Albania
Constitutional Court

Important decisions

Identification: ALB-2000-2-004

a) Albania / **b)** Constitutional Court / **c)** / **d)** 23.06.2000 / **e)** 37 / **f)** Interpretation / **g)** to be published in *Fletorja Zyrtare* (Official Gazette), 18, 987 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.3.5 **Sources of Constitutional Law** – Techniques of review – Logical interpretation.
4.5.3.1 **Institutions** – Legislative bodies – Composition – Election of members.
4.9.4 **Institutions** – Elections and instruments of direct democracy – Eligibility.
5.3.39.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Offices, concurrent holding.

Headnotes:

The heads of communes or municipalities do not have the right to offer their candidatures or to be elected as deputies and similarly, deputies do not have the right to offer their candidatures or to be elected as heads of communes or municipalities without giving up this office. The office of deputy is incompatible with that of head of commune or municipality.

Summary:

In pursuance of Article 134 of the Constitution, a group of 36 deputies, constituting more than 1/5 of the total number of Assembly deputies, requested an interpretation of the Constitution from the Constitutional Court as to the rights of heads of communes and municipalities to offer themselves as candidates for deputies, and vice versa. They also requested an interpretation of the Constitution on the issue of keeping both tenures, that of deputy and that of head of commune or municipality.

The Constitutional Court noted that Article 69.1 of the Constitution lists the range of subjects that cannot be a candidate for or be elected as deputies and includes the head of commune or municipality. The second item of this article considers as invalid the tenure of deputy acquired by the subjects foreseen in the first paragraph.

The Constitution does not explicitly prohibit the contrary, i.e. the question of whether a deputy enjoys the right to stand as a candidate or be elected as the head of commune or municipality. However, by interpreting Articles 69, 70.2 and 71.2 of the Constitution, both tenures, that of deputy and that of head of commune or municipality, are incompatible with each other. A deputy is not allowed to simultaneously exercise any other state function besides that of member of the Council of Ministers. The Constitution considers the tenure of deputy acquired without giving up the duty as head of commune or municipality to be invalid.

Law no. 8550, dated 18 November 1999, on the status of deputy, *inter alia,* settles the relationships between deputy and local government. Thus, a deputy enjoys the right to ask for explanations from local government bodies and to propose the review or abrogation of an act issued by local government bodies. These authorities would not be exercised if the deputy simultaneously exercised executive authorities in the local government body.

The Court considered that the argument according to which the constitutional provisions that applied before the entry into force of the Constitution did not foresee any incompatibility between the tenures of deputy and advisor is not founded, and as a consequence, the transitional provisions of Article 179 of the Constitution can be applied. This article resolves the problem of the endurance of some bodies (including local government bodies), but this does not exclude the possibility that the tenures of some special persons may end before the expected terms, as in the cases foreseen by Article 71 of the Constitution, where verification of one of the conditions relating to the ineligibility and incompatibility of the deputy tenure is also included.

The Constitutional Court reached the conclusion that the deputy has no right to offer his candidature or to be elected as head of commune or municipality without giving up the current office, and neither of the latter is able to simultaneously keep both tenures or exercise both functions: that of deputy and that in the executive body of the local government. Even the Electoral Code supports this view. A person who has acquired both tenures under previous laws and, at the same time, is exercising both of them, has the right to select between the tenure of deputy and that of head of commune or municipality.

For the above mentioned reasons, according to Articles 69.1.d, 69.2, 70.2 and 71.2.c of the Constitution, the heads of communes or municipalities have no right to offer their candidatures or to be elected as deputies and similarly, deputies have no right to offer their candidatures or to be elected as heads of communes or municipalities without giving up this office.

The office of deputy is incompatible with that of head of commune or municipality.

Languages:

Albanian, English.

Andorra
Constitutional Court

Summaries of important decisions of the reference period 1 May 2000 – 31 August 2000 will be published in the next edition, *Bulletin* 2000/3.

Argentina
Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-2000-2-005

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 27.06.2000 / **e)** S.243.XXXIV / **f)** S.A. Organización coordinadora argentina s/ infr. Ley 22.802 / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), volume 323 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Civil and Political Rights of 1966.
2.1.1.4.9 **Sources of Constitutional Law** – Categories – Written rules – International instruments – American Convention on Human Rights of 1969.
5.3.13.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Scope.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Decision, administrative, appeal / Court of Cassation, jurisdiction.

Headnotes:

The right of appeal to a higher court set forth in Article 8.2.h of the American Convention on Human Rights and Article 14.5 of the International Covenant on Civil and Political Rights is guaranteed only where a person has been accused or convicted of a criminal offence and does not cover convictions for other types of offence that do not come under criminal law.

Summary:

A public limited company was ordered, under the terms of an administrative decision, to pay a fine of ARS 5000 for breaching a ban on advertising and special offers of prizes in the form of goods and services. The case before the Supreme Court concerned the means of challenging the decision.

The National Appeal Court for Commercial Offences had upheld the penalty and the public limited company had then lodged an application with the National Criminal Court of Cassation. This had been rejected, the Court claiming that it did not have jurisdiction.

An extraordinary appeal *(recurso extraordinario)* was therefore lodged with the Supreme Court. The public limited company claimed *inter alia* that the right to appeal against a judgment to a higher court, as provided for in the instruments mentioned in the headnotes, had been violated inasmuch as it was impossible to obtain a review of the National Appeal Court decision. It also referred to the ruling by the Supreme Court of Justice in the Giroldi case (Decision G-342.XXVL.RH., of 07.04.1995, *Bulletin* 1995/3 [ARG-1995-3-001]) that a provision limiting the amount for which an appeal on points of law might be lodged was unconstitutional.

The Court found that the current case could not be equated with the Giroldi case inasmuch as the contested conviction was not in relation to a criminal offence.

The judgment upheld the conclusions of the Principal State Prosecutor. Two judges delivered a dissenting opinion.

Supplementary information:

The case of *Arce, Jorge Daniel s. recurso de casación* (Decision A.450.XXXII, of 14.10.1997, *Bulletin* 1997/3 [ARG-1997-3-008]) is also relevant.

Languages:

Spanish.

Identification: ARG-2000-2-006

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 01.06.2000 / **e)** Q.19.XXXIII / **f)**

Quiroga, Rosario Evangelina c/ Ministerio del Interior s/ art. 3 de la ley 24.043 / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), volume 323 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

2.3.3 **Sources of Constitutional Law** – Techniques of review – Intention of the author of the enactment under review.
2.3.7 **Sources of Constitutional Law** – Techniques of review – Literal interpretation.
2.3.8 **Sources of Constitutional Law** – Techniques of review – Systematic interpretation.
2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.
3.9 **General Principles** – Rule of law.
3.19 **General Principles** – Reasonableness.
5.3.5.1.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Arrest.
5.3.10 **Fundamental Rights** – Civil and political rights – Rights of domicile and establishment.
5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Exile, compulsory.

Headnotes:

Compulsory exile to a foreign country constitutes an infringement of personal liberty, for which compensation is payable.

The interpretation of the law must always take full account of the legislative body's intention and courts may not neglect this aspect on the grounds of possible technical shortcomings in a statutory instrument.

The courts, whose task it is to serve the law so that justice may be done, must consider both the reasons for, and the spirit of, the legislation they apply.

The law must be interpreted with the utmost caution where a potential loss of rights is at stake and the underlying spirit of its provisions must not be misrepresented through excessively rigorous argumentation.

The right approach, rather than sticking strictly to the letter of the law, is to apply it in a rational way, avoiding the risk of inert adherence to form.

It is always necessary to seek an interpretation of statutory provisions that reflects the justice of their intention. Allowing manifestly unjust solutions to prevail when other, just ones are available is incompatible with the common purpose of law-makers and judges.

Consideration must be given to the consequences of each criterion applied, for these are among the surest indicators of whether the criteria are reasonable and consistent with the overall legal system.

Summary:

The applicant had lodged a claim for compensation, which is payable under Act 24.043 to any person deprived, during the regime that ended in 1983, of the constitutional right to freedom as a result of unlawful decisions taken by the military courts or members of the national government of the day.

The court with which the original claim was lodged had admitted it, but only in respect of the period during which the applicant had been detained in an unlawful holding centre in the School of naval engineering *(Escuela de Mecánica de la Armada)*. It had dismissed the claim in respect of the period after the applicant's expulsion from Argentina.

The applicant therefore took her case to the Supreme Court, challenging the latter aspect of the judgment.

The Supreme Court found, firstly, that the intention behind the relevant legislation was clearly to do justice to all those persons who had been illegally detained in whatever circumstances, ranging from radical deprivation of liberty and threat to life to lesser forms of restriction.

The Court further held that, in the light of this intention and the criteria of interpretation mentioned in the headnotes above, the claim was admissible inasmuch as the applicant's departure from the country did not represent an end to her period of detention, rather a continuation of it: in leaving Argentina for Venezuela she had not been in a position to exercise real choice but had simply been offered the options of (a) continuing to live in captivity in the unlawful holding centre and (b) going into exile abroad.

One judge delivered a dissenting opinion.

Languages:

Spanish.

Armenia
Constitutional Court

Statistical data
1 May 2000 – 31 August 2000

24 referrals, 24 cases heard and 24 decisions delivered, including:

- 21 decisions concerning the conformity of international treaties with the Constitution. All the treaties examined were declared compatible with the Constitution;

- 3 decisions concerning disputes on the results of parliamentary elections. As a result of additional elections for the vacancies in the National Assembly 3 cases concerning disputes on the elections' results were initiated before the Constitutional Court.

Important decisions

Identification: ARM-2000-2-001

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 20.06.2000 / **e)** DCC-236 / **f)** On the dispute on the results of the elections of the National Assembly in constituency no. 5 held on 21 May 2000 / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

4.5.3.1 **Institutions** – Legislative bodies – Composition – Election of members.
4.9.2 **Institutions** – Elections and instruments of direct democracy – Electoral system.
4.9.8.4 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Identity checks on voters.
4.9.8.5 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Record of persons having voted.
4.9.8.8 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Counting of votes.
5.3.39 **Fundamental Rights** – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Election, parliamentary, partial / Inaccuracy, amount / Ballot, registration / Electoral commission, compulsory record, register.

Headnotes:

The requirement of the Electoral Code to allocate five percent more ballots than the number of the voters on the precinct voter list is a guarantee for the implementation of the right to universal suffrage, provided by Article 3 of the Constitution.

While summarising the election results in the precinct electoral commissions, the number of the ballots submitted and registered by the Regional electoral commission will be admitted as a basis.

Summary:

Two candidates who participated in the National Assembly additional elections in constituency no. 5, held on 21 May 2000, appealed to the Constitutional Court requesting that the elections in that constituency be declared invalid. They argued that violations of the Electoral Code had taken place during the conduct of elections and the summary of its results to such an extent that they had influenced the elections' results.

In their appeals the two appellants particularly mentioned the following violations. According to the summary on the submission of the ballots, made by the Yerevan electoral commission, the number of ballots allocated to the precinct electoral commissions of the no. 5 constituency, attested to by the signatures of these commissions' chairmen in compliance with the requirements of the Electoral Code, was five percent more than the number of voters on the constituency voter list. However, according to the summary protocols of the precinct electoral commissions, the number of ballots precinct electoral commissions had at their disposal was 1,369 less than the number of ballots allocated by Yerevan electoral commission in compliance with the law. Accordingly, while deciding the amount of inaccuracies, the precinct electoral commissions used the number which is mentioned in the protocols on the registration of ballots in the precinct electoral commissions as the number of ballots allocated. The appellant party considers that if the precinct electoral commissions had used the number of the ballots mentioned in the summary on the submission of the ballots made by Yerevan electoral commission, the amount of inaccuracies would make it impossible to determine which candidate had been elected.

The appellant parties also based their request on the fact that according to the summary protocols of 11 precinct electoral commissions and Yerevan electoral commission's protocol on the preliminary results of elections in the relevant constituency the appellant candidate had been given 1,504 votes, the elected candidate 1,507, and the number of inaccuracies was 27. Following the complaint of the elected candidate's proxy, appropriate verification was carried out in two precincts of the constituency to examine the conformity of the precinct protocols with the factual results of the elections in these two precincts. As a result of the verification, the elected candidate had been given an additional 76 votes, which had had a decisive influence on him being elected deputy.

According to the Electoral Code, the election of deputies is recognised as invalid if the amount of inaccuracies influencing the number of votes makes it impossible to determine which candidate was elected or if in the course of preparation or conduct of elections such violations of the Code occurred that might affect the results of elections. The manner in which the amount of inaccuracies should be determined is precisely provided for by the Electoral Code. According to the Code, the precinct electoral commission compiles a protocol on the amount of inaccuracies on the basis of the data contained in the precinct summary protocol. The commission registers as a first amount of inaccuracies the difference between the number of ballots given to the precinct electoral commissions and the total number of ballots and cancelled ballots. The second amount of inaccuracies is the difference between the number of signatures in the voters' lists and the number of ballots in the ballot box. These two amounts of inaccuracies together form the total amount of inaccuracies in the precinct. According to the record of the ballots, forms and seals given to the precinct electoral commissions by Yerevan electoral commission, the latter submitted 30,050 ballots to the 11 precinct electoral commissions, while according to the precinct summary protocols the number of ballots submitted to the precinct electoral commissions was 28,681. Though the Yerevan electoral commission argued that the number of ballots mentioned in the summary protocols would be admitted as the number of ballots submitted to the precinct electoral commissions, the Constitutional Court considered that such an approach was not derived from the requirements of the Constitution and the Electoral Code. The requirement of the Electoral Code to allocate five percent more ballots than the number of voters on the precinct voter list, is a guarantee for the implementation of the right to universal suffrage, provided by Article 3 of the Constitution.

Moreover, according to the Electoral Code the ballots must be registered. They are submitted and received by electoral commissions by making compulsory records in registers, with the signatures of the submitting and receiving persons and the issue of a receipt. Before the summary of the election results in precincts the ballots allocated to the precinct electoral commissions are counted only when the ballots are received from the Regional electoral commission by the precinct electoral commission's chairmen under their responsibility. There is no other provision in the Electoral Code which provides for counting the ballots before the summary of the election results. Thus, while summarising the election results in the precinct electoral commissions, the number of the ballots submitted to the precinct electoral commissions by the Regional electoral commission and registered by the Regional electoral commission will be admitted. On the basis of such an approach, the amount of inaccuracies in the constituency repeatedly surpassed the difference between the votes received by the two candidates who had received the highest number of votes.

