law, the legislation shall be illegal despite the fact that it resolves local, not national, issues.

The Traffic Act places certain responsibilities in the field of road safety with the local governments. Narva City Government sought to justify its regulations under the provisions of this Act. On the other hand, everything related to state borders and the border regime is a national issue. The State Borders Act establishes that the border regime shall determine, *inter alia*, the procedure for persons crossing the state border and means of transport to be used; for goods to be transported across the state border; for persons and means of transport to enter and exit border checkpoints and for goods to be brought to and be removed from border checkpoints (Sections 8.1, 8.2 and 8.5).

The rules adopted by Narva City Government give certain persons priority to enter customs and border checkpoints and give employees of a private law entity the right to organise the entering of customs and border checkpoints and to send vehicles back if the one hour passage permit has expired. These rules, which apparently regulate traffic in town, are extended to the sphere which is defined by the notion of border regime. Everything related to the border regime is a national issue. Section 8.3 of the State Borders Act empowers the Government of the Republic or an agency authorised by the government to regulate in this field.

Thus, the Court concluded that the disputed regulations of Narva City Government were in conflict with Article 3.1 in conjunction with Article 154.1 of the Constitution and with Sections 8.1.1, 8.1.2, 8.1.5 and 8.3 of the State Borders Act. Given that conclusion, the Court did not deem it necessary to elaborate on the issue of the local tax.

The Court declared the disputed regulation of the Narva City Government, with amendments thereto, null and void.

Cross-references:

Decision 3-4-1-11-98 of 22.12.1998, *Bulletin* 1998/3 [EST-1998-3-009].

Languages:

Estonian, English (translation by the Court).

Identification: EST-2000-1-002

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 08.03.2000 / **e)** 3-4-1-3-2000 / **f)** Review of the procedure for organising shooting practice in Keila rural municipality / **g)** *Riigi Teataja III* (Official Gazette), 2000, no. 7, Article 70 / **h)**.

Keywords of the systematic thesaurus:

1.3.5 **Constitutional Justice** – Jurisdiction – The subject of review.
3.12 **General Principles** – Legality.
4.6.9.1.1 **Institutions** – Executive bodies – Territorial administrative decentralisation – Principles – Local self-government.
4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.4.17 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Shooting practice / Weapon.

Headnotes:

If an area which needs to be regulated involves a danger to life or health, then the distinction between national and local issues is not decisive. The obligation for the organiser of a shooting practice to apply for a special permit from the rural municipality government is in conflict with the Weapons Act.

Summary:

Keila rural municipality council issued a regulation by which the procedure for organising any shooting practice in this municipality was approved.

Although Keila rural municipality council amended the regulation upon the request of the Legal Chancellor, the latter still found it to be in contradiction with the Constitution. Thus, the Legal Chancellor proposed to the Supreme Court that it declare the regulations invalid. Among other legal deficiencies, the Legal Chancellor considered the requirement of obtaining special permits from Keila rural municipality for carrying out shooting practice to be in conflict with the

Constitution and laws. By so doing, the local government exceeded its competence and legislated in the sphere of national issues.

One day after the Supreme Court session, Keila rural municipality council declared the disputed regulations invalid.

The Constitutional Review Chamber of the Supreme Court noted that pursuant to Section 1.3 of the Weapons Act, the conditions and the procedure for the use of shooting galleries and ranges of the Defence Forces shall be established by a regulation of the Government of the Republic or a minister authorised by the government. Although the government had empowered the Minister of Defence to issue a regulation on this matter, the Minister had not done so at the time Keila rural municipality council adopted its regulations.

According to the Court, shooting practice involves a danger to the life and health of persons. Everyone's right to life and to the protection of health are protected by the Constitution (Articles 16 and 28). Pursuant to Article 14 of the Constitution it is the duty of the legislative, executive and judicial powers, as well as the duty of local governments, to guarantee rights and freedoms. If an area which needs to be regulated involves a danger to life or health, then the distinction between national and local issues is not decisive. Nevertheless, a local government body must ensure that its legislation is in conformity with the Constitution and laws.

The Court established that the Weapons Act does not regulate the construction, maintenance and use of shooting galleries and ranges of the Defence Forces. Pursuant to Section 58.6 of the Weapons Act, the permit for organising a shooting contest or practice is issued by a Police Prefecture with the consent of a local government executive body. The Court agreed with the Legal Chancellor that the obligation for the organiser of a shooting practice to apply for a special permit from the rural municipality government was in conflict with Section 58 of the Weapons Act.

As Keila rural municipality council had already annulled the disputed regulations, the Supreme Court could not declare the regulations null and void. The Court declared that the procedure for organising shooting practice in the administrative territory of Keila rural municipality had been illegal.

In addition, the Constitutional Review Chamber expressed the opinion that as long as the Government of the Republic or a minister authorised by the government has not established the requirements for shooting ranges of the Defence Forces and the procedure for use thereof, it is prohibited to organise shooting practice in such shooting ranges.

Languages:

Estonian, English (translation by the Court).

Identification: EST-2000-1-003

a) Estonia / **b)** Supreme Court / **c)** Supreme Court *en banc* / **d)** 17.03.2000 / **e)** 3-4-1-1-2000 / **f)** Review of the Supplementary Budget for 1999 Act / **g)** *Riigi Teataja III* (Official Gazette), 2000, no. 8, Article 77 / **h)**.

Keywords of the systematic thesaurus:

1.2.1.8 **Constitutional Justice** – Types of claim – Claim by a public body – Ombudsman.
1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
3.12 **General Principles** – Legality.
4.10.2 **Institutions** – Public finances – Budget.
4.12.5 **Institutions** – Ombudsman – Relations with the legislature.
4.12.6 **Institutions** – Ombudsman – Relations with the executive.
4.14 **Institutions** – Activities and duties assigned to the State by the Constitution.

Keywords of the alphabetical index:

Legal Chancellor, competencies / Legislative act, nature / Budget, allocation, dwelling, construction or purchase.

Headnotes:

A law which contains both legal rules and regulations of single, specific application is to be considered legislation of general application. The Legal Chancellor has the right to exercise review of the constitutionality and legality of regulations of single, specific application if these regulations are included in a piece of legislation of general application.

The state must fulfil its obligations under individual legal acts irrespective of whether the state budget provides for the necessary resources or not.

Summary:

On 28 June 1999 the Parliament (*Riigikogu*) passed the Supplementary Budget for 1999 Act (hereinafter "the Supplementary Budget"). The Legal Chancellor proposed that the parliament bring the Supplementary Budget into conformity with the provisions of Articles 3.1 and 116.2 of the Constitution. The parliament discussed the proposal of the Legal Chancellor, but did not approve it.

On 5 November 1999 the Legal Chancellor asked the Supreme Court to declare certain provisions of the Supplementary Budget invalid. According to Article 116.2 of the Constitution, the parliament shall not eliminate or reduce expenditure in the state budget which is prescribed by other laws. Section 33.5 of the Dwelling Act provides that resources for the construction or purchasing of dwellings are allocated by the state if a local government entity is unable to provide dwelling to persons who were deprived of their dwelling due to the return of houses under ownership reform. On 10 March 1999 the Government of the Republic issued Order no. 315-k for the implementation of Section 33.5 of the Dwelling Act, by which it allocated 103 million kroons from reserve capital to local government entities for the construction or purchasing of dwellings. The Supplementary Budget discarded these 103 million kroons.

The Supplementary Budget also reduced the State Forest Management Centre's budgetary surplus at the end of the budgetary year by 33 million kroons, without amending to the Forest Act accordingly.

According to the Minister of Justice, the Legal Chancellor had no competence to exercise review over the Supplementary Budget. Pursuant to Article 139.1 of the Constitution the Legal Chancellor shall review only legislation of general application. The disputed provisions of the Supplementary Budget have to be regarded as a law in the formal sense only.

On 5 January 2000 the Constitutional Review Chamber of the Supreme Court considered the petition of the Legal Chancellor. Due to differences of opinion on key issues the Chamber decided to transfer the Legal Chancellor's petition to the Supreme Court *en banc* for hearing.

The Supreme Court observed that in Chapter XII of the Constitution on "The Legal Chancellor" the term "legislation of general application" is used in relation to constitutional review exercised by the Legal Chancellor. A law is legislation of general application, containing legal rules. In Estonian legal practice there are laws which contain both legal rules and regulations of single application. One such law is the Supplementary Budget. The Supreme Court considered a law which contains both legal rules and regulations of single, specific application as legislation of general application. Therefore, the Supreme Court found that pursuant to Article 139.1 of the Constitution, the Legal Chancellor has the right to exercise review of the constitutionality and legality of the state budget and the supplementary budget.

The Court noted that Section 33.5 of the Dwelling Act obliges the state to allocate finances for the construction and purchasing of residential space, but that the Act does not provide for an exact amount. On the basis of documents submitted to the Court, the Court could not assess whether the fact that sums allocated from the 1999 state budget to rural municipality and city budgets for the implementation of the Dwelling Act were eliminated *de facto* stopped the implementation of Section 33.5 of the Dwelling Act for 1999. On these considerations the Court did not agree with the Legal Chancellor's claim that the Supplementary Budget was in conflict with the Constitution.

Nevertheless, the Court expressed its opinion that the state has the obligation to fulfil the obligations under Section 33.5 of the Dwelling Act irrespective of whether the state budget provides for the necessary resources or not.

The Court found that the expenditure of the State Forest Management Centre was not determined by a pertinent entry in the expenditure part of the state budget in either the State Budget for 1999 Act or in the Supplementary Budget. Consequently, the entry "013.99.05. reduction of surplus at the end of the budgetary year of the State Forest Management Centre 33 000 000" in the revenue part of the Supplementary Budget could not eliminate or reduce expenditure in the state budget. The entry of the Supplementary Budget concerning the reduction at the end of the budgetary year of the State Forest Management Centre surplus has to be regarded as the reduction of such revenue which had not been entered into records and was not reflected in the state budget. The essence of the contradiction referred to is a violation of the principle that the state budget shall be all-encompassing, unified and transparent, as laid down in Article 115.1 of the Constitution.

The Supreme Court decided not to satisfy the Legal Chancellor's petition.

One dissenting opinion and two concurring opinions were delivered by the justices of the Supreme Court.

In their dissenting opinion, Justices Ilvest, Kergandberg and Rätsep agreed with the Legal Chancellor that according to Article 116.2 of the Constitution and pursuant to Section 14 of the State Budget Act, the draft Supplementary Budget should have been appended with the draft amendments of all the laws whose implementation was either excluded or limited by the Supplementary Budget. As the draft amendment to Section 33.5 of the Dwelling Act was not appended to the draft Supplementary Budget, the reduction of sums provided for the construction of residential space by 103 million kroons by the Supplementary Budget was in conflict with Article 116.2 of the Constitution.

Chief Justice Lõhmus found in his concurring opinion that the Constitution can be interpreted so that the concept of legislation of general application covers all laws passed by the Parliament. In addition, there would be a gap in the system of constitutional review if the Legal Chancellor could not challenge all laws. A law which contains individual rules of law may be in manifest conflict with the Constitution without there being a possibility to ascertain the fact. At the same time it would be possible to have recourse to courts against legislation of specific application of the executive state power and local governments.

Justice Põld, with whom Justices Anton, Jõks, Järvesaar, Kull, Odar and Salmann concurred, found that the Legal Chancellor had no competence to dispute the entries and Section 4 of the Supplementary Budget. According to this view, legislation of general application means a general act (normative act). In fact, the Legal Chancellor does not dispute legislation of general application, instead he disputes a legal rule within such a document. Expenditure entries in a state budget do not contain legal rules – these entries are regulations of individual cases. The fact that there are some legal rules in a budget Act does not give the Legal Chancellor the right to dispute the entries in the budget which regulate individual cases and make up more than nine tenths of the State Budget for 1999 Act.

Languages:

Estonian, English (translation by the Court).

Identification: EST-2000-1-004

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 28.04.2000 / **e)** 3-4-1-6-2000 / **f)** Review of the Alcohol Act / **g)** *Riigi Teataja III* (Official Gazette), 2000, no. 12, Article 125 / **h)**.

Keywords of the systematic thesaurus:

3.15 **General Principles** – Proportionality.
3.18 **General Principles** – Margin of appreciation.
4.6.3 **Institutions** – Executive bodies – Application of laws.
5.1.1.4.1 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons – Private law.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Alcohol, licence for trade / Circumstance, consideration.

Headnotes:

A law establishing sanctions which an administrative agency must apply to a person who has committed an offence must allow the agency to take into account individual circumstances of the case. An imperative sanction prescribed by law may constitute a disproportionate infringement of individual freedoms.

Summary:

Tartu City Government revoked the licence for retail trade in alcohol of a company running a store. The proposal for revocation was made by the police because a shop-assistant of the store had sold a bottle of beer to a minor.

The company appealed to the Tartu Administrative Court. The Court did not apply Section 19.1.2 of the Alcohol Act due to its conflict with Article 11 of the Constitution, and submitted a petition to the Supreme Court, seeking that this provision of the Alcohol Act be partially declared null and void.

The Constitutional Review Chamber of the Supreme Court noted that the right of Estonian citizens to engage in enterprise (Article 31 of the Constitution) also applies to legal persons, pursuant to Article 9.2 of the Constitution.

According to Article 11 of the Constitution, any restrictions on rights and freedoms must be necessary in a democratic society and must not distort the nature of the rights and freedoms restricted. Restrictions must not prejudice legally protected interests or rights more than is justifiable by the legitimate aim of the provision. The measure must be proportionate to the desired aim.

The Court found that Section 19.1.2 of the Alcohol Act is disproportionate in so far as it does not allow any choice for the issuer of licences. The law provides imperatively that a licence shall be revoked if the procedure for the handling of alcohol is seriously breached. The issuer of licences has no possibility to deliberate whether the restriction of rights and freedoms is necessary in a democratic society in concrete cases before it. The law does not allow any consideration of the circumstances of the breach, for example the age of the buyer or the quantity and strength of alcohol sold. The legislator must give the executive the possibility to take into consideration different circumstances, so that the infringement of individual freedoms through the exercise of state power can be justified and correspond to the circumstances of the case.

The Supreme Court concluded that Section 19.1.2 of the Alcohol Act is in conflict with Article 11 in conjunction with Article 31 of the Constitution, and declared the disputed provision null and void.

The Court noted, however, that the above conclusion does not prevent revocation of licences in cases of serious breaches of law. Pursuant to Section 19.3.3 of the Alcohol Act, a licence may be revoked in cases of serious breaches of the law, if it is necessary considering all circumstances of the breach.

Cross-references:

Decision 3-4-1-1-99 of 17.03.1999, *Bulletin* 1999/1 [EST-1999-1-001].

Languages:

Estonian, English (translation by the Court).

Finland
Supreme Court

There was no relevant constitutional case-law during the reference period 1 January 2000 – 30 April 2000.

Finland
Supreme Administrative Court

Important decisions

Identification: FIN-2000-1-001

a) Finland / **b)** Supreme Administrative Court / **c)** Third chamber / **d)** 29.02.2000 / **e)** 401 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Geneva Convention on the Status of Refugees of 1951.
5.1.1.2.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.

Keywords of the alphabetical index:

Benefit of the doubt / United Nations High Commissioner for Refugees, instructions.

Headnotes:

An asylum seeker who was not considered to be in danger of being subjected to persecution in his home state and could not therefore be granted asylum could nonetheless be considered to be threatened with inhuman and degrading treatment and be in need of international protection in the way meant in the Aliens Act when the facts generally known about the human rights situation in the home state as well as the evidence of the circumstances in its entirety were taken into account.

Summary:

According to Section 30 of the Aliens Act, an alien shall be granted asylum and issued a residence permit if, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, he/she resides outside his/her country of origin or habitual residence and if, owing to such fear, he/she is unwilling to avail him/herself of the protection of the said country.

Under Section 31 of the same Act, an alien residing in Finland may be issued a residence permit on the basis of his/her need of protection if he/she, in his/her country of origin or habitual residence, is threatened with capital punishment, torture or other inhuman or degrading treatment or if he/she cannot return there because of an armed conflict or environmental catastrophe.

The Supreme Administrative Court ruled that the legislative materials for the mentioned Act and the instructions given by the United Nations High Commissioner for Refugees (U.N.H.C.R.) on procedures and criteria for determining refugee status, under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, have to be taken into account in considering grounds presented by the asylum seeker for persecution and for the need of protection. The instructions of the U.N.H.C.R. establish, as an important principle, that in unclear cases the applicant is given the benefit of the doubt.

In the case in question, the asylum seeker was not considered to be in danger of being subjected to persecution in his home state. Therefore, he could not be granted asylum. When, however, the facts generally known about the human rights situation in the applicant's home state as well as the evidence of the circumstances in its entirety were taken into account, the asylum seeker was considered to be threatened with inhuman or degrading treatment. He was thus in need of international protection in the way meant in Section 31 of the Aliens Act.

Languages:

Finnish.

France
Constitutional Council

Statistical data
1 January 2000 – 30 April 2000

11 decisions including:

- 1 decision downgrading a law, taken pursuant to Article 37.2 of the Constitution;
- 3 decisions on the review of laws submitted to the Constitutional Council pursuant to Article 61.2 of the Constitution for the purpose of ascertaining their constitutionality;
- 1 decision on the review of laws submitted to the Constitutional Council pursuant to Article 104 of the institutional Act no. 99-209 of 19 March 1999 on the status of New Caledonia adopted according to Article 77 of the Constitution;
- 3 decisions of electoral review pursuant to Article 59 of the Constitution;
- 3 decisions on the internal workings of the Constitutional Council.

Important decisions

Identification: FRA-2000-1-001

a) France / **b)** Constitutional Council / **c)** / **d)** 13.01.2000 / **e)** 99-423 DC / **f)** Act on the negotiated reduction of working hours / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 20.01.2000, 992 / **h)**.

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
3.10 **General Principles** – Certainty of the law.
3.17 **General Principles** – General interest.
5.2.1.2 **Fundamental Rights** – Equality – Scope of application – Employment.
5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.
5.4.9 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Freedom of contract / Clarity of the law / Working hours, reduction.

Headnotes:

The legislature failed to exercise its powers in setting a new precondition (an agreement on reducing working hours) for collective redundancy programmes in firms without making clear the consequences of failure to comply with this requirement, and, in particular, in leaving it to the administrative authorities and the courts to determine the impact of non-compliance on redundancy procedures.

Implementation of the substantive clauses of collective agreements concluded under and in accordance with the 1998 Act can only be challenged by the legislature on sufficient public interest grounds, which were not present in this particular case.

A breach of the principle of equal treatment may only be justified by a difference in situation as regards the purpose of the law. There is no such justification for the differences in overtime payment provided for by the act at issue, according to whether firms have reduced the working week to 35 hours for all their employees. The purpose of the law is to encourage uniform application of the 35-hour week; individual employees have no bearing on whether this is the case in their firm and the planned system does not act as an incentive to company managers.

Lastly, the category of employees who, on the introduction of reduced working hours, were already working part time and receiving the statutory minimum wage could not be excluded from the safeguards afforded by the act to other categories of full-time or part-time employees receiving the minimum wage for equivalent work without breaching the “equal work, equal pay” principle.

Summary:

The law referred to the Constitutional Council for examination, the so-called “second act on the 35-hour week”, lays down the conditions for general application of the procedure to reduce the working week, the underlying principles having been set out in the Act of 13 June 1998.

While the first act was found to be constitutional (Decision no. 98-401 DC of 10 June 1998, see

Bulletin 1998/2 [FRA-1998-2-004]), the second, which encountered considerable opposition in parliament, was referred to the Constitutional Council twice (by members of the National Assembly and the Senate respectively) and criticised on four counts; in at least one case, this entailed a major development in case-law which was welcomed by legal opinion (concerning freedom of contract, a principle which had already been upheld in the decision on the first act on the 35-hour week).

Without claiming in general, absolute terms that that the inalterability of contracts is a constitutional requirement or incorporating the idea of "legitimate expectation" into the body of constitutional principles, Decision 99-423 DC confirms that existing contract agreements can only be challenged on sufficient public interest grounds.

Languages:

French.

Identification: FRA-2000-1-002

a) France / **b)** Constitutional Council / **c)** / **d)** 27.01.2000 / **e)** 2000-1 LP / **f)** Territorial Act introducing a general tax on services / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 29.01.2000, 1536 / **h)**.

Keywords of the systematic thesaurus:

4.5.6 **Institutions** – Legislative bodies – Law-making procedure.
4.8.4 **Institutions** – Federalism and regionalism – Budgetary and financial aspects.
4.10.7 **Institutions** – Public finances – Taxation.

Keywords of the alphabetical index:

Procedural unconstitutionality, allegations / Economic and Social Council of New Caledonia, consultation.

Headnotes:

Tax matters are not regarded as social and economic affairs, even though all taxation measures have economic and social consequences.

Accordingly, it was not necessary to consult the New Caledonian Economic and Social Council on a law introducing a new tax to finance New Caledonia's budget.

Summary:

The complaint, lodged by the President of the Assembly of the Loyalty Islands province, only raised allegations of procedural unconstitutionality (claiming that it should have been compulsory to consult the Economic and Social Council and the Committee on Local Finances). The Constitutional Council found that the procedure followed for the adoption of the act was in conformity with the Constitution.

Supplementary information:

This was the first time the Constitutional Council had been asked to rule on a territorial act adopted by the Congress of New Caledonia under the new system set up by the Institutional Act of 19 March 1999, on the basis of the Noumea Agreement (5 May 1998) and the Constitutional Act of 20 July 1998.

Languages:

French.

Identification: FRA-2000-1-003

a) France / **b)** Constitutional Council / **c)** / **d)** 30.03.2000 / **e)** 2000-426 DC / **f)** Act on restrictions on the concurrent holding of elective offices and appointments and on the conditions for discharging them / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 06.04.2000, 5246 / **h)**.

Keywords of the systematic thesaurus:

4.5.12 **Institutions** – Legislative bodies – Status of members of legislative bodies.
4.9.4 **Institutions** – Elections and instruments of direct democracy – Eligibility.
4.17.1.1 **Institutions** – European Union – Institutional structure – European Parliament.
5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.

Keywords of the alphabetical index:

European Parliament, members, election / Offices, concurrent holding.

Headnotes:

Although rules on the incompatibility of local executive office and professional activities may be laid down in ordinary legislation, the conditions for incompatibility should not be excessive. The law is excessive in considering local executive office incompatible with posts as presidents of local chambers or commercial court judges in cases where the territorial jurisdiction of the local authority concerned is outside that of the local chamber or commercial court.

While the legislature is entitled to set a minimum age of eighteen years for persons standing for election to the European Parliament, this is only possible if equal treatment is afforded to all candidates, whether nationals or non-nationals.

Summary:

Restrictions on the concurrent holding of appointments are mainly laid down in ordinary legislation. The act referred to the Constitutional Council was criticised on three counts:

- the legislature had no jurisdiction to adopt provisions of an institutional nature in ordinary legislation;
- some of the rules on incompatibility were disproportionate;
- there was a breach of the principle of equality between French and other European candidates; the minimum age for European Parliament election candidates should therefore remain 23 years, irrespective of candidates' nationality.

However, the legislature did not infringe the principle of equality by failing to treat members of the national parliament and members of the European Parliament equally. As far as rules on incompatibility were concerned, the situation of members of the European Parliament elected in France should be brought into line with that of MEPs elected in the other EU member states rather than that of members of the French parliament.

Languages:

French.

Identification: FRA-2000-1-004

a) France / **b)** Constitutional Council / **c)** / **d)** 30.03.2000 / **e)** 2000-427 DC / **f)** Institutional Act on the incompatibility of elective offices / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 06.04.2000, 5246 / **h)**.

Keywords of the systematic thesaurus:

4.5.12 **Institutions** – Legislative bodies – Status of members of legislative bodies.
4.9.4 **Institutions** – Elections and instruments of direct democracy – Eligibility.

Keywords of the alphabetical index:

Municipality, population, threshold / Offices, concurrent holding.

Headnotes:

The legislature may set a population threshold for a municipality, beyond which the rules restricting the concurrent holding of national and local elective offices apply to the office of municipal councillor, provided that the same threshold governs which electoral system is used, in accordance with the provisions of the Electoral Code relating to municipal elections.

Summary:

Most of the practical details of the long-standing plans to limit the concurrent holding of elective offices are set out in the ordinary act (2000-426 DC, see [FRA-2000-1-003]). However, since the status of members of the national parliament is an institutional matter, an institutional act was necessary.

The institutional act was automatically referred to the Constitutional Council for examination; the decision is therefore not a response to a particular complaint.

Languages:

French.

Georgia
Constitutional Court

Summaries of important decisions of the reference period 1 January 2000 – 30 April 2000 will be published in the next edition, *Bulletin* 2000/2.

Germany
Federal constitutional Court

Summaries of important decisions of the reference period 1 January 2000 – 30 April 2000 will be published in the next edition, *Bulletin* 2000/2.

Greece
Council of State

Important decisions

Identification: GRE-2000-1-001

a) Greece / **b)** Council of State / **c)** Assembly / **d)** 04.02.2000 / **e)** 656/00 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.5.11 **Institutions** – Legislative bodies – Political parties.
4.6.4.1 **Institutions** – Executive bodies – Composition – Appointment of members.
4.13 **Institutions** – Independent administrative authorities.
5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons – Public law.
5.2.1 **Fundamental Rights** – Equality – Scope of application.
5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Media, audio-visual / National Audio-visual Council, members, appointment.

Headnotes:

The Constitution requires the State to organise a system for monitoring radio and television to guarantee objective information for citizens and programme quality. The choice of bodies for implementing this objective, i.e. the actual supervision of broadcasts, is incumbent upon the legislature, which may set up either a body made up exclusively of public officials or civil servants or one which includes members appointed by social groups or political parties. However, there are limits on the power of the legislature: criteria for selecting members of this body must be suitable, and the persons appointed must have guarantees of personal and functional independence in the performance of their duties. It follows that participation in the National

Audio-visual Council by members appointed by political parties, bodies whose constitutional purpose is to contribute to the satisfactory operation of democratic principles and the parliamentary system, is not contrary to the principle of the separation of powers. The National Audio-visual Council is an independent administrative authority. The government does not have any power of hierarchical control over it; however, the Minister for the Press is empowered to monitor the legality of its acts.

The principle of equality is applicable to political parties. Under this constitutional principle, the legislature must guarantee them equal opportunity; it must also refrain from granting unjustified privileges to certain political parties or imposing arbitrary burdens on others.

The participation of political parties in appointing members of the National Audio-visual Council as a function of the number of parliamentary seats they hold is not contrary to the principle of equality.

Summary:

A Greek political party, "The Social and Democratic Movement", which at the time had nine seats in Parliament, entered an application for judicial review, calling for the ministerial decision on the creation of the National Audio-visual Council to be set aside. The applicant alleged that its exclusion by law from the procedure for appointing members of the National Audio-visual Council was contrary to the constitutional principle of equality. The law made provision for participation in the appointment of members of that body by four political parties as a function of the number of parliamentary seats they held. The Social and Democratic Movement had not appointed any member, because it was in fifth place by number of elected members of parliament.

The application had been introduced in the relevant divisional court, which, after finding that the applicant had *locus standi*, had considered *ex officio* the constitutionality of political parties' participation in the procedure for appointing members of the National Audio-visual Council. According to the majority opinion, State supervision over radio and television being of an administrative nature, the bodies set up to carry out that supervision must emanate from the executive power: consequently, in the current state of positive law, which guarantees the principle of neutrality of the administration and the formation of a professional civil service, most of the body set up to supervise the audio-visual domain, if it is a collective body, must be made up of public officials appointed in accordance with a procedure that guarantees their personal independence. Pursuant to the principle of separation of powers, the appointment of administrative bodies in general is incumbent on the State and its institutions: participation by political parties or other private organisations in the procedure for appointing members of administrative bodies is unconstitutional. Hence, the appointment of members of the National Audio-visual Council by the political parties represented in parliament and as a function of the number of seats they hold there is unconstitutional. After taking a position on this basic question, the court also considered the grounds invoked by the applicant, namely violation of the principle of equality. In a majority decision, it found that – should the unconstitutionality of participation by political parties in appointing members of the National Audio-visual Council be refuted – the exclusion from this process of a political party which had met the threshold requirement set by electoral law and was thus represented in parliament violated the principles of national sovereignty and equality between political parties.

Given the importance of the issue, the divisional court referred the case to the Assembly of the State Council. The Assembly unanimously found that the participation in the National Audio-visual Council of members appointed by political parties was not contrary to the principle of separation of powers. It then rejected by a large majority the complaint of violation of the principle of equality: the legislature's decision to set at four the number of political parties which participate in appointing members of the National Audio-visual Council is justified by the wish to shield this body from the vicissitudes of politics and thereby guarantee its smooth functioning. Thus, this is a provision based on an objective criterion which meets legitimate requirements that do not prejudice the principle of equality, which is also applicable to political parties. The application for the ministerial decision to be set aside was rejected.

Supplementary information:

This decision on a point of principle had considerable practical impact. All decisions by the National Audio-visual Council, notably those imposing sanctions, would be unlawful if it was found that its membership was unconstitutional.

Languages:

Greek.

Hungary
Constitutional Court

There was no relevant constitutional case-law during the reference period 1 January 2000 – 30 April 2000.

Ireland
Supreme Court

There was no relevant constitutional case-law during the reference period 1 January 2000 – 30 April 2000.

Italy
Constitutional Court

Important decisions

Identification: ITA-2000-1-001

a) Italy / **b)** Constitutional Court / **c)** / **d)** 11.01.2000 / **e)** 10/2000 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 4 of 26.01.2000 / **h)**.

Keywords of the systematic thesaurus:

1.3.4.2 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between State authorities.
4.5.9 **Institutions** – Legislative bodies – Relations with the courts.
4.5.12 **Institutions** – Legislative bodies – Status of members of legislative bodies.
4.7.1.3 **Institutions** – Courts and tribunals – Jurisdiction – Conflicts of jurisdiction.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Parliamentary duty / Immunity, scope / Defamation.

Headnotes:

In cases concerning conflicts of powers between state authorities resulting from opposing assessments – made on the basis of Article 68.1 of the Constitution by (a) one of the chambers of the Italian parliament (Senate or Chamber of Deputies) and (b) the judicial authorities – as to the non-reviewability by the courts of opinions expressed by members of the chambers, it is not sufficient for the Constitutional Court merely to verify the validity or the consistency of the grounds – if explicitly stated – on which the relevant chamber based its view that no proceedings could be brought against one of its members for an opinion he or she had expressed, as if the Court's judgment were simply a review procedure (similar to that of an administrative court concerning an action alleged to constitute an abuse of authority) of a discretionary decision by the political assembly. Since, as a third party to the conflict, the Court is called upon to guarantee both the independence of the member's chamber and the powers of the judicial authorities, it cannot review the merits, from a constitutional standpoint, of a decision as to non-reviewability taken by one of the two chambers without verifying – and what the Court itself has said in the past about the nature of its review requires some degree of clarification and rectification in this regard – whether in the case in question there were genuine grounds for non-reviewability. In other words, it must assess whether the opinion at issue was actually expressed in the exercise of the member's parliamentary duties, basing this assessment on the notion of the exercise of such duties as it may be inferred from the Constitution.

Opinions expressed during the work of the member's chamber and its different bodies, in the exercise of one of the chamber's functions or resulting from actions, including individual ones, carried out in the person's capacity as a member of the assembly, are opinions expressed in the exercise of parliamentary duties within the meaning of Article 68.1 of the Constitution. In contrast, political activity performed by a member outside this framework cannot in itself be considered as being part of parliamentary duties. Opinions expressed by a member during political debate outside the assembly's specific field of competence and activity represent the exercise of the freedom of expression to which everyone is entitled. It must therefore be concluded (notwithstanding the Court's previous case-law on the matter) that, for non-reviewability to be established, the functional relationship between the statements made and parliamentary activity cannot simply be a thematic link; the statements in question must be shown to be an expression of parliamentary activity.

Once it has been established, on the basis of Article 68.1 of the Constitution, that the statements made by a member of the Chamber of Deputies or the Senate – for which he or she is called to account before the judicial authorities – can be considered to be covered by parliamentary immunity only because they reflect opinions expressed in the parliament, it cannot however be held that this immunity applies solely to the one occasion on which the opinion was expressed in that context, and that such immunity does not apply if the opinion is repeated outside parliament. The publicity normally surrounding parliamentary activities presupposes that immunity extends to all other activities and occasions where the opinion is repeated outside parliament, provided, of course, that the substance of the opinion is by and large the same, even though the words used may be different. In contrast, the mere fact that the statement considered harmful deals with the same topic as the opinions expressed by the member of the Chamber of

Deputies or the Senate is not enough to warrant extending the immunity covering the latter to the former.

Summary:

The Rome court had applied to the Constitutional Court to settle a case of conflict of powers arising from a resolution of the Chamber of Deputies stating that the facts in respect of which the requesting court was conducting proceedings (criminal libel via the press) against a member of the Chamber of Deputies, following statements made by the latter to a press agency, concerned opinions expressed by the member of parliament in the exercise of his parliamentary duties and that they were therefore covered by Article 68.1 of the Constitution and could not be subject to review.

The Court allowed the application, making a distinction between opinions expressed in the exercise of parliamentary duties, which could not be subject to review, and opinions expressed in the exercise of political activity, which were not covered by this prerogative (see *"Headnotes"*), and stated that it was not for the chamber to define the statements made by one of its members to the press as being non-reviewable insofar as the subject matter of those statements did not correspond substantially to that of the questions presented by the member concerned to the government. The Court therefore annulled the resolution of the chamber insofar as these statements were considered by the latter to be non-reviewable on the basis of Article 68.1 of the Constitution.

Cross-references:

The judgment is a reversal of the case-law as established in Judgment no. 265 of 1997. See also subsequent Judgments nos. 11 and 56 of 2000 which apply the principles set out in the decision detailed above.

Languages:

Italian.

Identification: ITA-2000-1-002

a) Italy / **b)** Constitutional Court / **c)** / **d)** 07.04.2000 / **e)** 94/2000 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 16 of 12.04.2000 / **h)**.

Keywords of the systematic thesaurus:

3.8 **General Principles** – Territorial principles.
3.16 **General Principles** – Weighing of interests.
3.19 **General Principles** – Reasonableness.
4.9.1 **Institutions** – Elections and instruments of direct democracy – Instruments of direct democracy.

Keywords of the alphabetical index:

Municipality, boundary changes / Referendum, consultative / Population concerned.

Headnotes:

In order to interpret correctly Article 133.2 of the Constitution (which provides, following consultation of the population concerned, for the establishment of new municipalities and changes in the boundaries or names of existing municipalities through regional laws), the Constitutional Court considers it necessary to point out first of all that the regulations governing changes in municipal boundaries have been assigned by the aforementioned article of the Constitution to regional legislation. These regulations also fall under the heading of "town boundaries", which Article 117 of the Constitution includes in the legislative field of competence of regions having ordinary status. While the regional legislature is under an obligation to consult the population concerned, it is also responsible for establishing, in accordance with the provisions of the Constitution and the fundamental principles of the state, the procedure whereby boundary changes will be made. It is therefore responsible for laying down the criteria for defining the population concerned.

Article 133 of the Constitution does not specify exactly who (in the various possible cases of new municipalities being established or boundaries being changed) the "population concerned" is; clearly, the population consulted does not necessarily and in all cases have to coincide with the whole population of the municipalities affected by the change, since the obligation to consult relates to populations and not territorial entities. A certain margin of discretion therefore has to be left to the regions, and if appropriate the state, in determining the fundamental principles.

The criteria which regional laws must apply in the various possible cases for the purpose of determining the "population concerned" that must be consulted on municipal boundary changes in accordance with Article 133.2 of the Constitution should under no circumstances lead to this population being identified on a non-rational basis in view of the various circumstances and factors which determine the interest on which the obligation to consult is based: in all cases, these criteria should not exclude from the consultation process sectors of the population who cannot be considered to have no interest in stating their views on the proposed changes. The people residing in the areas which are to be transferred to another municipality cannot be excluded from the referendum; their views should be given particular importance and the regional legislature should take special account of those views when making the final decision. The criteria for determining the other people concerned, even if less directly, by the boundary changes in question, fall within the regional legislature's margin of discretion. Nevertheless, there must be no *prima facie* and automatic exclusion of people belonging to the municipalities concerned based on factors which offer no proof that the people in question do not have the interest referred to in Article 133 of the Constitution, on which the obligation to consult is based; accordingly, any exclusion of a section of the municipal population must be based on reasonable factors.

Summary:

The Court ruled Sections 6.1 and 6.2 of Law no. 25 of 1992 of the Veneto region, as amended by its Law no. 61 of 1994, to be unconstitutional as it violated Articles 3 and 133 of the Constitution; the Court also ruled Law no. 37 of 1995 of the Veneto region to be unconstitutional. That law had redrawn the boundaries of three municipalities in the province of Verona, following a consultation procedure under Section 6 of Law no. 25 of 1992 of the Veneto region, which contained unconstitutional criteria.

The criterion adopted by the Veneto regional legislature does not appear to be in conformity with the principle enshrined in Article 133.2 of the Constitution. The criterion in question automatically excludes sections of the population who, even though not directly concerned, live in the municipalities whose boundaries are to be modified, in cases where the extent of the changes is lower than the strictly defined minimum threshold of 10% of the total surface area of the municipality or 30% of the population. This criterion takes no account of the fact that removing even a small part of a municipality's territory can have a significant effect on the interests of the municipality and its population, for example because of the particular configuration of the territory or because the area concerned houses infrastructures or other amenities of special importance to the municipality in question. Even where boundary changes involve several municipalities, the criteria adopted by the legislature enable them to be implemented in such a way that excessive importance is attached to the interests of the municipality into which several areas are to be incorporated.

Cross-references:

The Constitutional Court had already ruled in the past – albeit differently – on the question of defining "population concerned" to be consulted in the procedure for changing municipal boundaries. The Court had held in Judgment no. 453 of 1989 that the people to be consulted should be those directly concerned, i.e. only those residing in the area to be transferred from one municipality to another. Then, in Judgment no. 433 of 1995, the Court had asserted that the general rule deriving from Article 133.2 of the Constitution should require "consultation of the whole population of the municipality or municipalities whose boundaries are to be changed"; it would be only in special, exceptional circumstances, on the basis of "an assessment of factual elements to be carried out on a case-by-case basis when the electorate is called upon to vote in the referendum" that "consultation of the whole population of the municipality of which one or more areas seek to be reassigned [in a situation where a new municipality is to be formed] could be avoided."

Languages:

Italian.

Japan
Supreme Court

There was no relevant constitutional case-law during the reference period 1 January 2000 – 30 April 2000.

Kazakhstan
Constitutional Council

There was no relevant constitutional case-law during the reference period 1 January 2000 – 30 April 2000.

Latvia
Constitutional Court

Important decisions

Identification: LAT-2000-1-001

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 24.03.2000 / **e)** 04-07(99) / **f)** On the Conformity of the Resolution of the Cabinet of Ministers on Protection of Foreign Investments of Windau Ltd with the Constitution of the Republic of Latvia and laws of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), 113/114, 29.03.2000 / **h)**.

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.12 **General Principles** – Legality.
4.6.2 **Institutions** – Executive bodies – Powers.
4.6.8 **Institutions** – Executive bodies – Relations with the courts.
4.7.1 **Institutions** – Courts and tribunals – Jurisdiction.
4.10.8.1 **Institutions** – Public finances – State assets – Privatisation.
5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons – Public law.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

Electricity, privatisation / Power, electric, purchase.

Headnotes:

A decision settling a civil law dispute between legal entities can be made only by a court and not by the Cabinet of Ministers even if one of the parties to the dispute is a state-owned company involved in the process of privatisation under the supervision of the State Privatisation Agency.

Summary:

The case was initiated by 26 members of parliament who questioned the conformity of the Resolution of the Cabinet of Ministers on the Protection of Foreign Investments of Windau Ltd with the Constitution *(Satversme)* and various laws.

On 30 November 1999 the Cabinet of Ministers adopted a Resolution giving the State Privatisation Agency the task of ensuring that the State Stock Company Latvenergo signed a contract with Windau Ltd on purchasing surplus electrical power at double the average sales tariff.

In accordance with the Constitution and the Law on Judicial Power, civil law disputes shall be reviewed only by courts. In adopting the challenged Resolution, the Cabinet of Ministers in fact resolved a civil law dispute and acknowledged the subjective civil right of Windau Ltd. The challenged Resolution thus had the same legal effect as a court decision.

The concept of the democratic republic, laid down in Article 1 of the Constitution, obliges all state institutions to act in accordance with the principle of legality, the separation of powers and the guarantee of mutual checks and balances.

In a democratic state based on the rule of law the activities of the state administration must be in compliance with laws. The purpose of the system of checks and balances is to curb the tendency of each of the three branches of power to infringe or encroach upon the others and to guarantee the stability of the institutions of the state as well as the continuity of functioning of the state power.

The Cabinet of Ministers, in adopting the challenged Resolution, failed to observe the principle of the separation of powers and limited the right of Latvenergo to appeal to a court.

The Constitutional Court decided that Item 1 of the Cabinet of Ministers Resolution on Protection of Foreign Investment of Windau Ltd was not in compliance with Articles 1 and 86 of the Constitution or with the Law on Privatisation of State and Municipal Property and declared it null and void from the moment of its adoption.

Languages:

Latvian, English (translation by the Court).

Liechtenstein
State Council

Important decisions

Identification: LIE-2000-1-001

a) Liechtenstein / **b)** State Council / **c)** / **d)** 11.04.2000 / **e)** StGH 1999/36 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.13 **General Principles** – *Nullum crimen, nulla poena sine lege*.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.
5.3.13.27 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to counsel.

Keywords of the alphabetical index:

Defence counsel, official / Lawyer, renouncing authority to act for client / Criminal offence, essential elements.

Headnotes:

It is lawful to apply legal concepts which are subject to interpretation to the essential elements of a criminal offence even in view of the principle "*nulla poena sine lege"*. Of course, it is possible that an approximate transposition of such concepts may infringe this fundamental right.

One of the bases of criminal law doctrine is that awareness is an ingredient of intent. The criminal code also contains a legal definition of this concept. Therefore the concept in question, which is an essential component of the offence, is defined in a sufficiently precise manner not to contravene the principle of "*nulla poena sine lege"*.

Lawyers defending clients in criminal cases and justifying their expenses must be able to tell whether they are making themselves guilty of money laundering or not when taking on a case and accepting the payment of fees.

It is sufficient for lawyers to ask their clients to provide reliable evidence that the money used to pay their fees comes from a legal source. The evidence is considered reliable, for example, if the client can prove that he or she has a regular income from an employer, his or her own business, or another source beyond suspicion.

Though there may be a deficiency in the law as regards the appointment of unpaid representatives in cases in which the client's capital, though not frozen by the courts, is regarded by the lawyer as being "contaminated", this legal vacuum should be tolerated *de lege lata,* particularly in all cases where the right to an official defence counsel at the final hearing is laid down directly by the law. However, from the point of view of fundamental rights, it is not necessary for there to be a higher principle deriving directly from the law and entailing a general right to free representation.

Summary:

Referring to Article 165.2 of the Criminal Code (on money laundering), which states that anyone who knowingly appropriates elements of the property of a second party which derive from a third party as a result of a criminal offence is liable to a penalty, a firm of lawyers stated that it renounced its authority to act for its client and requested the appointment of an official defence counsel; the reason given for this decision was that it was the only means for the lawyers' firm to ensure that it would not be convicted of money laundering. The Constitutional Court *(Staatsgerichtshof)* found that the rejection of this request did not contravene the rights of the defence and that the complaint that Article 165.2 of the Criminal Code was unconstitutional was not founded under the principle "*nulla poena sine lege"*.

Languages:

German.

Lithuania
Constitutional Court

Statistical data
1 January 2000 – 30 April 2000

Number of decisions: 4 final decisions.

All cases – *ex post facto* review and abstract review.

The main content of the cases was the following:

- right to a pension: 1
- freedom of assembly: 1
- right to property: 1
- competence of executive bodies: 1

All final decisions of the Constitutional Court were published in the Lithuanian *Valstybės žinios* (Official Gazette).

Important decisions

Identification: LTU-2000-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 07.01.2000 / **e)** 11/99 / **f)** On the right of assembly / **g)** *Valstybės Žinios* (Official Gazette), 3-78 of 12.01.2000 / **h)**.

Keywords of the systematic thesaurus:

2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.15 **General Principles** – Proportionality.
3.21 **General Principles** – Prohibition of arbitrariness.
4.6.3 **Institutions** – Executive bodies – Application of laws.
4.6.9 **Institutions** – Executive bodies – Territorial administrative decentralisation.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.28 **Fundamental Rights** – Civil and political rights – Freedom of assembly.

Keywords of the alphabetical index:

Meeting, permanent places, designation.

Headnotes:

Under Article 36.1 of the Constitution citizens may not be prohibited or hindered from assembling in unarmed peaceful meetings. The constitutional establishment of the right of assembly means that it is treated as one of the fundamental human rights and values in a democratic society and is an indivisible element of the democratic system. It is an important element in striving towards an open, just and harmonious civil society and a state governed by the rule of law which are the main aims of the Lithuanian nation as established in the preamble of the Constitution.

Summary:

Article 6.2 of the Law on Meetings provides that local governments may designate permanent places or premises for meetings.

The petitioner – the Kaunas Regional Court – doubted whether above mentioned norm was in compliance with the Constitution.

The Constitutional Court noted that the legislator enjoys discretion when establishing the procedure for the implementation of the right of assembly. However, it stated that he may not deny the essence of this right because any interference of the State with the exercise of the right of assembly, as with other rights and freedoms, is only recognised as lawful and necessary to the extent that it respects the principle of proportionality. Where any public place or publicly-used buildings are chosen for the meeting, the place for the meeting must, in accordance with the procedure established by Law, be agreed with the chief officer of the executive body of the local government council or his authorised representative.

The Constitutional Court emphasised that this officer or his authorised representative, when he adopts a decision refusing to authorise the holding of a meeting in the proposed place and manner and at the proposed time, is bound by the bases of the restriction of the freedom of assembly as indicated in Article 36.2 of the Constitution. In adopting such a decision, he must present clear evidence showing how the meeting will violate the security of the State or the community, public order, public health or morals, or the rights and freedoms of others. On the other hand, the Constitutional Court also noted that local governments may establish permanent places

or premises for meetings. In such cases the Law provides for a simplified procedure for the implementation of the right of assembly.

The Constitutional Court drew the conclusion that the disputed provisions of the Law whereby local governments may establish permanent places or premises for meetings may not be interpreted as granting the right for local governments not to allow people to assemble in peaceful meetings in places which are not designated by the local government. The Court also noted that it is not correct to interpret the provision of the Law as prohibiting citizens from assembling in peaceful meetings in other places which are not established for that purpose by the local government.

The Constitutional Court ruled that Article 6.2 of the Law on Meetings is in compliance with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2000-1-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 10.02.2000 / **e)** 25/98, 31/98, 10/99, 14/99, 20/99, 21/99, 22/99, 28/99 / **f)** On pensions / **g)** *Valstybės Žinios* (Official Gazette), 14-370 of 18.02.2000 / **h)**.

Keywords of the systematic thesaurus:

3.12 **General Principles** – Legality.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Pension, state, victims / Victim of repression, determination by government / Victim, pension.

Headnotes:

The constitutional right to old age and disability pension, as well as to social assistance in the event of unemployment, sickness, widowhood, loss of breadwinner, and other cases provided by law must only be determined by law. This includes the bases, as well as the size, of these pensions. The state pensions provided for in the Law on State Pensions are also to be considered such payments.

Summary:

Article 52 of the Constitution provides: “The State shall guarantee the right of citizens to old age and disability pension, as well as to social assistance in the event of unemployment, sickness, widowhood, loss of breadwinner, and other cases provided by law.” Article 11.4 of the Law on State Pensions provides that “State pensions for victims shall not be awarded to individuals listed in Parts 1 and 2 of this Article if between 1939-1990, they served or worked in penal (anti-guerrilla) or 'defenders of the people' detachments or units, structures of the State Security Committee of the former USSR and other structures whose activity was devoted to combating the resistance movement in Lithuania or perpetrating genocide of the Lithuanian population. The Government of the Republic of Lithuania shall approve the list of the services and positions of the said institutions or structures for serving in which persons shall not be awarded state pensions for victims.” The petitioners (8 courts) had doubts regarding the compliance of this provision with the Constitution when they were investigating cases concerning termination of state pension payments to persons who in the course of World War II served in active armies, partisan detachments or similar units.

The Constitutional Court emphasised that the following main provisions are established in Article 11.4 of the Law: 1) the institutions or structures in which service or work during the said period excludes victims from being awarded state pensions, and that the government is empowered to approve the list of the services and positions of the said institutions or structures for serving in which persons shall not be awarded state pensions for victims; 2) that state pensions for victims shall not be awarded to persons who during the said period served or worked in other institutions or structures, and that the government is empowered to specify which services and positions in these other institutions or structures exclude persons from being awarded state pensions for victims. Thus, this legal norm establishes clear legal regulation and the limits of this regulation. The legal norm whereby the government is empowered to determine the services and positions in institutions or

structures which are clearly indicated by the law is to be interpreted as granting the government the right to specify particular positions and services and not as providing the government with the legal grounds to change the limits established in the law. The Constitutional Court thus ruled that to this extent, the provision of Article 11.4 of the Law on State Pensions is in conformity with the Constitution.

The Law on State pensions was amended on 4 November 1997 to empower the government to approve the list of services and positions of other institutions or structures for serving in which persons shall not be awarded state pensions for victims. The law does not give a clear definition of these other institutions or structures, leaving the government to do so by a substatutory act. As it has the power to approve the list of services and positions of other institutions or structures for serving in which persons shall not be awarded state pensions for victims under the Law on State Pensions, the government has also the right to establish persons who shall not be awarded these pensions. The Constitutional Court therefore ruled that to the extent that the provisions of Article 11.4 of the Law on State Pensions allowed the government to approve the list of the services and positions of other institutions or services not indicated in the law for serving in which persons shall not be awarded state pensions for victims they are in conflict with Article 52 of the Constitution.

The petitioners also questioned whether Article 8.3.2 of the Law on the Legal Status of Victims of the Occupations of 1939-1990 is in compliance with the Constitution. This norm restricts the possibility for some persons to gain the status of victims and provides that this legal status shall not be recognised to “regular employees of the repressive structures of Nazi Germany and the Soviet Union, agents and informers of these structures, head employees of the national-socialist and communist parties, and members of the organisations and structures which acted against the independence and territorial integrity of Lithuania and its residents. Head employees of the Communist Party include the following persons: secretaries of the Central Committee of the Communist Party of Lithuania, heads of its subdivisions down to the instructors of the branches, secretaries of district committees, heads and instructors of its subdivisions, and regular party secretaries of enterprises and organisations.” The Constitutional Court ruled that these questions may be regulated by laws.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2000-1-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 23.02.2000 / **e)** 21/98, 6/99 / **f)** On the Introduction of Labels of the 1998 Standard for Marking Tobacco Products and Alcoholic Drinks / **g)** *Valstybės Žinios* (Official Gazette), 17-419 of 25.02.2000 / **h)**.

Keywords of the systematic thesaurus:

5.1.1.4.1 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons – Private law.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2 **Fundamental Rights** – Equality.
5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Property of legal persons, equal treatment / Lawful possession, goods / Fair competition / Right, essence.

Headnotes:

The constitutional principle of the protection of private ownership which means that an owner is guaranteed the right to demand that his rights shall not be violated by other persons also pre-supposes the duty of the state to protect the rights of the owner from any unlawful encroachment. Ownership rights must be defended by law. All other normative acts regulating ownership rights must be in conformity with laws.

Any restrictions on the rights of ownership must not violate the essence of the right of ownership. If such a right is limited to the extent that its implementation becomes impossible or unreasonably restricted, or its legal protection is no longer ensured, there are grounds to assert that the essence of such a right has been violated, which is equivalent to a denial of this right.

The constitutional principle of the equality of all persons shall be applicable not only to natural but to legal persons as well.

Summary:

Item 5 of the procedure for marking alcoholic drinks manufactured and sold in the Republic of Lithuania with labels of the 1998 standard approved by Sub-item 6.4 government Resolution no. 36 of 14 January 1998 was amended on 25 February 1998 as follows: "5. It shall be prohibited to trade in alcoholic drinks manufactured in the Republic of Lithuania which are not marked with labels (with the exception of the cases pointed out in Item 2 of this Procedure) or marked with labels of the old standard, as well as to transport them, store them in store-rooms or keep them in commercial, administrative or subsidiary premises of trade or public catering enterprises or keep them in any other places. The aforesaid provision shall be applied to the alcoholic drinks manufactured in Lithuania labelled with the labels of the old standard and the unlabelled national drinks manufactured prior to 15 August 1997 by the company "Lietuviskas midus" which were bottled either into special bottles or packed in imported souvenir package as of 1 August 1998, while to wholesale trade enterprises they shall be applied as of 1 June 1998." The petitioners – the Rokiskis District Local Court and a group of *Seimas* members – requested an investigation into whether the provisions of Item 5 of the Procedure were in compliance with the Constitution.

The Constitutional Court noted that alcoholic products are special products, the manufacture, import, trade and use of which are subject to a special state regulatory regime. The Constitution recognises certain possibilities for restricting the rights of ownership, as well as certain other fundamental human rights. However, in these cases, one must conform to the fundamental position that the essence of a fundamental human right must not be violated through restrictions. The legal regulation established by the said government Resolution of 14 January 1998 whereby an enterprise is prohibited not only from trading in lawfully acquired alcoholic drinks belonging to it but also from keeping and transporting them, and when nothing is said about the procedure and conditions under which an enterprise is permitted to sell alcoholic drinks manufactured in Lithuania marked with labels of the old standard which were lawfully acquired prior to the introduction of the said prohibitions and which belonged to it, is to be considered as prohibiting the enterprise from possessing, using and disposing of the property belonging to it, and, therefore, as denying the right of ownership in essence. The Constitutional Court emphasised that such regulation also infringes the freedom of individual economic activity and initiative as well as the freedom of fair competition established in Article 46 of the Constitution. Moreover, the other legal norms set down in Article 46 of the Constitution establishing the constitutional bases of the national economy are violated.

The Court also noted that Item 5 of the Procedure violated the principle of equality of all persons before the law guaranteed in Article 29.1 of the Constitution and the principle of a state governed by the rule of law enshrined in the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2000-1-004

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 05.04.2000 / **e)** 24/99 / **f)** On the Regulations for Operational Activities / **g)** *Valstybės Žinios* (Official Gazette), 30-840 of 12.04.2000 / **h)**.

Keywords of the systematic thesaurus:

2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources.
3.12 **General Principles** – Legality.
4.6.2 **Institutions** – Executive bodies – Powers.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.

Keywords of the alphabetical index:

Resolution of the government / Operative record file.

Headnotes:

The norms of Article 94.2 and 94.7 of the Constitution providing that the government shall implement laws and discharge other duties prescribed to it by the Constitution and other laws are to be interpreted as establishing a duty on the government to amend and supplement previously adopted acts so that they are in conformity with subsequently adopted laws or to repeal previously adopted acts where they are in conflict with the law.

Summary:

The Higher Administrative Court appealed to the Constitutional Court questioning the compliance of Sub-item 4.7 of the Regulations for operational activities of the system of internal affairs of the Republic of Lithuania approved by government Resolution no. 731-19 of 30 September 1993 with the Constitution and the Law on Operational Activities. Article 7.3.7 of the Law on Operational Activities provided that under the procedure established by the government, operational entities shall have the right to compile an operative record file and make use of it. However, it was established in Sub-item 4.7 of the Regulations that the procedures for compiling and making use of an operative record file had to be established by the Minister of Internal Affairs.

It must be stressed that the Law, which was adopted on 22 May 1997, did not abolish the Regulations.

The Constitutional Court noted that a law is a legal act of the highest order. A governmental resolution is only a substatutory legal act. Where a government resolution containing the norm conflicting with a law is adopted prior to the adoption of the law, such a government resolution must be harmonised with the norms of the subsequently adopted law, and the government has a duty to ensure that this is done.

The Constitutional Court ruled that Sub-item 4.7 of the Regulations was in conflict with the Law and the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Malta
Constitutional Court

Statistical data
1 September 1999 – 31 December 1999

- Number of judgments: 3
- Number of introduced cases: 10

Statistical data
1 January 2000 – 30 April 2000

- Number of judgments: 7
- Number of introduced cases: 7

Important decisions

Identification: MLT-2000-1-001

a) Malta / **b)** Constitutional Court / **c)** / **d)** 06.10.1999 / **e)** 595/97 / **f)** John Mousu' et v. Director of Public Lotto et / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.
1.4.3 **Constitutional Justice** – Procedure – Time-limits for instituting proceedings.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.17 **General Principles** – General interest.
5.3.37.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Property, enjoyment / Property, ownership / Property, possession / Property, right to dispose of / Presidential declaration, effect.

Headnotes:

A deprivation of property effected for no reason other than to confer a private benefit in favour of a private party can never be in the public interest. However, the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means of promoting the public interest. A fair balance must necessarily be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

According to Section 7 of the European Convention Act (Chapter 319 of the Laws of Malta) no breach of human rights and fundamental freedoms committed before 30 April 1987 will give rise to an action invoking the European Convention on Human Rights.

Summary:

The applicants were the owners of a Lotto Office, which had been leased in 1965. By means of a Notice published in the Government Gazette, a Presidential Declaration on 22 November 1977 declared the premises to be expropriated for a public purpose. The Constitutional Court held that from the evidence produced by both parties, it was evident that notwithstanding the expropriation order, the premises in question were still to be used as a Lotto Office by third parties. The effect of the expropriation order was merely that of giving an advantage to a third party to occupy premises without payment. It was evident that as a result of the expropriation order there was no apparent advantage to the public interest and the common good. Therefore, the expropriation was not justified.

In terms of Chapter 319 of the Laws of Malta, the Courts are prohibited from investigating complaints of a breach of fundamental human rights that occurred prior to 1987 (when the law was enacted). The respondents argued that the President's declaration was issued prior to 1987, and therefore the Court had no jurisdiction to hear and determine the matter under the terms of the law. On their part, the applicants contended that notwithstanding the Presidential Declaration they continued to enjoy the physical possession of the Lotto Office. In fact they argued that rent was paid up to 31 May 1997.

The Constitutional Court held that Article 1 Protocol 1 ECHR guaranteed the peaceful enjoyment of possessions, including the right to have, to use, to dispose of, to pledge, to lend and even to destroy one's possessions. Following the publication of a Presidential Declaration in terms of Article 3 of the Ordinance for the Acquisition of Land for a Public Purpose (Chapter 88 of the Laws of Malta), the government was empowered to dispose of the property in issue. From that moment, the owner is divested of the enjoyment of his property or his right to dispose of the same. However, until a formal deed is published whereby the property is transferred to the competent authority, the ownership of the property is not transferred. The law itself envisages the possibility that notwithstanding a Presidential Declaration, the competent authority chooses not to take possession of the property in question. In this respect Article 32.1 stipulates: "Nothing in this Ordinance shall be taken to compel the competent authority to complete the acquisition of any land unless the competent authority shall have entered into possession of the land...".

Therefore, the declaration issued by the President of Malta did not have the effect of divesting the owner of all his proprietary rights over the property. Thus, it is possible for the competent authority to permit the owner to remain in possession of the expropriated property. This is what actually took place in the present case. Although legally speaking the Declaration had disturbed the owners' peaceful enjoyment of their property, it could not be stated that there was such a disturbance in practice. The fact that for so many years the owners continued to enjoy the property and continued to receive rent for it, entitled them to presume that the competent authority had changed its decision in respect of the expropriation. It was only in 1997 that the competent authority definitely took over the possession of the premises. Therefore, the Court had jurisdiction to decide the merits of the case in terms of the European Convention.

Cross-references:

Sporrong and Lönnroth v. Sweden, 23.09.1982, Series A, no. 52; *Special Bulletin ECHR* [ECH-1982-S-002].

Languages:

Maltese.

Identification: MLT-2000-1-002

a) Malta / **b)** Constitutional Court / **c)** / **d)** 07.04.2000 / **e)** 678/98 / **f)** Youssef Isa v. Attorney General / **g)** / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.15 **General Principles** – Proportionality.
3.19 **General Principles** – Reasonableness.
5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.

Keywords of the alphabetical index:

Bail, amount / Bail, goal.

Headnotes:

Where the guarantee for the granting of bail is monetary, the amount set must be assessed mainly by reference to the accused, his assets and his relationship with the persons who will provide the security. Such criteria aim to constitute a deterrent to dispel any wish on the part of the accused to abscond.

Article 14 ECHR protects individuals placed in similar situations from any discrimination in the enjoyment of the rights set forth in the other provisions of the Convention. It has no independent existence, and plays an important role in complementing the other provisions of the Convention and its Protocols.

Summary:

The applicant was granted bail on a deposit of Lm 700 (Maltese pounds) by means of a decree delivered by the Criminal Court on 11 February 1999. The applicant was accused of having misappropriated funds. On 28 October 1997 he was granted bail on a deposit of Lm 5,000. He remained in preventive custody as he contended that he did not have the financial means to deposit such an amount.

The Constitutional Court argued that the main purpose of preventive detention should be to guarantee the presence of the accused person in court for each sitting. The security demanded from the accused should not serve the purpose of providing an indemnification for damages caused by the commission of the crime, but should ensure the presence of the accused at each hearing.

The sum required for release must not impose heavier burdens on the person in question than are necessary to obtain a reasonable degree of security. Where the detainee is required to give as security a sum of money that he is not in a position to raise, while it may be assumed that a lower sum would provide adequate security for his compliance with a summons to appear for trial, then the prolongation of the detention would certainly be unreasonable. The financial situation of the person concerned and/or his relation to the person who will provide the security must necessarily be taken into account.

Although it is for the accused to provide all the requisite information, this does not relieve the authorities of the duty to make an inquiry in this respect, thereby enabling them to decide on the possibility of releasing the accused on bail. Therefore the Court's duty was to make an assessment that would produce an objective and realistic decision according to the particular circumstances of each case. Any statement made by the accused on his financial means was to be considered and also verified.

The Court concluded that having considered that the applicant was a foreigner and that he had no property or family in Malta, as well as the seriousness of the crime of which he was accused and the punishment if found guilty, it was satisfied that the amount set for the granting of bail was not unreasonable. It appeared from the records of the proceedings that by applying the above principles the Court of Magistrates (Malta) had already, by two previous orders, diminished the amount of security required. The initial amount set was Lm 5,000. Three months after his arrest the accused had declared himself to be in a financial position to procure the deposit of an amount of money which was close to the original sum set for the granting of bail.

The applicant also argued that a wealthy person could deposit any sum whereas a person who was not in a financial position to provide security would remain under arrest. In this respect he alleged a violation of Article 14 ECHR. The Court held that since the amount to be deposited as security was calculated amongst other things on the basis of the financial means of the accused and not the damages which the offence had provoked, it was possible for a person who had substantial means to be asked to deposit a considerable amount of money for a relatively minor offence, whereas a person not having

the same financial means may be requested to deposit a much smaller amount for the same offence.

The Court dismissed the applicant's claims with costs.

Cross-references:

Mario Pollacco v. Commissioner of Police et, Constitutional Court, 06.10.1999.

Languages:

Maltese.

Moldova
Constitutional Court

Important decisions

Identification: MDA-2000-1-001

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 11.01.2000 / **e)** 1 / **f)** Constitutionality review of some provisions of the Decree of the President of the Republic no. 930-II of 22 March 1999 and of the Electoral Code, in the wording of Law no. 480-XIV of 2 July 1999 / **g)** *Monitorul Oficial* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

3.3 **General Principles** – Democracy.
3.4 **General Principles** – Separation of powers.
3.12 **General Principles** – Legality.
4.5.7 **Institutions** – Legislative bodies – Relations with the Head of State.
4.9.1 **Institutions** – Elections and instruments of direct democracy – Instruments of direct democracy.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Referendum / Member of Parliament, substitute.

Headnotes:

The Constitution states that problems of utmost gravity or urgency confronting society or the state shall be resolved by referendum, and the President of the Republic is empowered to request the citizens of the Republic to express their will by way of referendum on matters of national interest (Articles 75 and 88.f of the Constitution).

The Constitution guarantees a person's right of access to any information of public interest (Article 34 of the Constitution). The Constitution charges the public authorities with correlative obligations, such as: to inform citizens correctly not only on issues of public interest, but of personal concern as well, to guarantee the right to television broadcasting.

The office of the member of parliament could be obtained, following the pronouncement of his mandate as vacant.

Summary:

A member of parliament lodged an appeal with the Court for the constitutional review of the Decree of the President of the Republic regarding the unfolding of the republican-consultative referendum on the issue of changing the system of government in the Republic, as well as the constitutional review of Article 150.3 of the Electoral Code. Simultaneously, the President of the Republic referred to the Court claiming the constitutional review of the Law on the amendment and completion of the Electoral Code.

The member of parliament argued that the Law ostensibly empowers the President of the Republic not only to initiate republican referenda, but also to issue Decrees on their unfolding, which exceeds the President's constitutional powers.

The Head of the State argued that the parliament by passing the law encroached upon some provisions of the Constitution, having restricted the right of the subjects and even of the citizens entitled to initiate referenda by way of which the people could express their will on matters of national interest.

Taking into account that the Decree of the President of the Republic has ceased to have legal force at the date on which the application was lodged – 24 May 1999 and at the date of its examination – 11 January 2000, the Court found it had to suspend the process of constitutional review of the Decree in question.

The parliament being the sole legislative authority of the state, the main power of which is passing the laws, which can be constitutional, organic or ordinary, the Court noted that the President of the Republic should not disregard parliamentary proceedings on the organisation of either a constitutional or legislative republican referendum.

The argument brought forward by the President of the Republic according to which the provisions of Article 47 of the Electoral Code violate the right of citizens to free access to information has been disclaimed by the Court on the following grounds.

The content of the right of access to information is deemed to be complex. Article 34 of the Constitution guarantees a person's right of access to any information of public interest, which includes: the right of a person to be promptly, correctly and clearly informed on the stipulated matters, particularly on actions undertaken by public authorities; free access to sources of public information; the possibility to receive radio and television programs directly and in the appropriate conditions; the obligation on public authorities to establish the appropriate financial and judicial conditions for free and thorough broadcast of any kind of information.

In securing the right of access to any information, the Constitution charges the public authorities with corresponding obligations, such as: to inform citizens correctly not only on matters of public interest, but of personal concern as well; to guarantee the right to television broadcasting. All the rulings and details laid down by the legislator through the provisions defined in Article 47.3 of the Electoral Code violate neither a person's right of access to information nor the obligation on public authorities to ensure that citizens are correctly informed.

The Court dismissed, therefore, the argument of the President of the Republic pursuant to which the republican referendum could not be held on the same day as parliamentary, presidential or general local elections, on account of a violation of the subjects' right to initiate referenda. Relying on Article 72.3.b of the Constitution, the parliament should regulate by organic law the organisation and carrying out of the referendum, which it did by the Law subjected to constitutional review.

Being an exclusive prerogative of the Parliament, the regulation of the organisation of a referendum and its unfolding cannot be qualified as a restriction of the President's power relative to the initiation of referenda.

While exercising its power of constitutional review, the Court held points 2, 8, 9.1, 9.2, 10, and 15 of the Law on the amendment and completion of the Electoral Code to be constitutional, as well as Article 150.3 of the Electoral Code.

The Court pronounced as unconstitutional points 3 and 4 and the clause "the substitute members of Parliament" of points 5.1, 6.2 and 6.3 of the Law on the amendment and completion of the Electoral Code.

The process aimed at the constitutional review of the Decree of the President of the Republic regarding the republican consultative referendum on the issue of changing the system of government in the Republic was suspended.

Languages:

Romanian, Russian.

Identification: MDA-2000-1-002

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 11.04.2000 / **e)** 15 / **f)** Constitutionality of Articles 150.1 and 150.2 of the Electoral Code / **g)** *Monitorul Oficial* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

3.3.2 **General Principles** – Democracy – Direct democracy.
3.4 **General Principles** – Separation of powers.
4.4.1 **Institutions** – Head of State – Powers.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.9.1 **Institutions** – Elections and instruments of direct democracy – Instruments of direct democracy.

Keywords of the alphabetical index:

President of the Republic, guarantor of the Constitution / Referendum, consultative, legislative.

Headnotes:

When the holding of a referendum on a revision of the Constitution is initiated by the citizens pursuant to Article 152 of the Electoral Code, or by the President of the Republic, parliament is not empowered to reject the proposal.

Summary:

Article 150 of the Electoral Code, set out in Act no. 480-XIV of 2 July 1999, sets out the procedure for adoption of an order or decree concerning the holding of a republican referendum.

According to paragraph 1 of the aforementioned article, within six months of receiving a proposal to initiate the referendum procedure, parliament has to adopt one of the following types of order:

- an order declaring that a referendum is to be held (at least sixty days after adoption of the order);
- an order rejecting a proposal by members of parliament or citizens that a referendum be held;
- an order on the solution of the problems forming the subject of the proposed referendum, which therefore does not take place.

Article 150.2 stipulates that an order rejecting a proposal that a legislative or consultative referendum be held requires a majority of the votes of elected members of parliament, and that an order rejecting a proposal that a constitutional referendum be held requires a majority of two-thirds of the elected members.

The application by the President of the Republic for the purpose of determining the constitutionality of Articles 150.1 and 150.2 of the Electoral Code was the basis for consideration of the question whether parliament can reject a referendum proposal put forward by the citizens or by the President of the Republic, and whether parliament is empowered to amend a bill tabled by the President of the Republic or by the citizens before making it the subject of a constitutional referendum.

Having examined the arguments set out in the application, the Constitutional Court noted that the disputed provisions of Articles 150.1 and 150.2 of the Electoral Code contravene Articles 2, 38, 77 and 88 of the Constitution, both by their content and in the meaning conferred on them by judicial practice, and prevent citizens from exercising their constitutional rights.

If parliament, under the terms of Article 150.1.b of the Electoral Code, rejects a referendum proposal by the citizens, it contravenes the provisions of Articles 2.1 and 39.1 of the Constitution. Rejection of an initiative of the people, in whom national sovereignty is vested and who are entitled to give their opinion on matters of national interest, constitutes a restriction of their constitutional right to express their will.

The provisions of Articles 75, 77, 88.f and 141.1.c of the Constitution, examined in their entirety together with the constitutional provisions concerning the status of the Head of State, indicate that the referendum is a legal instrument of the Head of State. The Constitution makes no provision for the placing of certain statutory restrictions on the President's right to call a referendum.

In the Constitutional Court's opinion, the citizens and the President of the Republic are entitled to initiate the holding of any type of republican referendum in accordance with Articles 2.1, 38.1, 39.1, 75.1 and 88.f of the Constitution, which enshrine the principle of

sovereignty and the people's right to resolve by referendum, in conformity with the Constitution and the law, problems of the utmost importance to society or the state.

In view of the above, the Constitutional Court declared unconstitutional the phrase "or by the citizens" in Article 150.1.b of the Electoral Code, as well as the provisions of Article 150.2 of the Electoral Code.

Languages:

Romanian, Russian.

Identification: MDA-2000-1-003

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 20.04.2000 / **e)** 16 / **f)** Interpretation of certain provisions of Articles 73, 82, 86, 94, 98, 100 and 101 of the Constitution / **g)** *Monitorul Oficial* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.12 **General Principles** – Legality.
4.4.1 **Institutions** – Head of State – Powers.
4.4.1.2 **Institutions** – Head of State – Powers – Relations with legislative bodies.
4.4.1.5 **Institutions** – Head of State – Powers – International relations.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.5.8 **Institutions** – Legislative bodies – Relations with the executive bodies.
4.6.2 **Institutions** – Executive bodies – Powers.

Keywords of the alphabetical index:

Law, national budget / Head of State, guarantor of the Constitution / Government, resignation.

Headnotes:

The President of the Republic is not competent to adopt decrees of a general, binding nature in the socio-economic field, even if parliament has been dissolved and the government has resigned, because, according to Article 60.1 of the Constitution, parliament is the sole legislative authority of the state.

Even if the government has resigned, it is not only empowered but obliged to present the draft budgetary law to parliament for approval. Under no circumstances is the President of the Republic competent to submit a draft budgetary law to parliament.

With regard to the procedure for forming a government, set out in Article 98 of the Constitution, the Court found that, since the Constitution does not refer to the notion of a "provisional government", neither the Head of State nor parliament is competent to form a government.

As far as the resignation of the Prime Minister is concerned, the Court had previously ruled that, when the Prime Minister ceases his/her activity within the government, the President of the Republic must designate another government member to act as interim Prime Minister to discharge the latter's duties until a new government is in place.

Summary:

The application by the President of the Republic with regard to the interpretation of certain provisions of Articles 73, 82, 86, 94, 98, 100 and 101 of the Constitution was the basis for considering whether the President of the Republic is empowered:

- when the government has resigned and parliament is dissolved, to adopt decrees of a general, binding nature in the socio-economic field in order to secure the proper functioning of the state, its economic security in particular and national security in general;

- when the government has resigned, to present to parliament for approval, by virtue of the right to initiate legislation, a draft budgetary law for the current year and to negotiate and sign international treaties in accordance with Article 86.1 of the Constitution;

- when the government has resigned following a motion of censure in parliament:

    - to appoint another government member to act as interim Prime Minister,
    - to appoint a provisional government until the members of the government are sworn in.

The Constitutional Court ruled that the part of the proceedings referring to the interpretation of

Article 101.2 of the Constitution concerning the competence of the President of the Republic, if the government has resigned, to appoint another government member to act as interim Prime Minister should be suspended.

According to Article 86.1 of the Constitution, the President of the Republic is empowered, on behalf of the Republic, to take part in negotiations, conclude international treaties and submit them to parliament for ratification within a certain period laid down by law.

The Court noted that, although treaties concluded by the President of the Republic do not have immediate legal force, since they only come into force if ratified by parliament, the Head of State is free to sign or to choose not to sign treaties, regardless of whether the government has resigned.

Languages:

Romanian, Russian.

Netherlands
Supreme Court

There was no relevant constitutional case-law during the reference period 1 January 2000 – 30 April 2000.

Norway
Supreme Court

Important decisions

Identification: NOR-2000-1-001

a) Norway / **b)** Supreme Court / **c)** / **d)** 25.02.2000 / **e)** Inr 12 B/2000 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2000, 279 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Decision, administrative / Defamation / Public interest / Newspaper article, declaration as “null and void”.

Headnotes:

The right to declare a newspaper article on an administrative decision null and void depends on an interpretation of the provisions on freedom of expression in Article 100 of the Constitution and in international instruments, especially Article 10 EHCR and Article 19 of the International Covenant on Civil and Political Rights.

Summary:

The newspaper *Bergens Tidende* had printed an article on an administrative decision concerning the suspension of two driving instructors’ official licences.

The instructors (A and B) sued the journalist, the editor and the newspaper, seeking compensation and requesting that 8 statements in the article be declared null and void, including the statement that A was unqualified and had committed 26 violations of the applicable rules.

The City Court found in favour of the defendants, and the driving instructors’ appeal to the Court of Appeal was dismissed.

The instructors appealed to the Supreme Court.

The Supreme Court found no reason to declare the article null and void nor to award damages.

The newspaper did not deny that the article might include defamatory statements and that evidence proving the truth of the allegations had not been adduced.

However, the Supreme Court did not consider the statements to be unlawful.

The Court held that, in determining the limits within which statements can lawfully be put forward, one must consider the provisions in Article 100 of the Constitution, Article 10 ECHR and Article 19 of the International Covenant on Civil and Political Rights.

These limits can be altered in accordance with developments both nationally and internationally.

Regarding the right to declare a newspaper article on administrative decisions null and void, the Court referred to judgments delivered by the European Court of Human Rights concerning Article 10 ECHR – the *Bladet Tromsø and Stensaas v. Norway* judgment of 20 May 1999 and the *Nilsen and Johnsen v. Norway* judgment of 25 November 1999.

In this specific case the Court attached considerable weight to the fact that the case concerned an essentially correct article on an administrative decision made after the usual adversarial procedure, to which the journalist had gained access in accordance with the provisions of the Freedom of Information Act. Furthermore, essential parts of the article were also based on a lawsuit about an earlier decision of suspension concerning A. The newspaper had already reported on the main hearing and the judgment in that case.

For other reasons, this subject matter also had to be considered of public interest in the district.

The appeal was accordingly dismissed.

Supplementary information:

Under Norwegian defamation law, three kinds of remedies exist for unlawful defamation, namely the imposition of a penalty under the provisions of the Criminal Code, an order under Article 235 of this Code declaring the defamatory allegation null and void and an order under the Damage Compensation Act 1969 to pay compensation to the aggrieved party.

Languages:

Norwegian.

Poland
Constitutional Tribunal

Statistical data
1 January 2000 – 31 April 2000

I. Constitutional review

Decisions:

- Cases decided on their merits: 10
- Cases discontinued: 0

Types of review:

- Ex post facto review: 9
- Preliminary review: 1
- Abstract reviews (Article 22 of the Constitutional Tribunal Act): 7
- Courts referrals ("legal questions"), Article 25 of the Constitutional Tribunal Act: 3

Challenged normative acts:

- Cases concerning the constitutionality of statutes: 8
- Cases on the legality of other normative acts under the Constitution and statutes: 2

Holdings:

- The statutes in question declared wholly or partly unconstitutional (or the acts of lower rank held to violate the provisions of superior laws and the Constitution): 3

- Upholding the constitutionality of the provision in question: 7

II. Universally binding interpretation of laws

- Resolutions issued under Article 13 of the Constitutional Tribunal Act: 10
- Motions requesting such interpretation rejected: 0

Important decisions

Identification: POL-2000-1-001

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 07.12.1999 / **e)** K 6/99 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 7, item 160 / **h)**.

Keywords of the systematic thesaurus:

5.2 **Fundamental Rights** – Equality.
5.3.37 **Fundamental Rights** – Civil and political rights – Right to property.
5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Enterprise, mining / Liabilities procedure, reduction / Ownership, usufruct.

Headnotes:

Legal provisions providing that an increase in remuneration cannot exceed the average annual increase of prices of goods and services introduced in a draft budget act for a particular year and provisions providing for general rules of procedure concerning the reduction of liabilities of mining enterprises do not breach the principles of democracy, equality and equality in economic activity.

A provision granting a mining enterprise the possibility of renouncing on behalf of mining municipalities ownership or a perpetual usufruct right over superfluous properties, in relation to which the establishment of companies together with mining municipalities for the purpose of regenerating the municipalities is not planned, is not contrary to the constitutional right to property.

Summary:

The Tribunal noted that the provisions under examination are of a temporary nature. They do not result in a worsening of the situation of employees of mining enterprises in relation to their remuneration. They only temporarily limit the possibility for any increase. Additionally, rules concerning a procedure relating to a reduction of liabilities of mining enterprises justify a need to refer to resolutions and terms of performance which are specific to legal relationships concerning mining.

In the Tribunal's opinion, the provision by which the ownership or perpetual usufruct right may be renounced does not infringe the ownership rights of the mining enterprises. The right to use and dispose of a property according to the will of an owner is a crucial feature of the ownership right. Furthermore, in the Tribunal's opinion, the examined provision only describes an admissible way of disposing of the property.

Languages:

Polish.

Identification: POL-2000-1-002

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 15.12.1999 / **e)** P 6/99 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 7, item 164 / **h)**.

Keywords of the systematic thesaurus:

2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources.
3.12 **General Principles** – Legality.
4.7.4.1.3 **Institutions** – Courts and tribunals – Organisation – Members – Status.
4.7.5 **Institutions** – Courts and tribunals – Supreme Judicial Council or equivalent body.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

National Judicial Committee, regulations / Law, common provisions.

Headnotes:

Regulations of the National Judicial Committee, which exclude application of the code of administrative procedure in proceedings before the National Judicial Committee (KRS), are contrary to the Act on the KRS and the Constitution. The provisions regulate issues which must be provided for in the form of law.

Summary:

The case was examined by the Tribunal as a result of a legal question lodged by the Supreme Administrative Court. The question related to proceedings commenced as a result of an appeal from a resolution of the KRS relating to consent for holding a judicial post after the age of 65 years.

In the Tribunal's opinion, the regulations of the KRS are internal regulations. Therefore, they cannot breach provisions of common law, including provisions of the code of administrative procedure.

The Tribunal also noted that the Civilian Courts Act *expressis verbis* provides for cases in which it is possible to appeal to an administrative court from a decision of the KRS. It states that the retirement of a judge by the KRS has the form of an administrative decision and therefore the provisions of the code of administrative procedure shall be used in the procedure before the KRS. Consequently, the provision of the KRS's regulations excluding application of the provisions of the code of administrative procedure violates the provisions of this act.

Cross-references:

Decision of 21.06.1999 (U 5/98).

Languages:

Polish.

Identification: POL-2000-1-003

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 20.12.1999 / **e)** K 4/99 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 7, item 165 / **h)**.

Keywords of the systematic thesaurus:

3.3 **General Principles** – Democracy.
3.10 **General Principles** – Certainty of the law.
5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Uniformed services, pensions / Benefit, group, valorisation.

Headnotes:

Basing the valorisation of uniformed services' pensions on rules provided for by the provisions of the Act on pensions from the Social Security Fund is concordant with the constitutional rule of democracy.

The application of provisions of the Act on pensions from the Social Security Fund in relation to pensioners (former soldiers and civil servants) receiving their incomes by virtue of employment relationship, service, other paid work or performance of non-farm economic activity is discordant with the rule of maintaining confidence resulting from the Constitution and the equality rule.

It is not relevant whether the addressees of the Law have the possibility of reading a law which has been published.

Summary:

The Tribunal held that provisions under consideration do not result in the loss of the right to benefits and exclusion of their valorisation. They changed the method of valorisation of a certain group of benefits but they maintained a stable economic value of the received benefits. Breaching expectations relating to the amount of the future benefits does not constitute in itself a breach of the right to valorisation.

In the Tribunal's opinion, even though the examined provisions do not limit the right to choose the place of work, the limitation of pensions benefits due to performance of work affects the accomplishment of this right granted by the Constitution. The worsening of the legal position of the addressees of the provisions at issue constitutes a breach of the legal security right to based on the provisions of the Constitution.

The publication of a law constitutes a condition of its entry into force. It is not relevant, however, whether the addressees of the law have benefit of being able to read a law which has been published.

Cross-references:

Decision of 14.03.1995 (K 13/94).

Languages:

Polish.

Identification: POL-2000-1-004

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 11.01.2000 / **e)** K 7/99 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 1, item 2 / **h)**.

Keywords of the systematic thesaurus:

3.3 **General Principles** – Democracy.
4.6.4 **Institutions** – Executive bodies – Composition.
4.8.3.4 **Institutions** – Federalism and regionalism – Institutional aspects – Administrative authorities.

Keywords of the alphabetical index:

Territorial self-government / Function, accumulation, management bodies.

Headnotes:

It is consistent with the principle of constitutional democracy to prohibit accumulation of the following: membership of the management body of a city *(poviat)*; a post in the management body of a municipality or in the self-government of a "*voivodship*"; employment in a governmental administration; the post of deputy or senator.

Summary:

The case was examined by the Constitutional Tribunal in response to a claim lodged by the Speaker of the Polish Senate. According to the claimant the intention to introduce equal rules to prohibit a accumulation of membership in the management bodies of a voivodship, poviat and city with rights of poviat was not introduced in a clear and unmistakable manner and consequently, was not in accordance with the rules of good legislation. The claimant was thus of the opinion that the democracy rule had been breached.

The Tribunal noted that provisions of the Act on self-government of municipality and the Act on self-government of voivodship show that cumulating membership in management bodies of two different units of self-government is generally forbidden. Moreover, members of the management bodies cannot work in a governmental administration. However, exercising the function of a deputy or a senator is only prohibited in relation to members of management bodies of poviats and voivodships.

In the Tribunal's opinion, a systematic reference was used while drafting the prohibition on combining a post in the management authority of a city with rights of poviat with a mandate of deputy or senator. As the Tribunal mentioned, it is a standard practice used while drafting legal acts, to ensure brevity and consistency between a number of legal acts relating to the same issue. Consequently, in the Tribunal's opinion the provisions examined are in accordance with rules on legislation.

Supplementary information:

One judge has delivered dissenting opinion (Jerzy Ciemniewski).

Languages:

Polish.

Identification: POL-2000-1-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 12.01.2000 / **e)** P 11/98 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 1, item 3 / **h)**.

Keywords of the systematic thesaurus:

3.15 **General Principles** – Proportionality.
3.16 **General Principles** – Weighing of interests.
5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Municipality, rent control / Lease, termination / Rent, control by municipality.

Headnotes:

Provisions introducing a controlled rent, determined by a municipality, for a lease of premises located in houses or premises owned by natural persons is contrary to the constitutional right to property. The limitations introduced in such provisions breached the terms of the Constitution.

Summary:

The case was examined by the Tribunal as a result of a legal query introduced by the Supreme Court. In the Tribunal's opinion, there is a conflict of two interests – an owner's rights and a tenant's rights – both of which are protected at the constitutional level (although not equally). The Tribunal does not challenge the need to protect tenants by introducing provisions limiting the freedom of an owner to determine the amount of rent. The Tribunal emphasises, however, that any provision which interferes with the right of property must be considered with reference to all existing limitations of the right. The provisions in force significantly limit the right to use and dispose of premises by the owner. In particular, the right to terminate a lease is only possible where the tenant obviously breaches his duties. As a result, the provisions providing the possibility for municipalities to determine the rent and to fix its rate below the costs of exploitation and maintenance of a building constitute an excessive interference with the right of property. The inadequacy of the controlled rents in relation to the real expenses for maintenance of the building borne by the owner and the lack of any compensation for loss led to results which were disproportionately onerous to the owners as compared with the costs of the tenant's protection and violate the principle of proportionality.

The Tribunal also emphasised that the Constitution lays down the conditions for introducing any limitations upon the rights and liberties of an individual. The limitations may be introduced only in a form of a law. It is not possible to adopt blank norms which would give the executive and local authorities freedom to decide upon the final conditions of such limitations and in particular, to decide upon the scope of the limitations. The provisions examined introduce only a maximum amount for the controlled rent, giving the municipalities the freedom to fix the rent. Such a solution, in the Tribunal's opinion, creates serious doubt as to whether the constitutional requirement of limiting rights and liberties by a way of a law has been met.

Supplementary information:

One judge delivered a dissenting opinion (B. Lewaszkiewicz-Petrykowska).

Cross-references:

- Decision of 26.04.1995 (K 11/94).
- Decision of 02.06.1999 (K 34/98), *Bulletin* 1999/2 [POL-1999-2-019].
- Decision of 12.01.1999 (P 2/98), *Bulletin* 1999/1 [POL-1999-1-002].

Languages:

Polish.

Identification: POL-2000-1-006

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 22.02.2000 / **e)** SK 13/98 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 1, item 5 / **h)**.

Keywords of the systematic thesaurus:

5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2 **Fundamental Rights** – Equality.
5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Scope – Non-litigious administrative procedure.
5.3.37 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Decision, final administrative, possibility of appeal / Appeal, extraordinary, exclusion / Land ownership, protection.

Headnotes:

Excluding the provisions of the code of administrative procedure concerning extraordinary measures of appeal in relation to final decisions issued under provisions of the Act on settlement of ownership of land is not contrary to the constitutional right to property, succession and democracy.

Summary:

The case was examined before the Tribunal as a result of a constitutional claim brought by a natural person. It concerned the possibility of limiting extraordinary measures of appeal from final administrative decisions granting ownership of land.

The Tribunal noted that the constitutional right to property relates both to former owners and those who acquired ownership of land on the basis of the provisions of the Act under consideration. The Constitution does not protect ownership differently according to the way ownership was acquired.

Moreover, the Tribunal emphasised that a rule providing the possibility to issue administrative decisions may be introduced with a reference to the democracy rule. However, even assuming that this rule also includes the possibility of extraordinary measures of appeal, this would not give grounds to claim that a limitation in time concerning the possibility to use such measures is contrary to the Constitution. Appeals against administrative decisions without any time limits are provided for in the code of administrative procedure. Other laws may provide for deviations from this rule. Such deviations are subject to examination by the Constitutional Tribunal as to their conformity with the Constitution.

Cross-references:

Decision of 25.05.1999 (K 9/98).

Languages:

Polish.

Identification: POL-2000-1-007

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 07.03.2000 / **e)** K 26/98 / **f)** / **g)** *Dziennik Ustaw Rzeczyposplitej Polskiej* (Official Gazette) of 16.03.2000, item 227; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 2 / **h)**.

Keywords of the systematic thesaurus:

4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
5.4.9 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Military, trade union, membership, exclusion.

Headnotes:

The provisions of the Act on professional soldiers forbidding professional soldiers from setting up and taking part in trade unions are not contrary to the principle of equality.

Summary:

The case was brought to the Tribunal by the Ombudsman, who argued that the freedom to take part in trade unions is a basic guarantee of employees' rights and is treated as a fundamental right.

The Tribunal noted that the principle of equality means that persons in analogous situations are treated the same, while persons in different situations are treated differently. The differentiation test is justified by values and rules secured by the Constitution.

In the Tribunal's opinion there are no grounds for comparing soldiers with any other category of persons. There is not any significant common feature which would allow to ascertain whether discrimination has occurred in this case. Therefore, the prohibition under consideration is not contrary to the principle of equality.

Cross-references:

Decision K 24/96 (09.06.1997), *Bulletin* 1997/2 [POL-1997-2-013].

Languages:

Polish.

Identification: POL-2000-1-008

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 08.03.2000 / **e)** Pp 1/99 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 2, item 58 / **h)**.

Keywords of the systematic thesaurus:

3.3 **General Principles** – Democracy.
4.5.11 **Institutions** – Legislative bodies – Political parties.
5.3.39 **Fundamental Rights** – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Political party, organisational structure, dynamic unity.

Headnotes:

Provisions of the statutes of the Christian Democratic Party providing for the appointment and removal of the president of the region by the president of the Party are consistent with the constitutional right of citizens to organise into political parties.

Summary:

The case was examined before the Tribunal as a result of a motion of one of the regional courts. The applicant argued that the Constitution obliges parties to achieve their aims through democratic methods. According to the provisions of the Act on political parties, party bodies are appointed by way of elections and majority voting resolutions. The applicant claimed the provisions under examination do not comply with these conditions.

The Tribunal noted that the Constitution provides for the dynamic unity of internal and external organisational structures and methods of activity of a political party. The unity should enable citizens organising themselves into parties to influence effectively and to participate in democratic life. The freedom to form internal structures and methods of activity cannot be limited as long as they do not threaten the party's performance of its constitutional role and do not exclude democratic methods of influence over national policy.

In the Tribunal's opinion, the Constitution limits the possibilities and scale of intervention of the public authorities, including the legislator, in the internal structures and methods of activity of political parties.

Cross-references:

Decision of 24.04.1996 (W 14/95), *Bulletin* 1996/2 [POL-1996-2-008].

Languages:

Polish.

Identification: POL-2000-1-009

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 14.03.2000 / **e)** P 5/99 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 2, item 60; *Dziennik Ustaw Rzeczyposplitej Polskiej* (Official Gazette), 2000, no. 17, item 229 / **h)**.

Keywords of the systematic thesaurus:

3.15 **General Principles** – Proportionality.
5.3.37.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Road, public / Acquisition, ownership by virtue of law.

Headnotes:

Transferring the ownership of properties formerly constituting public roads to the State Treasury or units of self-government and basing the grounds of compensation for the transfer on the value of the property as at the date of coming into force of the Act providing for such compensation is consistent with the constitutional conditions concerning expropriation for public purposes and equitable compensation.

Summary:

In the Tribunal's opinion, expropriation by virtue of the law is aimed at the settlement of proprietary relationships. It also simultaneously guarantees that the interests of an owner are satisfied.

The Constitutional Tribunal stated that the accepted method of valuation of the expropriated property, which constitutes a material element for calculation of the compensation due to the previous owners, may be treated as covered by the idea of "equitable compensation".

The Tribunal highlighted that as a result of the provisions of law under examination being amended, the petition had lost its validity.

Cross-references:

Decision of 19.06.1990 (K 2/90).

Languages:

Polish.