With respect to the appellant party's second argument, the Constitutional Court held that the verification in two precincts had been carried out in violation of the Electoral Code. According to Article 62 of the Electoral Code, upon the written request of two members of the Regional electoral commission or the proxy of the candidate, the Regional electoral commission verifies the conformity of the precinct summary protocol of the relevant precinct with the factual results of the elections. The verification of the conformity of the precinct summary protocols with the factual election results presumes the verification of all data which are mentioned in the precinct summary protocol. According to Article 61 of the Electoral Code, the summary precinct protocols include the total number of voters according to voter lists, the number of registered voters who received ballots according to signatures, the number of ballots allocated to the precinct electoral commission, the number of cancelled ballots, the number of valid ballots in the ballot box, the number of invalid ballots, the total number of the ballots in the ballot box, the number of the ballots cast against candidates and the number of votes cast for each candidate. According to this Article, the verification of conformity of summary precinct protocols with the factual results of elections also demands a re-account of the cancelled ballots. However, the request of a member of the Yerevan electoral commission to verify the number of cancelled ballots was rejected and in the protocol formed as a result of verification only a few data were mentioned: the number of invalid ballots, the number of votes cast for each of the candidates and the number ballots cast against all candidates.

The Constitutional Court pronounced the elections in the constituency invalid and submitted the materials on the violations uncovered during the examination to the General Prosecutor for consideration.

Supplementary information:

As a result of the invalidation of elections in the no. 5 constituency the re-election was held. Yerevan electoral commission, while summarising the results of the elections in the precincts, adopted a decision recognising the elections invalid. A new appeal was lodged by the elected candidate, who requested that the Commission's decision be invalidated. Yerevan electoral commission had based its decision on the fact that, as a result of verification made by the commission in one of the precincts, the loss of 600 cancelled ballots had been discovered and the commission included this fact in the basis for counting the amount of inaccuracies. The Constitutional Court upheld the appeal and recognised the Commission's decision invalid. It found that the loss of the cancelled ballots after making the protocols according to the manner determined by law could not be considered as a basis to invalidate the elections.

Languages:

Armenian.

Austria
Constitutional Court

Statistical data

Session of the Constitutional Court during June 2000

- Financial claims (Article 137 B-VG): 12
- Conflicts of jurisdiction (Article 138.1 B-VG): 3
- Review of regulations (Article 139 B-VG): 29
- Review of laws (Article 140 B-VG): 126 (of which 91 cases are identical)
- Challenge of elections (Article 141 B-VG): 1
- Complaints against administrative decrees (Article 144 B-VG): 957
  (518 refused to be examined)

Important decisions

Identification: AUT-2000-2-004

a) Austria / **b)** Constitutional Court / **c)** / **d)** 19.06.2000 / **e)** / **f)** / **g)** G 16/00 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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.
5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.

Keywords of the alphabetical index:

Age limit / Family, bringing in, right / Immigration / Self-sufficiency.

Headnotes:

When settling the rights of members of a third state to bring in family the federal legislator may without doubt fix an age limit which is below the age of majority.

However, a law which restricts the bringing-in of family to spouses and minors under the age of 14 fixes an age limit which is not objectively justified and thus violates the principle of equal treatment among foreigners.

Summary:

A Turkish citizen who was 14 years and one month old was denied permission to establish residence because of the age limit fixed in § 21.3 Alien Act *(Fremdengesetz)* on the one hand and because he was seen as not being able to earn his own living on the other hand. Represented by his father, he filed a complaint with the Court claiming the unconstitutionality of the law applied on the grounds of inequality. The Court started its *ex officio* review considering that the attacked law leads to the unequal treatment of minors under and over the age of 14 for which no objective justification can be found.

The Federal Government defended the age limit by arguing that minors over the age of 14 – contrary to those under 14 – have in general a different perspective when entering Austria to join their family. Such minors would obviously come here for reasons of work. Thus this group would be less dependent on their parents and family ties would therefore be less close. The government concluded that parents caring about a family unit would in any case try to have their children with them as soon as possible and not wait till their children reached the age of 14.

The Court disagreed with the government's view stating that minors over the age of 14 might well still be dependent on their parents. These minors are in general not able to earn their own living and be self-sufficient. The Court found additionally that other legal rules contradicted the government's reasoning. According to the Law on Compulsory School Attendance *(Schulpflichtgesetz 1985)* general compulsory school attendance starts on 1 September after a minor reaches the age of six and lasts for nine school years. The legal rules on employment of children and juveniles *(Bundesgesetz über die Beschäftigung von Kindern und Jugendlichen 1987)* do not allow (with only a few exceptions) children to be given work of any kind. These rules cover children up to the day they reach the age of 15.

As the law provoked unequal treatment among foreigners it was consequently annulled by the Court. The entry into force of the annulment was postponed by half a year.

Languages:

German.

Identification: AUT-2000-2-005

a) Austria / **b)** Constitutional Court / **c)** / **d)** 29.06.2000 / **e)** G 175-266/99 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.9 **General Principles** – Rule of law.
4.8.3 **Institutions** – Federalism and regionalism – Institutional aspects.
4.8.5.1 **Institutions** – Federalism and regionalism – Distribution of powers – Principles and methods.
4.13 **Institutions** – Independent administrative authorities.

Keywords of the alphabetical index:

Broadcasting, private / Broadcasting, board / Licence, granting.

Headnotes:

Article 133.4 of the Constitution permits by way of exception the establishment of boards whose members include judges *(Kollegialbehörden mit richterlichem Einschlag)*.

Due to the fact that such boards are not subject to the direction and supervision of the supreme administrative organs and are also exempt from parliamentary control their setting up needs to be particularly justified.

The tasks of the Private Broadcasting Board *(Privatrundfunkbehörde)* which was called the Regional Radio and Cable Broadcasting Board up to 1 January 1999 *(Regional- und Kabelrundfunkbehörde)*, namely the granting of licences, do not satisfy this requirement.

Summary:

More than 90 complaints were filed with the Court against decisions of the Regional Radio and Cable Broadcasting Board (and subsequently the Private Broadcasting Board) by which licences for local, regional and nationwide broadcasting were refused.

The Court started its *ex officio* review of § 13 of the Law on Regional and Local Broadcasting *(Regionalradiogesetz)* which established the Board. As the Court could not find any justification for the setting up of this Board it pronounced that the law was unconstitutional.

Cross-references:

The Court referred to the legal view stated in its judgment of 24 February 1999, B 1625/98 (Telecom-Control Commission; see *Bulletin* 1999/1 [AUT-1999-1-002]).

Languages:

German.

Azerbaijan
Constitutional Court

Important decisions

Identification: AZE-2000-2-005

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 12.07.2000 / **e)** 1/9 / **f)** *Azerbaycan* (Official Gazette) / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.6.3 **Institutions** – Executive bodies – Application of laws.
5.3.10 **Fundamental Rights** – Civil and political rights – Rights of domicile and establishment.

Keywords of the alphabetical index:

Residence, registration, restriction.

Headnotes:

The relevant state body shall refuse to register a person at a given place of residence, except where they are residing there as a family member, if the size of the inhabited area provided for each person living in the given area is less than the standard laid down by Article 40 of the Housing Code (Article 8.3 of the Law on Registration of Place of Residence).

Languages:

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

Identification: AZE-2000-2-006

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 27.07.2000 / **e)** / **f)** *Azerbaycan* (Official Gazette) / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
5.3.13.2 **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:

Land, dispute / Land code.

Headnotes:

The linking of the examination of land disputes in courts with the prior decision of the relevant executive of municipal body should be regarded as a restriction of a person's right to apply directly to a court. Whether a person applies to the relevant executive or municipal body or directly to a court in connection with the land disputes depends on his/her will. Such a restriction impedes the complete exercising of the rights laid down in Articles 60.1, 71.2 and 71.7 of the Constitution.

Summary:

In its petition the Supreme Court requested verification of the conformity of Article 103.2 of the Land Code with Articles 60.1, 71.2, 71.7, 147.1 and 149.3 of the Constitution.

Among bodies which are entitled to resolve land disputes, Article 103.1 of the Land Code specifies the relevant bodies of the executive, municipalities and courts, and part II lays down that in cases where the parties disagree with the decision adopted by the relevant executive or municipal body the disputes shall be examined by courts.

An analysis of Articles 54, 69, 70, 73 and 75 of the Land Code shows that disputes on the granting of land areas, their withdrawal, the restriction or termination of the rights to use and rent the property which is situated on a given land area, as well as other disputes arising from civil and legal relationships, shall be resolved through judicial proceedings.

Property disputes based on administrative grounds or another form of obligatory submission of one party to another party shall be resolved via the procedure established by legislation. In this regard, Article 103.1 of the Land Code specifies the relevant bodies of the executive and municipalities as bodies which are

entitled to resolve land disputes. But as regards the application of an individual in connection with land disputes, the decision whether to apply to the relevant body of the executive, municipalities or directly to a court depends on his/her will.

The linking of the examination of land disputes in courts with the prior decision of the relevant executive or municipal body should be regarded as a restriction of a person's right to apply directly to a court. Such a restriction impedes the complete exercising of the rights laid down in Articles 60.1, 71.2 and 71.7 of the Constitution.

The recognition of the provisions of Article 103.2 and 103.5 of the Land Code as requiring that physical and legal persons apply first of all to the relevant executive or municipal bodies, before they can turn to the courts, contradicts the provisions of Articles 147.2 and 149.3 of the Constitution, which provide that the Constitution is the Act having the highest legal force in Azerbaijan and that laws may not contradict the Constitution.

Taking the above into account, the Constitutional Court decided that from the point of view of the provisions of Articles 60.1, 71.2, 71.7, 147.1 and 149.3 of the Constitution, the relevant provision of Article 103.2 of the Land Code should be interpreted in such a way that it does not exclude the right of a person to apply directly to a court to obtain a decision on land disputes. Furthermore, a person who considers that there has been an infringement of his/her rights connected with land disputes can apply as he/she chooses to the relevant bodies of the executive, municipalities or directly to a court.

Languages:

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

Identification: AZE-2000-2-007

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 28.08.2000 / **e)** 1/12 / **f)** *Azerbaycan* (Official Gazette) / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.4.5.2 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes – Parliamentary elections.
4.9.6 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures.
5.3.36 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law.
5.3.39 **Fundamental Rights** – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Political party, registration / Election, Central Election Commission.

Headnotes:

A political party established in accordance with the legislation of the Azerbaijan Republic, which intends to take part in elections and has obtained a registration certificate through the relevant body of the executive at latest 6 months prior to the announced day of elections, shall be registered by the Central Election Commission (Article 29.1 of the Law on Elections to the Parliament *(Milli Majlis)*).

Normative legal acts improving the legal situation of physical persons and legal entities, eliminating or mitigating their legal responsibility can have retroactive effect. Other normative legal acts have no retroactive effect (Article 149.7 of the Constitution).

Summary:

The President submitted a petition requesting the Court to determine whether Article 149 of the Constitution covers Article 29.1 of the Law on Elections to the Parliament *(Milli Majlis)*.

According to the general rule, adopted normative acts have no retrospective effect and they cover only those relations arising after the acts have entered into force. However, the possibility for the law to have a retroactive effect is not excluded. A normative legal act that improves the legal situation of physical persons and legal entities or protects their rights and freedoms to a greater extent may have retroactive effect. This is reflected in Article 149.7 of the Constitution.

According to the same Article, normative legal acts that change the legal situation of physical persons and legal entities for the worse have no retrospective effect.

The guarantee laid down in the Constitution confining the retrospective effect of a normative legal act to those cases where the effect is to improve the legal situation of persons covers all fields of law, including the Law on Elections to the parliament. Article 29.1 of this law provides that a political party established in accordance with the legislation of the Azerbaijan Republic, which intends to take part in elections and has obtained a registration certificate through the relevant body of the executive at latest 6 months prior to the announced day of elections, is to be registered by the Central Election Commission. According to Article 34 of the Law on Elections to the Parliament adopted on 12 August 1995, political parties or blocs which had been registered under the procedure laid down by law not later than 70 days prior to the elections day can take part in elections.

As can be seen from the above the same legal relations are regulated in different ways and this fact creates the need to interpret Article 29.1 of the Law on Elections to the parliament in connection with Article 149.7 of the Constitution.

Thus, the Constitutional Court held that the provisions of Article 29.1 of the Law on Elections to the parliament covered only these political parties that had been established in accordance with that law and obtained a registration certificate through the relevant body of the executive after the law had entered into force.

Languages:

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

Belgium
Court of Arbitration

Important decisions

Identification: BEL-2000-2-005

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 03.05.2000 / **e)** 46/2000 / **f)** / **g)** *Moniteur belge* (Official Gazette), 08.06.2000 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.15 **General Principles** – Proportionality.
4.7.15.1.4 **Institutions** – Courts and tribunals – Legal assistance and representation of parties – The Bar – Status of members of the Bar.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Lawyer, professional secrecy / Debt, settlement / Debtor, insolvent, assets, information.

Headnotes:

Legislation whereby a lawyer may not refuse on grounds of professional secrecy to divulge information about the assets of a person who is the subject of a collective debt settlement procedure is unconstitutional.

Summary:

The professional associations representing lawyers in Brussels and Liège, as well as a number of individual lawyers, applied to the Court of Arbitration to set aside a section of the Collective Settlement of Debts Act of 5 July 1998. Under the procedure provided for in the Act, the courts make arrangements for bankrupt debtors to pay off as much of their debts as possible while, at the same time, being assured of a decent standard of living for themselves and their families. In this connection, Article 1675/8 of the Judicial Code (inserted by the disputed Act) aims to ensure transparency in relation to debtors' assets, so that the procedure is not abused by solvent debtors seeking to conceal all or part of their attachable assets. To this end, the law included a provision for

waiving the principle of professional secrecy, notably in respect of lawyers representing, or having represented, a debtor.

The applicants argued that the contested provision introduced discrimination between, on the one hand, debtors and their lawyers involved in collective debt-settlement procedures and, on the other, debtors and their lawyers involved in other types of court proceedings to which the principle of professional secrecy applied.

The Court recognised that the waiving of lawyers' professional secrecy was relevant in pursuit of the aim of Article 1675/8 of the Judicial Code, but held that the measure adopted – providing for professional secrecy to be waived absolutely and *a priori* – was disproportionate to that aim. It pointed out that the courts were at liberty to refuse applications for the collective settlement of debts in cases where debtors did not show good faith.