Portugal
Constitutional Court

Statistical data
1 January 2000 – 30 April 2000

Total: 256 judgments, of which:

- Preliminary review: 1 judgment
- Abstract *ex post facto* review: 12 judgments
- Appeals: 128 judgments
- Complaints: 106 judgments
- Political parties and coalitions: 3 judgments
- Political parties' accounts: 1 judgment
- Referenda: 5 judgments

Important decisions

Identification: POR-2000-1-001

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 29.03.2000 / **e)** 199/2000 / **f)** / **g)** *Diário da República* (Official Gazette), no. 101 (Serie I-A), 02.05.2000, 1775-1780 / **h)**.

Keywords of the systematic thesaurus:

4.8.1 **Institutions** – Federalism and regionalism – Basic principles.
4.9.2 **Institutions** – Elections and instruments of direct democracy – Electoral system.
4.9.3 **Institutions** – Elections and instruments of direct democracy – Constituencies.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.

Keywords of the alphabetical index:

Autonomy, regional / Election, regional / Election, proportional representation / Region, political status / Representation, proportional / Electoral system.

Headnotes:

Article 113 of the Constitution lays down the general principles of electoral law and stipulates that direct, secret, regular elections are the general rule in

appointing the members of the elected organs of supreme authority, the autonomous regions and local government (Article 113.1 of the Constitution) and that the votes cast are converted into seats in accordance with the principle of proportional representation (Article 113.5 of the Constitution).

The principle of proportional representation is reiterated in other provisions of the Constitution, on the election of members of the Assembly of the Republic (Article 149.1 of the Constitution) and the election of local authority assemblies (Article 239.2 of the Constitution). But it also concerns the organs of government of the autonomous regions, Article 231.2 of the Constitution stipulating that the regional legislative assembly is elected by direct, secret, universal suffrage in accordance with the principle of proportional representation. Indeed, the principle of proportional representation is so important to the functioning of the Portuguese electoral system, and even to the fabric of the democratic regime, that it is one of the areas where revision of the substance of the Constitution is subject to restrictions (Article 288.h of the Constitution). In Portuguese constitutional law, therefore, the fundamental principles of the electoral system are not freely open to amendment by the legislature.

For the election of representative assemblies proportional representation is, by definition, the fairest electoral system from the point of view of political party representation; the principle is that as close a correlation as possible is achieved between the votes cast and the seats allocated, the rule being that seats are generally awarded according to the percentage of votes won by the different candidates or parties. Proportionality in the allocation of seats, however, depends on several factors, including the type of electoral system adopted, the method used to count the votes, or the number of seats to be filled in each constituency, i.e. the size of the constituency.

Summary:

The Constitutional Court was asked by a group of members of the Assembly of the Republic to carry out an abstract *ex post facto* review of the constitutionality of a provision of the political and administrative statutes governing the autonomous region of Madeira, and a similar provision of the electoral law of the regional legislative assembly of Madeira, in respect of the principle of proportional representation enshrined in Articles 115.5 and 231.2 of the Constitution.

Under the provisions concerned, each constituency, when electing the regional legislative assembly, elects one member for every 3,500 registered voters plus one if the residual voters total more than 1,750. In practice, this means that two municipalities in the region are single-seat constituencies.

The principle of proportional representation is supposed to apply to all constituencies, but allowing for such single-seat constituencies, even in the context of a proportional representation system – unless combined with other vote-counting mechanisms or methods, such as the "highest remainder" system or the method provided for in Article 149.1 of the Constitution – does not guarantee proportionality in the conversion of votes into elective office.

The Court therefore declared both provisions unconstitutional, with general binding force.

Supplementary information:

The Court had already, in two previous judgments, ruled on the compatibility of elections involving only single-seat constituencies (in certain constituencies or municipalities in regional elections) with the constitutional principle of proportional representation. In Judgment 183/88 the Court ruled, in preliminary review, that a provision of a decree of the Assembly of the Republic was unconstitutional because it effectively created a third electoral constituency consisting of a single-seat. And in Judgment 1/91 it ruled that proportional representation called, in principle, for a list system in each constituency, as elections with single-seat constituencies invariably led to majority representation.

On the subject of the statutes of the autonomous regions and electoral systems, see also Judgment 630/99, *Bulletin* 1999/3 [POR-1999-3-006].

Languages:

Portuguese.

Romania
Constitutional Court

Important decisions

Identification: ROM-2000-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 23.03.1999 / **e)** 47/1999 / **f)** Decision relating to the constitutionality of Sections 23-30 in Chapter III of Government Emergency Order no. 26/1997 concerning the protection of children in difficulty, as republished / **g)** *Monitorul Oficial al României* (Official Gazette), no. 264/09.06.1999 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.12 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Convention on the Rights of the Child of 1989.
3.12 **General Principles** – Legality.
5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Child, protection and assistance / Educational measures / Liability, criminal / Emergency order.

Headnotes:

The legal provisions governing the educational measures provided for in the Criminal Code to protect children in difficulty who are not criminally responsible are unconstitutional.

In the case of children who are not criminally responsible, in accordance with Article 45.1 of the Constitution, parliament must provide for special protection and assistance arrangements that differ from the punishment regime for young persons who are criminally responsible.

Summary:

The Constitutional Court was asked to examine the constitutionality of Sections 17 and 18 of government emergency Order no. 26/1997, as republished.

The objection was referred by a lower court of its own motion. In the grounds for its objection, it argued that the educational measures specified in Sections 17 and 18 of the emergency order were not specifically intended for the category of children who were not criminally responsible for their actions and did not therefore offer those young persons real protection. The sections challenged were in contravention of Article 45.1 of the Constitution, according to which "children and the young shall enjoy special protection and assistance in the pursuit of their rights", while the regulations governing the treatment of young persons who had committed an offence under the criminal law but were not held responsible for this were not in compliance with Article 37.b and Article 40 of the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989 and ratified by Romania in Act no. 18 of 27 September 1990.

Following the referral to the Constitutional Court, Sections 17 and 18 of government emergency Order no. 26/1997 were amended and supplemented, and they became Sections 23-30 of Chapter III, entitled "educational measures concerning children who have committed a criminal offence, but for which they are not criminally responsible", of Act no. 108/1998.

The amendments to the legislation maintained the initial regulations and the Constitutional Court therefore examined the constitutionality of the version as amended, in accordance with its judicial practice.

Article 99 of the Criminal Code stipulated that young persons under the age of 14 were not criminally responsible and that those aged 14 to 16 could only be held criminally responsible if there was evidence that they had understood that an offence was being committed. These legal provisions were compatible with Article 40.3.a of the Convention on the Rights of the Child.

The fact that an offender was under age, subject to the aforementioned conditions, removed the criminal nature of the offence on the grounds that the offender was unable to recognise the social significance of his actions and to control the conduct that led to those actions. Cases ceased to be criminal in character, in such circumstances, once the young persons committing such offences ceased to be considered guilty, on account of the inadequate development of their mental faculties, which made it possible that they had not understood the character and the effect of their actions and were unable to control them.

The anti-social acts committed by such young persons did not incur criminal responsibility, but they did create grounds for providing certain measures of

protection serving a dual purpose: protecting the young persons concerned from factors that could threaten the harmonious development of their personalities and defending society against the risk of the proliferation of such acts.

The educational measures provided for in Sections 23-30 of emergency Order no. 26/1997 repeated, in their entirety, the provisions of Articles 102-106 of the Criminal Code relating to warnings, freedom under supervision, and detention in a medical-educational institution. These educational measures were applicable to young persons who were criminally responsible and represented sanctions in criminal law which amounted to penalties.

The legal provisions under consideration were unconstitutional because the educational measures for the protection of children who were not criminally responsible were the same as those laid down in the Criminal Code, which were criminal law penalties. This constituted a violation of Article 45.1 of the Constitution, in pursuance of which parliament should have provided for special protection and assistance arrangements that differed from the punishment regime for young persons who were criminally responsible.

Languages:

Romanian.

Identification: ROM-2000-1-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 05.05.1999 / **e)** 70/1999 / **f)** Decision relating to the constitutionality of Sections 2.1, 6.1. 9, 11.2, 12.1.B.h, 15.1, 17.1 and 17.2, 18, 30.2 and 45 of the Organisation and Conduct of Referendums Act, approved by the Chamber of Deputies and the Senate at their sittings of 22 February 1999 / **g)** *Monitorul Oficial al României* (Official Gazette), no. 221/19.05.1999 / **h)**.

Keywords of the systematic thesaurus:

1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
1.3.2.1 **Constitutional Justice** – Jurisdiction – Type of review – Preliminary review.
1.3.4.5.6 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes – Referenda and other consultations.
1.3.5.4 **Constitutional Justice** – Jurisdiction – The subject of review – Quasi-constitutional legislation.
1.4.6.1 **Constitutional Justice** – Procedure – Grounds – Time-limits.
1.5.4.3 **Constitutional Justice** – Decisions – Types – Finding of constitutionality or unconstitutionality.
2.3.8 **Sources of Constitutional Law** – Techniques of review – Systematic interpretation.
4.4.1 **Institutions** – Head of State – Powers.
4.4.3.4 **Institutions** – Head of State – Term of office – End of office.
4.4.4.2 **Institutions** – Head of State – Liability or responsibility – Political responsibility.
4.9.4 **Institutions** – Elections and instruments of direct democracy – Eligibility.
4.9.6.1 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Electoral rolls.
4.9.6.4 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Ballot papers.

Keywords of the alphabetical index:

Legislative approach / Drafting error / Referendum, initiative / Referendum, confirmation, results.

Headnotes:

Under Section 2 of Act no. 47/1992, the Constitutional Court's powers to exercise constitutional oversight are confined to determining whether legislation is compatible with the Constitution. Aspects relating to the legislative approach adopted are solely the responsibility of Parliament, which under Article 58.1 of the Constitution is the country's only legislative authority.

A systematic interpretation of the provisions of the Organisation and Conduct of Referendums Act shows that it was approved by parliament as an organic law, in accordance with Article 72.3.c of the Constitution.

In the case of the referendum on the suspension of the President, the wording of the question on the voting slip was not in breach of Article 95.1 of the Constitution, which governs the President's suspension from office.

The President's constitutional right to call a referendum on certain matters of national interest cannot be restricted, either by limiting the right to hold one prior

to certain measures being taken or by making it obligatory to place the issues that are the subject of the referendum before Parliament, since this would be incompatible with Article 90 of the Constitution, which deals with referendums.

Laying down in law the purpose and date of a referendum, as distinct from the regulations governing its organisation and conduct, is not in breach of Article 72.3.c of the Constitution, on the organisation and conduct of referendums.

Organising the referendum on the basis of the electoral constituencies and polling stations used for parliamentary and local elections, and of the permanent, special and other electoral registers referred to in the Act, is not unconstitutional.

The Constitutional Court is empowered, under Article 144.g of the Constitution, to assume jurisdiction, of its own motion, to rule on whether the rules and procedures on the organisation and conduct of referendums have been observed.

Summary:

The President asked the Constitutional Court to rule on the constitutionality of certain provisions of the Organisation and Conduct of Referendums Act. The grounds cited concerned the nature of the legislation under which the Act was adopted, aspects relating to the technical approach and the drafting, the jurisdiction of the Constitutional Court and the suspension of the President. The grounds of unconstitutionality also concerned the relevant legislation, which according to the author, restricted the President's constitutional right to call a referendum on matters of national interest before taking certain steps, including legislative measures, and advising parliament of the referendum's purpose.

In a letter to the Constitutional Court, a member of parliament, in his capacity of initiator of the contested legislation, argued that the President's objection on grounds of unconstitutionality had been lodged out of time, after the period for promulgation provided for in Article 77.1 of the Constitution had expired.

The Court ruled that the referral was lawful, since the Organisation and Conduct of Referendums Act had not been promulgated, which meant that there were no constitutional or legal barriers to a review of constitutionality.

The Court found that the objections concerning the provisions establishing that national referendums were the means whereby the people could directly express their sovereign will on revisions to the Constitution, suspension of the President of Romania from his functions and other problems of national interest were not constitutional in nature. The objections related to symmetry between the relevant legislation and the wording of the Constitution, and thus to technical aspects of drafting rather than constitutionality. The Constitutional Court's powers to rule on constitutionality were confined to the Act's compatibility with the Constitution, in accordance with the last part of Section 2.3 of Act 47/1992. This is why the Court had ruled that the incorporation of a legal provision in a particular form of legislation was a technical drafting matter (for example, in Decision no. 37/1996, published in the *Monitorul Oficial al României* (Official Gazette), part I, no. 141 of 8 July 1996).

The Court found that the Organisation and Conduct of Referendums Act was an organic law, which parliament had passed with the necessary quorum, and that all the Act's provisions were compatible with Article 72.3.c of the Constitution. It was the Constitution that determined whether legislation took on the character of organic legislation, and not the provisions of other legislation, such as the Organisation and Conduct of Referendums Act.

The wording of the legislation containing the question “Do you agree with the suspension of the President of Romania?”, which must be included on the ballot paper for a referendum on the suspension of the President, was constitutional and did not have to refer to a proposal of parliament to that effect.

Parliament could not make a proposal to suspend the President because he had been elected by the people, not by parliament, and was responsible not to parliament but to the electorate, who had elected him by universal suffrage.

Under Article 95 of the Constitution, if parliament suspended the President from office a mandatory procedure had to be followed before any sanction could be imposed, on a decision not of parliament but of the electorate.

The Court did not have jurisdiction to correct drafting errors and to reword the texts of legislation submitted for review. It could not, therefore, uphold the objection relating to the unsatisfactory nature of the term “optional referendum”.

The Court ruled that the words “prior to certain measures being taken”, in the context of the President's right to call a referendum on matters of national interest was unconstitutional, having regard to Article 90 of the Constitution. The Act's wording,

particularly the wording “prior to certain measures being taken”, placed a legal restriction on the President's exercise of his constitutional right, and thus contravened Article 90 of the Constitution.

The provision that obliged the President to explain to parliament what “other matters” should constitute the subject of a referendum which he intended to call was in breach of Article 90 of the Constitution.

Only the President had the power to decide on what “matters of national interest” he could seek the people's opinion by referendum.

The provisions of the Act establishing the purpose and date of the referendum separately from the regulations governing its organisation and conduct were not in breach of the Constitution, and nor were those which stipulated that the referendum should be conducted using the electoral constituencies and the polling stations used for parliamentary elections.

The Court held that although the President of Romania was not mentioned in the Section specifying that citizens and political parties had the right, during the referendum campaign, to express their opinions freely and without discrimination, the wording of the text did not exclude the President from exercising this right.

The provisions of the Act preventing the Court from assuming jurisdiction, of its own motion, to rule on failure to observe referendum rules or procedures, when it had either identified these directly or received information concerning them (from citizens, the media, non-governmental organisations and so on), were unconstitutional, having regard to Article 144.g of the Constitution, which empowered the Court to rule on specific cases where constitutional matters were at issue and, in particular, on applications or referrals concerning possible breaches of referendum rules or procedures. This right was indissolubly linked to the exercise of the Court's powers regarding the “confirmation” of the referendum results. If it was established that certain frauds had taken place that cast doubts on the correctness of the results, the Court would not confirm these results. However, the non-confirmation of the results of a referendum was a legal act that did not have the effect of nullifying the national referendum concerned.

According to the rules governing its powers, the Court also assumed jurisdiction of its own motion and extended its right of review to the provision that, to be valid, applications for the setting aside of national referendums must be lodged within 48 hours of the end of voting, which it declared unconstitutional, since it was evidently and necessarily impossible to dissociate it from the preceding provisions.

Supplementary information:

The provisions declared unconstitutional by the Court in Decision no. 70/1999 have been removed from the Organisation and Conduct of Referendums Act (no. 3 of 22 February 2000), promulgated by the President of Romania by Decree no. 33 of 18 February 2000.

Languages:

Romanian.

Identification: ROM-2000-1-003

a) Romania / **b)** Constitutional Court / **c)** / **d)** 20.07.1999 / **e)** 113/1999 / **f)** Decision on the constitutionality of certain provisions of the legislation authorising the government to issue orders, adopted by the Chamber of Deputies and the Senate in a joint sitting on 1 July 1999 / **g)** *Monitorul Oficial al României* (Official Gazette), no. 362/29.07.1999 / **h)**.

Keywords of the systematic thesaurus:

1.3.2.1 **Constitutional Justice** – Jurisdiction – Type of review – Preliminary review.
1.5.4.3 **Constitutional Justice** – Decisions – Types – Finding of constitutionality or unconstitutionality.
2.1.1.4.1 **Sources of Constitutional Law** – Categories – Written rules – International instruments – United Nations Charter of 1945.
2.1.3.3 **Sources of Constitutional Law** – Categories – Case-law – Foreign case-law.
2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources.
3.1 **General Principles** – Sovereignty.
3.8.1 **General Principles** – Territorial principles – Indivisibility of the territory.
4.3.1 **Institutions** – Languages – Official language(s).
4.3.4 **Institutions** – Languages – Minority language(s).
4.5.2 **Institutions** – Legislative bodies – Powers.
4.6.2 **Institutions** – Executive bodies – Powers.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.

5.2.3 **Fundamental Rights** – Equality – Affirmative action.
5.2.2.10 **Fundamental Rights** – Equality – Criteria of distinction – Language.

Keywords of the alphabetical index:

Law, inconsistencies, content / Discrimination between majority and minorities.

Headnotes:

The provisions of the legislation authorising the government to issue orders concerning the organisation and functioning of rural co-operation and the establishment of an agency for state lands and the agricultural development fund do not breach Article 114.1 of the Constitution, which allows delegated legislation for non-organic laws.

The authorisation of the government to ratify the European Charter of Regional or Minority Languages is not in breach of Article 114.1 of the Constitution.

Summary:

At the request of 26 senators, the Constitutional Court considered the challenge on grounds of unconstitutionality to the provisions concerning the organisation and functioning of rural co-operation and the establishment of an agency for state lands and the agricultural development fund. These provisions were included in the legislation authorising the government to issue orders.

The group of senators argued that the two orders concerned the general property system, which under Article 72.3.k of the Constitution is dealt with in organic legislation. The legislation authorising the government to issue orders therefore violated Article 114.1 of the Constitution.

A group of 61 members of parliament also challenged the same Act in the Constitutional Court, but this time regarding the provisions authorising the government to ratify the European Charter for Regional or Minority Languages.

They argued that ratification of the Charter was a parliamentary prerogative. They also argued that the Charter ignored certain inviolable values enshrined in the Romanian Constitution, namely the unitary, national and independent character of the Romanian state, judicial independence, administrative autonomy and the principle of non-discrimination by the majority of Romanian citizens against minorities. Certain provisions of the Charter therefore necessitated a revision of the Romanian Constitution, because they provided for the use of regional or minority languages alongside the official state language, the introduction of federal elements such as the organisation of the population within the Romanian state according to ethnic criteria, rather than acknowledging the relationship between the majority and minorities, and the use of mother tongues in the administrative and judicial systems, with no requirement also to use the official language. It was further contended that there was an unconstitutional conflict between the European Charter for Regional or Minority languages and the treaty on understanding, co-operation and good-neighbourliness between Romania and Hungary, in which both sides expressly agreed that Recommendation 1201 (1993) of the Council of Europe did not oblige parties to grant persons belonging to national minorities the right to a special territorial autonomous status based on ethnic criteria. These provisions were said to violate Article 1 of the Constitution, on the Romanian state, Article 6.2 of the Constitution, on the right to identity, Article 13 of the Constitution, on the official language, and Article 148.1 of the Constitution, limiting the power to amend the Constitution.

It was argued that the orders deemed to be unconstitutional related to the category of constitutional laws and that the Charter could not therefore be ratified under delegated legislation.

The group of members of parliament also invoked a decision of the French Constitutional Council which had ruled that some clauses in the European Charter for Regional or Minority Languages violated the French Constitution.

With regard to the first objection, the Court found that, based on the wording of the relevant texts, it was not possible to establish an intention to regulate the general legal system governing property and inheritance, an area that was indeed reserved for organic legislation in accordance with Article 72.3.k of the Constitution.

Whether or not legislation was organic depended on the content of the regulations, as well as on the procedures involved in its adoption or, possibly, its constitutional nature.

As the sole legislative authority, parliament was free to decide on the areas of delegated legislation, subject to Article 114.1 of the Constitution, even in cases where it had started to debate certain bills or other legislative proposals with the same or a similar objective.

The Court also ruled that inconsistencies in a law's content were not grounds for a review of its constitutionality.

Turning to the second objection, the Court stated that according to the Constitution, legislation in force and parliamentary practice, international treaties signed on behalf of Romania must be submitted to parliament for ratification through the law, and that this was compatible with the institution of delegated legislation, provided for in Article 114 of the Constitution.

The Court noted that Article 72.3 and other parts of the Constitution making it obligatory to enact organic legislation in certain fields did not extend to this category of ratifying legislation.

The Charter's ratification did not breach the principle of the "independent, unitary and indivisible National State" enshrined in Article 1 of the Constitution, since according to the preamble to the Charter (sub-paragraph 7) "the protection and promotion of regional or minority languages in the different countries and regions of Europe represent an important contribution to the building of a Europe based on the principles of democracy and cultural diversity within the framework of national sovereignty and territorial integrity". Similarly, Article 5, headed "existing obligations", stated that "nothing in this Charter may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes of the Charter of the United Nations or other obligations under international law, including the principle of the sovereignty and territorial integrity of States".

The Court found that ratification of the Charter did not require a revision of Article 13 of the Constitution, concerning the official language, because sub-paragraph 6 of the Charter's preamble made it clear that "the protection and encouragement of regional or minority languages should not be to the detriment of the official languages and the need to learn them", while Article 8.1 referred explicitly to the possibility of introducing certain educational measures in areas where regional or minority languages were used, "without prejudice to the teaching of the official language(s) of the State".

Ratification of the Charter did not breach the principles of equality and non-discrimination *vis-à-vis* other Romanian citizens, since according to the second sentence of Article 7, paragraph 2 of the Charter:

> "The adoption of special measures in favour of regional or minority languages aimed at promoting equality between the users of these languages and the rest of the population or which take due account of their specific conditions is not considered to be an act of discrimination against the users of more widely-used languages."

Following an examination of the Charter's content, the Court concluded that many of the measures provided for already featured in the country's legislation and that, under the terms of Article 2 of the Charter, parties were not required to apply it in its entirety, but only "a minimum of thirty-five paragraphs or sub-paragraphs chosen from among the provisions of Part III of the Charter, including at least three chosen from each of the Articles 8 and 12 and one from each of the Articles 9, 10, 11 and 13".

Ratification of the Charter did not entail a revision of the Constitution, but in drawing up and adopting the Charter's ratification order, the government did have to make sure that the measures selected from the various options available were compatible with the Constitution and to make the necessary reservations in so far as the Charter allowed this. The government also had to respect the limits to its powers under Article 114.1 of the Constitution. The ratification order would be subject to parliamentary review and should be placed before the Chamber of Deputies and the Senate for approval, according to the legislative procedure, before the resumption of parliamentary proceedings.

The Charter could also be subject to concrete, *ex post facto* review of its constitutionality, under the grounds provided for in Article 144.c of the Constitution, and indirectly to abstract preliminary review of the legislation approving the order, if its constitutionality was contested under Article 144.a of the Constitution.

The Court ruled that the decision of the French Constitutional Council was not relevant to the case, in view of the totally different set of constitutional provisions that applied to national minorities in Romania.

Nor did it accept the argument that there had been a failure to observe certain provisions of the treaty on understanding, co-operation and good-neighbourliness between Romania and Hungary, since the European Charter for Regional or Minority Languages did not contain references to territorial self-government and conflicts between the two documents were not liable to constitutional review.

Supplementary information:

One judge issued a dissenting opinion.

Cross-references:

The Court has previously ruled on what constitutes organic legislation. This is now a matter of established case-law, exemplified by Decision no. 2 of 05.01.1995, published in the *Monitorul Oficial al României* (Official Gazette), Part I.

Languages:

Romanian.

Identification: ROM-2000-1-004

a) Romania / **b)** Constitutional Court / **c)** / **d)** 20.07.1999 / **e)** 114/1999 / **f)** Decision on the constitutionality of the law approving emergency Order no. 36/1997 amending and supplementing the Education Act, no. 84/1995 / **g)** *Monitorul Oficial al României* (Official Gazette), no. 370/03.08.1999 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.
2.2.1.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.
3.17 **General Principles** – General interest.
4.3.1 **Institutions** – Languages – Official language(s).
4.6.2 **Institutions** – Executive bodies – Powers.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
4.18 **Institutions** – State of emergency and emergency powers.
5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.
5.3.43 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Emergency order / Exceptional case, objective character / Education, higher / Language, education.

Headnotes:

The provisions of the decision on the constitutionality of the law approving emergency Order no. 36/1997 amending and supplementing the Education Act, no. 84/1995, do not breach the terms of Article 114.4 of the Constitution, according to which emergency orders may be enacted only in exceptional cases and with due regard for parliament's constitutional powers as described at Article 58 of the Constitution.

Section 123 of the Education Act, no. 84/1995, which provides for the possibility of teaching certain higher education courses in national minority languages and establishing multicultural higher education colleges, is constitutional. The provisions of this section are intended to guarantee equality between citizens from national minorities and ethnic Romanians by ensuring the existence of educational establishments suited to their needs.

Summary:

A group of 86 members of parliament submitted to the Constitutional Court an exception of unconstitutionality in respect of the law approving emergency Order no. 36/1997 amending and supplementing Act no. 84/1995.

It was argued in support of unconstitutionality that the provisions of Article 114.4 of the Constitution were not respected when the emergency order was enacted. These provisions specify that legislation of this sort may be enacted only in exceptional cases. Reference was made to the Constitutional Court's practice in such matters, according to which the exceptional circumstances cited to support an emergency order's constitutional legitimacy are justified "by the urgent need to resolve a situation which, by virtue of its exceptional nature, requires the adoption of immediate solutions in order to avoid serious prejudice to the public interest". In the case in question, these requirements were not met. It was also argued that Article 123 of the Education Act was unconstitutional in that setting up multicultural higher education colleges on demand in which the languages of instruction would be determined by reference to the Act, thereby making it possible to exclude the use of Romanian, could not guarantee that Romanian would be present as a language of instruction. This amounted to non-respect for Article 6 of the Constitution (on the right to identity) and Article 13 of the Constitution (on the official language of Romania).

Furthermore it was argued that the legislative provisions at issue also violated the recommenda-

tions of the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities, that the opportunity for instruction and education in a person's mother tongue be guaranteed without prejudice to learning or teaching in the official language. For this reason, Article 123 exceeded "both the provisions of the Constitution and recommendations made at European level in this matter".

With regard to the allegation of violation of the provisions of Article 114.4 of the Constitution, which reads: "In exceptional cases, the government can adopt emergency orders. They will go into effect only after being sent to parliament for approval. If parliament is not in session, it will be convened on a mandatory basis", the Court held that emergency orders must fulfil two conditions. They must be enacted "in exceptional cases" and they must be urgently needed. Since the Constitution gives no explicit definition of "exceptional cases", the Constitutional Court ruled in its Decision no. 65 of 20 June 1995 that the term refers to situations which are not expressly envisaged by the law. Account being taken of such extreme situations, the government could justifiably enact emergency orders, pursuant to Article 114.4 of the Constitution, on grounds of public interest where the unusual and excessive nature of exceptional cases required the immediate adoption of solutions to avoid serious prejudice to that interest. In its Decision no. 83 of 19 May 1998 (*Bulletin* 1998/2 [ROM-1998-2-005]), the Court stressed the objective character of exceptional cases, in the sense that their existence was dependent not on government intent but on the need for or the presence of certain circumstances justifying their identification, and that the urgent need for legislation must emerge from the note justifying an emergency order or from evidence presented by the government during parliamentary debate.

In this case, having considered the note justifying the ruling in question, the Court held that the practical situation foreseen by the proposer of the emergency order constituted an exceptional case and necessitated urgent measures which would permit the educational reforms to be adopted as soon as possible prior to implementation in September 1997. The government's purpose in enacting this ruling was to make improvements to the Education Act and bring it into line with its national programme and with the treaties and conventions to which Romania is a party, with a view to introducing and accelerating the process of educational reform.

The Constitutional Court held that the question of public interest must be assessed relative to the date on which the emergency order was enacted, not to that on which the bill for approval of the ruling was debated in parliament or that on which these debates were concluded.

The Court also held that the emergency order did not regulate the organisation of the education system in general, which, under the terms of Article 72.3.m of the Constitution, is the preserve of statutory law; it did however regulate other matters relating to the application of the programme of national educational reform – the chief of these being arrangements for improving the national education system.

The Court noted that, in the case in question, parliament had made 79 changes to the emergency order, incorporating into the Act certain provisions of a statutory law nature. It was for this reason that voting on the Act, in accordance with the provisions of Articles 74.1 and 76.2 of the Constitution, was deemed to require the same majority as that required by the Constitution for the adoption of organic laws.

The Court held that according to the emergency order, Article 123 of the Act, which provided for the possibility of teaching certain higher education courses in national minority languages and establishing multicultural higher education colleges, did not discriminate against other Romanian citizens. On the contrary, it was intended to guarantee equality between citizens from national minorities and ethnic Romanians by ensuring the existence of educational establishments suited to their needs.

The text thus complied with the principles of equality and non-discrimination in relation to other Romanian citizens, which are enshrined in Article 6.2 of the Constitution.

Article 123 prescribed the manner in which persons belonging to national minorities might exercise their right to learn and receive instruction in their mother tongue and thus also conformed to the provisions of Article 32.3 of the Constitution, which states: "The right of members of ethnic minorities to learn their mother tongue and the right to be taught in this language are guaranteed; the means of exercising these rights are stipulated by law".

It could not be concluded from the various provisions in Article 123 that there was a rule excluding the Romanian language. Anticipating the hypothetical content of future legislation establishing multicultural higher education colleges, which was the real basis for the objection as to unconstitutionality, was quite clearly not an approach that could be used in monitoring constitutionality. The Court held that the concept of languages of instruction, as used in

Article 123.1, differed from that of an official language as referred to in Article 13 of the Constitution.

The use of "languages of instruction" was limited to teaching and "instruction" activities, whether in the classroom, seminars, related scientific activities or elsewhere; other activities (such as the drafting of documents used by the teaching institution, including certificates of study and official correspondence) must be conducted in the "official language", which under the Constitution is Romanian.

With regard to the harmonisation of Article 123 with "the relevant rules at European level", the Court noted that this matter related to the monitoring of constitutionality only in so far as the provisions of Article 20 of the Constitution were concerned.

Supplementary information:

Constitutional Court Decision no. 65 of 20 June 1995 on the constitutionality of the Act giving approval for emergency Order no. 1/1995 concerning the conditions for salary increases in 1995 in autonomous state-run businesses and companies in majority state ownership was published in the Monitorul Oficial al României (Official Gazette), Part I, no. 129 of 28 June 1995.

Constitutional Court Decision no. 83 of 19 May 1998 (*Bulletin* 1998/2 [ROM-1998-2-005]) on an exception of constitutionality regarding the provisions of emergency Order no. 22/1997 amending and expanding the Local Government Act no. 69/1991 was published in the Monitorul Oficial al României, Part I, no. 211 of 8 June 1998.

Article 20 of the Constitution reads as follows:

"1. Constitutional provisions on the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration of Human Rights and with other treaties and pacts to which Romania is a party.

2. If there is disagreement between the pacts and treaties on fundamental human rights to which Romania is a party and domestic laws, then international regulations will have priority."

In this context, the Constitutional Court concluded that the content of Article 123 did not breach any provisions of the international instruments to which Romania is a party.

Since Romania has not ratified the European Charter for Regional or Minority Languages or the Framework Convention for the Protection of National Minorities, these two international instruments were not concerned by the constitutional controls mentioned in Article 20 of the Constitution. None the less, Article 123 did not exclude the use of the official language and was in compliance with these international instruments, which state that measures concerning national minority languages must not be detrimental to the assimilation and use of the official language.

Languages:

Romanian, French.

Identification: ROM-2000-1-005

a) Romania / **b)** Constitutional Court / **c)** / **d)** 05.10.1999 / **e)** 143/1999 / **f)** Decision on an objection of unconstitutionality regarding the provisions of Article 120.5 of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), no. 585/30.11.1999 / **h)**.

Keywords of the systematic thesaurus:

5.2 **Fundamental Rights** – Equality.
5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.

Keywords of the alphabetical index:

Expert opinion, need / Expert opinion, where conducted / Expert opinion, participation / Expert witness recommended by the parties.

Headnotes:

The provisions of Article 120.5 of the Code of Criminal Procedure, which stipulate that paragraphs 3 and 4 of the same article, concerning the right of each party to request that an expert witness of his choice be appointed to take part in conducting an expert appraisal, do not apply in the case of appraisals conducted under Article 119.2 of the Code of Criminal

Procedure, are unconstitutional because they do not comply with Article 24.1 of the Constitution on the right to defence counsel.

Accordingly, each party must enjoy the right in all cases to request that an expert witness of his choice be appointed to take part in conducting an expert appraisal; by law, such appraisals may be conducted in any place.

Summary:

By virtue of an interlocutory decision dated 16 March 1999, an objection of unconstitutionality was submitted to the Constitutional Court in respect of the provisions of Article 120.5 of the Code of Criminal Procedure, on the grounds that they breached Article 16 of the Constitution. In the view of the person lodging the objection, when a court decided for reasons which it had no duty to disclose that an expert police appraisal was necessary, the parties could not benefit from the rights laid down in Article 120.3 and 120.4 of the Code of Criminal Procedure. In a similar case, a different court had ruled that expert appraisals must be conducted by an authorised body, other than those specified in Article 119.2 of the Code of Criminal Procedure, on which basis the parties to the proceedings would enjoy the rights in question. According to the person lodging the objection, this amounted to a breach of the constitutional principle that citizens are equal before the law.

The Court held that Article 120.5 of the Code of Criminal Procedure did not breach Article 16 of the Constitution. The need for an expert appraisal during criminal proceedings arose from the facts of the matter, which also required that the appraisal be conducted by a forensic department, criminal science laboratory or other specialised institution. Where this was the case, the court was bound, by virtue of the provisions of Article 119.2 of the Code of Criminal Procedure, to call on the services of an institution specialising in expert appraisal, irrespective of the parties' wishes and interests. Consequently, Article 120.5 of the Code of Criminal Procedure extended to both parties, whatever their identity, the right laid down in Article 118.3 and confirmed in Article 120.3 and 120.4 to request that an expert witness of their choice take part in the appraisal.

Article 120.5 of the Code of Criminal Procedure did not breach Article 16 of the Constitution, since these provisions applied without exception to all the parties to cases in which specialised institutions conducted expert appraisals in accordance with Article 119.2 of the Code of Criminal Procedure.

However, the Constitutional Court held that Article 120.5 of the Code of Criminal Procedure did violate Article 24.1 of the Constitution, according to which, inasmuch as it was not enjoyed by the parties to a criminal trial, due process guaranteed each party's right to require that the expert witness of his choice take part in the expert appraisal, whereas by law this had to be conducted by a specialised institution.

Non-participation in an expert appraisal by the party's expert witness of choice could not be offset by the party's right, where the latter believed the appraisal to have been incompetently or incorrectly conducted, to request a subsequent explanation or completion of the expert appraisal or that a fresh appraisal be conducted.

Consequently, the Court held that Article 120.5 of the Code of Criminal Procedure was also applicable to expert appraisals under Article 119.2, since each party must have the right in all cases to require that an expert witness of his choice be appointed to take part in conducting an expert appraisal; by law, such appraisals could be conducted in any place.

Languages:

Romanian.

Identification: ROM-2000-1-006

a) Romania / **b)** Constitutional Court / **c)** / **d)** 19.10.1999 / **e)** 160/1999 / **f)** Decision on an objection of unconstitutionality concerning the provisions of the final clause of Article 136.1 of the Employment Code, adopted under Act no. 10 of 23 November 1972 / **g)** *Monitorul Oficial al României* (Official Gazette), no. 610/14.12.1999 / **h)**.

Keywords of the systematic thesaurus:

1.3.5.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law – Laws and other rules in force before the entry into force of the Constitution.
2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.

2.1.1.4.7 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Economic, Social and Cultural Rights of 1966.
2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.
2.2.1.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.
5.2.1.2.1 **Fundamental Rights** – Equality – Scope of application – Employment – In private law.
5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.

Keywords of the alphabetical index:

Compensation, limit / Employee / Contract, employment, termination, illegal / European Social Charter, revised.

Headnotes:

The provisions of the final clause of Article 136.1 of the Employment Code, according to which the compensation payable to an employee reinstated in his post following the overturning of the termination of an employment contract is calculated on the basis of the average salary paid over the course of the last three months preceding the said termination, are contrary to the principle of equality and the right to work (Articles 38.1 and 16.1 of the Constitution). Compensation has to be equal to the total amount which he would have received if he had worked.

Summary:

By an interlocutory decision of 28 April 1999, the court in Iasi referred to the Constitutional Court an objection of unconstitutionality concerning the provisions of Article 136.1 of the Employment Code. The exception was voiced in a case in which the court in Iasi rejected an application, made under the terms of Article 136 of the Employment Code, to uphold a salary deduction.

Article 136.1 of the Employment Code provided as follows: where termination of an employment contract was overruled, the employer was bound to reinstate the person unfairly dismissed in his post and pay him, for the period during which he was without remuneration, compensation calculated on the basis of the average salary paid to him during the last three months preceding the termination of this contract. The grounds for the objection indicated that it was concerned only with the final clause of Article 136.1 of the Employment Code, which described the method for calculating compensation payable to employees reinstated in their posts following the overruling of the termination of an employment contract. The Constitutional Court therefore limited its ruling to these statutory provisions.

The Court rejected the allegation of non-compliance with Article 48 of the Constitution, according to which a person who has suffered damage as a result of the violation of one of his rights by a public authority, through an administrative act or as a result of failure to have a request resolved by the legal deadline, is entitled to have the right in question recognised and the act revoked and to receive compensation for the damage. In its capacity as employer, the local council was party to the employment contract, so that its decision to terminate the contract was not an administrative act but an act under employment law.

However, the Court held that the final clause of Article 136.1 of the Employment Code, limiting the compensation payable to the employee to a figure calculated on the basis of the average salary received during the last three months preceding the illegal termination of the employment contract, was contrary to Articles 38.1 and 16.1 of the Constitution.

The first of these provisions, Article 38.1 of the Constitution, is to be found in the second part of the Constitution (entitled “Fundamental rights, freedoms and duties”) and states that the right to work cannot be restricted; Article 16.1 of the Constitution enshrines citizens’ equality before the law and public authorities, without privilege or discrimination.

At the same time, by virtue of Articles 11.1 and 20.1 of the Constitution, the Court held that the provisions of Articles 6.1 and 7 of the International Covenant on Economic, Social and Cultural Rights, which Romania ratified by Decree no. 212/1974, were also violated. The same was true of Article 1.2 of the revised European Social Charter, which was adopted in Strasbourg on 3 May 1996 and ratified by Romania in Act no. 74/1999.

Since the main purpose of exercising the right to work was to receive remuneration, each employee had the right, for the period during which he was prevented by an unlawful measure from performing the duties prescribed in the employment contract and, consequently, from drawing the salary payable for the work which he would have done, to compensation equal to the total amount which he would have received if he had worked.

Under Article 11.1 of the Constitution, the Romanian State pledges to fulfil, to the letter and in good faith, its obligations under the treaties to which it is a party.

Article 20.1 of the Constitution states that constitutional provisions on citizens' rights and freedoms shall be interpreted and applied in accordance with the Universal Declaration of Human Rights and with other treaties and pacts to which Romania is a party.

The Court held that, in order to guarantee respect for the principle laid down in Article 16.1 of the Constitution, it was essential to enshrine non-discrimination in law. This would entail implementation of the general rule contained in Article 111.1 of the Employment Code, which specifies that the employer is bound by law to pay compensation to any person who, through the employer's fault, has suffered loss while performing his duties at work or in relation thereto.

Furthermore, with regard to the unconstitutionality of the final clause of Article 136.1 of the Employment Code, which was adopted under Act no. 10 of 23 November 1972 – that is, before the Constitution was adopted – the Court held that the provisions of Article 150.1 of the Constitution, according to which laws and all other normative acts remain in force as long as they are not in conflict with the Constitution, should be interpreted as signifying that the aforementioned statutory provisions were no longer in force.

Supplementary information:

Under Article 11.1 of the Constitution, the Romanian State pledges to fulfil, to the letter and in good faith, its obligations under the treaties to which it is a party. Article 20.1 of the Constitution states that constitutional provisions on citizens' rights and freedoms shall be interpreted and applied in accordance with the Universal Declaration of Human Rights and with other treaties and pacts to which Romania is a party.

Article 6.1 of the International Covenant on Economic, Social and Cultural Rights, which the United Nations General Assembly adopted on 16 December 1966, states that the States Parties to the Covenant recognise the right to work, which includes the right of all to the opportunity to gain their living by work which they freely choose or accept, and will take appropriate steps to safeguard this right. Under Article 7 of the same international instrument, the States Parties recognise the right of all to the enjoyment of just conditions of work.

Languages:

Romanian.

Identification: ROM-2000-1-007

a) Romania / **b)** Constitutional Court / **c)** / **d)** 28.10.1999 / **e)** 168/1999 / **f)** Decision on the constitutionality of Sections 3.1, first sentence, 3.2.c and 23 of Decree no. 387/1977 approving the statute on the organisation and functioning of tenants' associations / **g)** *Monitorul Oficial al României* (Official Gazette), no. 85/24.02.2000 / **h)**.

Keywords of the systematic thesaurus:

1.3.5.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law – Laws and other rules in force before the entry into force of the Constitution.
2.1.1.4.2 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Universal Declaration of Human Rights of 1948.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.
3.17 **General Principles** – General interest.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Association, organisation, special forms / Association, contribution quota, joint expenses.

Headnotes:

The fact that they have been established by law, in the instant case by Decree no. 387/1977 approving the Statute on the organisation and functioning of tenants' associations, to ensure the achievement of a goal in the public interest, in this case the proper management of buildings divided into flats, does not make the bodies concerned associations within the meaning of Article 11 ECHR and does not breach

Article 37 of the Constitution, enshrining freedom of association as a fundamental social and political right.

Summary:

The Constitutional Court was asked to rule on the constitutionality of Sections 3.1, first sentence, 3.2.c and 23 of Decree no. 387/1977 approving the Statute on the organisation and functioning of tenants' associations, in a civil case concerned with tenants' obligation to pay certain sums of money required by their tenants' associations. In the grounds for the appeal, it was argued that the following provisions were in breach of Article 37 of the Constitution, on the right of association: the first sentence of Section 3.1, which stipulated that holders of tenancy contracts were automatically members of the relevant tenants' association, and Section 23, according to which in carrying out their responsibilities tenants' associations were advised, supported and monitored by the committees and executive offices of their local councils. It was also argued that Section 3.2.c, according to which members of tenants' associations were entitled to receive explanations about how the contributions to shared expenses were apportioned, a decision that could not be challenged, and if the challenge was rejected could be raised in the general assembly of the tenants' association, breached Article 21 of the Constitution, concerning free access to justice.

Article 37 of the Constitution made citizens' freedom to associate in political parties and formations, trade unions and other forms of organisation, to enable them to take part in a range of political, social, cultural and other activities, a fundamental social and political right.

The Court found that under Article 20.1 of the Constitution, provisions concerning citizens' rights and liberties were to be interpreted and enforced in conformity with the Universal Declaration of Human Rights, and with covenants and other treaties to which Romania was a party, which included the Convention for the Protection of Human Rights and Fundamental Freedoms. Under Article 11 ECHR, everyone had the right to freedom of peaceful assembly and to freedom of association with others and no restrictions could be placed on the exercise of these rights other than such as were prescribed by law.

With regard to the areas covered by Article 11 ECHR, in its 1981 judgment in the *Le Compte, Van Leuven and De Meyere v. Belgium* case (*Special Bulletin ECHR* [ECH-1981-S-001], the European Court of Human Rights had found that a Belgian medical organisation established by law did not constitute an association within the terms of Article 11 ECHR, since the organisation had a public law character whose legal status and specific responsibilities meant that it carried out activities in the public interest.

The Constitutional Court ruled that in certain situations parliament could establish a special form of association designed to protect general interests which did not fall within the ambit of freedom of association, as defined by Article 11 ECHR and Article 37 of the Constitution.

Mutatis mutandis, the tenants' associations referred to in Decree no. 387/1977 had been legally established, in the general interest, that of the proper management of buildings containing a number of flats. In the absence of such associations, the legitimate rights and interests of persons living in the buildings could be adversely affected by misunderstandings or disputes.

Turning to Article 3.2.c, the Court did not accept that there had been a breach of Article 21 of the Constitution, concerned with free access to justice, because under Section 7 of Decree no. 387/1977 the parties concerned could ask the courts to review the legality of any decision of a tenants' general assembly concerning the apportionment of contributions to shared expenses.

The Court found that Section 23 of Decree no. 387/1977 had no relevance to the case as it bore no relationship to the right of association enshrined in Article 37 of the Constitution.

These provisions were in any case no longer relevant, in view of the responsibilities granted to local authorities under the Local Public Services Act (no. 69/1991).

Languages:

Romanian.

Identification: ROM-2000-1-008

a) Romania / **b)** Constitutional Court / **c)** / **d)** 23.11.1999 / **e)** 199/1999 / **f)** Decision concerning the constitutionality of Sections 6 and 10 of the Organisa-

tion and Conduct of Public Meetings Act (no. 60/1991) / **g)** *Monitorul Oficial al României* (Official Gazette), no. 76/21.02.2000 / **h)**.

Keywords of the systematic thesaurus:

1.3.5.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law – Laws and other rules in force before the entry into force of the Constitution.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
2.2.1.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and constitutions.
3.18 **General Principles** – Margin of appreciation.
3.19 **General Principles** – Reasonableness.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Legislation, temporal conflict / Legal demonstration, prior authorisation, peaceful conduct / Public order.

Headnotes:

The legal requirement to seek approval to organise and conduct a public meeting is not unconstitutional. Freedom of assembly may lawfully be subject to limits and restrictions, to protect citizens' constitutional rights and freedoms.

Summary:

The Constitutional Court was asked to rule on the constitutionality of Sections 6 and 10 of the Organisation and Conduct of Public Meetings Act (no. 60/1991), on the grounds that they were in breach of Article 36 of the Constitution, on freedom of assembly, and Article 150 of the Constitution, on temporal conflict of laws.