The Court ruled that the contested provision was contrary to the principle of equality set forth in Articles 10 and 11 of the Constitution and set it aside in respect of lawyers.

Languages:

French, Dutch, German.

Identification: BEL-2000-2-006

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 14.06.2000 / **e)** 67/2000 / **f)** / **g)** *Moniteur belge* (Official Gazette), 30.06.2000 / **h)** CODICES (French, Dutch, German).

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.
3.15 **General Principles** – Proportionality.
4.8.1 **Institutions** – Federalism and regionalism – Basic principles.
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.3.37 **Fundamental Rights** – Civil and political rights – Right to property.
5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Economic and monetary Union / Dwelling, abandoned, tax / Free movement, capital / Autonomy, fiscal / Tax, unoccupied building.

Headnotes:

The Walloon Region has the authority to impose an annual tax on abandoned dwellings. This tax does not infringe the principle of free movement of capital that is one element of the overall statutory framework of economic and monetary union within which the regions exercise their powers in the federal state of Belgium.

Nor is the tax contrary to the constitutional principle of equality except insofar as it is levied on buildings left unoccupied against their owners' wishes.

Summary:

A landlords' association and a number of property owners applied to the Court of Arbitration to set aside a Walloon Region decree of 19 November 1998 introducing a tax on abandoned dwellings in the region.

Rejecting arguments put forward by the Walloon Regional Government in its defence, the Court held that the applicants did have an interest in the subject of the claim as the disputed provisions directly and negatively affected the exercise of property rights, and it was possible that individual owners would be required to pay the contested tax.

The applicants submitted firstly that the impact of the disputed tax was equivalent to that of customs duty, constituted a barrier to interregional exchange and the free movement of capital and, therefore, breached the overall principle of Belgian economic and monetary union. On the basis of the European principles of free movement of capital and the relevant case-law of the European Court of Justice, the Court replied that the tax did not concern the movement of assets between the regions, but helped to defend the general interest and did not, therefore, constitute an unwarranted restriction on the free movement of capital.

The applicants further submitted that Articles 10 and 11 of the Constitution had been violated inasmuch as the tax was levied, without distinction, on the owners of unoccupied dwellings that were well maintained as well as the owners of empty, unmaintained buildings. The Court considered the aims of the contested legislation by examining the background to its adoption and found that the tax on unoccupied dwellings (irrespective of whether or not they were maintained) was consistent with the aim of combating inoccupancy. The Court referred here to the duty of legislative bodies (and particularly of the regional authorities responsible for housing) under Article 23.3.3 of the Constitution to guarantee the right to decent accommodation. However, in cases where the legislation affected persons with rights of ownership or other property rights in vacant and well-maintained buildings that were unoccupied for reasons beyond their control (eg because they were not let), the Court found that it was disproportionate to its aim and should not apply. The applicants' other claims were all rejected.

Languages:

French, Dutch, German.

Identification: BEL-2000-2-007

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 21.06.2000 / **e)** 80/2000 / **f)** / **g)** *Moniteur belge* (Official Gazette), 31.08.2000 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Homosexuality / Lesbian / Social security, family allowance / Household / Cohabitation.

Headnotes:

It is discriminatory to grant entitlement to cumulative family allowance (with the sum payable per child increasing according to the number of children in the household) to cohabiting persons of opposite sexes, irrespective of whether they are married, and to cohabiting persons of the same sex related by marriage or otherwise, but not to other cohabiting persons of the same sex.

Summary:

Under the Belgian family allowance system for persons in paid employment, the level of the monthly allowance per child increases according to the number of children in the household: it is thus lowest for the first (or eldest) child and highest for the third and subsequent children. If the household includes more than one claimant (ie working adult bringing up children and entitled to receive family allowance), all the children in respect of whom the allowance is payable are considered together (ie "cumulatively") provided that the claimants are (1) married, (2) persons of different sexes established as a household or (3) persons of the same sex related by marriage or otherwise.

Two courts had received applications from pairs of women living together, each with her own children, who had been refused cumulative family allowance in respect of the total number of children being brought up together, on the grounds that the household did not comprise "persons of opposite sexes" as required by the relevant legislation. Both courts applied to the Court of Arbitration for a preliminary ruling on whether the legislation was compatible with the principles of equality and non-discrimination laid down in Articles 10 and 11 of the Constitution. As the two cases concerned the same legislation, they were joined.

The Court of Arbitration held that the intention behind the law was to take account of the different types of household existing in what was a new social context, and that it was based on the principle that the bigger a household was, the greater its outgoings. The Court pointed out that this principle applied to households in which persons of the same sex cohabited, just as it did to those of opposite-sex or married couples.

It found that the contested legislation was inconsistent in giving the advantage of cumulative family allowance to cohabiting persons of opposite sexes whether or not they were married, and to cohabiting persons of the same sex related by marriage or otherwise, but not to other cohabiting persons of the

same sex. The Court ruled that there was no reasonable justification for the contested difference of treatment, which therefore infringed Articles 10 and 11 of the Constitution.

Supplementary information:

See *Bulletin* 1998/2 [BEL-1998-2-006].

Languages:

French, Dutch, German.

Identification: BEL-2000-2-008

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 21.06.2000 / **e)** 81/2000 / **f)** / **g)** *Moniteur belge* (Official Gazette), 19.07.2000 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.3.4.5.2 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes – Parliamentary elections.
1.3.4.5.3 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes – Regional elections.
1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
1.4.3 **Constitutional Justice** – Procedure – Time-limits for instituting proceedings.
2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.
2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.
4.9.8.6 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Casting of votes.

Keywords of the alphabetical index:

Election, European / Preliminary question, conditions / Voting, automated.

Headnotes:

The Court of Arbitration is not empowered to exercise control over elections or to hear claims concerning possible breaches of the law in relation to elections. An application to have legislation set aside is not admissible if the applicant's claims are, in fact, directed against other legislation promulgated more than six months before the date of the application.

Summary:

A number of individuals lodged applications asking the Court to set aside the election legislation of 18 December 1998 and annul the elections of 13 June 1999, to both houses of the Federal Parliament, the European Parliament and the Regional and Community Councils, organised on the basis of that legislation.

Many of their claims were rejected as inadmissible because they actually related to the Act of 11 April 1994 under which the automated voting system was introduced. Applications to have legislation set aside must be lodged within six months of the publication of the disputed provision in the *Moniteur belge* (Official Gazette).

Inasmuch as the applicants were challenging the conduct of the elections under the disputed legislation, the Court found that parliament was the body empowered by the Constitution to hear their claims, with no provision for appeal to a court of law, and that it itself had no authority to supervise elections or to hear claims concerning possible breaches of the law in relation to them.

It was, however, empowered to review the content of electoral legislation in the light of Articles 10 and 11 of the Constitution (setting forth the principles of equality and non-discrimination). Applications were admissible insofar as they concerned the new provisions for the appointment of experts to supervise the operation and smooth functioning of the automated voting and counting system, but the claimants had not complained of any alleged differences of treatment in this respect.

The applicants' request that the European Court of Justice be asked to make a preliminary ruling on the disputed elections (including the European Parliamentary elections of 13 June 1999) was likewise rejected on the grounds that it did not fall within the scope of the three types of question set out in Article 234 EC (formerly Article 177).

Supplementary information:

See also *Bulletin* 1997/1 [BEL-1997-1-001] on an application for a preliminary ruling made by the Court of Arbitration to the Court of Justice.

Languages:

French, Dutch, German.

Bosnia and Herzegovina
Constitutional Court

Summaries of important decisions of the reference period 1 May 2000 – 31 August 2000 will be published in the next edition, *Bulletin* 2000/3.

Bulgaria
Constitutional Court

Statistical data
1 May 2000 – 31 August 2000

Number of decisions: 3

Important decisions

Identification: BUL-2000-2-002

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 29.06.2000 / **e)** 04/2000 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), no. 55 of 07.07.2000 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
3.5 **General Principles** – Social State.
4.14 **Institutions** – Activities and duties assigned to the State by the Constitution.
5.4.12 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.
5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Social security, contributions, compulsory payment / ILO Convention no. 37 / ILO Convention no. 38.

Headnotes:

In order to implement citizens' constitutional right to social security, the state, via its legislature, establishes the structure of a social security scheme for citizens founded upon the principle of compulsory payment of contributions.

Summary:

An application was made by a group of MPs requesting that 19 provisions of the Social Security Code be declared unconstitutional and that 10 of these provisions be declared incompatible with the international agreements to which Bulgaria is party.

The principal ground for contesting most of the provisions in question was that the adoption of the principle of compulsory social security ran contrary to Article 51.1 of the Constitution, which states that citizens shall have the right to social security. In the view of the applicants, this constitutional right of citizens thus becomes an obligation.

The Constitutional Court ruled that implementation of the right to social security was an obligation of the state and that it was for the state, via its legislature, to introduce an appropriate set of rules. Otherwise, this constitutional provision could not be applied. The legislature must decide which form of social security scheme to adopt and on which principles it should be based in order to render its application compatible with the provisions of the Constitution.

The Social Security Code establishes the structure of the Bulgarian social security scheme on the basis of the principle of compulsory payment of contributions. Before the Code's entry into force, Bulgarian social security legislation was founded upon the same principle.

Social security schemes in most European and American countries also depend on the principle of compulsory payment of contributions. The same principle underlies a number of International Labour Organisation conventions which have been ratified and have entered into force in the Republic of Bulgaria.

In the light of all these considerations, the Constitutional Court unanimously dismissed the application for a finding of unconstitutionality in respect of Articles 1 and 3.1 of the Social Security Code, concerning the compulsory nature of social security, and in respect of all but two of the related provisions. It also unanimously dismissed the application to have four provisions governing compulsory supplementary insurance in respect of retirement pensions declared unconstitutional.

However, the clause extending compulsory social security to individuals of retirement age working without an employment contract (independent professionals, craft workers, traders and private farmers) and those preparing doctoral theses was declared unconstitutional. These individuals must remain outside the compass of compulsory social security.

The Constitutional Court also ruled that the provisions of Articles 74.4 and 74.5 of the Social Security

Code, relating to the period of employment required for entitlement to an invalidity pension on the grounds of a systemic disease, were at variance with International Labour Organisation Conventions no. 37 and no. 38, and allowed this part of the application.

Languages:

Bulgarian.

Canada
Supreme Court

There was no relevant constitutional case-law during the reference period 1 May 2000 – 31 August 2000.

Croatia
Constitutional Court

Important decisions

Identification: CRO-2000-2-011

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 03.05.2000 / **e)** U-I-236/1996, U-I-840/1997 / **f)** / **g)** *Narodne novine* (Official Gazette), 50/2000) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
3.15 **General Principles** – Proportionality.
5.1.1.1 **Fundamental Rights** – General questions – Entitlement to rights – Nationals.
5.1.1.2.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Person, displaced, accommodation / Venice Commission, advisers.

Headnotes:

Restriction of ownership rights, although undertaken with a legitimate aim, violates constitutional rights when there is no proportionality between the aim and the extent of the restriction.

Summary:

The subject of review was the Law on the Status of Displaced Persons and Refugees *(Narodne novine*, 96/93, 39/95) on grounds of which accommodation was provided in the property of other natural or legal persons for persons who were compelled to leave their homes due to the aggression against Croatia. “Displaced persons” refers to persons who went to another place in Croatia and “refugees” to those who went to foreign countries.

The disputed provisions of the amendments of the law provided that on the date of their entry into force all procedures of forcible eviction of displaced persons shall be suspended until conditions are created for their return or until they are, subject to their consent, provided with other suitable accommodation in the place of their displacement or in some other place. It also provided that the provisions of the Law on the suspension of procedures refer only to displaced persons accommodated before 1 March 1995. The constitutionality of the law was disputed by the People's Ombudsman and the Civil Committee for Human Rights.

The Court held that the restriction of ownership (and tenement rights) of persons whose property displaced persons were using was undertaken with a legitimate purpose but that the extent of the restriction of property of natural and legal persons who were dispossessed was not proportionate to the purpose. The disputed provisions restricted ownership without any compensation, did not specify any time period during which ownership would be restricted and linked the restriction to consent of the evictee.

Although during the procedure of constitutional review the disputed provisions were repealed by the legislator, the Court completed the instituted proceedings and declared the unconstitutionality of the provisions.

The grounds for the decision were the following provisions: Article 3 of the Constitution (suspending the enforcement of all final and enforceable court decisions is contrary to the rule of law and violates the right to a fair trial), Article 14 of the Constitution (principle of equality), Article 16 of the Constitution (restrictions of freedoms and rights in order to protect freedoms and rights of others, public order, public morality and health), Article 17 of the Constitution (restrictions of individual rights in cases of war, threat to independence or natural disasters), Article 48 of the Constitution (guarantee of the right to own property) and Article 50 of the Constitution (restrictions of property upon payment of compensation, restriction of property rights for the purposes of protecting the interests and security of the Republic). The Court also relied on Article 1 Protocol 1 ECHR (peaceful enjoyment of possessions).

Supplementary information:

The case was decided with the participation of international advisers of the Venice Commission in proceedings before the Court when it deals with cases relating to the rights of minorities or of persons belonging to minorities. The advisers in the case were Mr Armando Marques Guedes and Mr Giorgio Malinverni.

Languages:

Croatian, English.

Identification: CRO-2000-2-012

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 10.05.2000 / **e)** U-I-241/2000 / **f)** / **g)** *Narodne novine* (Official Gazette), 50/2000 / **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.
1.6.8 **Constitutional Justice** – Effects – Consequences for other cases.
5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

State official, privilege / Libel against state official, *ex officio* proceedings.

Headnotes:

It is unconstitutional to give legal protection to state officials different from that afforded to other citizens in cases of criminal acts which are linked to the person of the injured party and cases of criminal acts against the honour and reputation of a person.

Summary:

The Court annulled provisions of the Criminal Law according to which if criminal acts against honour and reputation are committed against certain state officials, namely the President of the Republic, the President of the Parliament, the Prime Minister, the President of the Constitutional Court and the President of the Supreme Court, in connection with their work or position, criminal proceedings shall be instituted *ex officio* by the Public Prosecutor after the aforementioned officials supply the Public Prosecutor with their consent in writing to the proceedings (consent could be revoked until the court decision became final). As other citizens have to protect their honour and reputation through private litigation the Court held that in such cases differences among citizens are not justified by the position or office of the person and that all citizens should exercise their constitutional right to respect for and protection of their reputation and honour under equal conditions and procedure.