The contested sections are as follows:

> Section 6: The organisation of public meetings shall be declared to the municipality or other local authority where the meeting is to be held.
>
> Section 10: After consultation with the local police, the local authority may prohibit the holding of the public meeting, if it has information that the conduct of the meeting would lead to a breach of Section 2 or if there are major construction or other public works at the location or on the route where the meeting is scheduled to take place.

The Constitutional Court found that Article 36 of the Constitution had to be taken in conjunction with Article 49 of the Constitution, since the exercise of freedom of assembly could be subject to certain legal restrictions and conditions, to ensure that citizens' constitutional rights and freedoms and their interests, and implicitly public order and national security, were not threatened.

In the context of Articles 11 and 20 of the Constitution, the Court noted that under Article 11 ECHR the right of assembly could be subject to certain restrictions which were prescribed by law and were necessary in a democratic society for the prevention of disorder, for the protection of morals or for the protection of the rights and freedoms of others. In this context, the European Court of Human Rights had ruled, in the cases of *Plattform Ärzte für das Leben v. Austria*, 1985, and *Rassemblement jurassien v. Switzerland*, 1979, that Article 11 ECHR allowed each state to adopt reasonable and appropriate measures to ensure the peaceful conduct of lawful demonstrations of its citizens, and that for gatherings taking place on the public highway, the requirement to seek prior authorisation was not unreasonable, since this would enable the authorities to ensure respect for public order and take the necessary measures to ensure that freedom to demonstrate was fully respected.

The Court found that since the contested provisions did not breach Article 36 of the Constitution, neither were they affected by Article 150.1, according to which laws and all other forms of legislation remained in force so long as they were compatible with the provisions of the Constitution.

Languages:

Romanian.

Identification: ROM-2000-1-009

a) Romania / **b)** Constitutional Court / **c)** / **d)** 29.11.1999 / **e)** 203/1999 / **f)** Decision on an objection of unconstitutionality concerning the provisions of Section 2.f of the Access to Personal Records and Disclosure of Membership of the Securitate as a Political Police Force Act / **g)** *Monitorul Oficial al României* (Official Gazette), no. 603/09.12.1999 / **h)**.

Keywords of the systematic thesaurus:

1.1.4.2 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.
1.3 **Constitutional Justice** – Jurisdiction.
2.1.1.1.1 **Sources of Constitutional Law** – Categories – Written rules – National rules – Constitution.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.3 **Sources of Constitutional Law** – Categories – Case-law – Foreign case-law.
2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.
2.2.1.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and constitutions.
3.15 **General Principles** – Proportionality.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.7.7 **Institutions** – Courts and tribunals – Supreme court.
4.11.3 **Institutions** – Armed forces, police forces and secret services – Secret services.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Supreme Court of Justice / Securitate / Disclosure, access to files.

Headnotes:

The fact that secret service operatives are exempt from application of the provisions of Article 2.f of the Access to Personal Records and Disclosure of Membership of the Securitate as a Political Police Force Act does not conflict with the provisions of Article 31 of the Constitution, on the right to information, or those of Article 49.1 of the Constitution, on the exercise of certain rights and freedoms.

Summary:

The Supreme Court of Justice referred to the Constitutional Court an objection of unconstitutionality concerning the Access to Personal Records and Disclosure of Membership of the Securitate as a Political Police Force Act. The grounds included the argument that the provisions of the Act in question, which imposed restrictions concerning persons in respect of whom it was possible to request information relating to their capacity as Securitate agents, was in breach of the provisions of Article 31.1 of the Constitution on the non-restriction of a person's right of access to any information of public interest. The alleged breach lay in the listing of high-ranking positions and offices to which the provisions of the Act were applicable, namely, the office of President of Romania, member of parliament, senator or government member and senior ranks, directorships and executive posts in all public authorities, government departments, courts, non-governmental organisations, unions, professional associations and the like. Operational posts in the intelligence services were excluded. This omission was seen as restricting the body of persons in respect of whom it was possible to obtain information, since it excluded secret service operatives, some of whom had been members of the political police responsible for infringements of citizens' rights and freedoms. This was therefore contrary to Article 31 of the Constitution, on the right to information.

It was argued in substance that the Act was unconstitutional with the exception of the provision whereby information could only be requested concerning directors and their deputies in the Romanian foreign intelligence, defence and security and special telecommunications departments who had worked as agents or informants for the Securitate. Implicitly, therefore, an exception was made for "other persons working in the operational divisions of these departments".

Unconstitutionality was alleged in respect of the provisions of Article 2.f of the Act, which provided that the right of access to information of public interest was guaranteed by entitling every Romanian citizen domiciled in the country or abroad, as well as the print and audiovisual media, political parties, legally established NGOs and public authorities and institutions to seek and obtain information concerning the membership as agents or informants of the Securitate political police of persons holding or standing for election or appointment to the following senior positions and offices: directorships and deputy directorships in the Romanian foreign intelligence, defence and security and special telecommunications departments. It was for this reason that the Court

dealt only with the constitutionality of these statutory provisions.

The Court held that Article 2.f of the Act did not conflict with the provisions of Article 31.1 of the Constitution, since it was not the provision of information concerning the capacity of agents and informants of the former Securitate that must be considered a potential threat to national security, but the disclosure of the identities of officers in the present intelligence services.

Accordingly, the provisions of Article 31.1 of the Constitution must be interpreted by reference to Article 31.3 of the Constitution.

The Court held that, in the light of the provisions of Article 20.1 of the Constitution, Article 31.3 of the Constitution conformed to Article 10.2 ECHR on freedom of expression and freedom to hold opinions and to receive and impart information.

It noted that, in accordance with Article 49.1 of the Constitution, the exercise of certain rights or freedoms could be restricted only by law and only if this was necessary, among other things, to "defend national security". Under Article 49.1, the restriction must be in proportion to the situation which caused it and could not impinge upon the existence of the right or freedom concerned.

With regard to these constitutional provisions, the Act in question did not impinge on the existence of the right of access to information of public interest but merely restricted the exercise of this right, and in a way that was proportional to the situation which caused it. This proportionality was a consequence of the fact that obtaining information on employees of the present intelligence services was excluded only in situations in which this might be damaging. Other clauses of the Act, such as Article 1.2 and 1.3 and Article 17.2, did however raise the possibility, in other circumstances, of publicly disclosing what position, if any, employees of the present intelligence services had previously held as Securitate agents or informants.

The Court was not competent to decide whether the Act was of such a nature as to achieve the purpose for which it had been proposed and adopted. Decisions on the substance of legislation and its suitability for adoption were the sole preserve of parliament, within its constitutional limits.

In order to hand down this decision, the Court also studied other legislation relating to similar matters, including the Act on secret documents from the former German Democratic Republic, which was adopted in Germany on 20 December 1991, Act no. XXIII of 1994 on the investigation of persons holding certain senior positions and on the "Historical Office" *(Történeti Hivatal)*, adopted by the Republic of Hungary, and the Act on access to documents of the former security services, which was published in the Official Gazette of the Republic of Bulgaria no. 63 of 6 August 1997 (together with Bulgarian Constitutional Court Judgment no. 10 of 22 September 1997). None of these laws regulates the provision of information, as matters of public interest, concerning agents or informants of the former secret service or political police bodies. What is more, they contain provisions to safeguard the confidentiality of data which could be damaging to national security.

Supplementary information:

Article 31.1 of the Constitution states: "A person's right of access to any information of public interest cannot be restricted".

Article 20.1 of the Constitution, on international human rights treaties, states that constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights and with other treaties and covenants to which Romania is a party.

Article 10.2 ECHR states: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

Article 1.2 of the Act on access to files and disclosure of membership of the Securitate as a political police force specifies that persons who are the subject of a file which reveals that they were pursued by the Securitate have the right on request to be told the identities of the Securitate agents and informants who provided information in the file. According to Article 1.3, where these persons are deceased their surviving relatives, up to and including their cousins twice removed, enjoy the same rights unless the deceased disposed otherwise.

Article 17.2 of the same Act provides that the National Council for the Study of the Securitate Archives shall publish in Part III of the *Monitorul Oficial al României*

(Official Gazette) details of the identities, including code names and roles, of Securitate officers and junior officers, whether active or covert, who were involved in political police activities.

Languages:

Romanian.

Russia
Constitutional Court

Statistical data
1 September 1999 – 30 April 2000

Total number of decisions: 14

Types of decisions:

- Rulings: 14
- Opinions: 0

Categories of cases:

- Interpretation of the Constitution: 1
- Conformity with the Constitution of acts of State bodies: 12
- Conformity with the Constitution of international treaties: 0
- Conflicts of jurisdiction: 1
- Observance of a prescribed procedure for charging the President with high treason or other grave offence: 0

Types of claim:

- Claims by State bodies: 3
- Individual complaints: 8
- Referral by a court: 5
  (Some claims were joined)

Important decisions

Identification: RUS-2000-1-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 21.10.1999 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 02.11.1999 / **h)**.

Keywords of the systematic thesaurus:

4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

University, state / University, private / Student / Military service, universal / Military service, postponement / Opportunity, equality.

Headnotes:

The provision under which citizens who are pursuing full-time education in private higher educational institutions which have not been licensed by the state are not entitled to postponement of the call-up order to military service for the duration of their studies is constitutional.

Summary:

The district court in the town of Omsk heard a case concerning the appeal by several students from the Law and Economics Institute (a private higher educational institution, not licensed by the state) against the refusal by the district recruitment commission to allow them to postpone the call-up order to military service for the duration of their studies. The refusal was based on the provision in the federal Law on the obligation to perform military service and on military service, under which citizens who are pursuing full-time studies in state or municipal educational institutions or state-licensed institutions for the purpose of receiving vocational training are entitled to postponement of military service. Having concluded that this norm contravened several constitutional provisions, the district court requested the Constitutional Court to examine its conformity with the Constitution.

The Constitutional Court noted firstly that, in accordance with Article 59 of the Constitution, defence of the homeland is the duty and obligation of the citizen. Performance of military service through conscription is envisaged as the principal means of accomplishing this constitutional duty. Article 24 of the contested law establishes the categories of persons who may be granted permission to postpone military service: within the age limits of 18 to 27 years, the date for conscription may be provisionally postponed. Under the contested provision, citizens pursuing their studies in higher educational institutions that are not state-licensed or citizens who are not granted permission to postpone their military service perform this constitutional duty prior to completion of their studies, and citizens who are pursuing full-time education in state-licensed higher educational institutions perform their military service subsequent to completion of their studies.

Asserting each individual's right to education, the Constitution states that everyone has the right, free of charge and on a competitive basis, to receive higher education in a state or municipal educational institution. Citizens may also receive higher vocational training in private higher educational institutions, in which studies are generally fee-paying. Under the legislation, citizens enjoy independence and freedom of choice with regard to the method of pursuing higher education, the educational institution and the course of studies selected.

In applying the constitutional provisions, the state lays down federal standards in the field of education.

The state licence, which is granted to private higher educational institutions and is conditional on the results of an evaluation, confirms that the content, level and quality of training meet the requirements of the above-mentioned standards. Possession of a state licence has several legal consequences; *inter alia*, the private higher educational institution is entitled to issue state diplomas and persons pursuing full-time studies in it are permitted to postpone conscription to military service.

In fulfilling the simultaneous tasks of training specialists with higher vocational education and ensuring recruitment to the armed forces through conscription, parliament is entitled to establish different procedures for performing the duty of military service for those citizens who are pursuing their studies in higher educational institutions. At the same time, students in higher educational institutions that are not state-licensed maintain the option of continuing their studies once they have accomplished their military service. In this way the constitutional right of all citizens to receive education is reconciled with fulfilment of their constitutional duty to perform military service albeit through following different procedures established by law. Thus, the constitutional principles of equality before the law and the equality of rights and freedoms of individuals and citizens are not violated. The contested provision is binding on all citizens to which it applies, and consequently it does not contravene the Constitution. It presupposes equality of opportunity, including in the choice of higher educational institution. The various legal consequences arising from a free choice of this nature cannot be considered to be a violation of constitutional guarantees.

The Constitutional Court found the provision concerned to be constitutional.

Languages:

Russian.

Identification: RUS-2000-1-002

a) Russia / **b)** Constitutional Court / **c)** / **d)** 11.11.1999 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 18.11.1999 / **h)**.

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.4.1.2 **Institutions** – Head of State – Powers – Relations with legislative bodies.
4.5.2.1 **Institutions** – Legislative bodies – Powers – Delegation to another legislative body.
4.5.3.3.1 **Institutions** – Legislative bodies – Composition – Term of office of the legislative body – Duration.
4.5.3.4.3 **Institutions** – Legislative bodies – Composition – Term of office of members – End.
4.5.6.4 **Institutions** – Legislative bodies – Law-making procedure – Relations between houses.
4.5.7 **Institutions** – Legislative bodies – Relations with the Head of State.
4.5.8.2 **Institutions** – Legislative bodies – Relations with the executive bodies – Questions of confidence.
4.5.8.3 **Institutions** – Legislative bodies – Relations with the executive bodies – Motion of censure.

Keywords of the alphabetical index:

State Duma, dissolution.

Headnotes:

The constitutional purpose of dissolving the State Duma as a constitutional legal means of settling possible disputes between the President and the State Duma during formation of a government, and between the government and the State Duma in the event of no confidence in the government or of a vote of no confidence in the government is to ensure that a government is formed in good time or that a government's activities continue, with the President's support, despite the lack of confidence expressed by the State Duma.

The constitutional legal consequences of dissolution of the State Duma are that, subsequent to its dissolution, the State Duma cannot adopt laws or exercise other powers in the meetings of the chamber.

These constitutional legal consequences tie in with the purpose of dissolving the State Duma and reflect the fact that the dispute from which they arise must be settled by the election of new members to the State Duma, on the basis of free elections as the supreme direct expression of the people's power. Consequently, legal acts adopted by the previous State Duma subsequent to the decision regarding its dissolution and the calling of fresh elections would not be legitimate. This is where the constitutional consequences of dissolving the State Duma differ from the consequences arising from the expiry of the time limit on the State Duma's powers. Parliament is entitled to decide on other consequences arising from dissolution of the State Duma which have no immediate response in the Constitution of the Russian Federation, including those concerning the status of deputies.

Under the system of checks and counter-balances established by the Constitution, no body of state governance is entitled to exercise or even less to appropriate constitutional powers that do not belong to it. In the event of dissolution of the State Duma and the calling of new elections, the State Duma's constitutional powers may not be exercised by the President or by the Federation Council, the other chamber in the Federal Assembly.

The preventive import of the above constitutional legal consequences of possible dissolution of the State Duma lies in the fact that they are intended to caution the President and the State Duma against unjustified conflicts that would prevent the harmonious functioning of the bodies of state governance and co-operation between them.

It follows that dissolution of the State Duma by the President entails cessation of the State Duma's exercise of the constitutionally established powers pertaining to the adoption of laws and of its other constitutional powers, exercised by the adoption of decisions during sittings of the chamber, from the point that a date is set for fresh elections. Accordingly, exercise by the President, the Federation Council or other state authorities of the State Duma's powers cited above is ruled out.

Summary:

At the request of the State Duma, the Constitutional Court provided a general binding interpretation of several provisions in the Constitution concerning dissolution of the State Duma.

In accordance with Article 109.1 of the Constitution, the State Duma may be dissolved by the President of the Russian Federation in the cases stipulated in

Articles 111 and 117 of the Constitution, namely: after the State Duma's third rejection of candidates for Chairman of the Government of the Russian Federation nominated by the President; if the State Duma twice expresses no-confidence in the government during a period of three months and the President does not announce the resignation of the government; in the event of a no-confidence vote by the State Duma concerning the government, where the President does not decide on resignation of the government.

The State Duma believes that there is uncertainty in determining the moment at which the functions of the State Duma are terminated in the event of dissolution. In the applicant's opinion, the State Duma's functions terminate in such cases at the moment when the new State Duma begins its work. To support this view, the applicant refers to the Constitutional provisions on the Federal Assembly as a permanently functioning body (Article 99.1 of the Constitution) and the provision stating that the powers of the previous State Duma shall cease from the start of the work of the new State Duma (Article 99.4 of the Constitution).

Languages:

Russian.

Identification: RUS-2000-1-003

a) Russia / **b)** Constitutional Court / **c)** / **d)** 01.12.1999 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 16.12.1999 / **h)**.

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.4.1.2 **Institutions** – Head of State – Powers – Relations with legislative bodies.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.7.4.3 **Institutions** – Courts and tribunals – Organisation – Prosecutors / State counsel.

Keywords of the alphabetical index:

Prosecutor’s office, responsibility / Prosecutor’s office, criminal accusation / Prosecutor’s office, temporary suspension / Parliament, powers, nature.

Headnotes:

The Federation Council (upper chamber of parliament) does not have jurisdiction to issue a decree on the dismissal of the Prosecutor General from his functions during the investigation period of criminal proceedings brought against him. Under the Constitution and in the absence of another legislative norm, such decrees are part of the President's duties.

Summary:

By Decree of 2 April 1999, the Prosecutor General was dismissed from his post for the duration of the investigation period in the criminal proceedings brought against him.

In the opinion of the Federation Council, which requested an opinion from the Constitutional Court in connection with a conflict of jurisdiction, this kind of dismissal may take place only in accordance with the arrangements set out in the Constitution for the appointment and dismissal from post of the Prosecutor General: in other words, it must be carried out by the Federation Council on a proposal from the President, and consequently the President had not been entitled to issue the above-mentioned decree.

The Constitutional Court noted firstly that, under Article 129 of the Constitution, the *Prokuratura* (the Prosecutor's Office) is a single centralised system in which lower Prosecutors are subordinated to higher Prosecutors and the Prosecutor General. In criminal proceedings, the Prosecutor General is responsible for the work of the Prosecutor's Office and of the other bodies for preliminary inquiry and, in this role, is empowered to give instructions to these bodies and to take procedural decisions on criminal cases before them. It is for precisely this reason that, should criminal proceedings be initiated against him, the Prosecutor General is relieved of his functions for the duration of the investigation, as provided for in the federal Law on the *Prokuratura*.

The dismissal of the Prosecutor General from his post for the duration of the investigation period is an inevitable consequence of the opening of criminal proceedings against him. However, a decree to this effect must be adopted in each case. Given the Prosecutor General's constitutional status, his dismissal must come under the jurisdiction of another

federal state authority that is not part of the *Prokuratura* system.

In accordance with the constitutional status of the Federation Council, the dismissal of the Prosecutor General does not come directly under its jurisdiction as a chamber of parliament. As a collegial representative body, the Federation Council examines questions which presuppose legal and political evaluation and consequently the possibility of choosing and of justifying the appropriateness of the possible solutions. Removal of the Prosecutor General from his post for the duration of an on-going investigation is made inevitable by the very fact of criminal proceedings being opened. In this case, any evaluation of the reason for his dismissal is excluded: accordingly, the Federation Council, as a representative collegial body, cannot resolve questions of this nature.

As head of state, the President is responsible for the harmonious functioning of the bodies of state governance. By virtue of his constitutional status, he is obliged to adopt legal decrees to guarantee application of the Constitution and laws in all cases where no other mechanisms for this purpose exist.

Since the obligatory nature of the Prosecutor General's dismissal from his post for the investigation period of the criminal proceedings initiated against him results from the Constitution and the federal Law on the *Prokuratura*, the President is not only entitled but obliged (in the absence of any other regulations) to issue a decree on the provisional removal of the Prosecutor General from his post.

At the same time, parliament's right to introduce other mechanisms for applying possible criminal proceedings against the Prosecutor General is not ruled out.

Languages:

Russian.

Identification: RUS-2000-1-004

a) Russia / **b)** Constitutional Court / **c)** / **d)** 27.12.1999 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 26.01.2000 / **h)**.

Keywords of the systematic thesaurus:

4.6.10.1 **Institutions** – Executive bodies – Sectoral decentralisation – Universities.
5.2.2.7 **Fundamental Rights** – Equality – Criteria of distinction – Age.
5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.
5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

University, chair / Retirement, age / University, autonomy / ILO Convention no. 111.

Headnotes:

The provisions of the federal law of 22 August 1996, setting out age limits for persons holding chairs in state and municipal institutions of higher education, do not comply with the constitutional principle of equality and freedom of employment.

Summary:

Following complaints by several citizens and a request from the district court of the city of Kazan, the Constitutional Court examined whether several provisions in the federal Law on advanced training and vocational training subsequent to higher education were constitutional.

Under this law, the post of chair in state and municipal institutions of higher education may be occupied until the age of 65 years. However, on a proposal from the higher educational institution's academic council, the principal may extend the age limit for holding the chair until the age of 70.

The Constitutional Court noted that, in line with the meaning of the contested provisions, established by case-law, the mere fact that individuals have reached the fixed age limit is sufficient reason for them to have to leave the post concerned, and does not require that any other circumstances be taken into account, including the results of the post-holder's activities in this function, their academic qualifications, state of health or professional and personal qualities.

At the same time, the Constitution establishes freedom of employment, and the right of each person to make free use of his or her abilities for work and to choose a type of activity and occupation.

These constitutional provisions do not confer a right on individuals to hold a specific post or a duty on

employers to give individuals a specific job or particular post. In the field of professional relations, freedom of work is primarily reflected in the contractual nature of the employment. It is through the framework of an employment contract, based on an agreement between the citizen and the employer, that the question of employment in a specific profession, trade or post, or with a specific qualification, is regulated. At the same time, freedom of work presupposes that everyone is guaranteed the possibility of establishing professional relations by making use of his or her abilities for work.

The constitutional principle of equality does not mean that parliament cannot introduce specific regulations concerning the conditions of recruitment to certain posts, where such distinctions are objectively argued and justified and correspond to constitutionally important objectives and requirements. In accordance with the 1958 ILO Convention no. 111, distinctions, exceptions or preferences in the area of employment and occupation that are based on the inherent requirements of a particular job are not deemed to be discrimination.

Accordingly, setting an age limit for holding certain posts is permissible if this limit is determined by the particular features and nature of the work to be accomplished; at the same time, respect for the constitutional principle of equality must be guaranteed, ruling out the unjustified statement of different requirements with regard to persons performing identical functions. Otherwise, the setting of an age limit would imply an age-based discrimination.

Having established the age limit for holding the post of chair, parliament did not simultaneously set out age limits for holding other teaching and professorial posts. Consequently, attainment of 65 years does not in itself prevent the effective exercise of this kind of activity.

The position of chair in state higher educational institutions is not classed by the legislator as an official civil service post. Parliament has not associated guarantees and any additional benefits to this post in line with those granted to state employees, intended to compensate for the prejudice caused to the principle of equality by the introduction of certain restrictions on their rights and freedoms.

Parliament is entitled to set out appropriate measures for the purpose of renewing management staff in higher educational institutions and recruiting the most qualified and promising research and teaching staff to these posts. The principle of the autonomy of higher educational institutions is not directly enshrined in the Constitution, but it is fundamental to the operations of higher educational institutions and is one of the legal principles on which the state's education policy is based.

Assertion of the autonomy of higher educational institutions presupposes that, when resolving the issue of whether a person aged over 65 may hold the position of chair, the opinion of the management of institutions and their collegial bodies must be the determining factor. The existing legal mechanism whereby the higher educational institution's academic council elects holders of the position of chair by secret ballot provides a democratic means of resolving this question. Fixing the age criterion as a complement to this arrangement is an unjustified intrusion by the state into contractual relations with regard to employment, entailing an illegal limitation on freedom in employment contracts and on autonomy.

The Constitutional Court found that the contested provision was unconstitutional.

Languages:

Russian.

Identification: RUS-2000-1-005

a) Russia / **b)** Constitutional Court / **c)** / **d)** 18.02.2000 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 01.03.2000 / **h)**.

Keywords of the systematic thesaurus:

3.12 **General Principles** – Legality.
4.7.4.3 **Institutions** – Courts and tribunals – Organisation – Prosecutors / State counsel.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right of access to the file.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.
5.3.25 **Fundamental Rights** – Civil and political rights – Right of access to administrative documents.

Keywords of the alphabetical index:

Prosecutor's office, inquiry / Inquiry, access to files.

Headnotes:

The provision in the Law on the *Prokuratura* (Prosecutor's Office) dispensing the prosecutor and the investigating agent from the obligation to provide any explanations and to inform any person about documents concerning the *Prokuratura's* actions is unconstitutional, insofar as it results in a refusal to notify citizens about documents that directly concern their rights and freedoms and prevents judicial review of such refusals.

This provision is not in breach of the Constitution where it acts as a guarantee against unacceptable interference in the P*rokuratura'*s work, as long as the above-mentioned civil right is not violated.

Summary:

The Constitutional Court examined a citizen's complaint against the *Prokuratura'*s refusal to notify him of documents concerning checks on the lawfulness of allocating housing to him. The justification given for refusal was the provision in the federal Law on the *Prokuratura* under which the *Prosecutor* and the investigating agent are not obliged to notify any person of documents concerning the *Prokuratura*'s activities. For the same reason, the ordinary courts had not allowed the appellant's complaint.

The Constitutional Court noted that the Constitution guarantees citizens the possibility of demanding access to any information directly affecting their rights and freedoms collected by bodies of state governance and officials thereof. The guarantee is particularly relevant when their private lives, honour and dignity are concerned. The grounds for such limitations may be established by legislation only as an exception, and must be related to the content of the information. This is not taken into consideration in the contested law, which does not provide for specific grounds for limiting the above-mentioned constitutional right of citizens.

The absence of legally-enshrined grounds which would entitle the *Prokuratura*'s organs to refuse to inform citizens about monitoring documents directly affecting their rights and freedoms also rules out the possibility of verifying, through judicial review, the lawfulness of the refusal itself. Thus, there is violation not only of the constitutional right of access to information, but also of the constitutional right to legal protection.

Languages:

Russian.

Identification: RUS-2000-1-006

a) Russia / **b)** Constitutional Court / **c)** / **d)** 25.04.2000 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 11.05.2000 / **h)**.

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
3.3.1 **General Principles** – Democracy – Representative democracy.
3.15 **General Principles** – Proportionality.
4.5.3.1 **Institutions** – Legislative bodies – Composition – Election of members.
4.9.2 **Institutions** – Elections and instruments of direct democracy – Electoral system.
4.9.6.1 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Electoral rolls.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.3.39.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.
5.3.39.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Election, parliamentary, electoral association / Electoral association, federal register / Electoral association, registration / Electoral association, registration, cancellation / Election, federal list, candidates.

Headnotes:

The provision in the electoral law stating that withdrawal from the list by a candidate holding one of the first three places in the electoral association's

federal list will result in a refusal to register that list or cancellation of its registration is not constitutional.

Summary:

Examination of this case was prompted by a request from a group of members of the Federation Council (upper chamber of parliament) to verify the constitutionality of a provision in the federal Law on the election of deputies to the State Duma.

Under this provision, the Central Electoral Commission refuses to register a federal list of candidates or cancels its registration if one or several of the candidates in the first three positions on the federal list of candidates withdraws (except for cases where candidates withdraw in compelling circumstances, either because they have been disqualified, or because the candidate or one of his or her close relatives is suffering from a serious illness or persistent health problems).

The Constitutional Court noted that, in accordance with the Constitution, citizens are entitled to participate in the administration of the affairs of the state both directly and through their representatives, and to elect and to be elected to bodies of state governance. Indeed, free elections are the supreme direct expression of the people's will. Citizens' constitutional right to elect and to be elected to bodies of state governance must be exercised on the basis of equality of rights in electoral matters.

This conclusion is in line with Article 21.1 and 21.3 of the Universal Declaration of Human Rights and Article 25.b of the International Covenant on Civil and Political Rights.

In accordance with the Constitution, human and civil rights and freedoms may be restricted by the federal law only to the extent required for the protection of the fundaments of the constitutional system, morality, health, rights and lawful interests of other persons, and for ensuring the defence of the country and the security of the state. Consequently, restriction of citizens' electoral rights is acceptable only where such limitations are justified, are used to pursue constitutionally important goals and are proportional to these goals.

The right to be elected to the bodies of state governance (the passive electoral right) is, by nature, an individual rather than a collective right. The rules drawn up by parliament for registration of the electoral list of candidates should not alter the substance of this right, even where such a list is put forward by an electoral association or bloc. However, the case-law has shown that withdrawal from the electoral list implies not only that an individual is withdrawing for unavoidable circumstances, but also as a matter of choice, at the initiative of the electoral association or following a decision of the Central Electoral Commission, in connection with inaccurate information provided concerning this person, where striking out from the list represents a sanction for violation of the electoral legislation.

Thus, the possibility for the other candidates on this federal list to exercise passive electoral rights and also the possibility for citizens exercising their active electoral rights to cast their votes for candidates from a given electoral association, depend on whether the candidates who were in the first three places remain on the federal list or withdraw from it. Consequently, the legal effects cited above are linked to the restriction of citizens' electoral rights.

The principle of equal electoral rights presupposes legal equality among the candidates included in the federal list, whatever their position in the order. However, the legal consequences foreseen in the contested provision violate this principle since, in contrast to withdrawal by candidates in other positions on the list, withdrawal by a candidate in one of the first three positions results in a refusal to register the entire list of candidates or cancellation of its registration.

The system of elections to the State Duma is intended to guarantee its representative nature, based on the constitutional principles of political pluralism and a multi-party system. However, the contested legal provision makes it impossible to achieve the objective of guaranteeing the Duma's representative nature as an organ of legislative power.

In addition, by granting candidates on the federal list the right to withdraw on their own initiative from subsequent participation in the elections at any moment, the law does not link exercise of this right with obtaining agreement from the electoral association. Hence, for reasons beyond its control, the electoral association may be unfairly deprived of the possibility of participating in elections by presenting a federal list of candidates, thus illegally restricting the constitutional freedom governing associations' activities. Equally, this provision prevents withdrawal from the electoral association by candidates at the head of the list who, following a change in their convictions or a change in the pre-electoral position of the electoral association, deem their continued presence on the list impossible, resulting in a violation of the Constitution's provisions under which no one may be coerced into joining any association or into membership thereof.

Moreover, refusal to register the federal list of candidates or cancellation of its registration is described as a provision on liability. However, parliament may establish the regulations on legal liability only for violations of the electoral legislation; these must be proportional to the act to which the law refers their application, and they must not result in illegal restrictions on the rights and freedoms of citizens.

In the light of the preceding considerations, the Constitutional Court found that the contested provision was unconstitutional.

At the same time, the Court took the view that its decision did not affect the results of the elections to the State Duma which were held on 19 December 1999, and could not be used as a basis for review of those results.

Languages:

Russian.

Slovakia
Constitutional Court

Statistical data
1 January 2000 – 30 April 2000

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 2
- Decisions on the merits by the panels of the Court: 17
- Number of other decisions by the plenum: 9
- Number of other decisions by the panels: 48
- Total number of cases submitted to the Court: 930

Important decisions

Identification: SVK-2000-1-001

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 07.03.2000 / **e)** PL. ÚS 50/99 / **f)** / **g)** to be published in *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

3.3.1 **General Principles** – Democracy – Representative democracy.
3.12 **General Principles** – Legality.
4.9.3 **Institutions** – Elections and instruments of direct democracy – Constituencies.
4.9.6.3 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Candidacy.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.3.39.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Political competition.

Headnotes:

The constitutional principles of citizens' right of access to elected office and of free political competition are not respected if electoral constituency boundaries are not fixed, and numbers of seats determined, in accordance with the Local Government Elections Act.

Summary:

On 21 April 1999 the Constitutional Court received an application from two political parties (the Christian Democratic Movement and the Democratic Party) under Section 59.1 of the Constitutional Court Act, asking it to declare void the local elections held on 10 April 1999 in the municipality of Zeleneč to designate municipal representatives, and to annul the result.

The applicants claimed that the contested elections were unlawful in several respects. In particular, they argued that since the Zeleneč local authority had been improperly constituted since 21 November 1997 it had not been entitled to take a decision reducing the numbers of constituencies and seats, as a result of which half the candidates on the applicants' electoral list had not been registered and a number of them had stood down. In the applicants' view, their right to seek electoral office had not been respected.

The Constitutional Court decided first that it had to examine the constitutional and legal conditions governing the contested elections in the period between the publication in the Official Gazette of the decision by the President of the National Council of the Slovak Republic to call the elections and the official declaration of the results.

It then found that, pursuant to Decision 1/1999 of the President of the National Council of the Slovak Republic, of 4 January 1999, and Section 9.3 of the Local Government Elections Act (no. 346/90), the latest date by which the local authority of Zeleneč ought to have fixed the number of constituencies and the number of seats to be filled in the municipal elections of 10 April 1999 was 4 February 1999. The Court held here that none of the Zeleneč local authority's decisions, of 4 September 1998, 25 November 1998 and 14 December 1998, establishing (in every case) a single constituency and fixing the number of seats at 12, fulfilled this requirement because they had been taken prior to the decision by the President of the National Council. The same was true of the municipal referendum held on 28 and 29 December 1998. Moreover the referendum result was not relevant because it represented a decision by the residents of the municipality and not – as the Local Government Elections Act required – the local authority. The Court accepted, on this point, that the local authority would have been entitled to take account of the referendum result, but only in the context of taking its own decision in official session. This had not been done.

The Court therefore found that the conditions necessary for the holding of the elections had not been met. Because neither the number of constituencies nor the number of seats had been fixed, the elections could not be held in accordance with the law.

Given these failures to satisfy statutory requirements, the Court concluded that there had been a violation of the right guaranteed in Article 30.4 of the Constitution, whereby "All citizens shall have equal access to elected or public offices".

In the contested case, the access to office enjoyed by the residents of the municipality of Zeleneč should not have been restricted by the establishment of a single electoral constituency and the fixing of the number of seats to be filled at 12 – the statutory number being 16. The reduction by four seats represented an unconstitutional restriction on the access to elected office enjoyed by the residents of the municipality of Zeleneč.

The Constitutional Court also found that there had been a breach of Article 31 of the Constitution, which stipulates that: "The regulation of political rights and freedoms, and the interpretation and usage thereof shall facilitate and protect political competition in a democratic society." Here the Court recalled its previous case-law, in which it had held that it would declare elections void only if there had been a serious or repeated violation of the laws governing their preparation and conduct, such as to restrict political competition in a democratic society. In this case there had been such a violation.

The reduction in the number of seats to be filled was not the only factor that had restricted political competition in the contested case. The Court had been forced to recognise that, through the combined effect of a number of unlawful aspects, not only had political competition not been facilitated, but it had, in fact, been damaged to the extent that the applicants' candidates had withdrawn from the poll.

Taking all this into account, the Court, having decided that Articles 30.4 and 31 of the Constitution had been violated, declared the contested elections void. However, it rejected the second part of the application

because the annulment of election results can only be considered if the elections themselves are valid.

Languages:

Slovak.

Identification: SVK-2000-1-002

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 27.04.2000 / **e)** II. ÚS 9/00 / **f)** / **g)** to be published in *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
3.20 **General Principles** – Equality.
3.21 **General Principles** – Prohibition of arbitrariness.
4.9.1 **Institutions** – Elections and instruments of direct democracy – Instruments of direct democracy.
4.9.4 **Institutions** – Elections and instruments of direct democracy – Eligibility.

Keywords of the alphabetical index:

Referendum, public affairs, administration, participation / Procedure, objectivity / Expert opinion.

Headnotes:

The procedure on the basis of which a local authority decides whether the conditions have been met for holding a local referendum, under the Municipalities Act, must comply with the constitutional requirement of objectivity.

Summary:

On 23 December 1999, 14 inhabitants of the municipality of Vranov nad Topl'ou lodged an application with the Constitutional Court under Article 127 of the Constitution, claiming that the municipal authority, in a decision of 8 November 1999, had violated the basic right guaranteed them by Article 30.1 of the Constitution, whereby "Citizens shall have the right to participate in the administration of public affairs directly […]". In accordance with this Article, the applicants had signed a petition calling for part of the municipality of Vranov nad Topl'ou (Čemerné) to be separated from the rest, and asking the authority responsible to hold a local referendum on the question. In its decision, the municipal authority refused to hold a referendum because the terms of the petition failed to comply with one of three statutory requirements under the Municipalities Act – namely that the territory to be separated should not have merged with the rest of the municipality in terms of urban development. The applicants claimed, however, that all the conditions for recourse to a referendum had been met, including this one.

The Court held that one of the main tasks of a state governed by the rule of law was to ensure that its citizens' rights and fundamental freedoms could be exercised, and were protected, both in law and in practice. Accordingly, procedures before state or other public bodies must be based on the procedural guarantees necessary to afford all citizens, without discrimination, genuine (rather than merely illusory) protection of their rights and fundamental freedoms.

One of the key features of such a procedure is that it should be objective, so as to prevent unreasonableness on the part of the body taking the decision, and ensure that the facts will be assessed impartially. Where a procedure necessitates the technical evaluation of important facts (that the decision-making body is not, itself, in a position to evaluate), the objectivity of the procedure and of the decision to be taken with regard to citizens' rights and fundamental freedoms will, in principle, be secured through recourse to expert opinion and the subsequent evaluation of such opinion by the body in question. Should that body, in the end, depart from the expert's opinion, it must, in order to fulfil the requirement of objectivity, set out in its decision sufficient and pertinent grounds for so doing.

The procedure in the contested case took place before a local authority outside any administrative procedural context. It was nonetheless bound to meet the constitutional requirement of objectivity, for otherwise there would be no guarantee of the principle of legal certainty – an integral component of the rule of law – nor of the constitutional principles of citizens' equality before the law and non-discrimination in the exercise of rights. In fact, neither the Constitution nor the Municipalities Act permits any exception to this constitutional requirement, whatever the nature of the body deciding on citizens' rights and fundamental freedoms and whatever the type of procedure.

Applying these principles, the Court found firstly that the local authority in the contested case had, indeed, sought a prior expert opinion, and in that respect its decision of 8 November 1999 met the requirement of procedural objectivity. The Court further held, however, that the local authority had not properly evaluated the expert opinion.

In fact, it had had two expert opinions available to it: one dated 13 February 1997 concluding that the Čemerné section of the municipality had merged with Vranov nad Topl'ou in terms of urban development, the other dated 18 August 1999, which came to the opposite conclusion. Thus, on the contested question, the local authority had not had a sufficiently conclusive expert opinion. A body deciding on citizens' fundamental rights as provided for in Article 30.1 of the Constitution must, however, obtain unambiguous technical advice on the question to be decided in accordance with the relevant legislation. Moreover, the Court pointed out that, despite the contradiction between the two expert opinions, the local authority body had opted, without sufficient explanation, to base its decision on the earlier opinion, which did not reflect the situation pertaining immediately before the decision was taken. It had thus failed to observe the requirement of procedural objectivity.

For that reason the Court found in favour of the applicants, ruling that their right, under Article 30.1 of the Constitution, to participate in the administration of public affairs had been violated. It therefore annulled the local authority's contested decision.

Languages:

Slovak.

Slovenia
Constitutional Court

Statistical data
1 January 2000 – 30 April 2000

The Constitutional Court held 25 sessions (13 plenary and 12 in chambers) during this period. There were 354 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 371 unresolved cases in the field of human rights protection (denoted Up- in the Constitutional Court Register) from the previous year at the start of the period (1 January 2000). The Constitutional Court accepted 126 new U- and 144 new Up- cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 106 (U-) cases in the field of the protection of constitutionality and legality, in which the Plenary Court made:
  - 29 decisions and
  - 77 rulings

- 38 (U-) cases joined to the above-mentioned cases for common treatment and adjudication.

Accordingly, the total number of U- cases resolved was 144.

In the same period, the Constitutional Court resolved 160 (Up-) cases in the field of the protection of human rights and fundamental freedoms (9 decisions issued by the Plenary Court, 151 decisions issued by a Chamber of three judges).

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas the rulings of the Constitutional Court are not generally published in an official bulletin, but are handed over to the participants in the proceedings.

However, all decisions and rulings 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 1 January 1987 via the on-line STAIRS database (Slovenian and English full text versions);

- since June 1999 on CD-ROM (complete Slovenian full text versions from 1990 to 1998, combined with appropriate links to the text of the Slovenian Constitution, Slovenian Constitutional Court Act, Rules of Procedure of the Constitutional Court and the European Convention for the Protection of Human Rights and Fundamental Freedoms – Slovenian translation);

- since September 1998 in the database and/or Bulletin of the A.C.C.P.U.F. (published by the Constitutional Council of France);

- since August 1995 on the Internet (Slovenian constitutional case law of 1994 and 1995, as well as some important cases prepared for the *Bulletin on Constitutional Case-Law* of the Venice Commission from 1992 to 2000, full text in Slovenian as well as in English "http://www.sigov.si/us/eus-ds.html");

- in the CODICES database of the Venice Commission.

Important decisions

Identification: SLO-2000-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 09.03.2000 / **e)** U-I-354/96 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 31/2000; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), IX, 2000 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract).

Keywords of the systematic thesaurus:

1.6.8.2 **Constitutional Justice** – Effects – Consequences for other cases – Decided cases.
3.3.1 **General Principles** – Democracy – Representative democracy.
4.5.3.1 **Institutions** – Legislative bodies – Composition – Election of members.
4.9.2 **Institutions** – Elections and instruments of direct democracy – Electoral system.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.3.39.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Election, allocation of seats / Constitutional Court, jurisprudence, reversal.

Headnotes:

The principle of the equality of the right to vote laid down in Article 43 of the Constitution requires that all voters have the same number of votes and that all votes have in advance the same possibility of being taken into consideration when election results are established (i.e. in the allocation of seats). However, it is not necessary for all votes to have the same impact on the election results or for the electoral system to ensure full proportionality between the number of votes won and seats allocated. Furthermore, the principle of the equality of the right to vote does not require all political parties to win the same number of votes to gain one seat; it suffices that political parties (more precisely: candidates or lists of candidates) are guaranteed equal possibilities in advance for obtaining a seat or seats. The conformity of the electoral system with the constitutional principle of the equality of the right to vote must be reviewed in terms of the equality of voters at the time when their votes are cast, not at the time when representative seats are allocated.

The challenged provisions regulate the manner of allocating seats and have no impact on the equal value of votes at the time when they are cast. Deviation from strict proportionality between votes won and seats allocated does not mean that voters are in unequal positions when voting, as there is an equal degree of probability that any vote will have a greater or smaller weight in the allocation of seats. A deviation from exact proportionality caused by the allocation of some seats on the basis of the sum of remaining votes given to the same lists in all constituencies, and the fact that the final impact of a vote depends on which party the voter voted for, thus does not violate the principle of the equality of the right to vote.

Summary:

Article 43.1 of the Constitution provides that the right to vote is universal and equal. In Decision no. U-I-44/96, dated 13 June 1996 (Official Gazette RS, no. 36/96 and DecCC V, 98), the Court ruled that the equality of the right to vote means that every voter

has the same number of votes and that the votes of all voters have the same value. It went on to state that a proportional electoral system, in which seats are allocated in proportion to the number of votes cast for each list of candidates, ensures that every vote is of equal weight, and that any deviation from the principle of proportionality developed in an electoral system may lead to an encroachment on the equality of the right to vote.

A strict application of the view embodied in Decision no. U-I-44/96 would mean that only an electoral system that ensures full proportionality (in so far as this is mathematically possible) between votes won and seats allocated would be in conformity with the principle of the equality of the right to vote. Furthermore, exceptions would only be allowed if they protect some other constitutional value, are necessary for achieving it and are proportional to the aim to be achieved (e.g. an electoral threshold). Any other deviation from full proportionality between the number of votes won and seats allocated would be unconstitutional. This view thus means that the legislature's discretion in selecting an electoral system consistent with the principle of the equality of the right to vote is limited to a proportional system ensuring the highest possible proportionality between the number of votes won and seats allocated.

Such an interpretation of the constitutional principle of the equality of the right to vote is too narrow. The Constitution does not restrict the legislature's own political judgment to this extent. The principle of the equality of the right to vote laid down in Article 43 of the Constitution requires that all voters have the same number of votes and that all votes be subject to the same rules when election results are considered and seats allocated. It is not necessary, however, for all voters' choices to have the same impact on the election results or for the electoral system to ensure full proportionality between votes won and seats allocated. Moreover, the principle of the equality of the right to vote does not mean that all political parties must obtain the same number of votes in order to win one seat; it is enough that political parties (or candidates or candidate lists) are guaranteed the same possibilities in advance for obtaining a seat or seats.

The principle of the equality of the right to vote thus requires that every voter bring to the polls the same number of votes having the same value, even though some votes may have a lesser impact (or none at all) on the election results. If all voters have the same number of votes and if their votes have the same possibility determined in advance of making an impact on the election results (and on the allocation of seats), they are considered equal by law at the time of voting; however, it may occur to any voter, with an equal degree of probability, that their vote has greater or lesser weight in the allocation of seats. The rules governing the allocation of seats apply equally to all voters and do not discriminate against any of them. However, there would be an encroachment on the equality of the right to vote if, for example, due to essential discrepancies in the number of qualified voters in constituencies, it were evident before or at the time of voting that the vote of a member of one constituency was worth less than the vote of a member of another constituency.

Accordingly, it follows that the conformity of the electoral system with the constitutional principle of the equality of the right to vote must be reviewed in terms of the equality of voters at the time of voting, not when seats are allocated.

The challenged provisions govern the allocation of seats and make no impact on the equality of votes at the time of voting. It is true that they depart to some extent from the principle of proportionality. However, this does not entail an unequal position of voters when voting, as there is an equal degree of probability that any vote will have a greater or smaller weight in the allocation of seats. The deviation from proportionality caused by the allocation of some seats on the basis of the sums of remaining votes given to the same lists in all constituencies, and the fact that the final impact of a vote depends on the list chosen by the voter, therefore do not entail a violation of the principle of the equality of the right to vote.

This departure from the view embodied in Decision no. U-I-44/96 does not mean that the Court's decision in that case was incorrect. Although its reasoning would have differed, the Court's finding of conformity with the Constitution in the earlier case would have been the same if the Court had followed the reasoning applied in this case.

Supplementary information:

Legal norms referred to:

- Articles 2, 3, 43 of the Constitution;
- Article 21 of the Constitutional Court Act (ZUstS).

One judge issued a concurring opinion.

One judge issued a dissenting opinion.

Cross-references:

In its reasoning, the Court referred to its case no. U-I-44/96, dated 13.06.1996 (Official Gazette RS, no. 36/96 – DecCC V, 98).

Languages:

Slovenian, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-2000-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 02.12.1999 / **e)** CCT 10/99 / **f)** National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others / **g)** / **h)** 2000 (1) *Butterworths Constitutional Law Reports (BCLR)* 39 (CC).

Keywords of the systematic thesaurus:

2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.19 **General Principles** – Reasonableness.
5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.2.11 **Fundamental Rights** – Equality – Criteria of distinction – Sexual orientation.
5.2.2.12 **Fundamental Rights** – Equality – Criteria of distinction – Civil status.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to family life.
5.3.43 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Discrimination, list of prohibited grounds / Immigration law / Spouse, definition.

Headnotes:

A law which permits the immigration of a foreign spouse of a South African person permanently and lawfully resident in the Republic but fails to provide an equivalent benefit to the same-sex life partner of similarly resident person infringes the rights to human dignity and equality, and cannot be saved by the limitations clause. The law is accordingly unconstitutional.

Summary:

A provincial High Court declared Section 25.5 of the Aliens Control Act no. 96 of 1991 unconstitutional on the grounds that the section permitted the immigration of foreign persons married to South African persons permanently and lawfully resident in the Republic, but failed to afford identical benefits to foreign persons involved in same-sex life partnerships with similarly resident South African persons. The first applicant was a public interest group committed to the advancement of the interests of same-sex persons. The last applicant was the Commission for Gender Equality (a body mandated by Chapter 9 of the Constitution), while the remaining applicants were foreign and South African same-sex partners. The respondents, as administrators of the Act, defended the constitutionality of Section 25.5. In terms of Section 172.2.a of the Constitution, any order of a High Court declaring an Act or a part thereof to be unconstitutional must be confirmed by the Constitutional Court before such a declaration has any force.

Section 25.5 makes specific provision for the authorisation of an immigration permit to the spouse or dependant child of a person who is permanently and lawfully resident in South Africa. The court concluded that the term "spouse", as conventionally understood, was not reasonably capable of including same-sex life partners within its ambit. The constitutionality of the section therefore, had to be determined in so far as it afforded a benefit to one group of persons (i.e. heterosexual life partners) but not to another group (i.e. same-sex life partners).

Ackermann J for a unanimous court concluded that Section 25.5 violated the constitutional rights to equality and human dignity guaranteed by Sections 9 and 10 of the Constitution, respectively. The right to equality had been infringed in that the section resulted in discrimination against same-sex life partners on overlapping or intersecting grounds of sexual orientation and marital status, both of which are specified grounds of non-discrimination in terms of Section 9.3 of the Constitution. Section 9.5 of the Constitution establishes a presumption of unfair discrimination on any of the listed grounds in terms of Section 9.3 of the Constitution unless it is established that such discrimination is fair. The court reiterated its earlier holding that gay and lesbian persons are a permanent minority in society, and have suffered in the past from patterns of disadvantage. The sting of past and continuing discrimination against gay and lesbian persons conveys the view that they do not have inherent dignity, and are not worthy of the human respect accorded to heterosexual persons and their relationships.

The court observed that under the Constitution the concepts of equality and human dignity are closely intertwined, and that all persons, regardless of their differences, have the same inherent worth and dignity as human beings. It was emphasised, that in the recent past an accelerating process of transformation had occurred in family relationships, as well as in societal and legal concepts regarding the family and what it comprises. The effect of Section 25.5 is to reinforce harmful and hurtful stereotypes of and prejudices against gay and lesbian persons, while at the same time propagating a singular conception of the family unit. This, it was held, clearly infringed gay and lesbian person's inherent right to have their dignity respected and protected. It suggested that gay and lesbian persons lack inherent humanity to have their families and family lives respected and protected. The fact that Section 25.5 had the laudable objective of facilitating the immigration of foreign spouses and the protection of families and the family life of heterosexual persons, did not justify withholding similar benefits to same-sex life partners.

The infringement of the rights to dignity and equality by Section 25.5 was furthermore, not a limitation which was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Section 25.5 therefore, failed the limitations analysis under Section 36 of the Constitution, and the section was accordingly confirmed to be unconstitutional.

The court also considered an appropriate remedy to rectify the omission of gay and lesbian persons from the benefits of Section 25.5, and adopted the approach of reading words into the impugned section. The effect of this would be to bring the section into compliance with the Constitution by ensuring that a foreign person involved in a permanent same-sex life partnership with a South African person permanently and lawfully resident in the Republic is allowed to seek an immigration permit under Section 25.5. The court summarised the principles that should guide a court when deciding that reading in is an appropriate order, and suggested guidelines for determining when a same-sex life partnership may be regarded as permanent.

Cross-references:

For cases on equality see *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* 1999 (1) *SA* 6 (CC), 1998 (12) *BCLR* 1517 (CC), *Bulletin* 1998/3 [RSA-1998-3-009]; *President of the Republic of South Africa and Another v. Hugo* 1997 (4) *SA* 1 (CC), 1997 (6) *BCLR* 708 (CC), *Bulletin* 1997/1 [RSA-1997-1-004]; *City Council of Pretoria v. Walker* 1998 (2) *SA* 363 (CC), 1998 (3)

BCLR 257 (CC), *Bulletin* 1998/1 [RSA-1998-1-001]. See also *Brink v. Kitshoff NO* 1996 (4) *SA* 197 (CC), 1996 (6) *BCLR* 752 (CC), *Bulletin* 1996/1 [RSA-1996-1-009]; *Fraser v. The Children's Court, Pretoria North and Others* 1997 (2) *SA* 261 (CC), 1997 (2) *BCLR* 153 (CC), *Bulletin* 1997/1 [RSA-1997-1-001]; *Larbi-Odam and Others v. MEC for Education (North-West Province) and Another* 1998 (1) *SA* 745 (CC), 1997 (12) *BCLR* 1655 (CC). For cases on remedies see *Ferreira v. Levin NO*; *Vryenhoek and Others v. Powell NO and Others* 1996 (1) *SA* 984 (CC), 1996 (1) *BCLR* 1 (CC), *Bulletin* 1995/3 [RSA-1995-3-010]; *Fose v. Minister of Safety and Security* 1997 (3) *SA* 786 (CC), 1997 (7) *BCLR* 851 (CC), *Bulletin* 1997/2 [RSA-1997-2-005].

Languages:

English.

Identification: RSA-2000-1-002

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 02.12.1999 / **e)** CCT 27/99 / **f)** The State v. Twala and Another / **g)** / **h)** As yet unreported.

Keywords of the systematic thesaurus:

5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Review, technical meaning / Success, prospects / Leave to appeal.

Headnotes:

There is no material difference between the wording of the interim and the final Constitution's entrenchment of a convicted person's right to appeal or review by a higher court. A right to appeal or review, as contained in the final Constitution, only requires that provision be made for a reassessment of the issues by a higher court. The final Constitution does not afford an absolute right of appeal or review to convicted persons.

Summary:

In an earlier decision, *State v. Rens* (*Bulletin* 1995/3 [RSA-1995-3-012]), the Constitutional Court interpreted the leave for appeal provisions as being consistent with Section 25.3.h of the interim Constitution, and accordingly upheld the provisions as being constitutionally valid. Section 25.3.h of the interim Constitution afforded an accused person a right to a fair trial which included the right "to have recourse by way of appeal or review to a higher court other than the court of first instance".

In this matter, however, the applicant ("Twala") challenged the constitutionality of Sections 316 and 315.4 of the Criminal Procedure Act no. 51 of 1977 (the "leave provisions") on the basis that the wording of the right to appeal or review contained in Section 35.3.o of the final Constitution differed from the wording of Section 25.3.h of the interim Constitution. The leave provisions provided that a convicted person could only seek an appeal or review by a higher court with the leave of the trial court or a higher court. The applicant asserted that the absence of the words "to have recourse by way of" in Section 35.3.o of the final Constitution implied that the drafters of the final Constitution meant that accused persons had an unqualified right of appeal or review by a higher court. Furthermore, it was argued that "review" should be given a technical meaning as this was how it was used in practice. Accordingly, the applicant argued, that the leave provisions constituted an unconstitutional limitation of the right to appeal or review by a higher court.

The court concluded that there is no material difference between the wording of the interim and final Constitutions. It reflects a desire to use plain language rather than to alter the scope of the right to appeal or review by a higher court. In addition, the language in Section 35.3.o of the final Constitution is clear in its context and does not indicate any intention to ascribe a technical meaning to "appeal" or "review".

The court interpreted Section 35.3.o of the final Constitution in the wider context in which it appears, that is the right to a fair trial which Section 35.3 of the final Constitution affords to all accused persons. The purpose of Section 35.3 of the final Constitution is to minimise the risk of wrong convictions and the consequent failure of justice. Section 35.3 of the final Constitution seeks to achieve flexibility in order to provide for the kind of reassessment which is both appropriate and fair in the circumstances of each case. Section 35.3.o of the final Constitution requires only an appropriate reassessment of the findings of law and fact of courts of first instance. It neither intends to prescribe, in a technical sense, the nature

of the reassessment as this will depend on the relevant circumstances, nor does it entrench an absolute right of appeal. Any law concerned with the right to appeal would therefore pass constitutional scrutiny so long as it was fair in terms of Section 35.3 of the final Constitution.

The leave provisions were fair in that they intended to provide convicted persons an opportunity to seek leave to appeal while barring meritless and vexatious litigation. Of particular relevance was the fact that the leave provisions provide a procedure for the reassessment of the disputed issues by two judges of the higher court, and a framework for that reassessment which ensures an informed decision as to the prospects of success. The leave provisions were accordingly upheld as being constitutionally valid.

Cross-references:

State v. Rens, *Bulletin* 1995/3 [RSA-1995-3-012]. See also *State v. Ntuli*, *Bulletin* 1995/3 [RSA-1995-3-011] for a decision distinguishing between the leave to appeal procedure and the application for a judge's certificate.

Languages:

English.

Identification: RSA-2000-1-003

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 25.02.2000 / **e)** CCT 31/99 / **f)** The Pharmaceutical Manufacturers Association of South Africa and Another *In Re*: the *Ex parte* Application of the President of the Republic of South Africa and Others / **g)** / **h)** As yet unreported.

Keywords of the systematic thesaurus:

1.1.4.1 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Head of State.
1.1.4.2 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
1.3.5.6 **Constitutional Justice** – Jurisdiction – The subject of review – Presidential decrees.
3.9 **General Principles** – Rule of law.
3.19 **General Principles** – Reasonableness.
4.4.1.4 **Institutions** – Head of State – Powers – Promulgation of laws.

Keywords of the alphabetical index:

Common law, constitutional application / Promulgation, Presidential Proclamation, date / Public power, review / *Ultra vires*, constitutional application.

Headnotes:

The President's decision bringing an Act of parliament into force is subject to review under the Constitution.

All exercise of public power must be rationally related to the purpose for which the power was conferred.

Summary:

The matter arose when the Transvaal High Court was requested to review and set aside the President's proclamation bringing the South African Medicines and Medical Devices Regulatory Authority Act no. 132 of 1998 ("the Act") into operation on 30 April 1999. The effect of the proclamation, which was authorised by the Act, was to bring the Act into force and repeal the previous regulatory structure for the control of medicines and other substances. The applicants alleged that, through an error made in good faith, the Act was brought into force before the necessary replacement regulatory infrastructure under the Act had been put in place. The entire regulatory structure for medicines and other substances was thereby rendered unworkable with serious consequences.

Two issues had to be decided by the Constitutional Court. The first was whether the High Court's order setting aside the President's decision as *ultra vires* his authority under the common law was a finding of "constitutional invalidity" that required confirmation by the Constitutional Court under Section 172.2 of the Constitution. If so, the second issue was whether the President's decision to bring the Act into force was constitutionally valid.

In a unanimous decision by Chaskalson P, the court held that the High Court's order was a finding of "constitutional invalidity" emphasising that the control

of public power by the courts through judicial review is and always has been a constitutional matter. This is so irrespective of whether the principles are set out in a written constitution or contained in the common law. Since the adoption of the interim Constitution, public power is controlled by the written Constitution, which is the supreme law. The court stated that there is only one system of law in the country and all law controlling public power, including the common law, draws its force from and is subject to the Constitution.

In deciding the second question, the court noted the reluctance of courts in other countries to review decisions of this kind because of the political nature of the judgment and its close proximity to legislative powers. However, the judgment stated all exercise of public power is subject to the Constitution and no discretion conferred on a public functionary can be unlimited.

The court held that the rule of law, which is a foundational value of the Constitution, requires that all exercise of public power, at a minimum, be exercised in a manner rationally related to the purpose for which the power was given. On the facts, the court held that the decision to bring the Act into force before the necessary regulations were in place was objectively irrational and therefore unconstitutional.

The court set aside the President's proclamation with the effect that the previous regulatory structure repealed by it was brought back into force.

Cross-references:

Fedsure Life Assurance Ltd and Others v. Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) *SA* 374 (CC), 1998 (12) *BCLR* 1458 (CC), *Bulletin* 1999/1 [RSA-1999-1-001]; *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others* 1999 (2) *SA* 14 (CC), 1999 (2) *BCLR* 175 (CC); *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others* 2000 (1) *SA* 1 (CC), 1999 (10) *BCLR* 1059 (CC), *Bulletin* 1999/3 [RSA-1999-3-008]; *Premier, Mpumalanga v. Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) *SA* 91 (CC), 1999 (2) *BCLR* 151 (CC); *S v. Makwanyane and Another* 1995 (3) *SA* 391 (CC), 1995 (6) *BCLR* 665 (CC), *Bulletin* 1995/3 [RSA-1995-3-002].

Languages:

English.

Identification: RSA-2000-1-004

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 30.03.2000 / **e)** CCT 41/99 / **f)** Harksen v. The President of South Africa and Others / **g)** / **h)** As yet unreported.

Keywords of the systematic thesaurus:

3.12 **General Principles** – Legality.
4.4.1.5 **Institutions** – Head of State – Powers – International relations.

Keywords of the alphabetical index:

Extradition proceedings / International agreement, parliamentary approval / International agreement, constitutional requirements / President, consent, nature.

Headnotes:

Presidential consent to the extradition of a requested individual does not constitute the conclusion of an international agreement and is therefore not subject to Constitutionally mandated parliamentary approval.

Summary:

In this case, the court was asked to consider the constitutionality of Section 3.2 of the Extradition Act no. 67 of 1962 which requires that the President of South Africa consent to the extradition of individuals requested by foreign states. Section 3.2 operates only in circumstances where no extradition treaty exists between South Africa and the requesting foreign state.

On 24 May 1995, the then President of South Africa consented to the surrender of the applicant to the Federal Republic of Germany (the FRG). As a result of this request and action taken pursuant thereto by the Minister of Justice, a magistrate acting under other provisions of the Extradition Act, held an inquiry after which he held that there was sufficient evidence to justify the applicant's extradition.

The applicant argued that Section 3.2 was unconstitutional as the President's consent concludes an international agreement which is not made subject to parliamentary approval mandated for international

agreements by Section 231 of the Constitution. It was submitted in the alternative that the failure, in this instance, to subject the 'international agreement' to the constitutional requirements of parliamentary approval and legislative incorporation, as provided for in Sections 231.2 and 231.4 of the Constitution, made the applicant's extradition process unlawful and invalid.

The court, in a unanimous judgment by Goldstone J, held that the presidential consent under Section 3.2 has domestic application only, serving merely to bring the requested individual within the ambit of the Extradition Act. Even if the presidential consent under Section 3.2 had created an international agreement and Section 231 of the Constitution thus applied, the failure to expressly incorporate its terms cannot render Section 3.2 unconstitutional. The court reasoned that the President's consent was a domestic act, was never intended to create international legal rights and obligations and did not constitute an international agreement. The constitutional requirements relating to international agreements thus did not apply. The court dismissed the submissions that the FRG was entitled to rely on the President's consent, so establishing an enforceable obligation against the South African State which was then required to engage the parliamentary procedures mandated by Section 231 of the Constitution.

The appeal was accordingly dismissed.

Languages:

English.

Identification: RSA-2000-1-005

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 14.04.2000 / **e)** CCT 25/99 / **f)** The State v. Manamela and Another / **g)** / **h)** As yet unreported.

Keywords of the systematic thesaurus:

2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.

5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.
5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right not to incriminate oneself.

Keywords of the alphabetical index:

Burden of proof, criminal proceedings / Right to remain silent.

Headnotes:

A law which makes it an offence to acquire stolen goods otherwise than at a public sale without having reasonable cause to believe that the person disposing of the goods was entitled to do so, reverses the normal criminal onus of proof. This unjustifiably limits the presumption of innocence and justifiably limits the right to remain silent. Both the parliamentary purpose and the concerns of the prosecution which lead to the enactment of the law are sufficiently catered for by the imposition of an evidential burden on the accused to prove reasonable cause.

Summary:

Section 37.1 of the General Law Amendment Act no. 62 of 1955 makes it an offence to acquire stolen goods otherwise than at a public sale without having reasonable cause to believe that the person disposing of them was entitled to do so. This imposes a duty on the accused to establish reasonable cause on a balance of probabilities in order to escape conviction and reverses the normal criminal onus of proof. The court unanimously found that the section infringed both the right to silence and the presumption of innocence enshrined in Section 35.3.h of the Constitution.

The court held unanimously that the limitation on the right to silence was justified in terms of Section 36 of the Constitution, since knowledge that stolen goods could easily be disposed of encourages the scourge of violent crime and in most cases the state cannot obtain evidence of the circumstances in which the accused acquired the stolen goods. Accordingly, there was nothing inherently unreasonable or unduly intrusive in requiring the accused to show that he or she held a reasonable belief that the goods had not been stolen.

The court was divided however, over the question whether the limitation on the presumption of innocence could also be justified under Section 36 of the Constitution. In a joint judgment, Madala, Sachs and Yacoob JJ held on behalf of the majority that the provision was overbroad. It was not limited to the receipt of motor cars or other items where persons could be expected to keep records. Instead, it caught in its net millions of people, frequently poor and illiterate, who bought household necessities from door to door vendors. They, and not the professional receivers, were the persons most vulnerable to incorrect conviction resulting from application of the reverse onus. The risk of social stigma and imprisonment was unacceptably high. Although the court emphasised that the range of policy choices available to parliament to deal with the problem of receiving stolen goods ought not to be unduly limited, the majority adopted the remedy of reading in and replaced the invalid reverse onus provision with words imposing an evidential burden. Accordingly, the burden of proof resting on the prosecution is alleviated by an obligation resting on the accused to produce evidence of a belief that the goods were not stolen which could reasonably be true.

In a dissenting judgment, O'Regan J and Cameron AJ held that the reverse onus was justifiable since it was reasonable in the circumstances to require the accused to prove on a balance of probabilities that his or her belief as to honest acquisition was reasonable. They concluded that the section creates a special statutory offence which imposes an obligation on citizens to assist in combating crime by acting diligently when acquiring goods otherwise than at a public sale. Where, as in South Africa, the market for dealing in stolen goods is extensive and thefts often accompanied by excessive violence, society has the right to oblige its citizens to act vigilantly to eradicate that market. The dissent addressed the majority's concern about the risk of unfair convictions by pointing out that the requirement of the reasonableness of the belief of the receiver of stolen goods contained in the statute takes account of the circumstances of the accused; that it is a lesser crime than common law theft and receiving stolen property; that the sentence may include fines and suspended sentences in appropriate cases; and that the accused is entitled to legal representation in appropriate cases.

Cross-references:

Presumption of innocence and reverse onus provisions: *S v. Zuma and Others* 1995 (2) *SA* 642 (CC), 1995 (4) *BCLR* 401 (CC), *Bulletin* 1995/3 [RSA-1995-3-001]; *S v. Bhulwana*, *S v. Gwadiso* 1996 (1) *SA* 388 (CC), 1995 (12) *BCLR* 1579 (CC), *Bulletin* 1995/3 [RSA-1995-3-008]; *S v. Mbatha*, *S v. Prinsloo* 1996 (2) *SA* 464 (CC), 1996 (3) *BCLR* 293 (CC), *Bulletin* 1996/1 [RSA-1996-1-001]; *S v. Julies* 1996 (4) *SA* 313 (CC), 1996 (7) *BCLR* 899 (CC); *Scagell and Others v. Attorney-General, Western Cape and Others* 1997 (2) *SA* 368 (CC), 1996 (11) *BCLR* 1446 (CC), *Bulletin* 1996/3 [RSA-1996-3-017]; *S v. Coetzee* 1997 (3) *SA* 527 (CC), 1997 (4) *BCLR* 437 (CC), *Bulletin* 1997/1 [RSA-1997-1-002]; *S v. Ntsele* 1997 (11) *BCLR* 1543 (CC), 1997 (2) *SACR* 740 (CC), *Bulletin* 1997/3 [RSA-1997-3-012]; *S v. Mbatha*, *S v. Prinsloo* 1996 (2) *SA* 464 (CC), 1996 (3) *BCLR* 293 (CC), *Bulletin* 1996/1 [RSA-1996-1-001]. Right to silence: *Osman and Another v. The Attorney General, Transvaal* 1998 (4) *SA* 1224 (CC), 1998 (11) *BCLR* 1362 (CC), *Bulletin* 1998/3 [RSA-1998-3-008].

Languages:

English.

Spain
Constitutional Court

Statistical data
1 January 2000 – 31 April 2000

Type and number of decisions:

- Judgments: 105
- Decisions: 111
  - Inadmissibility: 41
  - Discontinued proceedings: 27
  - Other resolutions: 43
- Procedural decisions: 2129
- Cases submitted: 2516

Important decisions

Identification: ESP-2000-1-001

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 20.07.1999 / **e)** 136/1999 / **f) / g)** *Boletin official del Estado* (Official Gazette), 18.08.1999, 29-96 / **h)**.

Keywords of the systematic thesaurus:

3.3.1 **General Principles** – Democracy – Representative democracy.
3.12 **General Principles** – Legality.
3.13 **General Principles** – *Nullum crimen, nulla poena sine lege*.
3.15 **General Principles** – Proportionality.
4.9.7 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.13.11 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Independence.
5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Impartiality.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.
5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
5.3.29 **Fundamental Rights** – Civil and political rights – Right to participate in political activity.

Keywords of the alphabetical index:

Terrorism / Election, free / Challenging a judge, procedure / Tribunal, impartial, pressure exerted by the media / Fundamental rights, deterring or discouraging their exercise / Constitutionality, domestic question, non-necessity.

Headnotes:

The right to participate in public affairs and the right of access to public office (Article 23 of the Constitution) and the freedoms of expression and information (Article 20.1.a and 20.1.e of the Constitution) in no way protect the dissemination of messages or programmes which are threatening or intimidating owing to their content or the context in which they are disseminated. Such messages may be deemed to constitute the offence of collaborating with a terrorist group and punished as such, in accordance with the Criminal Code (1973, the relevant section dating from 1989).

Any criminal-law rule imposing a minimum six year's imprisonment on an individual who has collaborated with a terrorist organisation by transmitting ideas or information from the said organisation through a lawfully established political association in the context of an election campaign is disproportionate and infringes the fundamental right to criminal sanctions based on law (Article 25.1 of the Constitution), because it impedes the free exercise of the rights to political participation and to freedom of expression (Articles 23 and 20.1 of the Constitution).

Outright rejection of a challenge to a judge does not infringe the rights to the effective protection of the courts and assistance by a lawyer, to a hearing with full guarantees and an impartial judge (Article 24 of the Constitution) if it is properly based on a finding that the challenge was wrongful and devoid of any legal basis. It therefore cannot be affirmed that such rejection materially deprives the litigant of all grounds of defence.

Pressure exerted by the media on a court adjudicating on any kind of case can infringe the right to an impartial judge (Article 24 of the Constitution), notably if such pressure originates in statements from other public authorities.

Summary:

This decision, which was given by the Plenary Assembly of the Constitutional Court, concerns the sentence passed by the Supreme Court on the leaders of the political formation Herri Batasuna (which means "The People's Left" in Basque). The 23 members of the statutory Bureau of this political formation were found guilty of the offence of collaborating with a terrorist group, fined and sentenced to seven years' imprisonment. The offence in question was defined in Article 174bis.a of the old Criminal Code (amended in 1973, the relevant section having been drafted under Implementing Act 3/1989) and was punishable with a prison sentence ranging from six years and one day to twelve years, plus a fine. In this particular case the appellants stood accused of having attempted to broadcast a video cassette of the ETA terrorist organisation during the election campaign for the 1996 general elections and disseminating electoral propaganda incorporating pictures and texts from the said video cassette, using electoral air time on television and radio which this political formation was granted free of charge.

The Constitutional Court afforded the appellants constitutional protection (*amparo*), considering that in this particular case application of the aforementioned provision of the Criminal Code infringed the right to criminal sanctions based on law (Article 25.1 of the Constitution). The Constitutional Court therefore quashed the judgment against the appellants.

However, the Constitutional Court rejected all the formal and procedural arguments submitted under the *amparo* appeal, namely: (a) the fact that the appellants had been judged by the Supreme Court and were therefore unable to appeal to any higher authority against the decision given; (b) the fact that the defendants had challenged the President of the Court on the very first day of the proceedings, arguing that one of his daughters worked in the Ministry of the Interior, which challenge the Court rejected and declared inadmissible on the grounds that it had been submitted out of time and was abusive and completely ill-founded; and (c) the allegation that the press and other media had campaigned against them, partly because of statements made by certain members of the government, which the appellants argued had proclaimed their guilt and had amounted to a parallel trial and had influenced the Supreme Court.

The Constitutional Court affirmed that the aforementioned facts were not in violation of any fundamental rights: (a) the loss of the right to appeal was offset by the fact that the judicial decision was to be given by the supreme criminal justice body, precisely in order to enhance the safeguards appertaining to the parliamentarians standing trial; (b) the declaration of inadmissibility of the challenge on the grounds that it had been submitted out of time, and was abusive and based on completely arbitrary claims, in no way deprived the defendants of their material grounds of defence; and (c) although the statements made by certain senior officials had not helped the work of the court, their content and effects had in the end proved innocuous.

As far as the merits of the case are concerned, the Constitutional Court judgment considered the combined effect of a number of relevant fundamental rights: the right to participate in political activity, the right to the freedoms of expression and information, and the right to criminal sanctions based on law, these three rights all being linked. The grounds of the judgment might be summed up as follows:

1. The right to participate in public affairs and the right of access to public office (Article 23 of the Constitution) are based on freedom. They therefore prohibit any interference with politicians by the public authorities, particularly when the former are presenting their views and proposals to the citizens. However, interference with the citizens themselves is also prohibited, particularly when they are being called upon to decide which political proposals they consider most appropriate. Moreover, the freedoms of expression and information (Article 20.1.a and 20.1.e of the Constitution) can only be fully exercised if they are enshrined as instruments for the rights of political participation.

2. Nevertheless, none of these freedoms can be used for the dissemination of messages or programmes which are threatening or intimidating owing to their content or the context in which they are disseminated, even if they are not strictly tantamount to the offence of proffering threats or exercising coercion. In such cases, however, great caution must be exercised because the public authorities must not be allowed to restrict citizens' freedoms, particularly during elections, and steps must be taken to enable third parties to disseminate neutral media reports presenting the said messages.

3. Having conducted a detailed analysis of the tape produced by the Herri Batasuna political formation as part of the advertisement which they sent to

various television channels, as well as of the video cassette which was to be shown at various public events, the Constitutional Court concluded that they did not constitute a neutral report in which the political formation had confined itself to transmitting a terrorist group's message. Instead, the Court ruled that in this video recording Herri Batasuna was endeavouring to communicate a message based on information provided by third persons and to canvass people to vote for their formation.

4. Having conducted an in-depth examination of the messages in question (which listed the terrorist group's objectives, stated that the violence would cease as soon as these objectives were attained and explicitly called on the electorate to vote for the Herri Batasuna political formation, all against a background of images of hooded gunmen), the Constitutional Court decided that they amounted to intimidation or coercion, because it would be obvious to any ordinary voter that the purpose of the video was a blatant attempt at intimidation.

5. Consequently, the behaviour for which the leaders of the HB political formation were being tried did not amount to lawful exercise of the rights to political participation or freedom of expression. Their acts were therefore – in principle – liable to criminal penalties. However, such penalties would only be constitutional if they met the requirements of the criminal legality principle and also if their severity did not lead to an unnecessary or disproportionate sacrifice of freedom or have the effect of deterring or discouraging citizens from exercising the fundamental rights involved in the penalised acts. The Court expanded in detail upon these primordial ideas in the light of constitutional case-law and the case-law of the European Court of Human Rights.

6. Therefore, an analysis had to be conducted of the Criminal Code provision applied in the decision in question, as interpreted by the Supreme Court, because it should be remembered that this Court has sole responsibility for interpreting and applying criminal classifications: the provision in question stipulates a minimum prison sentence of six years and one day for such cases, where the leaders of a lawful political association attempt to disseminate intimidating messages during an election campaign with a view to publicising the action proposed by the ETA and the HB and canvass people for their votes. It is immaterial that this attempt failed, because the dissemination of such messages had been prohibited by a court and the offence is precisely constituted by the activity itself or the abstract danger it entails.

7. The Constitutional Court affirmed that the provision of criminal law in question was aimed at protecting values or interests important enough to justify a minimum prison sentence of 6 years: terrorism is a particularly serious offence which jeopardises such important values as life, the safety of individuals, social peace and the democratic system.

8. There can be no doubt that the penalty laid down is well-founded (even if it raises certain other problems, because they are immaterial to this case), as stressed by the Constitutional Court, for three main reasons: (i) the judgment in question does not penalise the legitimate exercise of constitutional rights; (ii) the acts for which the appellants were convicted were aimed at promoting a terrorist group and its methods; (iii) the appellants do not invoke any alternative measure to the penal reaction, and the Constitutional Court obviously cannot usurp the role of imaginary legislator.

9. Notwithstanding the foregoing comments, Constitutional Court Decision no. 136/1999 considers the criminal law provision applied to the appellants disproportionate for yet different reasons: (i) the acts penalised proved relatively innocuous in practice; (ii) the sentence is heavy *per se* and as compared with penalties laid down for other offences and in other countries; (iii) in this case the rule is being applied to the expression of ideas and communication of information by a lawfully established political association as part of an election campaign, which is liable to discourage the lawful exercise of the fundamental rights to political participation and to freedom of expression; (iv) lastly, this deterrent effect is reinforced by the relative vagueness of the provision applied.

The Constitutional Court concluded that the criminal law provision on which the appellants' conviction was based, stipulating a minimum prison sentence of six years, has an obvious deterrent effect on the exercise of the freedoms of expression, communication and participation in public affairs, even though the acts penalised do not constitute a legitimate means of exercising these freedoms, which are absolutely necessary for the democratic functioning of society, and are totally indispensable in the case of political parties when canvassing citizens for votes.

Consequently, in this case the application of the said provision of the Criminal Code infringes the principle of criminal sanctions based on law in that it lays down disproportionate sentences. The rule is therefore unconstitutional solely because it does not provide for

adapting the criminal penalty to the seriousness of the act of collaboration with the terrorist group. The Constitutional Court's judgment specifies that there is no need to challenge the provision for unconstitutionality since it has already been repealed under the new Criminal Code.

Supplementary information:

Four judges expressed concurring opinions, adding that the applicants' right to presumption of innocence had also been infringed. However, three other judges expressed dissenting opinions, affirming that the applicants should not have been granted constitutional protection (*amparo*) because, in their view, none of the fundamental rights of the HB leaders had been violated.

Languages:

Spanish.

Identification: ESP-2000-1-002

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 17.01.2000 / **e)** 10/2000 / **f)** Gaiane Charlouian / **g)** *Boletín oficial del Estado* (Official Gazette), 42, 18.02.2000, 61-66 / **h)**.

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.

Keywords of the alphabetical index:

Evidence, taking / Foreign law, proof / Civil procedure, language, official translation / Foreign law, translation.

Headnotes:

The inaction of a judicial authority in taking evidence needed to prove foreign law in family litigation where the translation and validation of the civil law instrument are crucial to the judgment, constitutes not only a denial of justice (Article 24.1 of the Constitution) but also a restriction on the rights of the defence (Article 24.2 of the Constitution).

Summary:

Mrs Charlouian, an Armenian national, had made an application for separation from her husband which was dismissed by the civil courts on the ground that the applicant had not duly proved the foreign law applicable in the case as required by Article 12.6 of the Civil Code. The question arising in this appeal for constitutional protection *(amparo)* is whether there was an infringement of the appellant's right to receive effective legal protection without being denied a defence (Article 24.1 of the Constitution) and of her right to use material evidence (Article 24.2 of the Constitution).

The Constitutional Court considered the circumstances in which the above-mentioned evidence was taken at both levels of proceedings. It stressed that the court of first instance had declared material and admissible the evidence of the foreign law which the applicant had adduced by furnishing a copy of the 1987 Civil Code of the USSR, applicable in the Republic of Armenia, together with a plain translation of the section of that Code relating to causes of separation and divorce. Despite this the lower court had dismissed the application for separation, holding that the applicable foreign law was not adequately proven considering the unreliability of the private translation produced. The Court of Appeal for its part had acted otherwise: as the evidence of the foreign law had also been declared material and admissible at the second stage of the proceedings, the applicant, mindful of the difficulties encountered in proving the Armenian law and of what had transpired at first instance, asked the Court of Appeal for assistance in adducing the evidence in the proper manner. A first request for evidence was accordingly made to the Foreign Affairs Ministry of the Republic of Armenia, which replied by sending the Court of Appeal a certified true copy of a section of Armenian family law which, once translated, proved not to be the section requested. Nevertheless, the court already had in its possession a copy of the 1987 Civil Code of the USSR whose validity and applicability in the Republic of Armenia had been substantiated by the aforementioned request for evidence. Thus it merely remained to translate into Spanish the provisions relating to causes of separation and divorce. For that purpose,

the Court of Appeal issued a second request for evidence which initially went astray and was then served a second time. However, even before receiving the result of the second request for evidence, the Court of Appeal dismissed the application for separation on the ground of the appellant's failure to prove the foreign law applicable in the case.

The Constitutional Court held that the only procedural problem was to secure a reliable Spanish translation of the chapter of the Civil Code of the former USSR concerning separation and divorce, as the Court of Appeal was already provided with this text. The Constitutional Court also stressed that the Court of Appeal gave no explanation why, following the first request for evidence, it had decided to have this text translated into Spanish by a private agency but had not decided to do likewise with the text furnished by the applicant in the course of the proceedings. Although foreign law constitutes a fact to be proven by the person who invokes it, according to Article 12.6 of the Civil Code, the judicial authority is under a particular obligation to safeguard the legitimate rights and interests of the parties to the proceedings where the Spanish legal system itself, in the light of their submissions, calls for the application of foreign law. Consequently, in cases like the present one, the taking of evidence of foreign law and the court's action in the matter are by no means confined to mere assessment of evidence of a fact on which a party bases its claims.

Considering the circumstances of the case, the Constitutional Court concluded that the Court of Appeal could be held responsible for the failure to take evidence of the foreign law, in that it had ruled without awaiting a reply to the second request for evidence, although neither the fundamental rights of the other parties to the proceedings nor those of third parties were subject to any risk warranting limitation of the applicant's means of defence. Furthermore, in this case the refusal of evidence was not at all justified by any wish on the part of the court to discharge its duty to determine the case speedily and effectively. Nor was there any doubt that the applicant had displayed diligence in taking it upon herself to prove the Armenian law applicable under the terms of Article 107 of the Civil Code, since she had personally adduced prima facie evidence of this law which was subsequently corroborated by the outcome of the judicial measures taken. Lastly, it should be stressed that in the present case the evidence which was not admitted for want of a translation of the foreign law did not concern the nature of the facts but rather the legal provisions whose application was required by the Spanish legal system. On balance, the right to effective legal protection and the right to guarantees in respect of defence made it necessary for the judicial authorities to participate more actively than they had done in obtaining the evidence in question, having regard to the peculiarities of the case and also given that the applicant had furnished prima facie evidence and there was no reason not to rely on additional evidence of other types as the courts are empowered to do by Article 12.6 of the Civil Code.

Languages:

Spanish.

Identification: ESP-2000-1-003

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 31.01.2000 / **e)** 21/2000 / **f)** Serafín Blasco Parras y otro contra José Luis Lobo Pérez / **g)** *Boletín oficial del Estado* (Official Gazette), 54, 03.03.2000, 32-41 / **h)**.

Keywords of the systematic thesaurus:

1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.
1.3.5.12 **Constitutional Justice** – Jurisdiction – The subject of review – Court decisions.
1.6 **Constitutional Justice** – Effects.
3.16 **General Principles** – Weighing of interests.
5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Criminal jurisdiction, constitutional jurisdiction, relationship / Constitutional jurisdiction, declaratory power / Freedom of information, truth / Disclosure of information sources / Media, diligence, professional duty.

Headnotes:

Since the Constitution in no circumstances grants a right to investigation of criminal procedure or a right to secure a criminal conviction, an application for constitutional protection *(amparo)* is not the most suitable means of meeting such claims. The Constitutional Court nevertheless has full authority to determine whether the criminal courts place the proper construction on the fundamental right at issue in a criminal case when they terminate the proceedings or acquit the accused.

Untrue information concerning the implication of several managers of private businesses in grave irregularities committed by a public authority in connection with a contract for military equipment violates their fundamental right to respect for honour (Article 18.1 of the Constitution). Information providers must exercise diligence in this respect and satisfy themselves as to the accuracy of the information disclosed, if protection of freedom of information (Article 20.1.d of the Constitution) is to be guaranteed. Therefore it does not suffice to rely on general and unidentified sources of information.

Summary:

A national daily had published a report on various irregularities committed and bribes paid in connection with several government procurement contracts. The report mentioned a number of senior officials and managers of businesses. Certain of the latter, the applicants among them, lodged a complaint of insults and libel against the newspaper, but finally the complaint was not proceeded with.

The applicants contended that the dismissal of their complaint violated the fundamental right to respect for honour secured by Article 18.1 of the Constitution in so far as they were seeking protection of this fundamental right through the criminal actions brought. On this point the Constitutional Court adverted to the fact that the Constitution by no means secures an unconditional right to the investigation of a criminal case or a right to have the accused convicted, even where the sole purpose of the action is to secure judicial protection of a fundamental right. The application of criminal law can in no circumstances be reviewed in the context of an application for constitutional protection. However, the Constitutional Court is perfectly able to examine how the criminal courts have weighed the right to respect for honour with freedom of information, in order to verify that the weighing is consistent with the constitutional substance of these two fundamental rights. This power of the Constitutional Court may also be applied to criminal cases ending in an immediate termination order or the acquittal of the accused. In such cases, the constitutional ruling cannot set aside the criminal court decision to acquit but on the other hand may determine whether or not the fundamental right in question has been infringed.

The Constitutional Court held that the procedural decisions delivered by the criminal courts had incorrectly weighed the applicants' fundamental right to respect for honour with the right of the respondent newspaper to convey information freely. The information relating to the implication of several business managers in a web of irregularities could not be considered true and therefore could not validly be deemed protected by Article 20 of the Constitution; the information provider's duty of diligence was absolutely binding in so far as the information released imputed the perpetration of an offence to someone. It thereby not only cast discredit on the person concerned but also imperilled that person's right to be presumed innocent, considering that private individuals were involved. Furthermore, the journalist had not disclosed the identity of the persons who had purportedly given him confirmation of the payment of vast sums in bribes. Here it should be recalled that information providers are not bound to reveal their sources. Nonetheless, an unidentified information source does not permit a journalist to assert that he has properly discharged his duty of diligence as regards verification of the facts.

The Constitutional Court therefore allowed the application but held that only the applicants' right to respect for their honour had been violated.

Supplementary information:

One judge forcefully expressed a dissenting opinion against this judgment after referring to the line taken by the Constitutional Court in its Judgment no. 41/1997 (*Bulletin* 1997/1 [ESP-1997-1-006]) to the effect that criminal action in defence of a fundamental right is not part of its constitutional substance, and so the inadmissibility or failure of the criminal action can in no circumstances prejudice the fundamental right. This judge objected to the majority ruling, which he considered to be the unfortunate outcome of the European Court of Human Rights Decision of 14.10.1999 (*Riera Blume and others v. Spain*).

Articles 18.1, 20.1.d and 20.4 of the Constitution.

Cross-references:

The Constitution does not grant the right to secure a criminal conviction: Constitutional Court Judgments

nos. 199/1996, 41/1997 (*Bulletin* 1997/1 [ESP-1997-1-006]), 231/1998 and 215/1999.

Inadmissibility of criminal-law applications concerning offences against the right to respect for reputation: Constitutional Court Judgment no. 297/1994.

Unidentified information sources: Constitutional Court Judgments nos. 178/1993, 28/1996 (*Bulletin* 1996/1 [ESP-1996-1-005]), 51/1997 and 154/1999.

Languages:

Spanish.

Identification: ESP-2000-1-004

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 31.01.2000 / **e)** 24/2000 / **f)** Jianquin Ye / **g)** *Boletín oficial del Estado* (Official Gazette), 54, 03.03.2000, 46-51 / **h)**.

Keywords of the systematic thesaurus:

5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.

Keywords of the alphabetical index:

Expulsion, administrative procedure / Criminal proceedings, ongoing / Foreigner, expulsion under criminal procedure.

Headnotes:

When the public authorities have the permission of a criminal court judge to expel a foreigner charged with a criminal offence but do so before the hearing, the expulsion measure does not infringe the fundamental rights to judicial protection and to a fair trial (Article 24 of the Constitution). The 1985 Immigration Act prescribed, among other grounds for expulsion from the national territory, the involvement of a foreign national in activities contrary to law and order. The fact that the misdeeds leading to expulsion may constitute a criminal offence in no way signifies that the expulsion order cannot be in the remit of the administrative authority, further considering that the latter is subject to oversight by the administrative courts. It therefore rests with these courts to ensure judicial protection of the foreign national's rights. In authorising expulsion (after duly weighing the circumstances of each specific case), the criminal courts do not penalise the foreign national but rather afford him/her an additional safeguard.

Summary:

Mr Jianquin Ye, a Chinese national legally resident in Spain, was arrested at Madrid airport on a charge of procuring forged passports for several of his countrymen to enable them to enter the Schengen area. After questioning by the police and the investigating judge, he was released on bail pending investigation of a criminal charge of uttering forgeries and abetting illegal immigration. A month later, the police requested the court to authorise his expulsion without awaiting the outcome of the investigation or the holding of a hearing. The judge consented to the expulsion of Mr Ye, who lodged an application for constitutional protection *(amparo)* before the Constitutional Court.

The Constitutional Court did not allow the application, since it held that neither the fundamental right to receive effective judicial protection without being denied a defence (Article 24.1 of the Constitution) nor the fundamental right to a fair trial (Article 24.2 of the Constitution) had been violated.

The expulsion of a foreigner from the national territory by the public authorities is an administrative penalty which must be prescribed by a law and can be imposed only as the outcome of proceedings which secure the rights of the defence. In the present case, however, expulsion had not yet been ordered since the procedure was then at a preliminary stage. The criminal court judge was in the process of investigating the facts in order to determine whether they constituted an offence; the investigation of the case was not yet completed when the judge authorised the administrative authority to expel the charged foreign national before the hearing. This possibility is expressly contemplated in the 1985 Immigration Act (Sections 21.2 and 26) and does not infringe the rights in respect of judicial process set forth in Article 24 of the Constitution.

In the event of being finally expelled, a foreign national may exercise all rights of the defence as part of the same administrative procedure. Prior judicial action by the examining judge, limited to authorising expulsion before the hearing, does not penalise a foreigner charged with an offence but affords him/her more guarantees than are available to other foreigners against whom expulsion proceedings are brought for different reasons. The criminal court must have regard *prima facie* to the foreigner's rights without prejudice to the duty of exhaustive supervision of the administrative courts.

Supplementary information:

Articles 13 and 19 of the Constitution.

The 1985 Immigration Act (Organic Law 7/1985 of 1 July 1985) was repealed and replaced by Organic Law 4/2000 of 11 January 2000 concerning rights and freedoms of foreigners in Spain and their social integration: see Section 53.4.

Cross-references:

Fundamental rights of foreigners: Constitutional Court Judgments nos. 99/1985 of 30.09.1985 and 94/1993 of 22.03.1993; declaration of 01.06.1992 concerning the Treaty on European Union.

Expulsion from the national territory: Constitutional Court Judgments nos. 94/1993 of 22.03.1993, 116/1993 of 29.03.1993, 242/1994 of 20.06.1994 and 203/1997 of 25.11.1997 (*Bulletin* 1997/3 [ESP-1997-3-024], and Constitutional Court Decision no. 33/1997 of 10.02.1997.

The present Constitutional Court judgment makes reference to the following European Court of Human Rights decisions: *Abdulaziz, Cabales and Balkandali v. United Kingdom*, 28.05.1985, Series A, no. 94, *Special Bulletin ECHR* [ECH-1985-S-002]; *Berrehab v. Netherlands*, 21.06.1988, Series A, no. 138, *Special Bulletin ECHR* [ECH-1988-S-005]; *Moustaquim v. Belgium*, 18.02.1991, Series A, no. 193, *Special Bulletin ECHR* [ECH-1991-S-001]; *Ahmut v. Netherlands*, 28.11.1996, *Reports* 1996-VI.

Languages:

Spanish.

Identification: ESP-2000-1-005

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 31.01.2000 / **e)** 25/2000 / **f)** Sabino Dopico Fraguela contra Ministerio Fiscal / **g)** *Boletín oficial del Estado* (Official Gazette), 54, 03.03.2000, 51-55 / **h)**.

Keywords of the systematic thesaurus:

3.16 **General Principles** – Weighing of interests.
3.21 **General Principles** – Prohibition of arbitrariness.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Reasoning.

Keywords of the alphabetical index:

Imprisonment / Judgment, execution, stay / Illness, serious.

Headnotes:

When a person suffering from a serious illness is imprisoned, all justifications founded in law must be based on weighing of the interests and rights at issue, viz:

1. on the one hand, public safety, which might be threatened by failing to imprison a sentenced person whose prognosis as to likelihood of reoffending is negative, considering his personal circumstances and above all the effect of his illness on that prognosis;

2. on the other hand, the extent to which the sentenced person's right to life and integrity of person are affected, having regard to the type of illness and the greater or lesser effect which imprisonment would have on it.