The disputed provisions were annulled having in view Article 14 of the Constitution (equality before the law), Article 16 of the Constitution (restrictions of freedoms and rights in order to protect freedoms and rights of others, public order, public morality and health), Article 35 of the Constitution (legal protection of private and family life, dignity, reputation and honour) and Article 38 of the Constitution (freedom of thought and expression).

Supplementary information:

The same provisions were already reviewed by the Court (case U-I-274/1996, which was finalised on 10 July 1996) but the proposal to annul the provisions was not accepted. However, according to Article 52 of the Constitutional Act on the Constitutional Court, the Court may review the constitutionality of a law or the constitutionality and legality of other regulations, even where the same law or regulation has already been reviewed by the Court.

Languages:

Croatian, English.

Identification: CRO-2000-2-013

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 11.07.2000 / **e)** U-III-698/2000 / **f)** / **g)** *Narodne novine* (Official Gazette), 69/2000 / **h)**.

Keywords of the systematic thesaurus:

1.4.4 **Constitutional Justice** – Procedure – Exhaustion of remedies.
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.
5.3.13.10 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Disputed act, omission / Building permit, revocation.

Headnotes:

It is within the competence of the Constitutional Court to rule that ordinary or other courts did not pass decisions in a reasonable time.

Summary:

The Court decided that a municipal court was obliged to pass decision in a particular case in the shortest possible time, not longer than a year after the Court's decision.

The case was decided on the grounds of Article 59.4 of the Act on the Constitutional Court (passed in September 1999) according to which, as an exceptional measure, the Constitutional Court may institute proceedings after the constitutional complaint, even before other remedies have been exhausted, if it is obvious that due to the disputed act, or the omission to make an act in a reasonable time, constitutional rights or freedoms have been seriously violated and that grave and irreparable consequences may occur if the proceedings are not instituted.

The case concerned the reconstruction of a restaurant for which the necessary building permits from the administrative authorities were obtained but later on annulled after the construction works had been completed. After that, claims for compensation went through the municipal court, the district court and the Supreme Court which, on 17 December 1996, annulled the decisions of lower courts and returned the case for renewal of proceedings.

The constitutional complaint was lodged in connection with these renewed proceedings in which the municipal court did not pass decision within a reasonable time. It was ascertained that between the annulment of the building permit and the lodging of the constitutional complaint a period of 22 years, 5 months and 21 days passed; that the proceedings before courts in the same case lasted 10 years, 3 months and 4 days; that the municipal court did not do anything with the case for 2 years, 3 months and 3 days; that the decision of the Supreme Court stated clearly what should be done in order to complete the proceedings and that the behaviour of the complainant did not have any influence on the duration of proceedings.

Supplementary information:

The grounds for the decision were not only the Article 3 of the Constitution (rule of law), Article 14 of the Constitution (equality before the law), Article 26 of the Constitution (equality before courts) and Article 48 of the Constitution (guaranteed right to property) but also Article 6 ECHR (right to a fair trial).

In another case (U-III-1198/1999), in which the proposal to apply the provision of Article 59.4 of the Constitutional Act was submitted (that is to decide before exhaustion of other legal remedies), the Court refused the claim having in view the duration of the proceedings, the factual and legal complexities of the case, the case-load of the court, the behaviour of the parties to the cases and the fact that during the proceedings the legislator changed the relevant law in a way which contributed to the length of proceedings.

Languages:

Croatian.

Cyprus
Supreme Court

Important decisions

Identification: CYP-2000-2-001

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 12.05.2000 / **e)** 2/99 / **f)** / **g)** to be published in *Cyprus Law Reports* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

4.6.4.3 **Institutions** – Executive bodies – Composition – Status of members of executive bodies.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Civil servant, assets, obligation to disclose.

Headnotes:

The assets of a person constitute part of his private life.

Summary:

Article 15.1 of the Constitution safeguards the right to respect of private and family life. Under Article 15.2 of the Constitution "there shall be no interference with the exercise of this right except such as is in accordance with the law and is necessary only in the interests of the security of the Republic or the Constitutional order or the public order or the public health or the public morals or for the protection of the rights and liberties guaranteed by this Constitution to any person".

The House of Representatives enacted the state officials (Declaration and Control of Assets) Law of 1999. The law aimed at exercising control over the assets of a) state officials, b) persons connected with financial activities of the state in the private sector (Company Boards wherein the state participates) and c) persons closely connected with the aforesaid controlled persons, their spouses and minor children.

The law imposed on the controlled persons the obligation to submit to a Board, named the "Control Board", a statement of their assets upon the assumption of office and upon relinquishing their office, and at regular three-year intervals.

The above Board had extensive powers to enquire into the assets of the controlled persons. It could proceed with an enquiry:

a. following a complaint and

b. of its own motion whenever it appeared from the statement of a controlled person that:

   i. untrue information was included in his statement, or

   ii. there had taken place an increase of the assets of the controlled person or his wife, or his minor children, without sufficient justification in relation to the nature of its increase and its origin.

After the completion of the inquiry the Board would issue a report.

The statement of the controlled persons should then be published in May of each year in the Official Gazette of the Republic. Thus their assets would become public knowledge.

The President of the Republic, in exercise of his right under Article 51.1 of the Constitution, returned the law to the House of Representatives for reconsideration, indicating at the same time that the law contravened the Constitution and the principle of separation of powers. The House of Representatives persisted in its decision and returned the law to the President of the Republic for promulgation. Thereafter the President of the Republic, acting under Article 140 of the Constitution, referred the law to the Supreme Court for its opinion as to whether the law was unconstitutional.

The Supreme Court held:

The assets of the subject constitute part of his private life and their disclosure and control, which is laid down by the above law, constitute an interference with the exercise of the private life of the controlled persons.

Restrictions to the above rights may be imposed and interference may be permitted if it is considered necessary, and to the extent imposed by an existing need. The need should not only be an existing one

but it should have the character of a pressing social need, evaluated within the framework of a democratic society. It is up to the legislative authorities to establish the need which warrants the restriction of a fundamental right of the subject. The law in question does not refer to any facts which establish such a need. Since the law which restricts the fundamental right to private life is not founded on an existing direct and pressing need, it amounts to an infringement of this right, damaging to the individual and the social area in which he or she is functioning. The law is, therefore, unconstitutional because it interferes with the right of private and family life which is safeguarded by Article 15.1 of the Constitution.

Languages:

Greek.

Identification: CYP-2000-2-002

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 04.07.2000 / **e)** 6789, 6798 / **f)** / **g)** to be published in *Cyprus Law Reports* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

4.7.4.3 **Institutions** – Courts and tribunals – Organisation – Prosecutors / State counsel.
5.2 **Fundamental Rights** – Equality.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.

Keywords of the alphabetical index:

Offenders, prosecution, equality of treatment.

Headnotes:

There should not be discrimination by the Prosecuting Authorities in the treatment of offenders.

Summary:

Article 28.1 of the Constitution provides that "all persons are equal before the law, the administration and justice and are entitled to equal protection thereof and treatment thereby". Article 28.2 of the Constitution prohibits any direct or indirect discrimination against any person. Article 35 of the Constitution imposes upon the legislative, executive and judicial authorities of the Republic the obligation to "secure, within the limits of their respective competence, the efficient application of the provisions of the Constitution relating to fundamental rights and liberties".

The two respondents were charged before the Assize Court along with two other persons for the commission of the offence of obtaining money by false pretences, but the prosecution of the latter two was discontinued by the Attorney-General by the filing of a *nolle prosequi*.

Upon appeal by the prosecution against the insufficiency of the sentence of a fine imposed on the respondents, it was submitted on their behalf that their co-accused were treated differently by the prosecuting authorities in that their prosecution was discontinued by the filing of a *nolle prosequi*.

The Supreme Court declined to increase the sentence imposed on the respondents, despite its insufficiency, having held that Article 28.2 of the Constitution expressly prohibits every form of discrimination. The application of Article 28 of the Constitution as well as of any other article of the Constitution, which guarantees the fundamental rights and liberties of the subject, is linked with the provisions of Article 35 of the Constitution, which makes their efficient application an obligation of the legislative, executive and judicial authorities within the limits of their respective competence. The equal treatment of offenders falls equally upon all the authorities of the Republic. The principle of equality imposes the prosecution of all offenders without discrimination or exception. The treatment and punishment of offenders constitutes an aspect of the administration of justice and is the exclusive responsibility of the judicial authorities. The decision of the Attorney-General to discontinue a criminal prosecution is not controlled judicially. However, according to the case-law of the Supreme Court, discontinuing a criminal prosecution is related to the mode of treatment of the offenders and is, therefore, taken into consideration in assessing the sentence to be imposed on persons who are co-defendants with the persons whose prosecution was discontinued. Justice cannot remain indifferent in the face of the use of different measures in the treatment of offenders. Such a course is not permitted by Article 35 of the Constitution. Nor is it permitted by the nature of the judicial mission, which is at all times connected with equality. Justice does not condone the crime of the convicted persons nor does it abstain from its duty to punish them for the offence they have committed. It may reduce the sentence of the

convicted persons to the extent necessary to mitigate the sense of injustice caused by the different treatment of offenders. In this manner, on the one hand, the inequality in the treatment of offenders is mitigated and on the other hand justice performs the duty imposed on it by Article 35 of the Constitution.

Languages:

Greek.

Czech Republic
Constitutional Court

Statistical Data
1 May 2000 – 31 August 2000

- Judgments of the Plenum: 6
- Judgments of panels: 48
- Other decisions of the Plenum: 8
- Other decisions of panels: 673
- Other procedural decisions: 50
- Total: 775

Important decisions

Identification: CZE-2000-2-010

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 02.05.2000 / **e)** I. ÚS 326/99 / **f)** Residence on the territory of the Czech Republic / **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.
3.16 **General Principles** – Weighing of interests.
5.1.2.2 **Fundamental Rights** – General questions – Effects – Horizontal effects.
5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.

Keywords of the alphabetical index:

Residence, place of treatment / Housing, non-occupancy, eviction.

Headnotes:

Citizens have the right to reside anywhere within the territory of the Czech Republic, as well as abroad, without the exercise of this right being used to their

detriment. The provisions of the Civil Code must therefore be interpreted so as to ensure that provisions of international human rights treaties, such as Article 2 Protocol 4 ECHR and Article 12.1 of the International Covenant of Civil and Political Rights, as well as constitutional texts, are respected.

Summary:

The complainant was an elderly woman suffering from illness. During the period from January 1996 until October 1997, she received treatment at a hospital in another city (the place where her son lived). The owners of the building in which she had a flat considered that her absence constituted grounds for terminating her lease and evicting her pursuant to § 711.1.d and 711.1.h of the Civil Code (residence lease can be terminated for failure to reside there). The trial and appellate courts, as they did not find serious grounds for her to be away (she could have had treatment in her city of residence), agreed and ordered her to vacate.

The Constitutional Court found a violation of the constitutional right to free movement anywhere within the country or abroad without the exercise of that right being used against a person. The Court disagreed with the finding of the ordinary courts that the complainant had no serious grounds for being away from her residence. As she had the right to choose her place of treatment, her decision to seek treatment in the city where her son lived was valid, especially in view of her advanced age and the need for family support.

The Court held that the ordinary court decisions violated the right to travel as guaranteed by Article 2 Protocol 4 ECHR, as well as Article 14 of the Covenant of Civil and Political Rights. It referred predominantly to the European Convention on Human Rights and the Covenant, as Article 10 of the Constitution makes human rights treaties directly binding and requires courts to accord them precedence over statutes (such as the Civil Code).

Languages:

Czech.

Identification: CZE-2000-2-011

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 23.05.2000 / **e)** Pl. ÚS 24/99 / **f)** Amounts to be reimbursed by the state to private providers of medical services / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.3.5.7 **Constitutional Justice** – Jurisdiction – The subject of review – Quasi-legislative regulations.
3.9 **General Principles** – Rule of law.
3.14 **General Principles** – Publication of laws.
4.6.2 **Institutions** – Executive bodies – Powers.
4.6.3.1 **Institutions** – Executive bodies – Application of laws – Autonomous rule-making powers.

Keywords of the alphabetical index:

Medical service, private provider, reimbursement.

Headnotes:

The principle that neither the legislature nor the executive can deal with the forms of law – the sources of law – in an arbitrary fashion, for they must conform to the position of the constituent assembly, as well as to other considerations, such as transparency, accessibility, and preciseness, is derived from the concept of a law-based state, as enshrined in Article 1 of the Constitution.

According to Article 78 of the Constitution, the sole type of legal normative act which the government is authorised to adopt is an order, on the condition that it is published in the Collection of Laws. In the case at issue, a conflict arose between the normative content of the government's act and the absence of the legal form corresponding thereto.

In the view of the Constitutional Court the classification of the sources of law must, in the first place, be ascertained from the content of the legal norm, which is formed by an abstraction from the separate parts of a single legal enactment. government decisions setting the price of contractual services must be considered as the substitution of the manifestation of will of contracting parties by the act of a state body which is general, that is, has legal normative content. The degree of generality of a legal norm is defined by the fact that a legal norm determines, by definitional attributes, its subject matter and the subject of regulation in the form of a class, and not by the specification of their component parts.

To the extent that the substantive component of a legal norm is contained in a source to which an

empowering norm makes reference, such legal source must also be considered as a form of law. In the situation where conflict occurs between the generality of the legal act and the form corresponding thereto, the Constitutional Court gives preference to the assessment of the content rather than to a mechanical acceptance of the form.

Summary:

This case concerned the determination of the amounts to be reimbursed by the state to private providers of medical services. The relevant statutory provision, § 17.5 of the Act on Public Health Insurance, states that in cases where the associations of private providers do not come to an agreement with the General Health Insurance Co. (Czech public law health insurance) as regards the reimbursable amounts, the government shall decide as to what those amounts shall be. Following such an occurrence, a private health provider submitted a complaint to the Constitutional Court asking for the decision of the government be annulled. Prior to dealing with that issue, the panel hearing the case suspended proceedings of its own motion to submit to the Plenum the issue of whether § 17.5 conflicts with the Constitution.

That provision empowers the government to decide on the amount to be reimbursed for medical services and states that the decision is to be published in a ministerial publication rather than the Collection of Laws. The Constitutional Court found that such a decision of the government is an act of general normative character, not an administrative decision, and must be adopted as a government order (the sole normative act which, under the Constitution, the government is permitted to adopt) and published in the Collection of Laws. Accordingly, the Court annulled § 17.5.

Languages:

Czech.

Identification: CZE-2000-2-012

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 28.05.2000 / **e)** I. US 641/99 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
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.
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.
5.3.13.28 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to examine witnesses.

Keywords of the alphabetical index:

Evidence, partial submission / Expert, assessment / Evidence, written witness.

Headnotes:

The Constitutional Court is not, in relation to ordinary courts, a court of third or fourth instance, and is not competent to assess the overall legality or correctness of an ordinary court's decision. That however does not affect its authority to ascertain whether the decision constituted an interference with constitutionally guaranteed fundamental rights and basic freedoms. The Court's function then is to determine whether the evidence was presented in a manner that ensures a fair trial and to satisfy itself that the trial was conducted in a lawful and constitutional manner.

Where a trial court bases its decision on the written submission of a witness's views without calling the witness in to be questioned orally, relies solely on a witness for the submission of crucial documentary evidence, satisfies itself with the submission of only part of the evidence and decides an issue that requires the assessment of an expert, the right to judicial protection (Article 36.1 of the Charter of Fundamental Rights and Basic Freedoms) and the right to a fair trial (Article 6.1 ECHR) are violated.

Summary:

The complainant, a former financial officer of a political party, brought a case claiming a violation of his personal honour through the publication of a newspaper article which asserted he had concluded disadvantageous contracts for the party. He lost both the trial and appeal, then filed a constitutional complaint asserting the failure to provide due judicial protection and a fair trial. The Constitutional Court found the complaint to be founded and quashed the decisions of both ordinary courts.

The Court found the proceedings violated the Constitution particularly with regard to the manner in which the complainant's successor as party finance manager gave evidence on the issue of whether contracts were unfavourable. He submitted his views solely in writing and they were read out in court without the court calling the witness before it and asking him questions concerning his evidence, a procedural step which violates several provisions of the Civil Procedure Code.

To rebut this evidence, the complainant requested the submission of the allegedly unfavourable contracts, but only parts of them were submitted. Although the decisive issue was whether the contracts were disadvantageous for the party, an issue requiring expert analysis, the trial court did not call upon the assistance of an expert but decided the matter itself (solely on the basis of the mentioned written witness evidence).

Languages:

Czech.

Identification: CZE-2000-2-013

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 29.05.2000 / **e)** IV. ÚS 615/99 / **f)** Criminal proceeding / **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.
5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Impartiality.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.
5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.
5.3.13.27 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to counsel.

Keywords of the alphabetical index:

Pre-trial, investigator, conduct / Counsel, appointment, consent.

Headnotes:

Even though criminal proceedings are subdivided into several phases, none of these phases may be considered in isolation. If the pre-trial proceedings, for example, suffer from serious irregularities, then proceedings before the trial court, if they fail to remedy these irregularities defect either at all or in a suitable manner, cannot fulfil the requirements of an impartial and fair trial in the sense of Article 36.1 of the Charter of Fundamental Rights and Basic Freedoms and Article 6.1 ECHR.

Summary:

The complainant was a Russian national alleged to have committed fraud by taking advantage of a bank clerical error in his favour and withdrawing a large sum to which he was not entitled. He was found guilty and his appeal was turned down. He objected that the conduct of the investigator in the pre-trial phase and subsequent court proceedings based thereupon violated, among others, his constitutional right to counsel and the presumption of innocence.

The investigator's improper conduct was demonstrated by an assertion he wrote in the official report to the effect that he would not consider reliable the testimony of any Russian (the nationality of the complainant). Further, the investigator did not allow the complainant his choice of counsel, as required by the Criminal Procedure Code, but appointed one for him without his consent. The quality of defence by counsel appointed in such a manner was apparent from the fact that the counsel came late for the questioning of the complainant and did not pose a single question. Also, the complainant was not

informed, as required by the Act on Pre-Trial Custody, that he had the right to contact his national diplomatic representative.

In his report the investigator also pre-empted a conclusion (guilt) which resided solely within the competence of the courts, which means the complainant was considered guilty prior to being found guilty by a final court judgment.

The trial court ignored the objections of the complainant's counsel (chosen subsequently by the complainant) to these pre-trial irregularities and the request that the investigator in question be excluded on the ground that he was biased.

Languages:

Czech.

Identification: CZE-2000-2-014

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 22.06.2000 / **e)** III. ÚS 68/99 / **f)** Evidence proposed by the parties / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Evidence, non-admittance, reasons.

Headnotes:

Ordinary courts are not obliged to hear all evidence put forward by the parties to a case, and the admission of evidence depends on the court's assessment of its value. However, when giving the reasons for its decision, a court must always explain why it has decided not to admit certain evidence. If a court simply fails to respond to a proposal to call a witness and does not, in its judgment, explain its decision not to allow the proposed witness to give evidence, then it violates the right to a fair trial.

Summary:

The complainant, a tenant of a flat, was sued by the landlord who requested eviction on the ground that the tenant sublet the flat without the landlord's permission (as required by the Civil Code). The complainant claimed that the alleged sub-tenant, a Japanese student, in fact lived with him in a common household. Both trial and appellate courts found for the landlord and ordered the eviction. The complainant submitted a constitutional complaint, objecting to the fact that the trial court took the Japanese student's evidence in Czech without the aid of an interpreter and that it refused to admit certain other evidence (witnesses proposed by the complainant).

The Constitutional Court rejected the complaint concerning the Japanese student's evidence. It found in the record that she had told the trial court she understood Czech, her answers were clear and comprehensible, and the complainant was present when she gave evidence and made no request that an interpreter be used. Accordingly, the trial court's means of proceeding in this respect did not constitute a violation of the right to a fair trial and this objection was manifestly unfounded.

Regarding the trial court's refusal to hear proposed evidence, the Court agreed that this constituted a violation of the right to a fair trial. It is necessary for the trial court to give consideration to all evidence proposed and, although it is up to the court to determine whether proposed evidence merits a hearing, it must explain its reasons. In this case, the trial court appears to have based its decision primarily on the evidence of one person (who, moreover, the complainant alleges is biased against him), while refusing to hear witnesses proposed by the complainant.

Languages:

Czech.

Identification: CZE-2000-2-015

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 22.06.2000 / **e)** III. ÚS 170/99 / **f)** Relevant statutory criteria and reasons for the conclusions / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Reasoning.

Keywords of the alphabetical index:

Legal costs, reimbursement, refusal / Damages, award / Party, successful, unsuccessful.

Headnotes:

If a court has proceeded in a manner which it does not explain in an appropriate way, or in which one can see elements of arbitrary or random decision-making, it is not sufficient for it to make a mere formal reference to the relevant statutory provisions without some clarification of the conclusions which the court reached. Ordinary courts must give due consideration to the relevant statutory criteria and give persuasive reasons for the conclusions which they came to, otherwise it cannot be said that the right to judicial protection under Article 36.1 of the Charter of Fundamental Rights and Basic Freedoms has been respected.

Summary:

This case concerned an attack on the complainant's honour, in that a person declared him to be “a mafioso and a fraud”. The complainant sued the attacker and won to the extent that the trial and appellate courts found that the assertion had not been proven and so that it was false. Nonetheless, the ordinary courts refused his claim for damages, holding that the moral satisfaction of the judicial declaration to the effect that he was not a mafioso or a fraud was sufficient. It also refused the complainant's request to be awarded legal costs.

The Constitutional Court rejected the constitutional complaint regarding the ordinary courts' decision not to award damages. It emphasised that it is not a further ordinary instance, thus it cannot take upon itself the authority to review ordinary court decisions unless a fundamental right is concerned. It cannot be said that the trial court decisions were a violation of the right to dignity, honour and good name, especially as the trial court found that the contested assertion was not true and explained its reasons in an appropriate manner.

As far as the legal costs were concerned, the Court found a basic violation. Section 142.3 of the Civil Procedure Code provides that no fees shall be awarded if neither party is a clear winner. The trial court decided that as it had not granted his claim for damages, the complainant was not a clear winner. The Court disagreed, especially as the complainant had been successful on the merits (the trial court found that the assertions about him had been false). In any case, in neither court was any reasoning for the refusal of costs given. The courts had merely announced the refusal and made a general reference to § 142 without explaining in what respects the parties can be considered successful or unsuccessful.

Languages:

Czech.

Denmark
Supreme Court

There was no relevant constitutional case-law during the reference period 1 May 2000 – 31 August 2000.

Estonia
Supreme Court

Important decisions

Identification: EST-2000-2-005

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 12.05.2000 / **e)** 3-4-1-5-2000 / **f)** Review of the regulation of the government, entitled "Reimbursement of expenses for the use of personal automobiles for business travel" / **g)** *Riigi Teataja III* (Official Bulletin), 2000, 13, Article 140 / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
1.6.5.3 **Constitutional Justice** – Effects – Temporal effect – *Ex nunc* effect.
1.6.8.2 **Constitutional Justice** – Effects – Consequences for other cases – Decided cases.
3.12 **General Principles** – Legality.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
4.10.7 **Institutions** – Public finances – Taxation.

Keywords of the alphabetical index:

Vehicle, personal, use for business travel.

Headnotes:

The government can issue a regulation for as long as the law which delegates the government the power to issue a regulation remains valid. If the law is replaced with another one, the government must issue a new regulation as well.

Summary:

The Tax Board issued a precept to a public limited company, stating that the said public limited company had paid compensation for the use of personal automobiles for official trips to four of its employees who were not in fact owners of personal automobiles. This compensation should have been subject to income and social taxes. For this reason, an

additional amount of income tax, social tax and interest to be paid by the company was assessed.

The company filed a complaint against the precept with the Tax Board, but the Board refused to revoke the precept. The company appealed to the central taxation authority, and finally to the Tallinn Administrative Court. The Tallinn Administrative Court declared Section 3.2 of the government regulation, entitled "Reimbursement of expenses for the use of personal automobiles for business travel", to be unconstitutional and filed a petition with the Supreme Court, seeking the review of the constitutionality of the said provision.

The Constitutional Review Chamber of the Supreme Court noted that the disputed regulation was issued under the Personal Income Tax Act of 1990. According to the Income Tax Act of 1993 (enacted on 1 January 1994) the Minister of Finance was empowered to issue a regulation concerning reimbursement of costs relating to the use of a personal automobile for business travel. In fact, the Minister of Finance never issued the regulation. Instead, the government regulation enacted under the previous law was applied. In 1995 the Income Tax Act of 1993 was amended and the government was empowered to issue the relevant regulation. The government never did this; and the old regulation was continuously applied.

The Supreme Court noted that Article 87.6 of the Constitution means that the government shall be empowered to issue a regulation for as long as the law that delegates the government the power to issue such a regulation remains valid. When a new law contains a new delegation provision (although analogous to the previous one), the government shall issue a new regulation, unless the new law *expressis verbis* provides for the continuing validity of the previous regulation.

Since the government had already declared its regulation invalid, the Court only ruled on the unconstitutionality of the regulation in so far as it related to imposition of income tax.

As for the effects of its decision, the Court noted that the decision had *ex nunc* effect and the decision gave no grounds for income tax refunds to be paid to those tax payers who had not disputed the tax or in respect of whose complaints a decision of an administrative Court had become effective. The Court also explained that a constitutional review decision does not serve as a ground for review of an administrative Court decision according to Section 75 of the Administrative Court Procedure Act.

Concerning taxation under the social tax scheme, the Court found that the government was empowered, under the Social Tax Act of 1990, to issue the regulation. However, the government regulation imposed an additional requirement – that the owner of the automobile concerned had to be the employee himself or herself (which did not correspond to the term "personal vehicle" in the wording of the Social Tax Act). The Court was of the view that the government had acted *ultra vires*, since any vehicle which is not in the ownership or possession of an employer has to be regarded as a personal vehicle.

The Supreme Court found that Section 3.2 of the disputed regulation was unconstitutional due to the conflict with Article 87.6 of the Constitution.

Cross-references:

Decision 3-4-1-2-97 of 06.10.1997, *Bulletin* 1997/3 [EST-1997-3-002]; Decision 3-4-1-5-98 of 17.06.1998, *Bulletin* 1998/2 [EST-1998-2-005].

Languages:

Estonian, English (translation by the Court).

Identification: EST-2000-2-006

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 22.06.2000 / **e)** 3-4-1-7-2000 / **f)** Review of a directive of the director general of the National Housing Board / **g)** *Riigi Teataja III* (Official Bulletin), 2000, 18, Article 188 / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.6.5.4 **Constitutional Justice** – Effects – Temporal effect – Postponement of temporal effect.
3.12 **General Principles** – Legality.
4.6.2 **Institutions** – Executive bodies – Powers.
5.3.37 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Public agency, competence.

Headnotes:

The directors of public agencies did not have the right to issue legislation of general application, since the Government of the Republic Act did not give the directors such a right.

Summary:

The director general of the National Housing Board issued a directive by which the Instructions for the Registration of Buildings ("the Instructions") were approved. Tallinn Administrative Court, while resolving a complaint against the Tallinn Buildings Register, found that the Instructions were in conflict with the Constitution and therefore not applicable. The Databases Act is to be applied to the Buildings Register. The Court declared the directive of the director general of the National Housing Board unconstitutional and filed a petition with the Supreme Court seeking the review of the constitutionality of the directive.

The Constitutional Review Chamber of the Supreme Court noted that the directive of the director general of the National Housing Board contained universally obligatory rules of conduct, which were to be applied to an unspecified number of persons in an abstract number of cases. However, the Government of the Republic Act did not give the directors of public agencies the right to issue legislation of general application. Thus, the Supreme Court found that the directive was in conflict with Article 3.1 of the Constitution. According to this Article, the powers of the state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith.

According to Section 52.1 of the Databases Act, which became effective as of 19 April 1997, the statutes of state registers which had been approved prior to the entry into force of that Act should have been brought into compliance with the Act within two years. The government had failed to do that. The Supreme Court was, however, of the opinion that it is was not reasonable to declare the Instructions invalid without giving the government more time to bring the statutes of the state Buildings Register into compliance with the Databases Act. Discontinuance of the regulation established by the disputed directive might paralyse commerce of buildings and violate the constitutional right of any person to dispose freely of his or her property.

The Supreme Court declared the disputed directive of the director general of the National Housing Board invalid as of the entry into force of a new Statutes of buildings register, but not later than 1 September 2000.