The right to obtain a court decision founded in law (Article 24.1 of the Constitution) presupposes first and foremost that there should be a reasoned decision, that is a decision comprising details and explanations that indicate which legal criteria the decision is based on; furthermore, this statement of reasons must be founded in law, that is the basis for the decision must be non-arbitrary application of the rules deemed appropriate to the specific case.

Summary:

This application for constitutional protection *(amparo)* concerns two court decisions in pursuance of which a person was refused suspension of the six-year prison sentence imposed on him for attempted murder. The sentenced person claimed to be suffering from a serious and incurable illness, and certified this by producing several medical records.

In this judgment, the Constitutional Court granted the applicant constitutional protection, set aside the impugned decisions, and directed the court which had ruled in the matter to deliver new and properly reasoned decisions.

The Constitutional Court adverted to its practice regarding the right to be informed of the reasons for court decisions, and emphasised in this connection that the duty to state reasons is also owed by the courts where they have a certain degree of discretion in delivering judgment, as is the case when ruling on suspension of the execution of sentences in accordance with the Penal Code. The Court stressed that in the case before the Court the duty to give reasons was absolutely inescapable in that the obligation to clarify the foundation of the decision reflects not only the value of freedom but also the fundamental right to physical integrity (Articles 1.1 and 15.1 of the Constitution), since suspension of the execution of the sentence had been requested on the ground of the anticipated ill-effects of the sentenced person's imprisonment on the course of his illness.

In accordance with the aforementioned constitutional practice, the Constitutional Court held that in this case the impugned court decisions violated the applicant's right to effective judicial protection. Indeed, although the decisions fulfilled the obligation to state reasons, their grounding could not be accepted as a reasonable interpretation complying with the applicable rules (Article 80.4 of the Penal Code). In that respect, the Constitutional Court recalled that a judgment founded in law must state the reasons why the criminal court holds that suspension on special grounds – in this case, serious and incurable illness – is or is not warranted, and explain why, despite the illness, there is not good cause to order the suspension of the sentence having regard to the sentenced person's individual circumstances and to other legal values or interests affecting the decision.

Supplementary information:

In Judgment no. 48/1996 of 25.03.1996 (*Bulletin* 1996/1 [ESP-1996-1-008]), the Constitutional Court directly granted constitutional protection on the ground that the applicant's right to life and physical integrity had been violated.

Languages:

Spanish.

Identification: ESP-2000-1-006

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 03.02.2000 / **e)** 31/2000 / **f)** José Antonio Sánchez García contra Ministerio de Defensa / **g)** *Boletín oficial del Estado* (Official Gazette), 54, 03.03.2000, 78-83 / **h)**.

Keywords of the systematic thesaurus:

1.2.4 **Constitutional Justice** – Types of claim – Initiation *ex officio* by the body of constitutional jurisdiction.
1.3.2.3 **Constitutional Justice** – Jurisdiction – Type of review – Abstract review.
1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.
1.3.5.13 **Constitutional Justice** – Jurisdiction – The subject of review – Administrative acts.
3.12 **General Principles** – Legality.
4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
5.1.1.3.4 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Military personnel.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

Military, access to courts / Constitutional jurisdiction, subsidiarity / Officer, dismissal.

Headnotes:

The law that forbids any court to review the dismissal of an armed forces member infringes the right to

judicial protection as regards access to justice (Article 24.1 of the Constitution). It is immaterial that the prohibition applies solely to dismissals ordered after the member has been convicted of an offence of insubordination.

As fundamental rights are secured to all citizens, any restriction on their exercise founded on the specific situation applying to certain categories of persons is acceptable only if proven absolutely indispensable for the accomplishment of the task or function attaching to that specific situation.

An application for constitutional protection *(amparo)* is an extraordinary remedy intended to safeguard rights and freedoms. Thus the law must always provide for an ordinary remedy before the ordinary courts.

An internal issue of unconstitutionality, raised by the Constitutional Court itself in connection with an application for constitutional protection and concerning the abstract validity of a law, differs from an issue of unconstitutionality referred to it by the ordinary courts.

Summary:

In Judgment no. 31/2000, the Constitutional Court determined the issue of unconstitutionality which it had raised *ex officio* (in Judgment no. 18/1994) concerning Section 468.c of Organic Law 2/1989 of 13 April 1999 on military justice procedure, and ruled on three precise points:

i. the presumed violation, by the aforementioned statutory provision, of the right to effective judicial protection;

ii. the subsidiary nature of the application for constitutional protection *(amparo)*;

iii. the principle of judicial supervision of administrative activity (Articles 24.1, 53.2 and 106.1 of the Constitution).

According to the provision at issue, “no appeal under armed services disciplinary procedure may be lodged against an order of dismissal issued following final conviction on a charge of insubordination where the conviction carries a penalty of over six years' detention for one offence, or is punishable by absolute forfeiture of status as a primary or ancillary penalty”.

The Constitutional Court held firstly that the aforesaid statutory provision infringed the right to effective judicial protection (Article 24.1 of the Constitution) in totally excluding from judicial review a range of penalties such as suspension from duty on being finally convicted of the offence of insubordination. It was appropriate to recall here that suspension was by no means simply an automatic or mandatory effect of the criminal judgment, but was consequential to the disciplinary provisions embodied in Organic Law 8/1998 of 2 December 1998 laying down the disciplinary rules for the armed forces and permitting (Section 17) the dismissal of any member convicted on certain counts should the criminal sanction imposed not automatically entail loss of service status.

Where independent sanctions and other sanctions not imposed by the criminal court but ordered by an administrative authority are excluded from the ambit of judicial process, this has the effect of removing them from the supervision of judges and courts. On this point, the Constitutional Court recalled that in order to ensure the compatibility of military discipline with the constitutional framework, it must be subject to the supervision of judicial bodies.

The Constitutional Court also held that the provision at issue was contrary to the principle of judicial supervision of administrative activity (Article 106.1 of the Constitution), in preventing courts of justice from verifying the lawfulness of an administrative sanction as serious as suspension from duty. Indeed, even where it is consequential to certain court sentences, this measure constitutes a sanction over and above the criminal conviction and thus cannot be directly repositioned in the context of the judicial action.

Finally, the Court held that by preventing access to courts of justice, this provision in effect left the constitutional protection as the sole possible procedure for judicial review of decisions by the military administration. But in fact this constitutional protection procedure is an extraordinary review procedure which can never replace a common, general and fully operative remedy before the ordinary courts (Article 53.2 of the Constitution).

Supplementary information:

The issue of constitutionality determined by the Constitutional Court in this judgment was raised by the Court itself in Judgment no. 18/1994 of 20.01.1994 (in accordance with the procedure prescribed in Section 55.2 of the Organic Law on the Constitutional Court).

Languages:

Spanish.

Identification: ESP-2000-1-007

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 17.02.2000 / **e)** 46/2000 / **f)** María Julia Lorente Hernández contra Ministerio de Hacienda / **g)** *Boletín oficial del Estado* (Official Gazette), 66, 17.03.2000, 60-65 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
1.4.6 **Constitutional Justice** – Procedure – Grounds.
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.3.40 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Tax, personal income tax / Taxation rate, minimum.

Headnotes:

In accordance with the constitutional principle of equality before the Law on taxation (Article 31.1 of the Constitution), personal income tax law may in no case introduce a minimum taxation rate of 8% on irregular increases in assets if the average rate for the tax year is 0%.

The Constitutional Court can confine itself to examining the constitutional provisions invoked by the court of justice which raises the issue of unconstitutionality; any reference made by the prosecutor to other constitutional provisions can be treated only as a suggestion in the event that the Constitutional Court sees fit to examine them of its own motion. The repeal of the impugned provisions in no way invalidates the subject-matter of the constitutional procedure.

Summary:

The Higher Court of Justice of Valencia had raised an issue of unconstitutionality concerning the personal income tax law (Act 44/1978 of 8 September 1978 amended, as regards the provision which is the subject of this judgment, by Act 37/1998 of 28 December 1988). Under the terms of the act, the classes of income on which income tax is payable include irregular increases in assets. In addition, Section 27.6.2 of the same act, drafted in 1988, provides that where the average rate of taxation is 0%, irregular increases in assets are taxable at a minimum rate of 8%.

The total value of the income accruing to Mrs Maria Julia Lorente Hernández in 1989 amounted to 472,000 pesetas. Since it did not exceed the minimum taxable level, this amount was exempted from personal income tax, despite which the taxation department ordered her to pay a tax settlement of 8% in accordance with the provision at issue. However, had this gain been subject to personal income tax (according to law, income is taxable only from 618,000 pesetas per annum upwards), the initial income bands (up to 909,000 pesetas) would have been taxable at a rate of 0.1-7.9%, that is less than the 8% rate stipulated by the tax authorities. Mrs Hernández therefore appealed to the Valencia administrative litigation division which raised an issue of unconstitutionality regarding the aforesaid act.

In Judgment no. 46/2000, the Constitutional Court declared the designated statutory provision unconstitutional and void, being contrary to the principle of equality and progressive taxation in proportion to financial capacity (Article 31.1 of the Constitution).

In tax matters, Article 31.1 of the Constitution specifies and modulates the scope of the principle of equality (laid down for general purposes in Article 14). This principle is inseparable from the principles of financial capacity, general application, justice and progressiveness. The question before the Court was not to determine whether the law prescribed unequal treatment of a subjective kind, but to establish whether it gave rise to inequality founded on objective considerations, and whether it prescribed different tax treatment for persons receiving their income irregularly.

The purpose served by the provision in question was deemed perfectly lawful: to levy income tax on all income received by taxpayers from whatever source, in order to guard against evasion or undesirable savings, and to rectify the imbalances existing in relation to taxpayers in receipt of regular income.

However, the latest tax reform (introducing the minimum taxation rate of 8%) had a general unfair consequence in that it compelled all persons receiving minimal irregular income even below a taxable level to bear a heavier tax burden than persons receiving a larger amount of the same class of income.

The lawyer appearing for the State submitted that the law under challenge had been repealed in 1991 and replaced by Act 18/1991 introducing new income tax regulations, and that the constitutional procedure therefore had no object. In its judgment, the Constitutional Court confirmed its settled case-law, refuting this argument, and stressed that it had to rule on the constitutionality of the impugned statutory provision despite its repeal, since it remained a decisive element in the decision to be delivered by the administrative court which had raised the issue of constitutionality.

The Public Prosecutor moreover asserted in his report to the Court that the Act introducing the 8% minimum taxation rate was a statute approving the State budget. As such, considering that it amended a law specifically concerning taxation, it also infringed Article 134.7 of the Spanish Constitution, which prohibits any amendment of that kind except as expressly laid down in the relevant tax law. The Court considered that it need not rule on this question since it had not been raised by the judicial body, and did not see fit to address it *ex officio*, in accordance with the relevant Organic Law (Sections 39.2 and 84 of the Organic Law on the Constitutional Court).

Cross-references:

Principle of equality before the law in taxation matters: Constitutional Court Judgments nos. 27/1981 of 20.07.1981; 19/1987 of 17.02.1987; 209/1988 of 10.11.1998; 45/1989 of 20.02.1989; 221/1992 of 11.12.1992; 54/1993 of 15.02.1993; 214/1994 of 14.07.1994 and 134/1996 of 22.07.1996 (*Bulletin* 1996/2 [ESP-1996-2-023]).

In judgments determining issues of constitutionality, the Constitutional Court may also pronounce on the validity of repealed laws: Constitutional Court Judgments nos. 111/1983 of 02.12.1983; 199/1987 of 16.12.1987; 93/1988 of 24.05.1988; 28/1997 of 13.02.1997; 12/1998 of 15.01.1998; 174/1998 of 23.07.1998; 234/1999 of 16.12.1999.

Ex officio powers of the Constitutional Court: Section 39.2 of the Organic Law on the Constitutional Court, and Constitutional Court Judgment no. 113/1989 of 22.06.1989.

Languages:

Spanish.

Identification: ESP-2000-1-008

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 17.02.2000 / **e)** 47/2000 / **f)** / **g)** *Boletín oficial del Estado* (Official Gazette), 66, 17.03.2000, 66-71 / **h)**.

Keywords of the systematic thesaurus:

1.2.4 **Constitutional Justice** – Types of claim – Initiation *ex officio* by the body of constitutional jurisdiction.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
3.15 **General Principles** – Proportionality.
5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.

Keywords of the alphabetical index:

Detention on remand, condition, lawful purpose / Law, clarification / Criminal procedure.

Headnotes:

The law governing remand in custody is insufficient and does not uphold the right to personal freedom (Article 17 of the Constitution). Detention of a person facing a charge in criminal proceedings must not only be prescribed by law but also fulfil substantive conditions: it must serve a lawful purpose under the Constitution, besides which the court must explain in its decision the purpose justifying the measure and the proportionality of the detention to that purpose. In so doing it must not only take into consideration the seriousness of the penalty which may be imposed in due course but also weigh the specific circumstances of the act in question and the personal circumstances of the accused.

The general social unease caused by an offence in no way justifies remand in custody.

Summary:

Mr Francisco Castillo Lomas and other persons had been remanded in custody pending a judicial investigation to establish their involvement in various serious offences of drug trafficking and illegal possession of weapons. The court decisions challenged merely state that the offences in question carry very severe penalties (up to twenty years of imprisonment) and cause social unease, and that the remand of any person on reasonable suspicion of being implicated in these offences is consequently justified. However, neither the trial court nor the Court of Appeal (Audiencia provincial) had examined the pleadings of the accused, who asserted that there was not the slightest risk of his absconding since he was financially destitute, co-operating with the authorities, and had all his ties in Spain.

The plenary Constitutional Court granted the applicant constitutional protection *(amparo)* and set aside the decisions pursuant to which his remand in custody had been ordered. It also raised an issue of unconstitutionality regarding Articles 503 and 504 of the Code of Criminal Procedure.

In its judgment, the Constitutional Court referred to its extensive case-law concerning the foundation of a measure as serious as detention pending trial for an offence. In line with European Court of Human Rights precedent, the constitutional case-law stipulates, especially as from 1995, the fulfilment of certain conditions for a pre-trial detention measure to comply with the fundamental right to personal freedom (Article 17 of the Constitution), viz:

1. The detention must have a lawful aim, that is to avert risk of the accused absconding, obstruction of the criminal investigation, or a reoffending, but should never anticipate the penalty or forestall the offence as these are outcomes to be secured by the sentence alone and to be imposed only after a fair trial and under the terms of a court decision.

2. The detention must be ordered by a reasoned court decision; it does not suffice to invoke the provision authorising a judge to order it (chiefly Articles 503 and 504 of the Code of Criminal Procedure); all aspects that justify the application and continuation of such a measure must be weighed additionally.

3. The reasons stated must abide by the principle of proportionality: the freedom of a person presumed innocent can be curtailed only to the extent strictly necessary for achieving certain of the lawful outcomes which justify pre-trial detention.

Judgment 47/2000 compares each of these conditions with the provisions of the 1882 Code of Criminal Procedure (amended several times on this specific point, most recently in 1984), which provisions had been applied literally in the court decisions ordering the remand of the applicant. It emerged from this comparison that the Code of Criminal Procedure did not respect the fundamental right to personal freedom; its provisions did not specify the ends justifying the detention measure, and did not require the courts to give reasons for taking such a measure in each specific case; instead, it sufficed that the offence under investigation carry a severe penalty (prison sentence of over six months and a day) and that there be rational proof that the accused was involved in perpetrating it, while the personal circumstances of the accused were in no way contemplated.

In this judgment, the Constitutional Court accordingly held that the court decisions (which were confined to literal application of the law) violated the Constitution, and of its own motion raised an issue of unconstitutionality concerning the impugned statute, as it was aware that the violation of personal freedom originated in the wording of its provisions (in accordance with Section 55.2 of the Organic Law on the Constitutional Court).

Supplementary information:

The government has announced its intention to table in parliament a new bill on criminal procedure.

Cross-references:

Foundation of the pre-trial detention or remand measure: Constitutional Court Judgments nos. 128/1995 (*Bulletin* 1995/2 [ESP-1995-2-025]), 37/1996, 62/1996 (*Bulletin* 1996/1 [ESP-1996-1-011]), 44/1997, 66/1997 (*Bulletin* 1997/1 [ESP-1997-1-008]), 98/1997 (*Bulletin* 1997/2 [ESP-1997-2-012]) and 156/1997.

The case-law of the European Court of Human Rights is also highly important. The judgment refers to the following decisions of the European Court of Human Rights: *Neumeister v. Austria*, 27.06.1968, Series A, no. 8, *Special Bulletin ECHR* [ECH-1968-S-002]; *Matznetter v. Austria*, 10.11.1969, Series A, no. 10; *Tomasi v. France*, 27.08.1992, Series A, no. 241-A, *Special Bulletin ECHR* [ECH-1992-S-005]; and *W. v. Switzerland,* 26.01.1993, Series A, no. 254-A.

Languages:

Spanish.

Identification: ESP-2000-1-009

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 24.02.2000 / **e)** 48/2000 / **f)** Andecha Astur contra Junta Electoral de Asturias / **g)** *Boletín oficial del Estado* (Official Gazette), 76, 29.03.2000, 3-5 / **h)**.

Keywords of the systematic thesaurus:

1.5.1.1 **Constitutional Justice** – Decisions – Deliberation – Composition of the bench.
1.5.4.1 **Constitutional Justice** – Decisions – Types – Procedural decisions.
2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.
3.8 **General Principles** – Territorial principles.
3.16 **General Principles** – Weighing of interests.
4.3.3 **Institutions** – Languages – Regional language(s).
5.3.39.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Fundamental right, interpretation more favourable to their effectiveness / Case-law, development, reversal.

Headnotes:

The rejection of a political party's candidatures in the elections to the national parliament *(Cortes generales)* on the ground that they are submitted not in Spanish but in Bable (Asturian dialect) violates the fundamental right of access to public office on equal terms (Article 23.2 of the Constitution).

The Chambers of the Constitutional Court may depart from constitutional practice without needing to submit the question to the plenary Court when they entertain applications for protection in electoral matters.

Summary:

The political party Andecha Astur had put up several candidates in Asturias for the 2000 general elections to the House of Representatives and the Senate. The documentation submitted to the Central Electoral Commission was drafted in Bable, a minority language or dialect peculiar to the Asturias region. Bable is recognised in law by the Statute of the autonomous community of the Principality of Asturias, Article 4 of which was amended and strengthened as part of the 1999 reform, and also by an Asturias autonomous community Law on the use and preservation of Bable of 1998.

The Central Electoral Commission first, then the administrative court, had rejected the candidature of Andecha Astur and consequently refused to declare it. The Constitutional Court allowed the application for electoral protection lodged by the political party, set aside the previous decisions, and directed that the Andecha Astur party's candidatures be declared and published in the same terms as initially presented.

In this judgment, the Constitutional Court recalled that electoral law permitted the rejection of a candidature only in clearly defined cases and never on the ground that the documentation was drafted in a particular language. In widening the legally defined circumstances in which participation in elections can be denied, the Electoral Commission had unlawfully restricted the right of access to public office (Article 23.2 of the Constitution), to which special protection applies when it is exercised in the context of elections.

In its Judgment no. 27/1996 (*Bulletin* 1996/1 [ESP-1996-1-004]), the Constitutional Court did indeed affirm that to stipulate the drafting of candidatures in Spanish was a legitimate restriction on the right to participate in public affairs. This was nevertheless an isolated decision by one chamber of the Constitutional Court quite at variance with its practice of interpreting the fundamental right in the sense most favourable to its exercise. In the present case, it was quite permissible for the chamber to depart from the earlier decision of the Court, notwithstanding the stipulation in Section 13 of the Organic Law on the Constitutional Court that the question must be put to the plenary Court, because the case in question concerned an application for electoral protection on which it was expedient to rule urgently and within the imperative time-limits.

Supplementary information:

The Organic Law on the general electoral system (Organic Law 5/1998, amended), Section 47 on declaration of candidatures, provides that candidatures "not fulfilling the stipulations of the above sections or those made by the special provisions of this law" cannot be declared unless the defects found by the Electoral Commission are rectified, while Section 49 governs appeals against declaration of candidatures, initially to ordinary courts and subsequently to the Constitutional Court.

Decision of 20 January 2000 by the plenary Constitutional Court approving various rules on the introduction of the applications for protection prescribed by Organic Law 5/1985 of 19 June 1985 on the general electoral system (BOE 25.1, 3125).

Statute of the autonomous community of the Principality of Asturias (Organic Law 1/1991 of 30 December 1981, amended): Section 4.

Cross-references:

This judgment departs from the practice exemplified by Constitutional Court Judgment no. 27/1996 (*Bulletin* 1996/1 [ESP-1996-1-004]).

Languages:

Spanish.

Identification: ESP-2000-1-010

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 13.03.2000 / **e)** 71/2000 / **f)** Jean François Perronet contra República francesa / **g)** *Boletín oficial del Estado* (Official Gazette), 90, 14.04.2000, 50-55 / **h)**.

Keywords of the systematic thesaurus:

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

5.3.13.10 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Extradition, concurrency with imprisonment / Remand in custody, duration / Law, clarification.

Headnotes:

The remand in custody of a person subject to an extradition procedure may in no circumstances exceed the maximum term prescribed by law (Article 17.4 of the Constitution); the legislation in force does not permit this term to be suspended even if the extraditable person is concurrently serving an unsuspended prison sentence imposed for other offences under a separate criminal procedure.

Summary:

The applicant was arrested in Spain for extradition to France in order to stand trial for armed robbery and illegal possession of weapons. The National Court *(Audiencia nacional)* ordered him to be remanded in custody until surrendered to the French authorities. At the time of arrest, the applicant had been in possession of several weapons and explosives; he was tried for this in Spain under a separate procedure and sentenced to a term of over six years in prison. The Court of Appeal held that the full term of the sentence should not be taken into account for the purpose of calculating the maximum term of concurrent detention on remand (two years) and that the latter term should not be deemed to re-commence until the applicant had served the whole of his prison sentence without remission.

The applicant claimed that the maximum periods prescribed by law for detention on remand had not been observed. In this judgment, the Constitutional Court declared that the conditions of detention on remand, ordered in connection with an extradition procedure, were in no way affected by its concurrency with an enforceable criminal sentence. The laws of criminal procedure did not expressly provide for this possibility. It was unacceptable that the Spanish judicial authorities should make a broad interpretation so as to allow the maximum term of detention on remand to be suspended or deem it reckonable against the applicant while serving a prison sentence, in so far as he had committed an offence in Spain which was the cause of his extradition to France being postponed.

Supplementary information:

Articles 503 and 504 of the 1882 Code of Criminal Procedure (in the wording of Organic Law 10/1984 of 26.12.1984).

Section 10 of the Act relating to extradition on request (Act 4/1985 of 21.03.1985).

Cross-references:

Extension of remand: Constitutional Court Judgments nos. 98/1998, 234/1998 and 19/1999.

Remand warranted by extradition: Constitutional Court Judgments nos. 2/1994, 13/1994, 222/1997 and 5/1998.

Languages:

Spanish.

Identification: ESP-2000-1-011

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 14.03.2000 / **e)** 73/2000 / **f)** Presa de Itoiz / **g)** *Boletín oficial del Estado* (Official Gazette), 90, 14.04.2000, 61-77 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.4.7 **Constitutional Justice** – Procedure – Documents lodged by the parties.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources.
3.16 **General Principles** – Weighing of interests.
3.17 **General Principles** – General interest.
3.21 **General Principles** – Prohibition of arbitrariness.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.5.9 **Institutions** – Legislative bodies – Relations with the courts.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.
5.5.1 **Fundamental Rights** – Collective rights – Right to the environment.

Keywords of the alphabetical index:

Parliament, interference with justice / Validation of legislation / Administrative court, execution of judgment / Law of general application / Law, interlocutory judicial review / Law, interpretation / Regulation, no subject-matter reserved vis-à-vis statute law / Environment, conservation / Council of Europe, statute.

Headnotes:

No law may unduly undermine the operative provisions of a final judgment. Otherwise it might breach the fundamental right to the effective protection of the courts, the principle that the courts have sole competence to exercise judicial authority and the obligation of compliance with court decisions (Articles 24.1, 117.3 and 118 of the Constitution). Parliament may make legal reforms even if, in so doing, it prevents the execution of a decision given by a court under the law formerly applicable. However, under no circumstances may it legislate in pursuit of an unlawful aim, such as impeding the administration of justice, or pass legislation that may unduly sacrifice the specific interests safeguarded by a judgment awaiting execution on the sole ground of serving the interests enshrined in the new law.

Statements made by political representatives in no way constitute guidance for interpreting the law and cannot be used to distort its substance.

Parliament breaches the prohibition on arbitrary action by public authorities (Article 9.3.7 of the Constitution) only where there is no rational explanation for a law. A law laying down generally applicable new rules on the conservation of natural areas cannot be deemed arbitrary, even where the new rules are debatable from a political or technical standpoint.

Under the Constitution, statute law may have any subject matter, and parliament may in principle pass laws on subjects which were previously governed by regulations. Transforming regulatory provisions into statutory provisions in no way prevents their judicial review, since the courts may always refer the legislation to the Constitutional Court.

Only the courts may raise questions of unconstitutionality, after hearing the parties as to the actual

legal provisions whose compliance with the constitution is in doubt. Those provisions must moreover be clearly identified by the court, on consulting the parties, as must the articles of the Constitution which the court considers to be breached. Reference to any other constitutional provision by any party to the proceedings shall not be binding on either the court or the Constitutional Court, without this affecting the powers conferred *ex officio* on the latter.

Summary:

The administrative division of the National Court *(Audiencia nacional)* raised a question of unconstitutionality concerning a number of provisions of a Law on nature conservation areas passed in 1996 by the autonomous community of Navarra. That law repealed the earlier "foral" law of Navarra on the same subject, which dated from 1987, and, inter alia, replaced various provisions relating to the rules governing the protective areas surrounding nature reserves.

In 1995 the National Court had cancelled a project to build a dam in the Itoiz valley on the ground that it breached various provisions of the law of Navarra on nature conservation then in force. Following an appeal on points of law this decision was upheld by the Supreme Court in a judgment given in 1997 relating to only one aspect: the area which was to be flooded on building the dam affected a number of nature reserves in the Itoiz valley, as the protective strips of land surrounding them would partly disappear under the waters of the new dam reservoir. The dam project was also partly cancelled by a final judgment prohibiting the building of the upper part of the dam.

When it was preparing to execute the final judgment the National Court received an application from the public authorities seeking recognition that the execution of the judgment was legally impossible, since the new rules of 1996 permitted the existence of nature reserves without surrounding protective areas and the implementation of building projects in the public interest – as was the case with the Itoiz dam – on the protective strips of land. The National Court then raised a question of unconstitutionality in respect of the law passed in 1996 by the autonomous community of Navarra, deeming that it impeded the execution of the judgments handed down in 1995 and 1997.

The Constitutional Court ruled that the law under consideration did not breach the Constitution.

The principle that public authorities were prohibited from taking arbitrary measures (Article 9.3.7 of the Constitution), which must be applied with extreme care where it was a matter of reviewing parliamentary decisions that were nothing other than the expression of the people's will, could be deemed to have been breached only where there was no rational explanation for a law. The impugned law of Navarra in no way established rules *ad casum* (for a particular case), such as to amend the earlier legislation without justification. On the contrary, it constituted generally applicable legislation amending the rules governing natural areas in Navarra in terms which were indeed debatable from the technical and political points of view but were not devoid of justification.

In those circumstances it was of little consequence that a number of politicians and members of parliament had made statements enabling the National Court to find that the sole purpose of the new law was to prevent the execution of the court decision. The law under consideration brought the 1987 legislation of the autonomous community of Navarra into line with a law passed in 1990 at national level, with the aim of giving increased protection to natural areas. It also incorporated and harmonised the provisions of a number of earlier laws. The objective substance of that law could not be distorted by statements or initiatives that came within the realm of political debate or political strategy and in no way amounted to guidance on interpreting the law under consideration.

Parliament was empowered to amend the legislation on a subject or a given part of the legal system, whether or not that legislation had been applied by the courts in connection with earlier proceedings or with cases pending. Otherwise, the legal system would be immutable, and undue restrictions would be placed on parliament's rightful freedom of action. The question whether, in making such amendments to the legislation, parliament had interfered with judicial proceedings was quite a different matter, and in that case the issue was not arbitrary action by parliament but the right to the protection of the courts.

The fundamental right to the effective protection of the courts (Article 24.1 of the Constitution) guaranteed the execution of final judgments. The mere fact that a judicial decision had become impossible to execute following an amendment of the law on which it was based did not, in itself, constitute a breach of the Constitution, since compliance with court decisions was conditional on the characteristics of each individual set of proceedings and the substance of the decision. Firstly, parliament had very broad latitude to adopt legal reforms; secondly, compliance with final judgments was of considerable importance

in a state governed by the rule of law, as established by the Constitution, and was part of the common heritage shared with other European states (Articles 3 and 1.a of the 1949 Statute of the Council of Europe and case-law of the European Court of Human Rights).

Under the Constitution no law could unduly undermine the operative provisions of a final judgment (Articles 24.1, 117.3 and 118 of the Constitution). The law under consideration had a legitimate aim, which was none other than conservation of the environment (Article 45 of the Constitution). Furthermore, it did not clearly or flagrantly disrupt the balance between the interests enshrined in the law and the specific interests safeguarded by the judgment awaiting execution. First, the interests safeguarded by the judgment consisted in guaranteeing the protection of the nature reserves located in the valley to be flooded by the Itoiz dam project; those interests were duly taken into account by preserving a protective 500-metre strip of land around the reserves, as provided for in the final judgment and also in the new rules laid down by the law of 1996, under which the dam waters themselves were a means of guaranteeing the protection of the birds' nests in the area. Second, the new legislation combined conservation of the environment with other public interests, such as the implementation of a public works project intended to permit the irrigation of vast areas of agricultural land and the supply of drinking water to a number of urban areas and industrial estates.

Under the Constitution, statute law could deal with any subject matter, and the legislature could, in principle, assume responsibility for a task previously performed by the executive. It was therefore not unconstitutional that an appendix to the “foral” law of 1996 defined the protective areas surrounding the nature reserves, which had previously been governed by decree. It could not be said that the only reason for giving a higher rank to the legislation delimiting the nature reserves was to avoid its review by the administrative courts. Moreover, it should be pointed out that the courts could always verify the validity of legislation by referring a question of unconstitutionality to the Constitutional Court, as in the case under consideration.

From a judicial standpoint, the present judgment specified that it was for a court having to decide on referral of a question of unconstitutionality to consult the parties to proceedings, expressly state the articles of the Constitution with which it deemed the provisions in question to be in contradiction, and clearly define which provisions of the relevant law were concerned, so as to facilitate the parties' submissions and the production of state counsel's report. In the case under consideration the question of unconstitutionality had already been found inadmissible once (decision no. 121/1998 of the Constitutional Court, *Bulletin* 1998/2 [ESP-1998-2-012]) on account of a number of defects in satisfying these procedural requirements. The appeal court had then granted the parties a new time-limit for filing their submissions, after specifying the relevant provisions of the law of the autonomous community of Navarra, by means of a fairly complex series of references to various sections of the law, and the clauses of the Constitution considered to have been breached, and had subsequently once more referred the matter to the Constitutional Court. The Constitutional Court's judgment stated that the division of the National Court could have identified the relevant provisions in a simpler manner but the question of unconstitutionality was none the less properly posed.

Although one of the parties to the proceedings had relied on other grounds of unconstitutionality, the judgment merely dealt with the aspects mentioned by the court having raised the question of unconstitutionality, as there was no call for an *ex officio* examination of those grounds (Section 39.2 of the Organic Law on the Constitutional Court).

Supplementary information:

Statute of the Council of Europe of 1949, Articles 3 and 1.a.

Cross-references:

Regarding failure to execute final judgments, see Constitutional Court Judgments nos. 61/1984, 67/1984, 15/1986, 167/1987, 92/1988 and 107/1992.

The judgment takes account of Article 6.1 of the European Convention on Human Rights (Article 10.2 of the Constitution) and follows the precedents established in the following Judgments of the European Court of Human Rights: *National and Provincial Building Society and others v. United Kingdom*, 23.10.1997, *Reports* 1997-VII; *Stran and Stratis Andreatis v. Greece*, 09.12.1994, Series A, no. 301B, *Bulletin* 1994/3 [ECH-1994-3-021], and *Papageorgiou v. Greece*, 22.10.1997, *Reports* 1997-VI.

Regarding arbitrary measures by parliament, see Constitutional Court Judgments nos. 108/1986, 99/1987 and 239/1992.

Regarding the possibility of broadening the scope of a question of unconstitutionality, see Constitutional

Court Judgments nos. 113/1989 and 46/2000 [ESP-2000-1-006].

Languages:

Spanish.

Identification: ESP-2000-1-012

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 27.03.2000 / **e)** 87/2000 / **f)** Iván Aitor Sánchez Ceresani contra República de Italia / **g)** *Boletín oficial del Estado* (Official Gazette), 107, 04.05.2000, 77-84 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
3.8 **General Principles** – Territorial principles.
3.12 **General Principles** – Legality.
4.17 **Institutions** – European Union.
5.1.2 **Fundamental Rights** – General questions – Effects.

Keywords of the alphabetical index:

Fundamental right, essence / European Union, fundamental right, guarantee throughout member states / Reciprocity / Extradition, national, possibility / Foreign court, jurisdiction / Offence, international / Treaty, international, fundamental right / European Convention on Extradition / Dublin Convention of 1996.

Headnotes:

When dealing with an extradition request, the Spanish courts must uphold the fundamental rights secured by the Constitution, even where a possible violation of those fundamental rights is attributable to a foreign public authority. This is because fundamental rights are actual components of the legal system that concern all Spanish public authorities. Furthermore, the Spanish courts alone are competent to take decisions in respect of the person whose extradition has been requested.

A Spanish court which allows the extradition of a Spanish national for offences perpetrated in Spain in no way breaches the fundamental right of access to a court (Article 24.2.1 of the Constitution) where the offences are subject to universal jurisdiction under the international treaties to which Spain is a party, as is the case with international offences relating to drug trafficking.

Article 13.3 of the Constitution prohibits the extradition of Spanish nationals only in respect of political offences. This means that, except in such cases, extradition of a Spanish national is entirely in accordance with the Constitution where it is provided for under an international convention or, failing such a convention, under the Law on extradition requests.

Under no circumstances can the extradition of nationals to countries that have signed the European Convention on Human Rights give rise to general suspicions of failure to fulfil a state's obligations to guarantee and safeguard its nationals' constitutional rights. The countries concerned have specifically undertaken to uphold human rights and made themselves subject to the jurisdiction of the European Court of Human Rights, the ultimate guarantor of the fundamental rights of all individuals, irrespective of the different judicial cultures of the states parties to the convention.

Reciprocity in matters of extradition is not a fundamental right susceptible of protection; in this sphere it is enough that the courts respect the right to effective judicial protection (Articles 13.3, 24.1 and 53.2 of the Constitution). For extradition to be lawful, a court need merely certify in a reasoned decision that the foreign authorities from which the extradition request originated have complied with the principle of reciprocity.

Summary:

Italy had requested the extradition of a Spanish national accused of taking part in meetings and making payments in Spain in connection with a number of drug trafficking operations targeted at Italy. The Spanish national concerned was therefore accused of a drug trafficking offence under the international treaties on combating, preventing and punishing such offences ratified by Italy and Spain. The National Court *(Audiencia Nacional)* requested the Italian authorities to make further inquiries, so as to ascertain whether an Italian national might be

extradited to Spain in accordance with the reciprocity principle, but the Italians failed to give a conclusive reply. The Spanish court none the less decided to grant extradition, holding that the Italian authorities' response was sufficient.

The applicant argued that this decision infringed a number of his fundamental rights, an argument which was rejected by the Constitutional Court.

The Constitutional Court held that the court's decision allowing the Spanish national's extradition was reasonable. Recognising the Italian courts' jurisdiction to bring charges against a Spanish national, although the person concerned did not have Italian nationality and the offences had been committed in Spain, in no way breached the right of access to the ordinary court prescribed by law (Article 24.2.1 of the Constitution), as it was not arbitrary to base the relevant decision on the European Convention on Extradition and international treaties against drug trafficking, which permitted the extradition of nationals. The finding that Spanish extradition law, which banned the extradition of Spanish nationals, was not applicable in the case under consideration, since the treaties took precedence, was also entirely reasonable.

It was also to be noted that Italy had ratified the European Convention on Human Rights and was subject to the jurisdiction of the European Court of Human Rights, which meant that any general suspicion that its authorities failed to uphold the relevant judicial guarantees was quite unacceptable.

In addition the Constitutional Court held that the Spanish court's finding that the Italian authorities complied with the principle of reciprocity did not constitute a breach of the right to the protection of the courts. In the material circumstances the judicial decision was not arbitrary. In dealing with appeals for constitutional protection *(amparo)*, the Constitutional Court indeed took into consideration solely the arbitrariness of the judicial decisions. It also pointed out that, on completion of the judicial phase of the extradition procedure, it was for the government to verify that reciprocal treatment was guaranteed. There was therefore nothing to prevent the government from requiring further guarantees, refusing the extradition request if it deemed that the guarantee given was insufficient or, possibly, granting that request if it took the view that the fact that Spain and Italy were both members of the European Union afforded sufficient guarantee of reciprocity in the light of the general trend in such matters, reflecting Article 7 of the Dublin Convention of 27 September 1996, which, within the European Union, prohibited refusal of extradition on the ground that the person concerned was a national.

Lastly, the Constitutional Court did not find that there had been any undue delay in the proceedings (Article 24.2.6 of the Constitution), in so far as the applicant had not complained of such a delay at the relevant time. In any case, the delay was essentially attributable to the Italian authorities, who had been slow in sending the Spanish court the result of the additional inquiries requested.

Supplementary information:

Article 13.3 of the Constitution; Sections 3, 1.2 and 6 of the 1985 Act on extradition requests received; Section 278.2 of the 1985 Organic Law on the Judiciary.

Article 6 of the European Convention on Extradition, signed in Paris on 13 December 1957; Article 7 of the Dublin Convention of 27 September 1996.

Decision of the European Court of Human Rights in the case of *Soering v. United Kingdom*, 07.07.1989, Series A, no. 161, *Special Bulletin ECHR* [ECH-1989-S-003].

Cross-references:

Regarding extradition and Article 13.3 of the Constitution, see Constitutional Court Judgments nos. 11/1983, 11/1985, 102/1997, 141/1998 (*Bulletin* 1998/2 [ESP-1998-2-013]) and 147/1999.

Languages:

Spanish.

Identification: ESP-2000-1-013

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 30.03.2000 / **e)** 91/2000 / **f)** Domenico Paviglianiti contra República de Italia / **g)** *Boletín oficial del Estado* (Official Gazette), 107, 04.05.2000, 99-117 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
3.8 **General Principles** – Territorial principles.
5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.1.2 **Fundamental Rights** – General questions – Effects.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
5.3.13.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to participate in the administration of justice.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.

Keywords of the alphabetical index:

Extradition / Fundamental right, hard core / Fundamental right, essence / European Union, fundamental right, guarantee throughout member states / Trial *in absentia* / Right to defend oneself, waiver / Life imprisonment / Death penalty, abstract possibility.

Headnotes:

The Spanish courts must ensure that measures taken by foreign public authorities, which they must put into effect within the Spanish legal system, are consistent with the fundamental rights secured by the Spanish Constitution. Those rights are actual components of Spanish law and are part of public policy, which must be complied with in all circumstances.

Acts or omissions by foreign public authorities are not governed directly by the Spanish Constitution, but may indirectly breach the fundamental rights secured therein. Such an indirect breach occurs only where the act or omission adversely affects the very essence of a fundamental right, which is universally valid and applicable in that it has to do with human dignity and constitutes the hard core of the fundamental right concerned, in the light of the provisions of international conventions on human rights, of which the Spanish courts must take account before giving them full effect. Where an act or omission by a foreign public authority that violates the essence of a fundamental right is put into effect in the Spanish legal system by a Spanish court, the latter automatically breaches that fundamental right, as it does not uphold the essence of the right vis-à-vis the act or omission by the foreign public authority.

When very serious offences are in question, resulting in charges harmful to the personal dignity of the accused and carrying a severe prison sentence, a sentence imposed at the conclusion of criminal proceedings conducted in the absence of the accused breaches the essence of the rights to a defence and to a fair trial secured in Article 24.2 of the Constitution if the person sentenced is not afforded the possibility of subsequently bringing an action to have the judgment by default set aside.

The mere abstract possibility that a sentence of life imprisonment may be pronounced, in accordance with the Italian Criminal Code, does not breach either the right not to be subjected to inhuman or degrading punishment (Article 15 of the Constitution) or the rights of prisoners (Article 25.2 of the Constitution).

By granting the applicant's extradition, without making it conditional on the effective possibility of a second trial in his presence, the National Court *(Audiencia Nacional)* infringed his right to a defence and to a fair trial.

Summary:

The applicant, who had been prosecuted, convicted and sentenced *in absentia* in Italy for a number of very serious offences relating to his membership of a mafia-like organisation, was arrested in Spain, following which the Italian authorities requested his extradition with a view to enforcing the final judgments against him and bringing him to trial for various offences carrying a sentence of life imprisonment. The appeal court granted his extradition without imposing any conditions.

The applicant alleged *inter alia* two particularly serious violations of fundamental rights: a breach of his right to defend himself and to a fair trial, since the Italian courts had convicted and sentenced him *in absentia*, and a breach of his right not to be subjected to inhuman or degrading punishment or treatment, since his extradition had been granted without a demand for any guarantee from the Italian authorities that he would not be required to serve a life prison sentence in Italy.

The judgment of the plenary Constitutional Court was primarily concerned with determining to what extent the Spanish courts must project the substance of the fundamental rights secured in the Spanish Constitution on to measures taken by foreign public authorities which Spanish courts are required to recognise and put into effect in Spain. In this

connection, the Constitutional Court reiterated its established precedents on the subject, but none the less gave a number of important clarifications: foreign public authorities were not governed by the Spanish Constitution; however, the Spanish authorities could not co-operate with foreign authorities where, in so doing, they themselves also violated the essence of fundamental rights.

In the case of trial proceedings, not all of the guarantees contained in Article 24 of the Constitution could be projected on to past or future acts by foreign public authorities, and thereby possibly render the action taken by a Spanish court indirectly unconstitutional; only the basic principles enshrined in those guarantees, the very essence of a fair trial, could be projected in that way.

In this judgment it was held that being present at one's trial was not necessarily part of the essence of the right to a defence and to a fair trial with full guarantees (Article 24.2 of the Constitution), although under Spanish criminal law it was generally the case. The guarantees offered in Italy (active presence of counsel where the defendant was absent) were in principle sufficient. However, in the light of the provisions of the European Convention on Human Rights and the case-law of the European Court of Human Rights, the judgment added that it was essential that a person convicted *in absentia* of a very serious offence carrying a severe prison sentence should be able to seek to have the judgment by default set aside in a second trial, with a view to having the court review any prison sentence imposed. The Constitutional Court held that the appeal court's decision should be reversed on this point and the applicant's extradition should be granted on condition that a new trial afforded him sufficient possibility of appeal, thereby safeguarding his right to a defence.

The applicant also alleged that he was liable to life imprisonment *(ergastolo)* for a number of the offences resulting in the extradition measure. In its judgment the Constitutional Court held that this allegation was unfounded, since it had not been specified under what conditions the sentence was to be served and what degree of loss of liberty it entailed. Under these circumstances it was therefore quite impossible to determine whether the punishment was inhuman and degrading (Article 15 of the Constitution), as the applicant had alleged. In addition, attention must be drawn to the fact that Article 25.2 of the Constitution in no way meant that the sole legitimate purpose of a prison sentence was rehabilitation and social re-integration; that provision moreover did not set forth a fundamental right *per se*, but constituted directions from the constitution-making authority to parliament providing guidance on crime and prisons policy.

Supplementary information:

Two dissenting opinions were issued. The first, by the President of the Court, basically asserted that, where the minimum rights of the defence had been respected in the course of the trial from which the defendant was absent, as had been the case in the proceedings under consideration, the essence of the right to a defence and to a fair trial did not always require a further trial in which the defendant sought to have the judgment by default set aside. The second dissenting opinion (supported by three judges) gainsaid the judgment, asserting that accused persons could defend themselves if they were present in person at their trial or have themselves represented by counsel of their choosing if they did not wish to attend, and there was consequently no violation whatsoever of the rights of the person in question. These two dissenting opinions underlined three key factors: Italy was a member state of the European Union; it did in fact uphold the rights enshrined in the European Convention on Human Rights; and it had accepted the jurisdiction of the European Court of Human Rights in Strasbourg (which was consistent with Judgment no. 86/2000 delivered by the first division of the Constitutional Court). Articles 10, 13.3, 24 and 25 of the Constitution.

Cross-references:

Regarding the essential substance of fundamental rights, see Constitutional Court Judgment no. 11/1981.

Regarding human dignity, see Constitutional Court Judgments nos. 53/1985 and 120/1990.

Regarding extradition, see Constitutional Court Judgments nos. 11/1983, 141/1998 (*Bulletin* 1998/2 [ESP-1998-2-013]) and 87/2000 (ESP-2000-1-011].

The reasoning of the judgment and of the dissenting opinions is based on Articles 3 and 6 ECHR and other provisions and on the following decisions of the European Court of Human Rights: *Soering v. the United Kingdom*, 07.07.1989, Series A, no. 161, *Special Bulletin ECHR* [ECH-1989-S-003]); *Drozd and Janousek v. France and Spain*, 26.06.1992, Series A, no. 240; *Loizidou v. Turkey*, 23.03.1995, Series A, no. 310; *Tyrer v. United Kingdom*, 25.04.1978, Series A, no. 26, *Special Bulletin ECHR* [ECH-1978-S-002]); *T. and V. v. United Kingdom*, 16.12.1999; *Colozza v. Italy*, 12.02.1985, Series A, no. 89; *Special Bulletin ECHR* [ECH-1985-S-001]); *F.C.B.v. Italy*, 28.08.1991, Series A, no. 208-B; *Poitrimol v. France*, 23.11.1993, Series A, no. 277-A;

Lala and Pelladoah v. Netherlands, 22.09.1994, Series A, no. 297-B; *Barberà, Messegue and Jabardo*, 06.12.1988, Series A, no. 146, *Special Bulletin ECHR* [ECH-1988-S-008]); *Oberschlick*, 23.05.1991, Series A, no. 204; *Guerin v. France*, 29.07.1998, *Reports* 1998-V; *Deweer v. Belgium*, 27.02.1980, Series A, no. 35, *Special Bulletin ECHR* [ECH-1980-S-001].