Supplementary information:

According to Section 20.1 of the Constitutional Review Court Procedure Act the decisions of the Court become effective as of pronouncement. In this case the decision became effective as of pronouncement but the invalidation of the disputed legislation was postponed by the Supreme Court. The Court allowed the government a period of more than two months to enact a new regulation. The government made use of the period and on 22 August 2000 enacted the Statutes of National Buildings Register, which became effective on 1 September 2000.

Languages:

Estonian, English (translation by the Court).

Finland
Supreme Court
Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 May 2000 – 31 August 2000.

France
Constitutional Council

Important decisions

Identification: FRA-2000-2-005

a) France / **b)** Constitutional Council / **c)** / **d)** 04.05.2000 / **e)** 2000-428 DC / **f)** Law organising a referendum in Mayotte / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 10.05.2000, 6976 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.3 **Sources of Constitutional Law** – Techniques of review.
3.3.2 **General Principles** – Democracy – Direct democracy.
3.3.3 **General Principles** – Democracy – Pluralist democracy.
3.8.1 **General Principles** – Territorial principles – Indivisibility of the territory.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.9.1 **Institutions** – Elections and instruments of direct democracy – Instruments of direct democracy.
5.5.4 **Fundamental Rights** – Collective rights – Right to self-determination.

Keywords of the alphabetical index:

People, self-determination / Referendum, consultative / Interpretation, nullifying / Interpretation, constructive / Population, overseas.

Headnotes:

The second paragraph of the preamble to the 1958 Constitution establishes the right of the peoples of overseas territories to self-determination and free expression of their wishes.

Consequently, to consult them on changes in the status of their territory within the republic is in keeping with the Constitution. On the other hand, parliament may not in advance declare itself bound by the results of such a referendum.

Since the Mayotte people were simply being asked to give their opinion, parliament still had full responsibility

for deciding the final status of Mayotte. The provision obliging the government to table a bill heeding the results of the referendum must therefore be considered unconstitutional.

The Constitutional Council also held that the requirements of clarity and fairness established by its case-law (87-226 DC of 2 June 1987) were met if the regulatory authorities took whatever steps were appropriate to make it clear to the people of Mayotte that the referendum was purely consultative.

Summary:

The island of Mayotte has been French since 1841. Since the Comoros became independent in 1974, the island's legal system has been provisional. The Mayotte people refused the status of overseas territory in a referendum held in 1975. The island does not have the status of *département d'outre-mer* and could now scarcely be given it since specific aspects of the general law currently applicable on the island would be totally inconsistent with such status, particularly where fundamental rights (such as the status of women) are concerned.

Recent negotiations have resulted in an agreement on a new *sui generis* status for Mayotte. A referendum has been scheduled to ascertain the opinion of the local population on the future of their island.

Supplementary information:

At a time of deep disagreement on the future of Corsica, a group of MPs referred the legislation organising this consultative referendum to the Constitutional Council.

In this connection, it should be pointed out that the Constitutional Council only considered the referendum to be a constitutional issue insofar as it concerned an overseas population.

Languages:

French.

Identification: FRA-2000-2-006

a) France / **b)** Constitutional Council / **c)** / **d)** 30.05.2000 / **e)** 2000-429 DC / **f)** Law to promote equal access to elective offices and positions for women and men / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 07.06.2000, 8564 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources – The Constitution and other sources of domestic law.
4.5.6.3 **Institutions** – Legislative bodies – Law-making procedure – Right of amendment.
4.5.11.2 **Institutions** – Legislative bodies – Political parties – Financing.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.
5.2.3 **Fundamental Rights** – Equality – Affirmative action.

Keywords of the alphabetical index:

Non-punitive measure.

Headnotes:

There is no reason why the constitution-making authority should not introduce into the Constitution new provisions which, in the particular cases they are concerned with, lay down exceptions to constitutional rules or principles.

A plaintiff cannot rely on the binding nature of decisions of the Constitutional Council based on articles of the Constitution which have since been amended.

The provision at issue stipulates that if the difference between the number of male candidates and the number of female candidates which a party puts forward exceeds 2% of the total number of that party's candidates, the public funding allocated to the party is reduced proportionally. This is not a penalty but an adjustment of financial aid to encourage parties to implement the principle of equal access to elective office for women and men.

The amendment by ordinary legislation of a provision on which the constitutionality of an organic law depends robs the latter of its constitutional basis and must therefore be declared unconstitutional.

Summary:

On two occasions (82-146 DC of 18 November 1982 and 98-407 DC of 14 January 1999, *Bulletin* 1999/1 [FRA-1999-1-001]), the Constitutional Council rejected provisions imposing a gender "quota" for local elections (municipal elections in the first case and regional in the second).

The Constitution was revised in July 1999 to overcome this constitutional obstacle. Articles 3 and 4 of the Constitution were supplemented as follows:

Article 3 now states: "Statutes shall promote equal access by women and men to elective offices and positions." Article 4 states: "Political parties shall help implement the principle set out in the last paragraph of Article 3 as provided by statute".

To give effect to these constitutional provisions, the government asked that two laws be debated as a matter of urgency: one was an organic law concerning the electoral mandates of local authorities in overseas territories, and the Constitutional Council – to which the matter was automatically referred – held it to be in keeping with the Constitution (2000-430 DC of 30 May 2000); the other was ordinary legislation, referred to it by a group of senators (2000-429 DC of 29 May 2000).

In the case of elections based on the list system, the ordinary legislation in question provides for absolute parity (as regards both the number of candidates and their position on the list) and, in the case of general elections, which in France are based on single seat constituencies, for financial encouragement to parties to present an equal number of candidates of each sex.

The Constitutional Council found the provision lowering the threshold above which municipal elections are held on the basis of lists (ie 3 500 inhabitants) to be unconstitutional. It also confirmed its recent case-law on the parliamentary procedure restricting submission of amendments after the Joint Senate/National Assembly Committee has met (see 98-402 DC of 25 June 1998, *Bulletin* 1998/2 [FRA-1998-2-005], 98-403 DC of 29 July 1998, *Bulletin* 1998/2 [FRA-1998-2-006] and 99-414 DC].

The gist of this decision is that the Council does not allow ordinary legislation to interfere with a provision on which an institutional law's constitutionality depends (see 2000-427 DC, *Bulletin* 2000/1 [FRA-2000-1-004]). This finding led the Chair of the Law Commission of the National Assembly, which had tabled the unconstitutional amendment, to take the unusual step of criticising the finding publicly (cf. AJDA August 2000, p. 658).

Cross-references:

Decisions 82-146 DC of 18.11.1982 and 98-407 DC of 14.01.1999, *Bulletin* 1999/1 [FRA-1999-1-001]); 2000-430 DC of 30.05.2000; 98-402 DC of 25.06.1998, *Bulletin* 1998/2 [FRA-1998-2-005], 98-403 DC of 29.07.1998, *Bulletin* 1998/2 [FRA-1998-2-006] and 99-414 DC.

Languages:

French.

Identification: FRA-2000-2-007

a) France / **b)** Constitutional Council / **c)** / **d)** 06.07.2000 / **e)** 2000-431 DC / **f)** Law on the election of senators / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 11.07.2000, 10486 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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.

Keywords of the alphabetical index:

Senate, elections / Demography, criteria.

Headnotes:

According to the constitutional provisions concerning the Senate (Article 24 of the Constitution), the latter must, insofar as it represents the territorial units of the Republic, be elected by an electoral college representing these authorities.

Consequently Article 2 of the legislation at issue was contrary to the Constitution, in that it would have meant a substantial proportion, and in some

départements the majority, of the senate electoral college being made up of “supplementary delegates”, who are not local elected representatives.

Summary:

In France the Senate traditionally provides representation of the country’s territorial divisions. It represents the territory rather than the population and plays the role of a “moderating chamber”, on the clear understanding that the National Assembly, the only chamber elected by direct universal suffrage, has, save in exceptional circumstances, the “last word” in parliamentary matters.

To take greater account of the demographic differences between the 36 000 municipalities, whose elected representatives account for nine-tenths of the college which elects the Senate by indirect suffrage, the law submitted to the Constitutional Council sought to make a number of adjustments, the main ones being:

- lowering the threshold above which the senators of a *département* were elected by the proportional system;

- increasing the number of senatorial electors appointed from outside local authorities’ deliberative assemblies so as to give urban municipalities more weight.

Only the latter innovation was set aside, as it had the effect, nationally, of increasing the proportion of senatorial electors with no local mandate from 8 to 28% and even placing them in the majority in some *départements*.

Languages:

French.

Identification: FRA-2000-2-008

a) France / **b)** Constitutional Council / **c)** / **d)** 12.07.2000 / **e)** 2000-432 DC / **f)** Finance Amendment Act 2000 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 14.07.2000, 10821 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.8.4.2 **Institutions** – Federalism and regionalism – Budgetary and financial aspects – Arrangements for distributing the financial resources of the State.
4.8.4.3 **Institutions** – Federalism and regionalism – Budgetary and financial aspects – Budget.

Keywords of the alphabetical index:

Local authority, freedom of administration / Tax, residence tax / Threshold, “critical dependence”.

Headnotes:

Although the disputed provisions further reduce the proportion of the regions’ resources represented by the regions’ own tax revenue, they neither restrict this proportion nor reduce the regions’ overall resources to the point of restricting their freedom of self-government.

The effect of the reduction must be assessed in terms of the amount of tax revenue as compared with overall resources. The Council examines case by case whether the “critical dependence” threshold has been exceeded.

Summary:

The 1999 Finance Act (98-405 DC, *Bulletin* 1998/3 [FRA-1998-3-009]) introduced reforms to the rules governing business tax.

The subsequent 1999 Finance Amendment Act contained provisions for abolishing the regional share of residence tax, thus reducing the regions’ direct revenue. This was compensated for by a State subsidy. The senators who referred the legislation to the Council alleged that the regions’ loss of part of their own tax revenue and the inadequacy of the compensation scheme infringed the principle of local authorities’ freedom of administration. As the regions’ tax revenue still came to 37% of their overall resources, excluding loans, there was no infringement of the principle of freedom of administration.

Cross-references:

Decision 98-405 DC, *Bulletin* 1998/3 [FRA-1998-3-009].

Languages:

French.

Identification: FRA-2000-2-009

a) France / **b)** Constitutional Council / **c)** / **d)** 20.07.2000 / **e)** 2000-434 DC / **f)** Hunting act / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 27.07.2000, 11550 / **h)** CODICES (French).

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.
2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.17 **General Principles** – General interest.
4.5.6.3 **Institutions** – Legislative bodies – Law-making procedure – Right of amendment.
4.10.2 **Institutions** – Public finances – Budget.
5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of opinion.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Hunting, Right / Hunting, non-hunting rights / Local law / Incompetence, negative.

Headnotes:

It must be understood that, given its inclusion in the Rural Code, the legislative provision under which the right to prohibit hunting on one's private property depends on hunting's being objected to on all of the land belonging to land-owners or co-owners opposed to hunting, applies to land belonging to the objector which is with in the territory of the municipal or intermunicipal association concerned but does not apply to all of the owner's or owners' property throughout France.

Where a landowner states that, from personal conviction, he objects to hunting on his land, he is not required to explain his objections.

Although a ban on hunting one day per week does not infringe the right of ownership to the extent of grossly affecting the meaningfulness and scope of the right, it must be shown that there is justification for such a prohibition on the ground of public interest.

One such justification would be the need to ensure the safety of school children and the adults accompanying them on Wednesdays; on the other hand, allowing the authorities to choose another weekly period of twenty-four hours "on account of local circumstances" when neither the provision at issue nor the parliamentary debate refer to any ground of public interest justifying such a prohibition is liable to interfere with ownership rights in a manner contrary to the Constitution.

Although hunting federations are private law bodies, they are governed by special statutory provisions and have various public-service functions. The need for central government to ensure that hunting federations perform the public services required of them and that they make proper use of the resources they receive for the purpose are sufficient reason to introduce a special system of supervision. The obligations placed on local hunting federations, in particular scrutiny by the Auditor General's Department, therefore do not infringe freedom of association.

Summary:

The act at issue was passed in a context of widespread legal and political controversy over hunting in France (eg the administrative proceedings on account of delay in incorporating the "migratory birds" directive into French law and the European Court of Human Rights finding against *France in the Chassagnou case*, *Bulletin* 1999/1 [ECH-1999-1-006]). As soon as the legislation was enacted, its constitutionality was challenged in an application lodged by a group of parliamentarians.

In its reply to this application the Constitutional Council:

- confirmed its case-law regarding the right of amendment (cf. 2000-430 DC of 29 June 2000);

- applied once again the method of "nullifying interpretations" and "constructive interpretations" to safeguard the exercise of fundamental freedoms;

- clarified the scope of the principle of freedom of association established by the Council in its historic decision of 16 July 1971.

Languages:

French.

Identification: FRA-2000-2-010

a) France / **b)** Constitutional Council / **c)** / **d)** 25.07.2000 / **e)** / **f)** Decision on an application by Mr Stéphane Hauchemaille / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 29.07.2000, 11768 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
1.3.4.5.6 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes – Referenda and other consultations.
1.3.5.6 **Constitutional Justice** – Jurisdiction – The subject of review – Presidential decrees.
1.3.5.10 **Constitutional Justice** – Jurisdiction – The subject of review – Rules issued by the executive.

Keywords of the alphabetical index:

Election, preparatory procedure.

Headnotes:

As part of its general function of supervising the lawfulness of referendum procedure conferred on it by Article 60 of the Constitution, the Constitutional Council must rule on applications challenging the lawfulness of future referendum procedure in cases where deciding that the applications were inadmissible might seriously jeopardise its scrutiny of a referendum, vitiate the general conduct of the referendum or adversely affect the normal functioning of the public authorities.

Summary:

With regard to both presidential and parliamentary elections, the Council has already acknowledged in its case-law that, in certain circumstances, the election judge is responsible for dealing with disputes concerning preparatory procedure (see the *Richard* and *Durand* Decisions of 20 March 1997 and 6 April 1995 respectively).

The aforementioned case-law was applied to a referendum for the first time in the reply in summer 2000 to the appeals against the decrees on arrangements for a referendum on 24 September 2000 on shortening the President of the Republic's term of office from seven to five years. The Constitutional Council, which deals with the lawfulness of an actual referendum, can also rule, subject to strict and clearly specified conditions, on the preparations for a referendum.

Languages:

French.