Languages:

Spanish.

Identification: ESP-2000-1-014

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 10.04.2000 / **e)** 98/2000 / **f)** Santiago Aldazábal Gómez contra Casino de La Toja, S.A. / **g)** *Boletín oficial del Estado* (Official Gazette), 119, 18.05.2000, 41-48 / **h)**.

Keywords of the systematic thesaurus:

3.15 **General Principles** – Proportionality.
3.16 **General Principles** – Weighing of interests.
5.1.2.2 **Fundamental Rights** – General questions – Effects – Horizontal effects.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.
5.3.34 **Fundamental Rights** – Civil and political rights – Inviolability of communications.

Keywords of the alphabetical index:

Communication, recording, workplace / Worker, fundamental right / Fundamental right, violation, burden of proof.

Headnotes:

The installation in a place of work of listening and sound recording devices not essential for security purposes, or necessary to the proper functioning of the company concerned, breaches employees' right to personal privacy (Article 18.1 of the Constitution).

By virtue of the right to privacy (Article 18.1 of the Constitution), all individuals must be able to shield certain parts of their private lives from other people's influence and knowledge, so as to be able to enjoy a minimum quality of life, in accordance with the standards prevailing within our culture. However, the right to privacy is not an absolute right, but may be subordinated to other interests accorded greater importance in the Constitution, on condition that the restriction thereof is necessary to the achievement of the legitimate aim envisaged, is proportionate and at all times respects the right's essential substance.

Under no circumstances can an employment relationship entail the slightest curtailment of the fundamental rights of persons working in profit-oriented organisations, since the latter are also concerned by the constitutional principles and rights which make up the system of labour relations. In the context of an employment relationship fundamental rights may be restricted or sacrificed only within an organisation where other rights secured in the Constitution are exercised and where the exercise of each of the rights concerned must necessarily be modulated according to circumstances.

Summary:

The defendant company ran a casino where it had installed and operated listening and sound recording devices, with the aim of supplementing its surveillance system consisting of video cameras with no sound recording function. Microphones had been installed in two specific locations (the cash-desk, where customers exchanged money for chips, and the French roulette area). The applicant, who was acting on his own behalf and on behalf of the works committee, which he chaired, maintained that these sound recording devices (but not the video surveillance devices installed earlier) infringed the employees' right to personal privacy. The labour court had ordered that the microphones be removed, but the Superior Court of Justice of Galicia *(Tribunal Superior de Justicia)* had held on appeal that the measures taken by the company were entirely lawful.

The Constitutional Court granted the applicant constitutional protection *(amparo)*, overturned the judgment on appeal and upheld the labour court's decision.

This judgment first stated that the managerial authority vested in heads of companies so they could ensure that their companies functioned properly and were organised so as to promote productivity, an authority which was expressly recognised in Section 20 of the Act on the status of employees, enabled them to take the surveillance and supervisory measures which they deemed necessary to guarantee that employees performed their duties. As expressly required under labour law, that authority

must be exercised so as to ensure the strictest respect for the employee's dignity. In this connection, Section 7 of Organic Law no. 1/1982 of 5 May 1982 on civil protection of the right to honour, to personal and family privacy and to one's image recognised as unlawful interference with privacy "the installation in any location of listening, filming or optical devices or any other means of recording or reproducing people's private lives" and "the use of listening devices, optical devices or any other means of knowing about, recording or reproducing the private lives, statements or private correspondence of persons other than those use utilising the devices".

The Constitutional Court also pointed out that any employment contract entailed mutual checks and balances for the parties thereto, and that, in the case under consideration, the company's organisational powers were limited by the fundamental rights of its employees, which the employer was obliged to respect. On the other hand, the employees' fundamental rights could be limited by the company's organisational powers only where, in view of the very nature of the tasks to be performed, restriction of a right was necessary to serve an objective need or the company's interests. Even in that case, organisational and disciplinary authority could not under any circumstances be exercised with unconstitutional aims, violating the employee's fundamental rights, or justify a measure impeding the lawful exercise of those rights.

Since under Spanish law there were no rules governing the installation and use of listening and image and sound recording devices in places of work, in the event of a dispute it was for the courts to consider in what circumstances the use of such devices by the head of a company could be regarded as lawful by virtue of his or her managerial authority. The Constitutional Court took the view that, in the case under consideration, the appeal court had not duly weighed the requirements of the proportionality principle. The premise that employees were entitled to enjoy their right to privacy on company premises only in certain specific locations (cloakrooms, toilets, and other similar places) was entirely unacceptable. In this connection, the Constitutional Court held, on the contrary, that there was no reason to rule out *a priori* the possibility of employees' privacy being breached in the workplace *per se*.

The Constitutional Court acknowledged that installing listening and sound recording devices in two specific locations within the casino, namely the cash-desk and the French roulette area, was not pointless or devoid of interest for the company. However, this did not mean that the installation of such devices must be deemed lawful, given that the company already had other security systems. It was not proven that the listening devices were essential to the security and proper functioning of the casino. They clearly made it possible to listen in indiscriminately at any time to all kinds of conversations, both of employees themselves and of casino customers, which was a measure that far exceeded the managerial authority of the company's head and ultimately entailed unlawful interference with privacy.

Cross-references:

Regarding the right to privacy, see Constitutional Court Judgments nos. 209/1988 of 27.09.1988, 231/1988 of 01.12.1988, 197/1991 of 17.10.1991, 99/1994 of 11.04.1994 (*Bulletin* 1994/2 [ESP-1994-2-012]), 143/1994 of 09.05.1994 and 207/1996 of 16.12.1996 (*Bulletin* 1996/3 [ESP-1996-3-030]).

Regarding constitutional rights of relevance to work relationships, see Constitutional Court Judgments nos. 88/1985 of 19.07.1985, 6/1988 of 21.01.1988, 129/1989 of 17.07.1989, 126/1990 of 05.07.1990, 99/1994 of 11.04.1994 (*Bulletin* 1994/2 [ESP-1994-2-012]), 106/1996 of 12.06.1996 (*Bulletin* 1996/2 [ESP-1996-2-018]), 186/1996 of 25.11.1996, and 90/1997 of 06.05.1997 (*Bulletin* 1997/2 [ESP-1997-2-011]).

Languages:

Spanish.

Identification: ESP-2000-1-015

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 13.04.2000 / **e)** 105/2000 / **f)** Diputados contra Cortes Generales (Poder Judicial II) / **g)** *Boletín oficial del Estado* (Official Gazette), 119, 18.05.2000, 84-101 / **h)**.

Keywords of the systematic thesaurus:

4.3.1 **Institutions** – Languages – Official language(s).
4.7.4.4 **Institutions** – Courts and tribunals – Organisation – Languages.
4.7.5 **Institutions** – Courts and tribunals – Supreme Judicial Council or equivalent body.

4.8.3.3 **Institutions** – Federalism and regionalism – Institutional aspects – Courts.
4.8.5.1 **Institutions** – Federalism and regionalism – Distribution of powers – Principles and methods.
5.3.13.20 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Languages.

Keywords of the alphabetical index:

Judicial system, administration / Working hours / Civil servant in judicial post, status / Judicial procedure, translation of case-file / Translation of documents.

Headnotes:

Judges may *ex officio* order the translation into Spanish of judicial documents which they do not understand, even where those documents are written in the co-official language of the autonomous community where they hold office. Their authority to do so need not be expressly laid down by law, since it derives from the fundamental right of all members of the public to enjoy the effective protection of the courts without going undefended and from the courts' sole competence to exercise judicial power (Articles 24.1 and 117.3 of the Constitution).

The state and the autonomous communities have jurisdiction in judicial matters. Everything to do with the organisation of the courts, the status of judges and core judicial administration comes within the state's realm. The autonomous communities may, for their part, exercise the administrative powers laid down in the Organic Law on the Judiciary (Article 149.1.5 of the Constitution and the communities' statutes of autonomy).

The autonomous communities may be given the authority to regulate working hours and working arrangements in respect of court employees. They may even assume certain powers of direct relevance to those employees. However, it is for the central authorities to take any decision that may fundamentally alter the basic conditions of the status of employees of the justice system or the regulations applicable to them.

The Constitution reserves for the General Judicial Council solely those powers that could be of the greatest use to the executive in exercising some degree of influence over the courts: appointments and promotions, inspections and disciplinary measures (Article 122.2 of the Constitution). Other powers may be assigned by law to either the General Judicial Council or the government, without distinction.

Summary:

Over fifty members of the Congress of Deputies had lodged an application seeking an unconstitutionality ruling against the 1994 reform of the 1985 Organic Law on the Judiciary. The applicants basically challenged the removal of certain powers from the General Judicial Council, the judiciary's governing body independent of the national government (Article 122 of the Constitution), and above all the fact that the autonomous communities could exercise certain powers relating to the administration of justice.

The present judgment ruled on the correct constitutional interpretation of three sections of the Organic Law of 1994, but did not find that any of these provisions was unconstitutional and void.

Judges holding office in the autonomous communities with a co-official language could obtain translations into Spanish of case-file documents written in that co-official language where necessary (or where requested by any party to proceedings who deemed that a translation was necessary to the defence of his or her case). Judges were not required to know a co-official language other than Spanish. Denying them the authority to order *ex officio* the translation of documents having an impact on proceedings would therefore amount to preventing them from exercising the judicial authority which was their exclusive preserve under the Constitution (Article 117.3 of the Constitution) and from guaranteeing that all individuals enjoyed the effective protection of the courts and did not go undefended (Article 24.1 of the Constitution). By virtue of the direct binding effect of fundamental rights (Article 53.1 of the Constitution), all judges had the judicial authority to obtain a translation of case-file documents which they did not understand, even if no law expressly permitted them to do so.

In this judgment the Court reiterated that, under the Constitution, the state had sole competence for the administration of justice (Article 149.1.5 of the Constitution). It also reiterated that, under its statute of autonomy, each of the autonomous communities was granted the powers conferred on the government by the Organic Law on the Judiciary (in the so-called “subrogation clauses”), which had already been held to be in conformity with the Constitution in the Court's case-law. Under no circumstances could the autonomous communities' powers relate to matters which, under the Organic Law on the Judiciary, came within the competence of the General Judicial Council, or to matters coming within the jurisdiction of the national government or the Ministry of Justice, where this affected another power reserved for the state.

National law could give the Ministry of Justice authority to determine the working hours and working arrangements applicable in court registries and judicial offices and to all staff serving in the justice department, even if in so doing it deprived the General Judicial Council of certain powers vested in it under the previous law. The Constitution reserved for the Judicial Council solely those powers that could be of the greatest use to the executive in exercising some degree of influence over the courts: appointments and promotions, inspections and disciplinary measures (Article 122.2 of the Constitution). Other powers might be assigned by law either to the Judicial Council or to the government, as was the case with regard to the working hours and working arrangements applicable to justice system employees.

National law might permit the autonomous communities to assume certain powers with regard to the status of justice system employees and the regulations applicable to those employees, powers which might relate to recruitment, training, career and disciplinary measures in respect of the civil servants who assisted judges and magistrates in the performance of their judicial duties. However, this did not concern all powers, as there was a necessarily uniform core throughout Spanish territory, consisting of matters which must be governed by the Organic Law on the Judiciary and matters which must be reserved for central authorities, since they could fundamentally alter basic conditions of the status of justice system employees.

The government and the autonomous communities might indeed adopt regulations in judicial matters, but such regulations must be of limited scope. Under no circumstances could they regulate matters coming within the sole competence of the General Judicial Council. The autonomous community executives might lay down general rules only where they had the authority to do so, and their authority was moreover always more limited than that of the national government. No government, whether of the state or of an autonomous community, could regulate the legal status of career judges and members of the national legal service or even matters incidental to the exercise of their rights and the performance of their duties.

Supplementary information:

Articles 3, 117, 122, 149.1.5 and 152.1 of the Constitution.

The legislation challenged was Organic Law no. 16/1994 of 8 November 1994, which amended a number of provisions of the Organic Law on the Judiciary of 1 July 1985 (Law no. 6/1985).

Cross-references:

The judgments establishing precedents with regard to the territorial distribution of powers in judicial matters are Constitutional Court Judgments nos. 108/1986 of 29.07.1986, 56/1990 of 29.03.1990 and 62/1990 of 30.03.1990.

Languages:

Spanish.

Sweden
Supreme Court

Important decisions

Identification: SWE-2000-1-001

a) Sweden / **b)** Supreme Court / **c)** / **d)** 15.03.2000 / **e)** Ö 1867-99 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Company, legal representative, liability to pay tax / Company, tax, inability to pay / Tax, payment, legal representative, negligence.

Headnotes:

No State taxes, charges or fees may be levied except in so far as they are laid down in provisions which were in force when the circumstance that caused the tax, charge or fee to be incurred arose.

Summary:

According to Chapter 2 Article 10 of the Swedish Instrument of Government no State taxes, charges or fees may be levied except in so far as they are laid down in provisions which were in force when the circumstance that caused the tax, charge or fee to be incurred arose.

In the case of certain taxes, for instance value-added tax, a legal representative of a limited liability company may be ordered by a court to pay taxes incurred by the company when the company is not able to pay them itself. Before 1 November 1997 such an order could be issued only when the legal representative intentionally or through gross negligence failed to pay the company's taxes. This provision was, however, changed from 1 November 1997. According to the provision now in force the legal representative may be ordered to pay the company's tax if he or she failed to provide for insolvency, winding up, liquidation or similar arrangements in due time, without special reasons.

In the present case the Supreme Court, with reference to Chapter 2 Article 10 of the Instrument of Government, held that the new provision could not be applied when the tax, charge or fee was incurred before 1 November 1997, unless the legal representative would also have been ordered to pay under the old provision.

Languages:

Swedish.

Sweden
Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 January 2000 – 30 April 2000.

Switzerland
Federal Court

Important decisions

Identification: SUI-2000-1-001

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 01.10.1999 / **e)** 2P.68/1998 / **f)** MediService SA v. State Council of the Canton of Vaud / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 125 I 474 / **h)**.

Keywords of the systematic thesaurus:

3.12 **General Principles** – Legality.
3.15 **General Principles** – Proportionality.
3.17 **General Principles** – General interest.
4.8.5 **Institutions** – Federalism and regionalism – Distribution of powers.
5.2 **Fundamental Rights** – Equality.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Market access, free / Public health / Medicine, mail-order sale / Pharmacy, mail-order sale.

Headnotes:

Section 88 of the Federal Judicature Act, Article 2 of the transitional provisions of the 1874 Federal Constitution, Sections 2 and 3 of the Federal Internal Market Act; mail-order medicine sales.

Territorial scope of a cantonal public order act; capacity of a person residing outside the canton to appeal against a measure of this nature (recital 1d).

Abstract review of regulations on the basis of Article 2 of the transitional provisions of the Federal Constitution; application of the Federal Internal Market Act to cantonal regulations prohibiting pharmacies from regularly despatching medicines by post (recital 2).

Examination of the proportionality principle with reference to the Federal Internal Market Act (recital 3).

Types of medicine sales in association with the Post Office; relevant safety requirements (recital 4a). In this case, the Vaud cantonal regulations prohibiting a pharmacy in the canton of Solothurn from regularly sending medicines by post to the canton of Vaud violate, in view of the safety requirements imposed on this pharmacy by the canton of Solothurn, the right of free access to the market guaranteed by Section 2 of the Federal Internal Market Act (recitals 4b-f).

Summary:

One of the main activities of MediService SA, a company registered in the canton of Solothurn, is mail-order medicine sales. The cantonal pharmacist authorised the company to operate an official pharmacy in the canton of Solothurn, for the purpose of selling medicines over the counter and also by post. This authorisation was granted on condition that medicines were not supplied in cantons where postal delivery of medicines was prohibited, that they were issued on prescription only, and that they satisfied the relevant safety and quality requirements. MediService SA began to operate a conventional pharmacy and also to supply medicines by post, to the canton of Vaud, among other destinations.

The State Council of the Canton of Vaud had adopted regulations on mail-order selling and postal delivery of medicines. Under Article 4, medicines may be sent by post or delivered by messenger only in specific cases where there are valid reasons for doing so. MediService SA was informed that its activities in the canton contravened these regulations.

MediService SA brought a public-law appeal, requesting the Federal Court to set aside the regulations issued by the State Council of the Canton of Vaud. The Federal Court partly allowed this application.

Trade regulations issued by cantons under Article 31 of the Federal Constitution (freedom of trade and industry) are valid only on the territory of the canton concerned. However, they also apply to vendors who are based elsewhere but send goods to the canton. Since the appellant's activity, sending medicines by post to the canton of Vaud, was governed by the contested regulations, the appellant was entitled to bring a public-law appeal.

In accordance with the principle that federal law takes precedence (Article 2 of the transitional provisions of the Federal Constitution), cantons may not legislate in areas exclusively governed by federal law. This makes it necessary to decide whether the impugned cantonal regulations are compatible with the Federal Internal Market Act ("the Act").

The Act guarantees free market access, on a non-discriminatory basis, to all persons with registered offices or business establishments in Switzerland, for the purpose of pursuing gainful activities. Specifically, all such persons are entitled to supply goods or services throughout Switzerland, provided that the activity involved is lawful in the canton in which their registered office is situated. Restrictions on this principle are permissible only on certain conditions: they must apply equally to local suppliers, be essential to the preservation of overriding public interests and respect the proportionality principle. MediService SA is licensed to operate in the canton of Solothurn and is therefore entitled, in principle, to extend its services to the canton of Vaud.

The contested regulations are undeniably aimed at protecting human life and health, and accordingly meet a major public interest.

The proportionality principle is the central point in this case. The issue which needs to be considered under the Act is the institutional guarantee of a single internal market and of the individual's right of free access to that market. Restrictions on free access are consistent with the proportionality principle, *inter alia*, when the regulations applying at the place of origin are unable to provide the level of protection sought. It is up to the receiving canton to show that this is so.

In the case of mail-order medicine sales, public health protection needs to be considered from three angles in particular: guaranteed safety of products, protection of patients, and a supply of medicines which is reliable, close to hand, evenly distributed in geographical terms and accessible to the entire population. From the standpoint of patient protection, mail-order sales have certain shortcomings, since there is no direct contact between pharmacist and patient; however, patient behaviour patterns have changed, and the effectiveness of supervision by pharmacists should not be overrated; restricting postal sales to prescription-only medicines is, after all, a guarantee of safety. Certain risks regarding product safety and reliability of supply also attach to postal sales. However, the extensive measures taken by the appellant seem sufficient, even if they do not eliminate all the dangers.

Article 4 of the contested regulations accordingly violates the appellant's right of free access, under federal law, to the Swiss market. The prohibition is not necessary to protect an overriding interest, and is inconsistent with the proportionality principle embodied in the Act. The provision at issue is thus in breach of federal law. There seems to be no justification, however, for formally setting aside Article 4 of the regulations. It should simply be noted

that the ban on mail-order medicine sales may not be applied to the appellant.

Languages:

French.

Identification: SUI-2000-1-002

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 02.11.1999 / **e)** 2P.71/1999 / **f)** B. v. Canton of Bern Law Society / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 125 I 417 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.17 **General Principles** – General interest.
3.21 **General Principles** – Prohibition of arbitrariness.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2 **Fundamental Rights** – Equality.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.

Keywords of the alphabetical index:

Lawyer, disciplinary fine / Lawyer, advertising / Civil right / Criminal charge.

Headnotes:

Articles 6.1, 10 and 14 ECHR; Articles 31 and 55 of the Federal Constitution of 1874 (freedom of trade and industry and freedom of the press). Freedom of expression; advertising by restrictions on lawyers.

The disciplinary fining of a lawyer for contravening professional regulations on advertising does not involve civil rights or criminal charges within the meaning of Article 6.1 ECHR (recital 2).

Publication of an interview-based profile of a lawyer in a newspaper may be regarded as prohibited indirect advertising; review of constitutionality with reference to freedom of trade and industry, freedom of expression and freedom of the press (recitals 3-5), and equal treatment (recital 6).

Summary:

Mr B. practises as a lawyer in the canton of Bern, and is also chairman of the board of a public limited company which recently bought a well-known hotel. This purchase was reported in a number of newspaper articles, which mentioned Mr B. as chairman of the board and included his photograph. Shortly afterwards, the *Handelszeitung* published a profile of Mr B., containing details of his work as a lawyer, his practices in Bern and Zurich, the areas in which he specialises, and his clientele.

This article led to disciplinary proceedings before the Canton of Bern Law Society, which fined Mr B. 500 Swiss francs for breaching Section 14 of the Cantonal Act on lawyers, which prohibits "all excessive publicity" and requires them to refrain from "seeking to create any sensation which may work to their advantage".

Mr B. brought a public-law appeal in the Federal Court, requesting it to set aside the Law Society's decision, and specifically citing Article 6 ECHR and the principles of freedom of expression and economic freedom. This application was rejected.

The Federal Court first examined it with reference to Article 6.1 ECHR. Since the disciplinary measure in question was merely a fine, and not withdrawal of the right to exercise a professional activity, no civil rights were involved. Criminal charges, too, were not involved. Consequently, Article 6.1 ECHR did not apply.

Freedom of expression, as protected by unwritten constitutional law and Article 10 ECHR, had not been violated either. The Court noted that freedom to express and disseminate opinions was chiefly intended to protect the intellectual (and personal) dimension of opinions, whereas the disclosure of information for commercial purposes was covered by economic freedom. The application should thus be considered from this angle.

Article 31 of the Federal Constitution guarantees freedom of trade and industry, but allows the cantons to regulate the exercise of trade and industry. The duties of lawyers are laid down in the Bern Cantonal Act on lawyers. The use made of Section 14 of that act in this case did not violate either the legal prohibition on arbitrary decisions or economic freedom. Unlike the press articles on the company's

purchase of the hotel, the *Handelszeitung* feature was a full-scale report on the appellant's activities as a lawyer, and mentioned the hotel purchase only in passing. The main emphasis was on the organisation and size of Mr B.'s practice, his activities, his specialist fields and his distinguished clients; the article said that his practice was one of the best in the city and bore no comparison to that of any minor lawyer working on his own. It was thus entirely reasonable to regard the article as "excessive publicity". The ban on publishing articles of this kind was compatible with economic freedom, was in the public interest, and respected the proportionality principle, from the standpoint both of clients and of lawyers themselves; the aim was to preserve the dignity of the profession and to ensure fair competition between lawyers. Finally, it had not been shown that the disciplinary measure breached the equal treatment principle; the cases cited in the application bore no relation to the present one.

Languages:

German.

Identification: SUI-2000-1-003

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 14.02.2000 / **e)** 1P.774/1999 / **f)** X. v. Canton of Neuchâtel Administrative Court / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 126 I 33 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
4.6.11 **Institutions** – Executive bodies – The civil service.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

ECHR, applicability / Civil right / Civil servant, dismissal / Police officer, dismissal.

Headnotes:

Article 6.1 ECHR; dismissal of a police officer.

The appellant held an important position in the public service, and played a part in exercising public authority; the economic, social and personal factors cited are secondary to the principal claim, which relates solely to dismissal from the cantonal public service. Article 6 ECHR therefore does not apply (recital 2).

Summary:

The State Council of the Canton of Neuchâtel dismissed X., an assistant chief inspector of police, because his superiors had lost confidence in him. The cantonal Administrative Court upheld this decision.

X. brought a public-law appeal, requesting the Federal Court to set this decision aside. In particular, he complained that Article 6 ECHR had been violated on two counts: the State Council's decision was not a decision taken by a tribunal, and the Administrative Court had not reviewed all the factual and legal aspects of the case. The Federal Court rejected the appeal.

There was no need in this case to establish whether the review carried out by the Administrative Court was sufficient in terms of Article 6 ECHR. Disputes concerning the recruitment, careers and dismissal of public officials do not involve the determination of civil rights and obligations, unless purely economic rights are at stake. In its recent case-law, the European Court of Human Rights (the *Pellegrin v. France* judgment of 8 December 1999, *Bulletin* 1999/3 [ECH-1999-3-009]) has tended to replace the economic criterion with a "functional" criterion, based on the nature of the duties performed by public officials, regardless of the status of the legal relationship in domestic law. In this case, whichever criterion was used, the termination of X.'s services was not covered by Article 6.1 ECHR; accordingly, the appellant could not rely on this provision.

Languages:

French.

“The former Yugoslav Republic of Macedonia”
Constitutional Court

Important decisions

Identification: MKD-2000-1-001

a) “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 16.02.2000 / **e)** U.br.19/00 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.3.3 **General Principles** – Democracy – Pluralist democracy.
4.9.7 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.28 **Fundamental Rights** – Civil and political rights – Freedom of assembly.

Keywords of the alphabetical index:

Election campaign, restrictions / Election, parliamentary / Public order / Election campaign, gathering, prior notification, statutory obligation.

Headnotes:

The responsibility imposed on the organiser of a public election meeting to notify the Ministry of the Interior of such a meeting in advance is intended to protect citizens and to create the conditions necessary for peaceful assembling. It also aims to preserve the public peace and order in the interests of citizens not participating in the meeting.

Summary:

The Court rejected a petition lodged by an individual from Skopje requesting it to examine the constitutionality of certain provisions of the Law on the Election of Members of the Parliament.

According to Article 53 of the challenged Law, when organising gatherings in public places and places of public thoroughfare during an election campaign, the organiser of the election campaign must notify the Ministry of the Interior in writing at least 48 hours before the gathering is held.

The second provision challenged (Article 116.1.1 of the Law) provided for a fine to be imposed on political parties that failed to observe this obligation.

In its opinion, the Court took into consideration one of the fundamental values of the constitutional order, namely political pluralism and free, direct and democratic elections (as laid down in Article 8.1.5 of the Constitution).

According to Article 21 of the Constitution, citizens have the right to assemble peacefully and to express public protest without the need to make a prior announcement or to obtain a special licence. The exercise of this right may be restricted only during a state of emergency or war.

Article 54 of the Constitution states that the freedoms and rights of the individual and citizen can be restricted only in cases determined by the Constitution.

The manner of and conditions for the election of members of parliament are regulated by law adopted by a majority of the total number of representatives (Article 62.5 of the Constitution).

The Law in question provides that political parties have the right equally and under equal conditions to use all kinds of political campaign materials and means of providing information, the purpose of which is to influence the decision-making of electors with respect to their choice of candidates. Article 52 of the Law designates the organiser of a meeting as responsible for keeping order during such a pre-election meeting.

Bearing the above in mind, the Court concluded that public meetings concerning an election campaign cannot be treated as ones where citizens demonstrate their protest. Instead, their purpose is to present the program and candidates of certain political parties in order to influence electors' decisions with respect to the candidates. Therefore, this kind of meeting does not fall within the ambit of Article 21 of the Constitution, which is restrictive in nature, referring only to cases of peaceful assemblies aimed at expressing public protest.

Furthermore, many parties participate in the election campaign itself. Many people, depending on their political affiliation, participate in public meetings where they express their support for a certain candidate or program. Therefore, there is a possibility that several parties presenting different programs or promoting different candidates may organise meetings simultaneously and at the same place. The responsibility of organisers to notify the competent ministry (the Ministry of the Interior) in advance is primarily aimed at protecting citizens and creating the conditions necessary for peaceful assembling. Furthermore, the requirement to provide such notification is in line with the need to maintain public peace and order and to protect citizens not participating in the meeting.

The imposition of a statutory fine on a political party that fails to observe this obligation is a logical consequence of the material provision according to which the organiser must notify the competent body at least 48 hours before the meeting is to be held.

Therefore, the Court found that the challenged provisions were not inconsistent with the constitutional principle of political pluralism, nor did they violate human rights and freedoms.

Languages:

Macedonian.

Identification: MKD-2000-1-002

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 19.04.2000 / **e)** U.br.195/99 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), no. 36/2000 / **h)**.

Keywords of the systematic thesaurus:

1.3.5.10 **Constitutional Justice** – Jurisdiction – The subject of review – Rules issued by the executive.
3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
3.12 **General Principles** – Legality.
4.6.2 **Institutions** – Executive bodies – Powers.
5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Religion, encouragement by the state / School, introduction of religious activity / School, primary / School, secondary / Religious neutrality of the State.

Headnotes:

The freedom of religion includes the right of individuals to determine freely and independently their religious affiliation as well as their acceptance or non-acceptance of a certain religion or atheism. It means, for example, that everyone is free to decide whether to profess or not to profess a certain religion and whether to participate or not to participate in religious ceremonies.

The state can neither require nor order the carrying out of religious activities of any kind anywhere.

Summary:

The Helsinki Committee for Human Rights lodged a petition challenging the act of the Ministry of Education introducing a religious blessing at the beginning of the school year in elementary and secondary schools. The petitioner argued that the act was not in conformity with Article 19 of the Constitution and certain provisions of the Law on Elementary Education and the Law on Secondary Education.

The challenged act required elementary and secondary school principals to call pupils, teachers and other school employees together at the beginning of the school year and to invite parish priests to bless all for the happy commencement and successfulness of the new school year. According to the act, in areas where more than one religious conviction existed, religious leaders of each conviction concerned should pronounce such a blessing.

Although the act did not fulfil the criteria of a regulation, the Court found that its contents undoubtedly amounted to generally binding legal provisions that had been passed by a state body. Thus, the act introduced religious activity within elementary and secondary schools as a regulated and perpetual legal relation, which would continue to be valid and enforceable, irrespective of the fact that it referred only to the commencement day of the school year – 1 September 1999.

Article 16.1 of the Constitution guarantees the freedom of conviction, conscience, opinion and public expression of opinions. As a specific kind of freedom of conviction and conscience, the freedom of religious confession and its free and public expression, whether individual or collective, are guaranteed by Articles 19.1 and 19.2 of the Constitution. According to Article 19.3 of the Constitution, the Macedonian Orthodox Church and other religious communities and groups are separate from the state and equal before the law.

Furthermore, the Law on Elementary Education (Article 13.1) bans political and religious ceremonies and activities in elementary schools and the Law on Secondary Education (Article 7.1) bans such activities within secondary schools.

In reaching its decision, the Court observed two crucial facts: first, the act introduced religious activities in elementary and secondary schools and second, it is enforced by the legal order of the state. Therefore, the basis for judging the constitutionality and legality of the challenged act was the principle of the separation of the state from religious communities and groups and the extent of the state's neutrality, as crucial factors in the realisation of the freedom of religion.

Bearing this in mind, it can be concluded that the state cannot interfere in religious matters, whether to incite religious affiliation or to prevent the expression of a religious conviction. It cannot impose religious activities or ceremonies as socially desirable activities. Without delineating possible means of regulating the relations between the state and religious communities and groups, or more generally, between the state and the freedom of religion, one principle is nevertheless incontrovertible: the state can neither require nor order the carrying out of religious activities of any kind anywhere.

Furthermore, bearing in mind the above-mentioned statutory provisions, the Court found that the act was contrary to the provisions of the Law on Elementary Education and the Law on Secondary Education, as it introduced religious activities or ceremonies within elementary and secondary schools.

Languages:

Macedonian.

Ukraine
Constitutional Court

Important decisions

Identification: UKR-2000-1-001

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 27.10.1999 / **e)** 9-rp/99 / **f)** Official interpretation of Article 80.3 of the Constitution (parliamentary immunity) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), no. 44/99 / **h)**.

Keywords of the systematic thesaurus:

3.12 **General Principles** – Legality.
3.13 **General Principles** – *Nullum crimen, nulla poena sine lege*.
3.20 **General Principles** – Equality.
4.5.12 **Institutions** – Legislative bodies – Status of members of legislative bodies.
5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.

Keywords of the alphabetical index:

Immunity, parliamentary / Liability, criminal.

Headnotes:

Criminal responsibility starts from the moment of conviction. The process of bringing someone to criminal responsibility as a phase of criminal prosecution commences when a person is charged with a criminal offence. The consent of the Parliament *(Verkhovna Rada)* has to be obtained prior to charging a deputy with a crime in accordance with the Code of Criminal Procedure. Parliamentary immunity covers the people's deputy from the time of his/her formal election subject to confirmation by the appropriate election committee until the termination of his/her mandate. Where a person is charged a criminal offence and/or is arrested prior to his/her formal election as a people's deputy, criminal proceedings can be continued subject to the consent of the parliament regarding prosecution and/or detention.

Summary:

The Ministry of Internal Affairs requested an official interpretation of Article 80.3 of the Constitution. Article 80.3 stipulates that people's deputies cannot be brought to criminal responsibility, detained or arrested without the consent of the Parliament *(Verkhovna Rada)*. The constitutional request also raised the following issues: the moment when criminal responsibility and bringing a person to criminal responsibility begins; the need to cancel such preventive measures as detention prior to a person's election as a people's deputy; and the need to apply to the parliament for its consent when bringing a person to criminal responsibility and carrying out his/her arrest as prescribed by law.

Criminal responsibility is a type of legal liability and a special element of the mechanism of state legal regulation of persons accused of a criminal offence. The concept of criminal responsibility has not been legally determined, and, therefore, is interpreted differently in the theory of criminal law and the law of criminal procedure.

In accordance with Article 62.1 of the Constitution a person is presumed innocent until his/her guilt has been proved through legal procedure and established by a court verdict. In accordance with Article 3 of the Criminal Code, criminal responsibility applies only to a person who is guilty of committing a crime, i.e. a person who intentionally or negligently committed a socially dangerous act. No person can be found guilty of a criminal offence and punished other than on the basis of a court sentence and according to law. These provisions give reasons to consider criminal responsibility as a specific legal institution, within the framework of which the state responds to a committed crime.

The mere fact of instituting criminal proceedings against an individual, of arresting or detaining them or putting them on trial cannot be defined as criminal responsibility. A person is only criminally responsible pursuant to a reasoned court decision.

The status of people's deputy is determined by the Constitution and laws. An important constitutional guarantee is parliamentary immunity, which has the purpose of ensuring that the people's deputy carries out his/her functions efficiently and without any hindrance. The immunity is not a privilege; rather, it has a public and legal nature.

In accordance with the provisions of Article 80.2 of the Constitution, people's deputies are not legally responsible for the results of voting or for statements in parliament and its agencies except for an slander.

This means that a people's deputy cannot be held legally responsible for the aforementioned acts even upon termination of his/her mandate.

Parliamentary immunity also provides specific procedures for bringing to criminal responsibility or arresting people's deputies. They may not be brought to criminal responsibility or arrested without the consent of the parliament (Article 80.3 of the Constitution).

Parliamentary immunity covers people's deputies from the time of their formal election in accordance with the election results certified by the appropriate election committee through to termination of their mandate in accordance with procedures prescribed by law. If a person was elected a people's deputy after having been accused of a criminal offence or arrested in connection with a criminal offence, further criminal proceedings against such deputy may continue if the parliament gives its consent. This approach ensures the principle of equality of all people's deputies in the context of parliamentary immunity.

Languages:

Ukrainian.

Identification: UKR-2000-1-002

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 16.12.1999 / **e)** 10-rp/99 / **f)** Official interpretation of Article 10 of the Constitution / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), no. 4/2000 / **h)**.

Keywords of the systematic thesaurus:

2.3.8 **Sources of Constitutional Law** – Techniques of review – Systematic interpretation.
3.1 **General Principles** – Sovereignty.
4.2 **Institutions** – State Symbols.
4.3.1 **Institutions** – Languages – Official language(s).
4.5.2 **Institutions** – Legislative bodies – Powers.
4.8.3 **Institutions** – Federalism and regionalism – Institutional aspects.
5.2.2.10 **Fundamental Rights** – Equality – Criteria of distinction – Language.
5.3.38 **Fundamental Rights** – Civil and political rights – Linguistic freedom.

Keywords of the alphabetical index:

Language, official / Language of education, minorities.

Headnotes:

As the official language, Ukrainian is the compulsory language of communication on the entire territory of Ukraine for state bodies and bodies of local self-government while exercising their powers (the language of acts, work, office work, documentation etc.) as well as in other public areas of life as prescribed by law (Article 10.5 of the Constitution). Along with the official language, local bodies of executive power, bodies of the Autonomous Republic of Crimea and bodies of local self-government while exercising their powers can use the Russian language and other languages of national minorities within the limits and in accordance with procedures prescribed by law.

The language of education in pre-school, general secondary, vocational and higher educational state and communal institutions of Ukraine is Ukrainian. Along with the official language, the languages of national minorities may be used and studied in state and communal educational institutions in accordance with the provisions of Article 53.5 of the Constitution.

Summary:

The people's deputies raised the issue of the formal interpretation of the provisions of Article 10 of the Constitution relating to the compulsory nature of use of the official language by bodies of state power and their officials as well as use of the Ukrainian language in state educational institutions.

The term "state language" shall denote the language which the state designates as the compulsory means of communication in public spheres of the life of the society.

Article 10.1 of the Constitution has designated Ukrainian as the official language. This fully complies with the state-forming role of the Ukrainian nation, as per the preamble to the Constitution, which has historically populated the territory of Ukraine, made up the absolute majority of Ukraine's population and given the name to the state.

The concept of the official language is a component of "the constitutional order", which is larger by scope

and content. Another component, in particular, is the concept of national symbols. The right to determine and change the constitutional order in Ukraine belongs to the people (Article 5.3 of the Constitution).

Public areas, where the official language is used, are in the first place the areas where powers are exercised by agencies and bodies of the legislative, executive and judicial authorities, other bodies of state power and bodies of local self-government (language of work, acts, office work and documents, relationship among these bodies and agencies etc.). Other areas, which in accordance with part five of Article 10 and Article 92.1.4 of the Constitution are determined by laws, can also be related to the areas of use of the official language.

The issue of the use of the Ukrainian language and other languages in state educational institutions is also laid down by law.

Procedures for the use of languages in accordance with Article 4.92.1 of the Constitution are to be determined exceptionally by law.

Good knowledge of the Ukrainian language is one of the mandatory conditions of filling appropriate positions (Articles 103, 127 and 148 of the Constitution).

Use of Ukrainian as the official language is binding by constitutional law.

In accordance with Article 10.3 of the Constitution, free development, use and protection of the Russian language and other languages of national minorities of Ukraine shall be guaranteed. The inadmissibility of granting privileges or imposing restrictions on the basis of language is provided by Article 24.2 of the Constitution.

Languages:

Ukrainian.

Identification: UKR-2000-1-003

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 29.12.1999 / **e)** 11-rp/99 / **f)** Constitutionality of Articles 24, 58, 59, 60, 93, 190-1 of the Criminal Code (capital punishment) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), no. 4/2000 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.9 **General Principles** – Rule of law.
3.12 **General Principles** – Legality.
3.21 **General Principles** – Prohibition of arbitrariness.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

Keywords of the alphabetical index:

Death penalty, abolition / Punishment, purpose / Miscarriage of justice.

Headnotes:

The inalienable right to life is an integral part of a person's right to human dignity. As fundamental rights of the person, they predetermine the possibility of realising other rights and liberties and may be neither restricted nor abolished. Provisions of articles of the Criminal Code which provide for capital punishment as a type of punishment are unconstitutional.

Summary:

The people's deputies applied to the Constitutional Court regarding the constitutionality of the provisions of Article 24 of the Criminal Code on capital punishment as an exceptional sanction applied in cases of serious offences which are stipulated in the Special Part of the Code. The people's deputies maintained that the right to life provided by the Constitution is absolute, and, while interpreting the Constitution, a profound and clearly outlined respect for the value of human life as one of the fundamental principles of building a democratic society ruled by law should be taken into consideration. Therefore, in the context of the Constitution, imposing the death penalty as an exceptional sanction should be regarded as an "arbitrary deprivation of a human being's right to life".

The Constitution defines a human being, its life and health, honour and dignity, immunity and safety as the supreme social value (Article 3.1 of the Constitution), and provides that the establishment and protection of human rights and liberties is the main duty of the state (Article 3.2 of the Constitution).

The key constitutional provision recognising the right to life is the provision stipulating that this right is an integral (Article 27.2 of the Constitution), inalienable and inviolable (Article 21 of the Constitution) right. The right to life belongs to human beings from birth and is protected by the state.

The Constitution declares that constitutional rights and liberties, in particular the right to life, are guaranteed and may not be abolished (Article 22.2 of the Constitution). It also states that it is prohibited to introduce any changes or alterations which abolish the rights and liberties of human beings and citizens (Article 157.1 of the Constitution). It is prohibited to narrow the scope and content of existing rights and liberties when new laws are passed or changes are introduced to existing laws (Article 22.3 of the Constitution).

The provisions of Article 22.2 of the Constitution place a duty upon the state to guarantee constitutional rights and liberties, the right to life in the first place, and the duty to refrain from adopting any acts which may lead to the abolition of constitutional rights and liberties, including the right to life. Depriving a human being of life by the state through execution as a sanction even within the provisions stipulated by law is regarded as abolishing the integral right to life and is thus contrary to the Constitution.

Each person has the right to freely develop his or her personality as long as this does not violate the rights and liberties of others. The Constitution attributes an integral right to life to each human being (Article 27.1 of the Constitution) and guarantees protection of this right from abolition. At the same time, it establishes the provision that each person has the right to defend his/her life and health, and the lives and health of other people, from illegal encroachments (Article 27.3 of the Constitution). The Criminal Code has established provisions related to the acts of a person in a situation of necessary self-defence in order to protect his/her life and health or the lives and health of other persons if dictated by urgent necessity to prevent or terminate socially dangerous encroachments.

Constitutional support for an integral right to life as well as for other rights and liberties is based on the following fundamental principle: all exceptions related to rights and liberties of human beings and citizens shall be established by the Constitution rather than by laws or other normative acts. In accordance with Article 64.1 of the Constitution, “constitutional rights and liberties of human beings and citizens may not be restricted except in the cases provided for in the Constitution”.

The Constitution does not contain any provision whatsoever stating that the death penalty is an exception to the provisions of the Constitution on an integral right to life.

The inconsistency of the death penalty with the purposes of punishment as well as the possibility of judicial error should also be considered. This does not comply with constitutional guarantees of protection of human rights and liberties (Article 58 of the Constitution).

The death penalty also contradicts Article 28 of the Constitution which states that “nobody may be exposed to torture, cruel, inhuman or degrading treatment or punishment”, which reflects Article 3 ECHR.

Languages:

Ukrainian.

Identification: UKR-2000-1-004

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 10.02.2000 / **e)** 2-rp/2000 / **f)** Constitutionality of the Law on prices and pricing (prices and tariffs for housing and municipal and other services / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.5.8 **Institutions** – Legislative bodies – Relations with the executive bodies.
4.6.2 **Institutions** – Executive bodies – Powers.
4.6.7 **Institutions** – Executive bodies – Relations with the legislative bodies.
4.6.9.1.1 **Institutions** – Executive bodies – Territorial administrative decentralisation – Principles – Local self-government.

4.8.5.2.1 **Institutions** – Federalism and regionalism – Distribution of powers – Implementation – Distribution *ratione materiae*.
4.10.1 **Institutions** – Public finances – Principles.

Keywords of the alphabetical index:

Pricing policy, fundamental principles.

Headnotes:

While the definition of the principles of pricing policy is a prerogative of Parliament *(Verkhovna Rada)* the executive branch of powers implements these principles in practice.

Having performed a direct regulation of prices and tariffs, the parliament interfered with the powers of the relevant bodies of the executive power including the Autonomous Republic of Crimea and bodies of local self-government, thus violating the principle of the separation of state powers and Articles 6, 19, 116, 137 and 143 of the Constitution.

Summary:

The following provisions of the Law on prices and pricing dated 3 December 1990 as amended by the Law introducing changes to the Law on prices and pricing dated 17 March 1999 were found unconstitutional:

- in case of arrears regarding wages, stipends, pensions and other social payments, any rise in prices and tariffs for housing, municipal services and public transport shall be prohibited (Article 5.2);

- prices and tariffs for housing and municipal services (inclusive of power and natural gas supply for housing and municipal needs), public transport and communications shall be established by the Cabinet of Ministers in co-ordination with the Parliament *(Verkhovna Rada)* (Article 9.3).

Payment for housing, municipal services and public transport shall be made by citizens at the prices and tariffs established by the Cabinet of Ministers, the National Commission on Regulation of Electrical Energy, and other central and local bodies of executive power on 1 June 1998 (Section II.2 of “Final Provisions” of the Law introducing changes to the Law on prices and pricing dated 17 March 1999).

The case was initiated by the President who asked the Constitutional Court to examine the constitutionality of the Law introducing of changes to the Law on prices and pricing dated 17 March 1999. The President believed that by passing this Law, the parliament went beyond its powers determined by the Constitution (Articles 85 and 92 of the Constitution) and assumed authorities, which in accordance with the Constitution are assigned to bodies of the executive power and bodies of local self-government. By doing so, the parliament violated the principle of the separation of powers (Article 6.1 of the Constitution).

The principle of the separation of state powers (Article 6 of the Constitution) means that bodies of the legislative, executive and judicial powers exercise their authorities only on the grounds and in accordance with the Constitution and laws. Bodies of local self-government are bound to act in accordance with, within the framework of and in the manner prescribed by the Constitution and laws (Article 19.2 of the Constitution).

The parliament in accordance with Article 85.5 of the Constitution determines the fundamental principles of domestic and foreign policy including pricing as a component of internal economic and social policies of the state. While the Cabinet of Ministers implements pricing policy in practice (Article 116.3 of the Constitution) the principles of establishing and enforcing prices and tariffs are defined by parliament.

The main objective of the principles of pricing policy is directing and ensuring a balance of the entire mechanism of pricing and integrity in the regulating process in this area.

The co-ordination of prices and tariffs by the Cabinet of Ministers with the parliament as required by Article 9.3 of the Law on prices and pricing is not one of the parliament's powers of control prescribed by the Constitution. The parliament having overstepped its powers by obliging the Cabinet of Ministers to seek its consent in the establishing of prices.

Languages:

Ukrainian.

Identification: UKR-2000-1-005

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 27.03.2000 / **e)** 3-rp/2000 / **f)** Constitutionality of the Law on proclamation of an all-Ukrainian referendum on people's initiative / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.3.4.6 **Constitutional Justice** – Jurisdiction – Types of litigation – Admissibility of referenda and other consultations.
1.3.5.6 **Constitutional Justice** – Jurisdiction – The subject of review – Presidential decrees.
3.1 **General Principles** – Sovereignty.
3.3.1 **General Principles** – Democracy – Representative democracy.
3.3.2 **General Principles** – Democracy – Direct democracy.
4.5.7 **Institutions** – Legislative bodies – Relations with the Head of State.
4.9.1 **Institutions** – Elections and instruments of direct democracy – Instruments of direct democracy.
4.9.6 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures.