Identification: FRA-2000-2-011

a) France / **b)** Constitutional Council / **c)** / **d)** 27.07.2000 / **e)** 2000-433 DC / **f)** Law amending Law no. 86-1067 of 30.09.1986 on freedom of communication / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 02.08.2000, 11922 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
3.13 **General Principles** – *Nullum crimen, nulla poena sine lege*.
4.10.2 **Institutions** – Public finances – Budget.
5.2 **Fundamental Rights** – Equality.
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:

Television, licence fees / Internet / Cable distribution / Satellite package / Server / Television, digital terrestrial / Television, analogue terrestrial / Audiovisual Council, National.

Headnotes:

In order to ensure the independence of national broadcasting companies, their chairs are appointed by an independent administrative authority. This safeguard would no longer be effective if minutes of hearings and discussions of the National Audiovisual Council (CSA) concerning their appointment were made public in full.

To make the discussions entirely public would interfere with the independence of both the CSA and the national broadcasting companies and prevent the freedom of speech necessary for the appointment of the best candidate, contrary both to Article 6 of the Declaration of the Rights of Man and Citizen of 1789 (which requires that appointment to public office be decided solely with regard to candidates' integrity and ability) and the principle of respect for the privacy of those concerned.

If penalties were automatic the penalty might, in some cases, be disproportionate to the offence.

Insofar as preferential allocation to national broadcasting companies of new wavelengths suitable for use by digital terrestrial television is strictly supervised and is justified by the fact that state television channels, unlike private ones, have public-service functions, there is no infringement of the principle of equality.

There is no breach of equality between cable and satellite operators as long as parliament, while making the rules governing the two types of operator very similar, takes into account differences between the two which are of direct relevance to the need to maintain a wide range of choice.

In striking the necessary balance between freedom of communication on the one hand and protecting the freedom of others and preserving public order on the other, parliament is entitled to deal with "host" storage of illegal message content by introducing special rules on criminal responsibility of "hosts" that differ from the rules applicable to the authors and publishers of messages. This, however, is subject to compliance with the principle that offences and punishments be strictly defined in law and with Article 34 of the Constitution ("Laws shall establish the regulations concerning:… the determination of crimes and misdemeanours as well as the penalties imposed therefore"). According to the law, establishing the criminal responsibility of a "host" requires both that proceedings be brought by a third party who considers the site content "illegal or harmful to him", and that the "host" then fail to take appropriate steps to remedy the matter. By omitting to specify the formalities for bringing proceedings or the essential ingredients of the conduct for which a "host" may be found criminally responsible, parliament failed in its duties under Article 34 of the Constitution.

Summary:

This is the twelfth reform since enactment of the law of July 1982 on audiovisual communication.

The plaintiffs challenged:

- the provision requiring the National Audiovisual Council (CSA) to publish a full record of all hearings and discussions concerning appointment of the Chairs of the administrative boards of national broadcasting companies;

- the modifications to the CSA's power to impose penalties and in particular the requirement that, in all cases of infringement, the CSA order the infringing company to broadcast a statement. They alleged;

- a breach of the principle of equality between national broadcasting companies and private-sector broadcasters in that:

  - the act gave national broadcasting companies priority access to radio broadcasting and transmission resources;

  - the act incorporated provisions of the 1986 law which do not impose the same restrictions regarding composition of capital on state companies;

- cable broadcasting and satellite broadcasting were differently treated, the former continuing to require authorisation while the latter needed only to submit a declaration.

The act also stipulated the requirements for civil liability or criminal responsibility of "hosts" of Internet sites.

Languages:

French.

Georgia
Constitutional Court

Summaries of important decisions of the reference period 1 May 2000 – 31 August 2000 will be published in the next edition, *Bulletin* 2000/3.

Germany
Federal Constitutional Court

Important decisions

Identification: GER-2000-2-001

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 07.05.1998 / **e)** 2 BvR 2125/97 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

5.1.1.2.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
5.3.11 **Fundamental Rights** – Civil and political rights – Right of asylum.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Deportation / Appeal, leave to appeal / Matter of principle / Persecution, group / Kurd / Persecution, on political grounds / Legal issue, fundamental importance / Court, appellate, remedy, rendering ineffective.

Headnotes:

Constitutional requirements in compliance with Article 19.4 of the Basic Law of a review of the prerequisites for leave to appeal in proceedings concerning asylum.

Summary:

I. The complainant, a Kurd from South-East Turkey, applied for political asylum when entering Germany in March 1995.

In the subsequent asylum proceedings she alleged *inter alia* that she had been arrested and slapped by Turkish security authorities in March 1994 because of her support of the PKK; she was set free only after three days.

Her action filed against the refusal by the Federal Office for Recognition of Foreign Refugees failed.

In February 1996, the Administrative Court decided that the complainant had not satisfied the Court of her political persecution. The Court held that she could feel at least sufficiently safe from persecution because a nation-wide search for her had not been initiated. The Court, therefore, did not see any impediments to her deportation. The complainant's application to the Higher Administrative Court for leave to appeal from this judgment, based on the fundamental importance of the legal issue, also failed. Explaining its reasons, the Higher Administrative Court pointed out that it had already answered the fundamental question: whether a Kurd once suspected by the Turkish local security authorities from his or her native land of having supported the PKK must be afraid of Turkey-wide political persecution. This had been clarified by the deciding Court in other proceedings by judgment of September 1966. Accordingly, persons from South-East Turkey, suspected by the local security authorities of sympathising with the militant Kurd organisation are also not sufficiently safe from political persecution in West Turkey.

The complainant then appealed to the Federal Constitutional Court against the Higher Administrative Court's decision, alleging, in particular, a violation of the guarantee of recourse to the courts (Article 19.4 of the Basic Law). Judgment by the Higher Administrative Court of September 1996 had not yet been passed at the time she applied for leave to appeal, she declared. The Higher Administrative Court, therefore, should have re-interpreted the original appeal, which had been based upon the fundamental importance of the legal issue, as an appeal based on the divergence of the judicial decisions of the courts of first and second instance. She had therefore arbitrarily been deprived of her right of asylum only because the Higher Administrative Court happened to choose a different case of equal fundamental importance.

II. The First Chamber of the Second Senate considered the constitutional complaint to be obviously well-founded. As for the grounds, the Second Senate explained, essentially, that:

According to Article 19.4 of the Basic Law, a Court is not allowed to reduce unreasonably the right of legal enforcement of substantive law by excessively rigorous administration of the procedural rules. This applies also to appellate courts, which, accordingly, are not allowed to render remedies provided by the legal system ineffective and to 'inactivate' them for the person seeking justice.

These requirements are not met by the Higher Administrative Court's decision, the Second Senate ruled. The Court should have re-interpreted the appeal based upon the fundamental importance of the legal issue as one based upon the divergence of judicial decisions of the courts of first and second instance.

At the time of passing its judgment, the Higher Administrative Court had already decided in other proceedings that sufficient safety against persecution must be considered negated not only when a country-wide search has been initiated, but also as soon as the individual is suspected by local security authorities of sympathising with the militant Kurd organisation.

This corresponds to the legal opinion of the complainant, but is against the Administrative Court's view. Since September 1996, there has hence been a divergence between the judgment by the court of first instance of February 1996 and the ruling of the Higher Administrative Court; consequently, the complainant's petition for leave to appeal based upon the fundamental importance of the legal issue should have been re-interpreted.

The Federal Constitutional Court, therefore, remitted the case to the Higher Administrative Court for re-decision. Upon admission of the appeal, the Higher Administrative Court will be given a chance of extensively reviewing the judgment of the Administrative Court and, if necessary, of revising the judgment on the basis of a different assessment of the facts in the light of the legal regulations governing asylum.

Languages:

German.

Identification: GER-2000-2-002

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 10.11.1998 / **e)** 2 BvR 1057/91, 2 BvR 1226/91, 2 BvR 980/91 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.
3.16 **General Principles** – Weighing of interests.
3.17 **General Principles** – General interest.

5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.2.2.12 **Fundamental Rights** – Equality – Criteria of distinction – Civil status.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to family life.
5.3.40 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights of the child.
5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Tax, deduction / Employment, gainful / Marriage, discrimination / Family, burdens, equalisation / Tax, tax-free household allowance / Child, care, cost.

Headnotes:

1. Article 6.1 of the Basic Law contains a specific principle of equality. It prohibits disadvantaging marriage and family as compared with other life and education relationships. This prohibition of discrimination precludes any detrimental differentiation connected to the existence of marriage (Article 6.1 of the Basic Law) or the safeguarding of parental rights in a cohabitation (Article 6.1 and 6.2 of the Basic Law).

2. The financial ability of parents is reduced not only by the child's need of certain items for its daily life and of care during the time of gainful employment of the parents, but also by the need for child care in general. The cost of child care, as a necessary part of the bare subsistence level of the family (see BVerG 82, 60 <85>; 87, 153 <169 ff.>), must be exempted from income tax, no matter now the need is satisfied.

3a. In the necessary new regulation of tax-free child allowances, the legislator must also take the child's need of education into account; this applies, independently of the family status, to all parents who are conceded tax-free child allowances or receive child benefits.

3b. Insofar as the bare subsistence level of the family is based upon personal data such as family status, number and age of the children, it is necessary – in compliance with the rule of law demanding foreseeability and calculability of tax burdens – that this tax-relevant fact be defined in such a way that the mere presentation of such data is sufficient to ensure application of the law.

Summary:

I. According to § 33c of the Income Tax Act, single parents are allowed to deduct the cost of childcare, incurred through gainful employment, sickness or hindrance, from their taxable income. Parents with unlimited tax liability living in a conjugal community, however, are in principle liable to income tax also with their cost of childcare incurred because of the parents' gainful employment. Only when one parent living in conjugal community is sick or hindered and the other is either gainfully employed or also sick or hindered, are the costs of childcare taken into account.

The legislator further provided that extramarital educational communities are granted tax-free household allowances (§ 32 Income Tax Act) even when each of the parents is entitled to a tax-free basic allowance, while marriage partners are in principle not conceded such a tax-free household allowance. The tax-free allowance is intended to compensate for the higher expenses of single taxpayers who, because of their children, find themselves compelled to extend their homes and households. Singles with children are granted an additional tax-free allowance, comparable to another tax-free basic allowance, to ensure they are – in the proportional range of the income tax – taxed in the same way as jointly assessed marriage partners.

The tax-free household allowance granted is solely based upon the household of the single taxpayer; it is not increased with the number of children.

II. In 1983, 1984, 1986 and 1987, each of the five complainants lived in a conjugal community with their children below 16 years of age. At this time, both parents were in each case, at least temporarily, gainfully employed and jointly assessed.

Applications for fiscal consideration of those expenses which had been incurred because of care of the children remained unsuccessful.

Upon legal action instituted by the complainants, the Financial Courts decided that the complainants cannot be included into the regulation concerning deduction of the cost of childcare and into the regulation concerning tax-free household allowances because each of these provisions refers exclusively to single parents with children.

The complainants appealed to the Federal Constitutional Court from these court decisions and, indirectly, from the corresponding legal provisions in their then versions, they alleged in particular a violation of their Fundamental Rights from Article 3.1 in conjunction with Article 6.1 of the Basic Law. Regarding the fiscal treatment of inevitable expenses for childcare, they

argued that singles must not be privileged as compared with parents living in a conjugal community.

III. The Second Senate declared the legal provisions objected to (§ 33.1 - 4 of the Income Tax Act of December 1984, § 22.3 and 22.4 of the Income Tax Act of January 1984, § 32.7 of the Income Tax Act of April 1986), and all subsequent versions of the Act unconstitutional.

In its reasoning, the Senate explained that educational duty is within the personal responsibility of the parents; however, it need not be practiced exclusively by the parents themselves.

Article 6.1 of the Basic Law, as a negative right, at the time guarantees the freedom to decide oneself in which way life in one's conjugal community and family shall be arranged. Parents are free to plan and live their family life according to their own ideas; in their educational responsibility, they are also free to decide whether and in which developmental phase the child shall be predominantly taken care of by one parent alone, by two parents alternately, or by a third person.

The guardian function of the State resulting from Article 6.2.2 of the Basic Law does not authorise the State to urge parents to educate their children in a certain way, so the Second Senate declared. Rather, the Basic Law leaves decisions concerning educational principles to parents. As the child's interests are usually best safeguarded by its parents, they themselves can decide about the way in which the child is taken care of, about the child’s possibilities of meeting friends and having experiences and about the contents of the child’s education.

As stated by the Second Senate, Article 6.1 of the Basic Law contains a specific principle of equality. This principle forbids disadvantaging of marriage and family compared with other life and educational partnerships. This prohibition of discrimination precludes any detrimental differentiation in connection with the existence of marriage or the safeguarding of parental rights in a conjugal community (Article 6.1 and 6.2 of the Basic Law).

Accordingly, discrimination also exists if and when marriage partners or parents, because of their marriage and family and because of the way marriage and family are arranged, are excluded from tax relief. The principle of fiscal equality demands, at least for direct taxes, taxation according to the taxpayer's financial capability.

The State has to ensure that the income of taxpayers to the extent of a “minimum subsistence level” is tax-free, the Second Senate held. In the case of families, this applies to the minimum subsistence level of all family members, i.e. including also that of the children.

The financial status of parents is reduced not only by the child's need of items for its daily life and of care during the time of gainful employment of the parents, but also by the need of childcare in general. Expenses for childcare, as part of the bare subsistence level of the family, must be exempted from income tax.

Because of the duty to ensure childcare, which reduces their working power or their financial availability, taxpayers with children are less capable of paying taxes than taxpayers without children, argued the Second Senate. If the costs arising from the parental duty to bring up, educate and provide care for their children are neglected in the assessment of income tax, parents would be disadvantaged over and above tax payers without children, whose financial capacity is not reduced by the fulfilment of parental duties. In this context it makes no difference, the Second Senate held, how the needs of the child are met. The Income Tax Act must always exempt the cost of child care, no matter whether the parents themselves take care of the child, whether they prefer a third person taking temporarily care of the child, or whether both parents decide to work in a job and, therefore, avail themselves of a third person's help. These needs – different to the needs arising from the parents' gainful work – must, therefore, be taken into account independently of the actual cost paid.

In view of the State's duty to protect marriage and family in accordance with Article 6.1 of the Basic Law, the State is also confronted with the task of establishing and promoting the actual preconditions of childcare in the form chosen by the parents. Care of children represents a service which is also in the community's interest and which must be appreciated by the community, the Second Senate ruled. The State, accordingly, has to make sure that parents have a chance of both partly or temporarily giving up work to the benefit of personal childcare, and of combining family activities and gainful employment.