Keywords of the alphabetical index:

Referendum, all-Ukrainian / Popular initiative.

Headnotes:

The expression of a no-confidence vote in the Parliament *(Verkhovna Rada)* and the adoption of a new Constitution are unconstitutional by way of an all-Ukrainian referendum.

Where any other issues set forth in the Decree are approved by an all-Ukrainian referendum on the people's initiative, they shall be mandatory for consideration by the appropriate bodies of state power in accordance with the procedures prescribed by the Constitution and laws.

Summary:

The people's deputies lodged a claim to the Constitutional Court to examine the constitutionality of the Decree of the President proclaiming an all-Ukrainian referendum at the people's initiative. They emphasised that the Decree differs from what is provided in Article 13 of the Law on all-Ukrainian and local referendums. The institution of an all-Ukrainian referendum at the request of citizens is an essentially new type of referendum. Its organisation and the procedures for its conduct are not regulated by the aforementioned Law, and this disables the holding of such a referendum. The all-Ukrainian referendum at the people's initiative cannot directly introduce changes to the Constitution since the Constitution does not provide for consultative referendums. Issues which in accordance with the Decree are to be included in bulletins do not comply with requirements for the holding of referendums since some of them cover two or more independent issues, and this may affect the free expression of the will of citizens by voting.

The all-Ukrainian referendum is one of the forms of expression of the people's will (Article 69 of the Constitution), which may be called by the Parliament *(Verkhovna Rada)* or the President according to their powers established by the Constitution. In particular, the parliament calls an all-Ukrainian referendum on issues regarding the territory of Ukraine (Articles 73 and 85.2 of the Constitution). The President calls an all-Ukrainian referendum on changing the Constitution in accordance with Article 156 of the Constitution. A referendum shall not be permitted regarding draft laws on issues of taxes, the budget and amnesty (Article 74 of the Constitution).

The Constitution also provides that an all-Ukrainian referendum may be held at the people's initiative, proclaimed by the President, at the request of at least three million Ukrainian citizens who are eligible to vote and provided that signatures in support of the referendum have been collected in at least two thirds of oblasts (regions) and that there are at least one hundred signatures per oblast (Article 72.2 of the Constitution). At the same time, the Constitution does not provide for a no-confidence vote in an all-Ukrainian referendum, including that proclaimed at the people's initiative, in the parliament or any other constitutional governmental bodies as a possible reason for early termination of their authorities. This is why the issue of a no-confidence vote in the parliament would be a violation of the constitutional principle whereby bodies of state power exercise their authorities according to the Constitution and the principles of a state ruled by law.

In accordance with the Constitution, the bearer of sovereignty and the only source of power in Ukraine is the people. People exercise power directly and through the bodies of state power and local self-government. The right to determine and change the constitutional order in Ukraine belongs exclusively to the people and may not be usurped by the state, its bodies or its officials (Article 5 of the Constitution).

The issue of the adoption of a new Constitution is put to an all-Ukrainian referendum without obtaining the people's will on the necessity to adopt a new Constitution. It brings into doubt the very existence of

the current Constitution, which may lead to weakening the fundamental principles of the constitutional order and the rights and liberties of people and citizens.

Confirming the exclusive right of the people to determine and change the constitutional order, the Constitution has established a clear procedure for introducing changes to the Constitution. Changes to the Constitution are the competence of the parliament and this competence is exercised within the limits and in accordance with the procedures prescribed by Section XIII of the Constitution. The Constitution, while introducing changes to it, balances the actions of the President, the people's deputies and the parliament for the realisation of the people's will.

Languages:

Ukrainian.

Identification: UKR-2000-1-006

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 11.04.2000 / **e)** 4-rp/2000 / **f)** Official interpretation of Article 86 of the Constitution and Articles 12 and 19 of the Law on the status of people's deputy (requests of people's deputies to the prosecutor's office) / **g)** / **h)**.

Keywords of the systematic thesaurus:

4.5.2 **Institutions** – Legislative bodies – Powers.
4.5.9 **Institutions** – Legislative bodies – Relations with the courts.
4.7.4.3 **Institutions** – Courts and tribunals – Organisation – Prosecutors / State counsel.

Keywords of the alphabetical index:

Deputy activity / Prosecutor's office, requests.

Headnotes:

A people's deputy is not allowed to petition agencies of the Office of Public Prosecutor with demands, proposals or instructions in specific cases.

Where agencies of the Office of Public Prosecutor receive proposals, instructions or demands from people's deputies on specific cases, prosecutors and investigators must observe the law.

Summary:

The Office of Public Prosecutor lodged a claim to the Constitutional Court for an official interpretation of the provisions of Article 86 of the Constitution and Articles 12 and 19 of the Law on the status of people's deputy concerning the right of a people's deputy "to apply to the Office of Public Prosecutor with requests and addresses which contain demands and instructions regarding specific criminal, civil and arbitration proceedings".

Bodies to which a people's deputy may apply with a request are the bodies of the Parliament *(Verkhovna Rada)* and the Cabinet of Ministers. Moreover, requests made by people's deputies at sittings of the parliament may be addressed to executives of other bodies of state power and bodies of local self-government as well as to senior managers of enterprises, institutions and organisations located on the territory of Ukraine regardless of their form of ownership.

According to Article 86.1 of the Constitution, a people's deputy must address his/her demands and proposals only to the heads of agencies of the Office of Public Prosecutor, not to other employees, including investigators.

People's deputies may not address heads of agencies of the Office of Public Prosecutor with requests which are contrary the requirements of law.

Heads of agencies of the Office of Public Prosecutor are only required to notify the people's deputy of the results of consideration of his/her request.

Agencies of state power and local self-government, their officials, the media, social and political organisations (movements) and their representatives must not interfere with the activities of the Office of Public Prosecutor.

The Constitution does not directly provide for control over the activities of the Office of Public Prosecutor; neither is there a possibility to obtain additional powers of control by passing an appropriate law.

Proposals, instructions and requests of a people's deputy must comply with the Constitution and laws and may concern only the issues concerning deputy activities.

The issue of state prosecution support in court, the representation of the interests of an individual or the state in court in cases stipulated by law, the supervision of observance of laws by agencies during an investigation, the supervision of the legality of the execution of court rulings in criminal cases, the enforcement of actions restricting personal freedom as well as requests to investigators of the Office of Public Prosecutor regarding the pre-trial investigation of specific criminal cases cannot be deemed as connected with a deputy's activities.

Prosecutors and investigators of the Office of Public Prosecutor while carrying out judicial actions are independent from any agencies and other officials whatsoever, and obey only the law. Any influence on a prosecutor or investigator with the intention of hindering the carrying out of his/her duties is prohibited by the law.

Languages:

Ukrainian.

Identification: UKR-2000-1-007

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 18.04.2000 / **e)** 5-rp/2000 / **f)** Constitutionality of Article 5.2 of the Law on authorised human rights representative of the parliament (age requirement) / **g)** / **h)**.

Keywords of the systematic thesaurus:

4.12.1 **Institutions** – Ombudsman – Appointment.
5.2.1.2 **Fundamental Rights** – Equality – Scope of application – Employment.
5.2.2.7 **Fundamental Rights** – Equality – Criteria of distinction – Age.

Keywords of the alphabetical index:

Qualification requirement.

Headnotes:

The requirements of the law which states that the authorised human rights representative of the Parliament *(Verkhovna Rada)* may be appointed from among citizens of Ukraine, who, on the day of election, attained the age of 40 cannot be deemed to restrict the right of citizens to enjoy equal access to the public service and service in local bodies of self-government (Article 38.2 of the Constitution).

Summary:

The people's deputies claimed that the establishment of the age requirement for candidates for the position of the authorised person of the Parliament *(Verkhovna Rada)* in matters of human rights contradicts certain provisions of the Constitution, since Article 101 of the Constitution does not stipulate any age limitation for citizens to fill the vacant position of the authorised person of the parliament in matters of human rights.

The Constitution does not contain the term "requirement"; instead it fixes certain qualification requirements for candidates to some public service positions. This applies to candidates for people's deputies, professional judges and judges of the Constitutional Court. The Constitution lays down certain qualification requirements for presidential contenders. Often qualification requirements for certain categories of state servants are established by appropriate laws, in particular for candidates to the positions of judge of the Constitutional Court, judge of the Higher Arbitration Court, members of the Higher Council of Justice and members of the Central Election Committee. Qualification requirements are dictated by the nature and type of activities of the aforementioned officials and, therefore, cannot be deemed to restrict the right of citizens to enjoy equal access to the public service.

The institution by the Constitution and laws of certain qualification requirements does not violate the constitutional principle of equality since all citizens who comply with specific qualification requirements are eligible to occupy the aforementioned positions.

Bearing in mind the special importance of the activities of the authorised person of the parliament in matters of human rights, the essence of which lies in exercising parliamentary control over the observance of constitutional rights and liberties, the parliament has the power to establish qualification requirements for a candidate for this position. The Constitution does not prohibit this. Among such qualification requirements, there are, in particular, experience and social maturity which can only be acquired after attaining a certain age.

Languages:

Ukrainian.

Identification: UKR-2000-1-008

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 19.04.2000 / **e)** 6-rp/2000 / **f)** Official interpretation of Article 58 of the Constitution and Articles 6 and 81 of the Criminal Code (retroactivity of criminal law) / **g)** / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
3.9 **General Principles** – Rule of law.
3.12 **General Principles** – Legality.
5.3.36.1 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

Retroactivity, laws and other normative acts / Criminal law.

Headnotes:

Only criminal laws which mitigate or annul criminal responsibility can be retroactive.

The Criminal Code (Articles 81.4, 82.4, 83.3, 84.4, 86.2 and 86-1) establishes criminal responsibility for theft of public or collective property on a large or essentially large scale, which is determined with consideration of the minimum wage as established by law effective at the time of discontinuation or termination of the crime. Alteration of the minimum wage does not entail an alternation of the qualification of crimes laid down by the aforementioned articles.

Consequently, the provisions of Article 6.2 of the Criminal Code related to retroactivity do not cover all these cases, and criminal cases should not be revised unless the law stipulates otherwise.

Summary:

The people's deputies submitted a petition to the Constitutional Court for an official interpretation of the provisions of Article 58 of the Constitution and Articles 6 and 81 of the Criminal Code regarding the fact that courts of common jurisdiction erratically ignore application of the principle of non-retroactivity of laws and other normative acts when they mitigate personal criminal responsibility in cases where the minimum wage is altered. This affects qualification of the act of theft of public or collective property on a large or essentially large scale (Articles 81.4, 82.4, 83.3, 84.4, 86.2 and 86-1 of the Criminal Code).

In accordance with Article 58.1 of the Constitution, laws and other normative and legal acts are not retroactive. The principle of the inadmissibility of the retroactivity of laws and other normative acts established by the Constitution is compliant with international legal acts, in particular, with Article 15 of the International Covenant on Civil and Political Rights and Article 7 ECHR.

The essence of the retroactivity of laws and other normative acts lies in the fact that their provisions apply to legal relations which existed prior to the coming into force of the above laws. However, their enforcement is impossible in some areas of law, especially criminal law.

In accordance with Article 58.2 of the Constitution, no one can be held criminally responsible for deeds which at the time they were committed did not constitute an offence. According to this constitutional provision, an action can only be made an offence by law and not by any other kind of normative act. This conclusion is supported by the provisions of Article 92.22 of the Constitution stipulating that only laws determine "the basis of civil legal responsibility; deeds which are criminal, administrative or disciplinary offences and responsibility for committing them."

The principle of the supremacy of law is acknowledged and in force in Ukraine. The Constitution has supreme legal force. Laws and other normative acts are adopted in accordance with the Constitution and must be compliant with it (Article 8 of the Constitution).

In accordance with the provisions of Article 6.1 of the Penal Code, criminality and providing adequate punishment for an offence are determined by the law in force at the time the offence was committed. Part two of the aforementioned article stipulates that a law

which eliminates reasons for punishment or softens the punishment shall be retroactive. These provisions of the Code correspond to the provisions of Article 58 of the Constitution. Retroactivity of criminal law means applying the law to persons who carried out acts prior to the validity of the law. Comparing the provisions of Articles 8, 58, 92 of the Constitution and of Article 152.1 of Section XV "Transitional Provisions" of the Constitution with Article 6 of the Code leads to the conclusion that only the criminal laws determine deeds as crimes and establish responsibility for their commitment. Retroactivity is provided for by criminal laws in cases when they cancel or soften responsibility of a person.

An enactment of the parliament on procedures to put into effect and enforce the Law on the introduction of amendments to the Criminal Code, the Criminal Procedure Code of the Ukrainian Soviet Socialist Republic and the Administrative Offence Code of the Ukrainian Soviet Socialist Republic dated 7 July 1992 no. 2548-XII established that the punishment for theft must be established with consideration of the value of the *corpus delicti* on the basis of the amount of the minimum wage prescribed by law in force at the time of discontinuation or termination of the crime (paragraph 4).

Therefore, lawmakers determined that altering the amount of the minimum wage does not affect the qualification of crimes committed prior to altering the minimal wage by appropriate laws.

The Constitution established that deeds which are considered crimes and responsibility for committing them are determined only by laws (Article 22.92.1 of the Constitution) rather than by sub-legal acts.

Criminal law may contain references to provisions of other normative legal acts. Unless these provisions are changed in future, the general content of a criminal law will not be changed. The opposite interpretation would mean that criminal law could be altered by sub-legal acts, in particular resolutions of the parliament, decrees of the President and acts of the Cabinet of Ministers, which would conflict with the requirements of Article 92.22 of the Constitution.

Articles 81.4, 82.4, 83.3, 84.4, 86.2 and 86-1 of the Criminal Code, which, in accordance with paragraphs two and three of the note to Article 81 of the Code, determine that the criteria of large scale or essentially large scale theft of public and collective property are blanket, and the above mentioned peculiarities of correlation of common and specific contents of a blanket provision do not apply to them.

Altering the minimum wage by appropriate normative and legal acts does not entail changes in the provisions, the contents of which are specified with application of such amount. This law, in this instance Articles 81.4, 82.4, 83.3, 84.4, 86.2 and 86-1 of the Criminal Code, cannot be deemed new, and the provisions of Article 58.1 of the Constitution and Article 6.2 of the Code are inapplicable to this law.

Languages:

Ukrainian.

United States of America
Supreme Court

Important decisions

Identification: USA-2000-1-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 07.12.1999 / **e)** 98-678 / **f)** Los Angeles Police Department v. United Reporting Publishing Corporation / **g)** 120 *Supreme Court Reporter* 483 (1999) / **h)**.

Keywords of the systematic thesaurus:

1.3.2.3 **Constitutional Justice** – Jurisdiction – Type of review – Abstract review.
1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
3.17 **General Principles** – General interest.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Overbreadth doctrine / Prudential limitations on adjudication.

Headnotes:

A law limiting public agencies' disclosure of the names and addresses of arrested persons does not constitute a facial interference with the exercise of a requesting person's rights of free expression guaranteed by the First Amendment to the United States Constitution, but instead is simply a restriction on access to government information.

Generally, because of the personal nature of constitutional rights and prudential limitations on constitutional adjudication, a person to whom a law may be applied constitutionally may not challenge that law on the ground that it could possibly be applied unconstitutionally to others in situations not before the court.

The overbreadth doctrine is an exception to the rule against constitutional challenges on behalf of others by a person to whom a law may be applied constitutionally, and will be applied by the courts in certain circumstances in recognition of the transcendent value to all society of safeguarding constitutionally protected expression.

Summary:

A private publishing company, which provides the names and addresses of recently arrested persons to its customers (including attorneys, insurance companies, drug and alcohol counsellors, and driving schools), challenged the constitutional validity of a law of the State of California that places restrictions on the use of such information when acquired from California state and local law enforcement agencies. Under the law, in order to gain access to such information from those agencies, a person requesting such access must declare that it is being made for one of five prescribed purposes (for example, scholarly or journalistic purposes) and that it will not be used to sell a product or service. Citing in particular the law's negative impact on other persons not before the court (for example, potential customers), the publishing company claimed that the system of selective disclosure reduced the free flow of information and therefore was inconsistent with the protection afforded commercial speech under the First and Fourteenth Amendments to the United States Constitution. The First Amendment, which is applied to the states by means of the Fourteenth Amendment, provides that the U.S. Congress "shall make no law…abridging the freedom of speech".

The lower federal courts, analysing the California law as a restriction on dissemination and receipt of protected speech, ruled that the California law was constitutionally invalid. The United States Supreme Court reversed, on two related grounds: first, that the legislation could not constitute an interference with the publisher's First Amendment rights, and second, that the publisher could not challenge the law on the theory that it possibly could be applied unconstitutionally to other persons not before the court.

In rejecting the existence of an interference with the publisher's First Amendment rights, the Court found that the law does not prohibit a speaker from disseminating information that it already possesses, and that California could decide to impose a total restriction on access to the information without violating the First Amendment. As to the publisher's claim that the law could also violate the rights of others, the Court recited its traditional rule that a person to whom a law may be applied constitutionally may not challenge the validity of that law on behalf of others. This rule, according to the Court, reflects both the personal nature of constitutional rights and prudential limitations on constitutional adjudication.

Such prudential limitations insure that the courts will adjudicate only "flesh and blood" legal problems that present data relevant and adequate to the development of an informed judgment.

In ruling against the publisher's claim on behalf of others not parties to the litigation, the Court declined to apply the overbreadth doctrine, which serves as an exception to the traditional rule cited above. Under the overbreadth doctrine, the courts will examine a challenge to a legal norm by a person whose rights are not directly implicated, in recognition of the "transcendent value" to all society of safeguarding constitutionally protected expression. The doctrine has been applied in cases, for example, where others might be threatened with criminal prosecution for engaging in expressive activity. In the instant case, however, the Court concluded that application of the overbreadth doctrine was not justified: the publisher's potential customers were not threatened with criminal prosecution, and indeed could seek access to the information just as the publisher sought to do, without incurring any burden other than the possibility that their request would be denied. In other words, the Court concluded, there was no possibility in the instant case that protected speech will be chilled.

Supplementary information:

In this decision, the Supreme Court limited its review to the publisher's facial challenge to the California law (in other words, the law as written, without examination of particular facts unique to the publisher's situation). It therefore did not examine the claim that the law was also unconstitutional "as applied" the publisher's specific situation. The publisher's "as applied" claims were not adjudicated by the lower courts, and the Supreme Court suggested that such claims might remain open for judicial review by the lower courts on remand.

Languages:

English.

Identification: USA-2000-1-002

a) United States of America / **b)** Supreme Court / **c)** / **d)** 11.01.2000 / **e)** 98-791, 98-796 / **f)** Kimel v. Florida Board of Regents / **g)** 120 *Supreme Court Reporter* 631 (2000) / **h)**.

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.15 **General Principles** – Proportionality.
3.17 **General Principles** – General interest.
4.8.1 **Institutions** – Federalism and regionalism – Basic principles.
4.8.5.3 **Institutions** – Federalism and regionalism – Distribution of powers – Supervision.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
5.2.2.7 **Fundamental Rights** – Equality – Criteria of distinction – Age.

Keywords of the alphabetical index:

Immunity, abrogation / Immunity, sovereign / Judicial activism.

Headnotes:

A federal legislative abrogation of the states' sovereign immunity against private lawsuits can be grounded validly only in the "appropriate legislation" clause of the Fourteenth Amendment to the U.S. Constitution, and can not be based on the Constitution's grant of congressional authority to regulate commerce among the states.

In order to qualify as "appropriate legislation" under the Fourteenth Amendment, a federal law must be responsive to or designed to prevent unconstitutional behaviour, and there must be "congruence and proportionality" between the means adopted and the legislative goal.

Determination of the substantive nature of the Fourteenth Amendment guarantees is within the exclusive competence of the judicial branch, although the legislature is entitled to deference in its conclusions as to the legislation need to secure those guarantees.

Unlike race or gender discrimination, classifications based on age are not inherently suspect under the Equal Protection Clause of the Fourteenth Amendment, and states may discriminate on the basis of age without offending that Clause if the age classifications are rationally related to a legitimate state interest.

Summary:

Employees of state institutions in the states of Florida and Alabama, in three separate actions, initiated lawsuits in federal courts against their employers under the Age Discrimination in Employment Act (the "ADEA"). The ADEA, a federal law, protects employees against discrimination on the basis of age beginning at age 40 and authorises suits for damages in federal court. The U.S. Congress enacted the ADEA in 1967 and extended its scope to include state government employers in 1974. The employees claimed that they had been denied certain pay increases and promotions in violation of the ADEA.

The courts of first instance arrived at different conclusions on the question of whether the Eleventh Amendment to the U.S. Constitution served as a grounds for dismissal of the employees' actions. The Eleventh Amendment has long been construed by the courts to bar federal jurisdiction over lawsuits against non-consenting states unless such immunity has been validly abrogated by federal legislation. The three cases were consolidated at the federal Court of Appeals for the Eleventh Circuit, and that court ruled that the ADEA did not validly abrogate the states' Eleventh Amendment immunity.

The United States Supreme Court, in a 5-4 decision, affirmed the judgment of the Court of Appeals. At issue in the Supreme Court's decision was the existence of a constitutional basis for the ADEA's abrogation of the states' Eleventh Amendment immunity. In *EEOC v. Wyoming* (1983), the Supreme Court ruled that the ADEA was a valid exercise of federal legislative power under the Commerce Clause of Article I of the U.S. Constitution, which grants Congress the authority to "regulate Commerce…among the several States". However, in *Seminole Tribe of Florida v. Florida* (1996), *Bulletin* 1996/1 [USA-1996-1-002], the Court ruled that the Congress lacks power under the Commerce Clause to abrogate the states' sovereign immunity against lawsuits by private individuals. As a result, the sole constitutional basis for congressional abrogation of such immunity is found in Section 5 of the Fourteenth Amendment to the U.S. Constitution, which states that "The Congress shall have power to enforce, by appropriate legislation" the provisions of Section 1 of the same Amendment, which states in relevant part: "No state shall…deny to any person within its jurisdiction the equal protection of the laws." As framed by the Court, the question in the instant case was whether the ADEA is "appropriate legislation" under Section 5 of the Fourteenth Amendment.

In order to qualify as "appropriate legislation", according to the Court, a federal law must be responsive to or designed to prevent unconstitutional behaviour; in addition, there must be "congruence and proportionality" between the means adopted and the legislative goal. In deciding these questions, the Court emphasised that although the conclusions of Congress as to the nature of legislation necessary to secure the Fourteenth Amendment guarantees are entitled to deference, the use of the term "enforce" in Section 5 shows that Congress was not granted the power to determine what constitutes the substance of a constitutional violation. The determination of the Fourteenth Amendment's substantive meaning, according to the Court, lies with the judicial branch. In this regard, the Court found that age discrimination, unlike race or gender discrimination, is not a suspect classification under the Equal Protection Clause of the Fourteenth Amendment. Unlike those who suffer discrimination on the basis of race or gender, the Court observed, older persons have not been subject to a history of purposeful unequal treatment. In addition, old age does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it. As a result, the Court stated, states may discriminate on the basis of age without offending the Equal Protection Clause if their age classifications are rationally related to a legitimate state interest – a less demanding standard than that imposed on classifications based on race or gender. Because of this relaxed standard, the Court concluded, the requirements that the ADEA imposes on the states are disproportionate to the risk that the states might engage in unconstitutional conduct.

Despite this finding that the ADEA prohibits very little conduct likely to be found unconstitutional, the Court acknowledged that even a rare occurrence of unconstitutional conduct might require a powerful remedy. Thus, the Court found it necessary to consider whether the ADEA is an appropriate remedy, and it therefore examined the legislative record for evidence of the reasons for Congress' action. The Court found that Congress' 1974 extension of the ADEA to the states was not grounded in any findings of a pattern of age discrimination by the states; therefore, the Court concluded that Congress had "virtually no reason to believe" that the states were engaged in unconstitutional conduct. On the basis of this lack of evidence, as well as the disproportionate impact of the ADEA's substantive requirements, the Court ruled that the Act was not "appropriate legislation" under Section 5, and that therefore the abrogation of the states' Eleventh Amendment immunity was invalid.

The four dissenting justices accused the majority of engaging in a "judicial activism" that involves the making of the Court's own legislative judgments and

represents a radical departure from the Court's proper role.

Supplementary information:

While striking down the ADEA's authorisation of private lawsuits against the states, the Court expressly emphasised that its decision did not affect the rights of state workers under existing state anti-discrimination laws.

Cross-references:

EEOC v. Wyoming, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), *Bulletin* 1996/1 [USA-1996-1-002].

Languages:

English.

Identification: USA-2000-1-003

a) United States of America / **b)** Supreme Court / **c)** / **d)** 24.01.2000 / **e)** 98-963 / **f)** Nixon v. Shrink Missouri Government PAC / **g)** 120 *Supreme Court Reporter* 897 (2000) / **h)**.

Keywords of the systematic thesaurus:

3.17 **General Principles** – General interest.
3.19 **General Principles** – Reasonableness.
4.9.7.1 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material – Financing.
5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
5.3.29 **Fundamental Rights** – Civil and political rights – Right to participate in political activity.
5.3.39.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Contribution, campaign / Evidence, empirical / Evidentiary burden / Influence, improper / Corruption, perception.

Headnotes:

Legislative limits on the size of contributions to candidates' campaigns for public office are an interference with constitutionally protected rights of free speech and free association, but will survive judicial scrutiny if closely drawn to serve a sufficiently important state interest.

The level of empirical evidence required to justify an interference with constitutionally protected rights will vary in accordance with the novelty and plausibility of the state's asserted justification.

The Constitution does not establish a minimum constitutional threshold for contribution limits in terms of monetary amounts; instead, the relevant question is assessing the validity of such limits is whether they are so low that they impede the ability of candidates to gather the resources necessary for effective presentation of their views.

Summary:

A political action committee (an entity established for the funding of campaigns for elective public office) and a candidate for the public office of state auditor sought a judicial injunction against enforcement of legislation in the State of Missouri that imposes limits on the amounts of financial contributions to candidates for state offices. They claimed that the limits on contributions were a violation of rights guaranteed under the First and Fourteenth Amendments to the United States Constitution. The First Amendment, which is applied to the states by means of the Fourteenth Amendment, provides that the U.S. Congress "shall make no law…abridging the freedom of speech". Under the U.S. Supreme Court's decisions in *Buckley v. Valeo* (1976) and later cases, the payment of a contribution to a candidate's campaign fund and the making of expenditures on behalf of one's campaign for public office are acts of free speech and free association protected by the First Amendment; however, the contribution amounts may be limited if the restrictive legislation is closely drawn to match a sufficiently important state interest.

The lower federal courts disagreed on the nature of the evidentiary burden imposed on the state to justify the contribution limits. The court of first instance, applying *Buckley v. Valeo*, sustained the law, finding

adequate support for its constitutional validity in the proposition that large contributions create suspicions of improper influence, thereby undermining the confidence of citizens in the integrity of government. The Court of Appeals, concluding that *Buckley v. Valeo* requires a more exacting standard of review, reversed. The Court of Appeals ruled that Missouri had failed to present empirical evidence that genuine problems resulted from contributions exceeding the statutory limits, and found that the state's claim of a compelling interest in avoiding corruption or the perception of corruption was insufficient to satisfy the strict scrutiny standard.

The United States Supreme Court in turn reversed the Court of Appeals, ruling that the prevention of corruption and the appearance of corruption is a constitutionally sufficient justification for the contribution limits. Rejecting the Court of Appeals' finding that the Missouri legislation was constitutionally invalid due to insufficient empirical evidence supporting the asserted state interest, the Supreme Court stated that the amount of evidence necessary to satisfy judicial scrutiny of legislative acts will vary in accordance with the novelty and plausibility of the asserted justification. While affirming that mere conjecture as to the existence of a state interest can not be adequate to justify an infringement of First Amendment rights, the Court concluded that the risks associated with large campaign contributions, recognised in *Buckley v. Valeo*, are neither novel nor implausible; therefore, the level of empirical evidence required by the Court of Appeals was excessive. The Court also stated that a more extensive documentary documentation might have been required of the state if the petitioners had made any showing of their own that might cast doubt on the apparent implications of the evidence in *Buckley v. Valeo*; however, the petitioners had only been able to cite academic studies that have been contradicted by other studies.

The Supreme Court also ruled that the Missouri law is adequately tailored to serve the legislative goals, despite the fact that the law's contribution limits are different from those at issue in *Buckley v. Valeo*. In rejecting the petitioners' argument, for example, that inflation since 1976 had pushed Missouri's permissible contribution amounts below a constitutionally acceptable minimum, the Court reiterated its ruling in *Buckley v. Valeo* that a fixed dollar amount could not serve as a minimum constitutional threshold. Instead, according to the Court, the relevant question is whether a contribution limit is so low that it impedes the ability of candidates to gather the resources necessary for effective presentation of their views. The resolution of this question, the Court added, can not be reduced to a narrow determination about the purchasing power of the U.S. dollar.

Cross-references:

Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

Languages:

English.

European Court of Human Rights

Important decisions

Identification: ECH-2000-1-001

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 16.02.2000 / **e)** 27798/95 / **f)** Amman v. Switzerland / **g)** / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.10 **General Principles** – Certainty of the law.
3.12 **General Principles** – Legality.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.
5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.
5.3.34.2 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Telephonic communications.

Keywords of the alphabetical index:

Telephone tapping / Data, personal, treatment.

Headnotes:

The interception of a phone call by the Public Prosecutor's Office violates the right to respect of the private life and correspondence when no provision of domestic law establishes precisely the conditions of this interception. Besides, the creation and storage of a record concerning the applicant also violates this right as these actions have no legal basis.

Summary:

Mr Amman, a Swiss national, imported into Switzerland depilatory appliances that he advertised in magazines. On 12 October 1981 a woman phoned him from the former Soviet embassy to order a depilatory appliance. That telephone call was intercepted by the Federal Public Prosecutor's Office, which then requested the Intelligence Service of the Police of the Canton of Zürich to carry out an investigation into the applicant. On the basis of the report drawn up by the Zürich police, the Public Prosecutor's Office filled in a record on the applicant for its national security records. The record indicated that the applicant was "a contact with the Russian embassy" and was a businessman.

The applicant learned of the existence of the records and asked to consult his record. He was provided with a photocopy in 1990. He filed an action against the Confederation requesting reparation for the unlawful entry of his particulars in the records. In a judgement of 14 September 1994 notified in January 1995, the Federal Court dismissed his action on the ground that the applicant had not suffered a serious infringement of his personality rights.

The question to be solved by the Court was whether the interception of the applicant's telephone calls by the Public Prosecutor's Office and the creation of the record on the applicant were violating his right under Article 8 ECHR to respect for his private life and correspondence.

The Court first recalled that the interception of a telephone call amounted to an interference with the applicant's right to respect for his private life and his correspondence. Such interference breached Article 8 ECHR unless it was "in accordance with the law", pursued one or more of the legitimate aims referred to in Article 8.2 ECHR and was necessary in a democratic society to achieve those aims.

In determining the issue of lawfulness, the Court had to examine whether the impugned measure had a legal basis in domestic law and whether it was accessible and foreseeable to the person concerned. The Court noted in the instant case that the relevant articles of the Federal Council's decree on the police Service of the Federal Public Prosecutor's Office and of the Federal Criminal Procedure Act were worded in too general terms to satisfy the requirement of "foreseeability". As regards the provisions, which governed the monitoring of telephone communications, the government was unable to establish that the conditions of application of those provisions had been complied with.

The Court concluded that the interference was not legally based and that there had therefore been a violation of Article 8 ECHR as far as the interception of the phone call was concerned.

The Court reiterated firstly that the storing of data relating to the "private life" of an individual fell within the application of Article 8.1 ECHR. The term "private life" must not be interpreted restrictively. The record indicated that Mr Amman was a businessman and a

"contact with the Russian Embassy". Therefore, Article 8 was applicable.

The Court observed that in the instant case provisions of domestic law did not contain specific and detailed provisions on the gathering, recording and storing of information. It also pointed out that domestic law expressly provided that documents which were no longer necessary or had become "purposeless" had to be destroyed. The authorities had failed to destroy the data gathered concerning Mr Amman after it had become apparent that no criminal offence was being prepared.

The Court concluded that there had been no legal basis for the creation and storage of the record on the applicant. Accordingly, there had been a violation of Article 8 ECHR as far as the creation and storage of the record were concerned.

Cross-references:

Halford v. United Kingdom, 25.06.1997; Kopp v. Switzerland, 25.03.1998, *Bulletin* 1998/1 [ECH-1998-1-005]; Kruslin v. France, 24.04.1990, Series A, no. 176-A, *Special Bulletin ECHR* [ECH-1990-S-001]; Malone v. United Kingdom, 02.08.1984, Series A, no. 82, *Special Bulletin ECHR* [ECH-1984-S-007]; Leander v. Sweden, 26.03.1987, Series A, no. 116, *Special Bulletin ECHR* [ECH-1987-S-002]; Niemietz v. Germany, 16.12.1992, Series A, no. 251-B, *Special Bulletin ECHR* [ECH-1992-S-007]; The Holy Monasteries v. Greece, 09.12.1994, Series A, no. 301-A; D. v. United Kingdom, 02.05.1997, *Bulletin* 1997/2 [ECH-1997-2-011].

Languages:

English, French.

Identification: ECH-2000-1-002

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 06.04.2000 / **e)** 26772/95 / **f)** Labita v. Italy / **g)** / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.12 **General Principles** – Legality.
5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
5.3.34.1 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Correspondence.
5.3.39.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Criminal investigation, lack / Mafia / Registration officer, absence.

Headnotes:

The lack of a thorough and effective investigation into the credible allegation made by the applicant that he had been ill treated by warders violates the right of anyone not to be subject to inhuman and degrading treatment. Detention pending trial is not sufficiently justified by the allegations of a former member of the Mafia who decided to cooperate with the authorities *(pentito)* and violates therefore the right to liberty and security of the applicant. The right to liberty and security of a person is violated when the person is kept in detention after his acquittal. The censorship of the correspondence of a detainee is contrary to his right to respect of his private and family life and correspondence when this censorship is not legally based. The restrictions on freedom of movement and right to vote of a person cannot be regarded as necessary in a democratic society when no concrete evidence to suggest the applicant was a member of the Mafia could be found during the preliminary investigation and trial.

Summary:

The applicant, Benedetto Labita, an Italian national, was arrested on 21 April 1992 on suspicion of being a member of the Mafia, following uncorroborated allegations by a former mafioso who decided to

cooperate with the authorities *(pentito)*. The applicant was held in detention pending trial for approximately two years and seven months, in Pianosa Prison in particular, where he alleged that he was subjected to ill-treatment that was, he said, systematically inflicted on prisoners. That allegation was supported in a report by a judge. A criminal investigation was opened but subsequently abandoned as it was impossible to identify those responsible for the ill-treatment. The applicant was also subjected to a special regime entailing censorship of all his correspondence. He was acquitted on 12 November 1994. Following his acquittal, preventive measures were imposed on him and he was deprived of his voting rights.

First of all, the Court had to establish whether Article 3 ECHR had been violated. As far as the allegations of ill-treatment are concerned, the Court considered that, despite the existence of objective evidence regarding the general conditions in Pianosa prison at the material time, that the material it had before it regarding the applicant's assertion that he had been subjected to physical and mental ill-treatment did not constitute sufficient evidence to support that conclusion. Therefore, on this aspect, the Court found no violation of Article 3 ECHR. But, considering that the case had been filed away not on the ground that there was no basis for the allegations but that those responsible had not been identified and having regard to the lack of a thorough and effective investigation into Mr Labita's credible allegation, the Court held that there had been a violation of Article 3 ECHR on that account.

The Court next had to examine whether the length of the detention was contrary to Article 5.3 ECHR. The detention pending trial of Mr Labita was solely justified by the allegations of a *pentito* who had stated that he learned indirectly that the applicant was a member of the Mafia. Statements of *pentiti* had to be corroborated by other evidence. In that case, there had been no evidence to corroborate the hearsay evidence of the *pentito*. The grounds stated in the impugned decisions were not sufficient to justify the applicant's being kept in detention for two years and seven months. The detention in issue has therefore infringed Article 5.3 of the Convention.

The Court also noted that the applicant remained in detention for twelve hours after his acquittal because of the registration officer's absence. Accordingly, there had been a violation of Article 5.1 ECHR as the additional delay in releasing the applicant was only partly attributable to the need for the relevant administrative formalities to be carried out.

The applicant's correspondence with his family and lawyer was censored by the authorities of Pianosa prison whereas the censorship was initially based on a law which did not indicate with sufficient clarity the extent of the relevant authorities' discretion. The censorship at a later date had no legal basis whatsoever. The Court concluded that the censorship of the correspondence was not "in accordance with the law" and that there had been therefore a violation of Article 8 ECHR.

The applicant had been subjected for three years to severe restrictions on his freedom of movement. These measures were "in accordance with the law" within the meaning of the third paragraph of Article 2 Protocol 4 ECHR. The Court considered it legitimate for special supervision to be taken against persons suspected of being members of the Mafia. The Court noted that the authorities had not found any concrete evidence to show that he was a member of the Mafia or that there was a real risk that he would offend. Therefore, the restrictions on the applicant's freedom could not be regarded as "necessary in a democratic society". There had been a violation of Article 2 Protocol 4 ECHR.

As someone who was subject to special police supervision because he was suspected of belonging to the Mafia, the applicant had automatically forfeited his civic rights and been struck off the electoral register. But, when his name was removed from the electoral register, there was no concrete evidence on which a suspicion that the applicant belonged to the Mafia could be based. The Court could regard the measure in question as proportionate. There had therefore been a violation of Article 3 Protocol 1 ECHR.

Cross-references:

Selmouni v. France, 28.07.1999, *Bulletin* 1999/2 [ECH-1999-2-008]; Assenov and others v. Bulgaria, 28.10.1998; Chahal v. United Kingdom, 15.11.1996, *Bulletin* 1996/3 [ECH-1996-3-015]; Tekin v. Turkey, 09.06.1998; V v. United Kingdom, 16.12.1999; Raninen v. Finland, 16.12.1997; Klaas v. Germany, 22.09.1993, Series A, no. 269, *Special Bulletin ECHR* [ECH-1993-S-006]; Ireland v. United Kingdom, 18.01.1978, Series A, no. 25, *Special Bulletin ECHR* [ECH-1978-S-001]; McCann and others v. United Kingdom, 27.09.1995, Series A, no. 324, *Bulletin* 1995/3 [ECH-1995-3-016]; Kaya v. Turkey, 19.02.1998, *Bulletin* 1998/1 [ECH-1998-1-004]; Yaşa v. Turkey, 02.09.1998; Amuur v. France, 25.06.1996, *Bulletin* 1996/2 [ECH-1996-2-011]; Dalban v. Romania; Wemhoff v. Germany, 27.06.1968, Series A, no. 7, *Special Bulletin ECHR* [ECH-1968-S-001]; W. v. Switzerland, 26.01.1993, Series A, n° 254-A;

Contrada v. Italy, 24.08.1998; I.A. v. France, 23.09.1998; Erdagöz v. Turkey, 22.10.1997; Brogan and others v. United Kingdom, 29.11.1988, Series A, no. 145-B, *Special Bulletin ECHR* [ECH-1988-S-007]; Fox, Campbell and Hartley v. United Kingdom, 30.08.1990, Series A, no.182, *Special Bulletin ECHR* [ECH-1990-S-004].

Languages:

English, French.

Identification: ECH-2000-1-003

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 06.04.2000 / **e)** 27644/95 / **f)** Athanassoglou and others v. Switzerland / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

Nuclear power plant / Danger, serious, specific and imminent.

Headnotes:

Articles 6.1 and 13 ECHR are not applicable when the connection between the Federal Council's decision to extend the operating license of a company to exploit a nuclear power plant and the rights protected by domestic law such as the rights to life and to physical integrity is too tenuous.

Summary:

The applicants, all Swiss nationals, live in the villages situated in zone 1 in the vicinity of unit II of a nuclear power plant in Beznau. In 1991, the private company, which had operated the nuclear power plant since 1971, applied to the Swiss Federal Council for an extension of its operating license for an indefinite period.

By April 1992 more than 18,400 objections were lodged with the Federal Office of Energy in order to request the Federal Council to refuse an extension of the operating license and to order the immediate and permanent closure of the nuclear power plant. They alleged that the nuclear power plant did not meet current safety standards, that the risk of an accident occurring was greater than usual, and that an extension of the operating license would entail risks for their rights to life, physical integrity and property.

In 1994 the Federal Council dismissed all the objections as being unfounded and granted the company a limited operating license expiring on 31 December 2004.

The question to be solved by the Court was whether the applicants were denied effective access to a court, in breach of Article 6.1 ECHR, and whether they were granted an effective remedy in relation to the decision to renew the operating license of the nuclear power plant according to Article 13 ECHR.

The Court considered that the report of the Institute for Applied Ecology and the other material which were submitted by the applicants did not show that at the relevant time the operation of the power plant exposed the applicants personally to a danger that was serious, specific and imminent. The Court also considered that the connection between the Federal Council's decision and the domestic-law rights invoked by the applicants was too tenuous and remote. It has always considered that tenuous connections or remote consequences are not sufficient to bring Article 6.1 ECHR into play.

The applicants appeared indeed to accept that they were alleging not so much a specific and imminent danger in their personal regard as a general danger in relation to all nuclear power plants. The Court considered, however, that how best to regulate the use of nuclear power was a policy decision for each Contracting State to take according to its democratic processes. Article 6.1 ECHR required that individuals be granted access to a court whenever they had an arguable claim that there had been an unlawful interference with the exercise of their rights recognised under domestic law. The procedure before the Federal Council was not decisive for the "determination" of any "civil right", such as the rights to life, physical integrity and of property. Article 6.1

ECHR was consequently not applicable in the present case.

For the same reasons, the Court considered that Article 13 ECHR was not applicable in that case.

Cross-references:

Kremzov v. Austria, 21.09.1993, Series A, no. 268-B; Balmer-Schafroth and others v. Switzerland, 26.08.1997, *Bulletin* 1997/2 [ECH-1997-2-015]; Le Compte, Van Leuven and de Meyere v. Belgium, 23.06.1981, Series A, no. 43, *Special Bulletin ECHR* [ECH-1981-S-001]; Golder v. United Kingdom, 21.02.1975, Series A, no. 18, *Special Bulletin ECHR* [ECH-1975-S-001]; Fayed v. United Kingdom, 21.09.1994, Series A, no. 294-B; Masson and Van Zon v. Netherlands, 28.09.1995, Series A, no. 327-A; Le Calvez v. France, 29.07.1998; Editions Periscope v. France, 26.03.1992, Series A, no. 234-B; Boyle and Rice v. United Kingdom, 27.04.1988, Series A no. 131.

Languages:

English, French.

Identification: ECH-2000-1-004

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 06.04.2000 / **e)** 34369/97 / **f)** Thlimmenos v. Greece / **g)** / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.
5.3.13.10 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.
5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.
5.3.26 **Fundamental Rights** – Civil and political rights – National service.

Keywords of the alphabetical index:

Jehovah's witness / Public employment, appointment.

Headnotes:

The decision to refuse to appoint a Jehovah's witness at a post of chartered accountant following the condemnation of the applicant by the Permanent Martial Court for insubordination for refusing to enlist in the army for religious reasons contravenes the right not to be discriminated against according to one's religious beliefs. Furthermore, the length of the procedure concerning the applicant's professional future did not satisfy the "reasonable time" requirement.

Summary:

The applicant, Mr Thlimmenos, a Greek national, is a Jehovah's witness. On 9 December 1983 the Permanent Martial Court found him guilty of insubordination for refusing to enlist in the army for religious reasons. On 8 February 1989 the executive board of the Greek chamber chartered accountants refused to appoint him as a chartered accountant because he had a criminal record, even though he had passed the relevant qualifying exam. Mr Thlimmemos appealed against this decision but his appeal was finally rejected on 28 June 1996.

The Court had to consider whether the decision to refuse to appoint the applicant to a post of chartered accountant contravened the right not be subject to discrimination in relation to the exercise of freedom of religion and whether the length of the proceedings satisfied the requirement of a hearing within reasonable time.

The Court first recalled that Article 14 ECHR had no independent existence and that it became applicable when the facts of the case fell within the ambit of another provision of the Convention or one of the protocols. The applicant was condemned by the permanent martial due to his religious beliefs. Therefore, the facts of the case fell within the ambit of Article 9 ECHR.

The right not be discriminated against in the enjoyment of the rights guaranteed under the Convention was also violated when States without an objective and reasonable justification failed to treat differently persons whose situations are significantly different. Although the State had a legitimate interest

to exclude some offenders from the profession of chartered accountant, it had to recognise that a conviction for refusing to wear the military uniform could not imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession. Excluding the applicant on the ground that he was an unfit person was not, therefore, justified. There existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a felony.

The Court concluded that there had been a violation of Article 14 ECHR taken in conjunction with Article 9 ECHR as the State should have introduced appropriate exceptions to the rule barring persons convicted of a felony from the profession of chartered accountants.

As to the alleged violation of Article 6.1 ECHR, the Court noted that the proceedings lasted seven years, one month and twenty days due to the Council of State's case-load and without any delay caused by the applicant. The Court considered that it was for the State to organise its legal system in such a way that its courts were able to guarantee the right of everyone to obtain a final decision within a reasonable time. Moreover, as the proceedings concerned the applicant's professional future, the length of the proceedings did not satisfy the "reasonable time" requirement.

The Court therefore concluded that there had been a violation of Article 6.1 ECHR.

Cross-references:

Sürek v. Turkey (no. 1), 08.07.1999; Nikolova v. Bulgaria, 25.03.1999; Inze v. Austria, 28.10.1987, Series A, no. 126; Chassagnou and others v. France, 29.04.1999, *Bulletin* 1999/1 [ECH-1999-1-006]; König v. Germany, 28.06.1978, *Special Bulletin ECHR* [ECH-1978-S-003]; Laino v. Italy, 18.02.1999; Vocaturo v. Italy, 24.05.1991, Series A, no. 206-C.

Languages:

English, French