In the cases at issue, the Second Senate ruled that the legal provisions governing the fiscal treatment of the cost of child care and the deduction of household allowances violate the complainants' rights contained within Article 6.1 and 6.2 of the Basic Law.

1. As far as the costs of childcare are concerned, the legal definition of those entitled to a deduction exceeds the group of singles who are exclusively dependent upon themselves. Only parents with unlimited tax liability who live in a conjugal community are in principle liable to income tax along with their cost of childcare incurred because of gainful work. Here, firstly, exclusion

from the lump sum regulation which is not limited to inevitable expenses leads to a discrimination which is not compatible with Article 6.1 and 6.2 of the Basic Law.

The protective scope of Article 6.2 of the Basic Law demands that the cost of childcare be taken into account for all parents, independently of whether, and if so, for what time the child is cared for by third persons.

2. The possibility of deducting tax-free household allowances for unmarried parents is incompatible with Article 6.1 of the Basic Law, because it is not conceded to conjugal educational communities but non-married parents even when they live in an educational community and when they are both liable to taxation.

This discrimination, the Second Senate ruled, cannot be justified by either an increase in household expenses as the result of a child in an extramarital educational community entitled to the deduction as compared with a cohabiting educational community. It is generally the case that that a child increases the cost of the parents' household.

3. Nor can the discrimination against parents living in a conjugal community be justified by the possibility of joint assessment, the Second Senate held. Joint assessment can be claimed by all parents, independently of whether they have dependent children or not. Hence, joint assessment is unsuitable to compensate for fiscal discrimination, because it would disadvantage married parents compared with marriage partners without dependent children. The relieving effect of joint assessment, furthermore, depends upon the level of income of each marriage partner and upon the rate of increase of such. Joint assessment has practically no effect if and when both husband and wife are gainfully employed and earn similar salaries.

The above-stated violation of the specific principle of equality of Article 6.1 of the Basic Law therefore cannot be remedied by repealing the tax privileges for 'false' single parents in the sense of § 33c Income Tax Act.

The regulation of the need of childcare violating equality does not neglect the fact that the need exists independently of sickness, hindrance or employment of the parents; nor does it depend upon the way childcare is practiced.

In the new regulation governing exemption of the cost of childcare from income tax, legislation will, therefore, have to allow for an identical care-related reduction of capability to pay taxes for all parents and to increase child allowances or child benefits correspondingly.

Educational needs, too, are not satisfactorily met by child allowances and child benefits. It is unfortunately the case that the minimum subsistence level does not adequately allow for the general costs, which parents have to meet for the socially adequate development of their child.

Such needs include – in contrast with the legal regulations – membership in clubs and other forms of meeting with other children or adolescents outside the family home, learning and practice of modern communication techniques, access to cultural and language expertise, responsible use of leisure times, and holiday arrangements.

To assess such educational needs, the present household allowance regulation gives an orientation in figures, which, however, are to be graded according to the number of children.

IV. The regulations found to be unconstitutional are to be further applied until 31 December 1999. The new regulation to be established after this date has to extend the needs of childcare to all parents, independently of the way in which parents satisfy such needs of their children.

Languages:

German.

Identification: GER-2000-2-003

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 25.11.1998 / **e)** 2 BvH 1/92 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
4.5.12 **Institutions** – Legislative bodies – Status of members of legislative bodies.

Keywords of the alphabetical index:

Parliament, group / Statement, personal / State Security Police.

Headnotes:

It is inadmissible to bring a dispute between organs within a *Land* before the Federal Constitutional Court if there is no objective interest in the constitutional review of the question as raised by the petitioner.

Summary:

I. In the *Land* of Saxony, an amending law of 8 January 1992 made the payment of expense allowances for the employment of assistants of parliamentary groups and of members of Parliament contingent upon these assistants signing a 'personal statement' concerning their contacts to the Ministry of State Security of the former GDR and upon the non-existence of findings which would, in the civil service, justify dismissal for exceptional reasons.

As a result, the "Linke Liste/PDS" parliamentary group of the Saxony Parliament and an individual member of Parliament brought the issue before the Federal Constitutional Court. The essence of their petition was that this regulation infringed their right to make free decisions as to the choice, recruitment and further employment of assistants; and that their right to receive adequate compensation which ensured their independence was unlawfully restricted.

II. The Second Panel of the Federal Constitutional Court *(Bundesverfassungsgericht)* considers the petitions inadmissible because they lack the legitimate interest to take legal action which is required for proceedings concerning a dispute between organs.

The Second Panel ruled that there was no longer an objective interest in the resolution of the question whether the enactment of the controversial regulation (Article 6.4 of the Saxony Members of Parliament Act – the Act) had infringed upon the petitioners' constitutional rights for the following two reasons:

1. Since the enactment of the law of which a review was requested, the constitutional standard has been changed as in the meantime the so-called *Vorschaltgesetz* (preliminary law) which had been enacted in Saxony as a provisional organisational statute, was superseded by the Saxony Constitution which took effect on 6 June 1992. Accordingly, the Constitutional Court of Saxony, which had been constituted in the meantime, is competent for judging this dispute, as it refers to the Constitution of the *Land*.

2. Moreover, the enactment of Article 6.4 of the Act can only be judged by taking into account the historical context at the time of creation and the margin of appreciation and creation which is the legislator's privilege. At that time, in a situation of transition from a dictatorship to a state with a free constitution, the legislator enacted a regulation which was characterised by insecurity and unawareness as the extent to which the structures and mentalities of the former regime would continue to make themselves felt during the first years after German unification. Nowadays, this special situation of political upheaval has ceased to exist and will not repeat itself under similar circumstances.

Nowadays there is, therefore, no objective interest whatsoever in reviewing the constitutionality of the law enacted at that time.

Languages:

German.

Identification: GER-2000-2-004

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 17.02.1999 / **e)** 1 BvL 26/97 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.
5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.

Keywords of the alphabetical index:

Ethics, instructions / Education, religious / Education, participation, duty.

Headnotes:

Constitutionality of the legal duty to attend classes in which the complementary subject 'ethics' is taught as a substitute for religious instruction.

Summary:

I. 1. The Schools Act of the *Land* of Lower Saxony provides for pupils not receiving religious instruction to attend moral philosophy classes, provided that this subject has been included into the schools' teaching programme (§ 128.1 of the Schools Act of Lower Saxony). This regulation does not, however, apply to those pupils for whom religious education of their confession cannot be provided.

The aim of the moral philosophy subject is to impart knowledge of religions, promote understanding of relevant notions of ethical values and norms and to provide the background to philosophical, ideological and religious questions.

2. A pupil in the twelfth grade of a Lower-Saxony secondary school took legal action against the duty to participate in moral philosophy lessons, as he considered the obligatory participation to be unconstitutional. After his protest addressing the administrative authorities concerned had failed, he applied to the competent Administrative Court for a judicial order against the defendant school directing the school to exempt him from the lessons.

The Administrative Court suspended proceedings and submitted the question to the Federal Constitutional Court for review as to whether § 128.1 of the Lower Saxony School Act was compatible with the Basic Law, particularly with Articles 3.3, 7.2 and 3.1 of the Basic Law.

II. The First Chamber of the First Senate of the Federal Constitutional Court has found the judicial submission inadmissible:

1. With regard to Article 7.2 of the Basic Law (“The persons entitled to raise a child shall have the right to decide whether he or she shall receive religious instruction”, the submitting Court failed to explain plausibly why § 128.1 of the Lower Saxony Schools Act violated this constitutional right.

2. As far as Article 3.3.1 of the Basic Law was concerned (“No one may be prejudiced or favoured because of... his faith or religion”), the Administrative Court did not adequately consider the question whether the regulation deemed unconstitutional affected the protective scope of this constitutional rule.

It is true that 'faith', according to Article 3.3.1 of the Basic Law, must not be referred to as a criterion of discrimination. It is also correct to assume that the term also comprises religious views. However, the Administrative Court failed to consider the question whether § 128.1 and 128.2 of the Lower Saxony School Act (directly) refers to lack of faith, and also whether Article 3.3.1 of the Basic Law in principle prohibits even indirect criteria of distinction – a question not yet answered by the constitutional jurisdiction.

The fact that, according to § 128 of the Lower-Saxony School Act, the duty to participate in moral philosophy classes arises from the mere circumstance of non-participation in scripture classes, and not from the reasons behind such non-participation, speaks against the assumption that the rule submitted for review could be directly connected with the absence of faith. The plaintiff of the initial proceedings, according to the pertinent literature, has in principle the chance of voluntarily attending the scripture lessons as an unaffiliated pupil, provided the confession concerned has agreed. In such a case, the duty to attend the moral philosophy classes no longer exists. This, too, suggests that § 128.1 and 128.2 refer only indirectly to religious or ideological facts.

The Administrative Court, furthermore, should have also considered the judicial view of other courts according to which pupils having to attend ethics lessons are not at a disadvantage compared with pupils receiving religious instruction, because both subjects, as so-called complementary subjects, are equivalent. It is the intent and purpose of § 128 of the Lower Saxony School Act, whilst respecting individual decisions of conscience against membership in a confession or participation in religious instruction, to ensure the dissemination of necessary information about the spectrum of socially effective notions of ethics and about the integration of such in the philosophical and religious horizon of issues, even without reference to the principles of a confession.

This intent of the Act reflects the legislator's aim to achieve an educational goal, i.e. the imparting of knowledge and notions of values, whether through religious instruction or moral philosophy lessons.

The Administrative Court furthermore failed to check in greater detail whether the subjects were comparable, and to discuss whether the legislator should be conceded a discretionary prerogative. There was reason to do so because, according to the findings by the Federal Constitutional Court in its previous decisions, religious instruction is presently regarded as a subject intended to impart knowledge; indeed at secondary schools, the subject has even been given a scientific status.

Finally, the Administrative Court also failed to discuss whether the unequal treatment of pupils receiving religious instruction and of those attending moral

philosophy classes could be constitutionally justified in the light of what the legislator intended.

3. The decision submitted was not adequately substantiated insofar as the Administrative Court assumed a violation of the general principle of equality (Article 3.1 of the Basic Law). The relevance of the question for the Court's decision whether moral philosophy may be chosen as an optional subject of special importance or as a final examination subject was not sufficiently clarified.

The applicant took legal action with the aim of achieving permanent exemption from moral philosophy classes. The Court did not consider the question whether he may nevertheless be interested in taking courses and in choosing moral philosophy as a subject of his school-leaving examination. The Administrative Court's decision hence did not provide information as to whether the applicant was affected at all by the assumed discrimination with regard to pupils attending moral philosophy classes.

4. The Administrative Court, furthermore, should have examined the question whether the discrimination assumed by the Court may be constitutionally justified by essential reasons.

In the Chamber's view, the main reason for doing so is § 190 of the Lower Saxony School Act, which requires that moral philosophy be established as an examination subject for the upper grades of secondary schools as soon as the subject-matter has been duly prepared and suitable teachers are available.

The teaching of moral philosophy was, however, introduced as a regular means of instruction and as a uniform alternative to religious instruction as late as 1993, when the curricular requirements were revised and parts redrafted. In view of this, the chamber suggested considering whether the purpose of § 190 of the Lower Saxony School Act, i.e. to allow the school administration time to develop the necessary didactic concepts and to recruit suitable teaching personnel, can (still) justify the discrimination with regard to pupils attending these lessons.

5. The argumentation by the Administrative Court hence does not meet the requirements which, in compliance with the consistent practice of the Federal Constitutional Court, are to be fulfilled upon a request for review in accordance with Article 100 of the Basic Law.

Languages:

German.

Identification: GER-2000-2-005

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 25.02.1999 / **e)** 1 BVR 1472/91 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

4.6.3.1 **Institutions** – Executive bodies – Application of laws – Autonomous rule-making powers.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Drug, reimbursement, exclusion / Statutory health insurance fund / Drug, negative List / Preparations List, publication, supply / Efficiency, economic.

Headnotes:

A list, published by the legislator, of pharmaceutical products which will in the future be excluded from the supply by statutory health insurance funds, interferes at least indirectly with the freedom of profession of the pharmaceutical manufacturers concerned.

Summary:

I. The German Code of Social Law provides that those insured under a statutory health insurance fund are in principle entitled to be supplied with drugs which are exclusively sold by pharmacists. An amendment of 1988 authorised the Federal Minister of Labour and Social Order to exclude, by ordinance, 'uneconomic' drugs from supply by the statutory health insurance funds. In February 1990, the Federal Minister made use of the authorisation; he issued an ordinance in which drugs excluded from supply were not specified by name or trade name, but were listed abstractly in terms of active-substance combinations.

The legislator has further provided that the Federal Committee for Physicians and Statutory Health Insurance (Federal Committee) shall, at regular intervals, prepare and update the list of those drugs which are excluded according to the ordinance, and publish it in the Federal Law Gazette.

After the ordinance had been published by the Federal Minister of Labour and Social Order, such a list of

excluded drugs was compiled not by the Federal Committee, but by the Federal Ministry of Health in October 1991. The list was merely sent to the Federal Committee, which announced that it assumed the list to have been published by the Federal Minister of Health.

The companies complaining to the Federal Constitutional Court produce and distribute drugs that are included in the list of preparations. In the initial proceedings in the Social Courts, they requested that the Federal Minister of Health be prohibited from publishing the list of preparations by way of urgent legal protection. A corresponding interim order of the court of first instance was cancelled by the Higher Social Court which itself rejected the motions for urgent legal protection that the companies had filed once more.

The companies concerned then filed a constitutional complaint against the decisions of the Higher Social Court in which they primarily alleged a violation of Article 12.1 of the Basic Law (freedom of profession).

After the proceedings at the Social Courts had been concluded, a provision was included in the 5th Code of Social Law as part of an amendment, authorising the Federal Minister of Health to prepare the list of preparations and publish it in the Federal Law Gazette, should the Federal Committee fail to comply with its duty to compile and publish the list within a period of time fixed by the Federal Minister of Health.

II. The First Chamber of the First Senate of the Federal Constitutional Court did not accept the constitutional complaints for decision, as they were not of fundamental constitutional importance; nor was their acceptance required to enforce constitutional law.

As for the grounds for its decision, the Court declared in essence:

1. The decisions of the Higher Social Court are not compatible with Article 12.1 of the Basic Law. The publication of the list of preparations does, in contrast to the findings of the decision objected to, represent a measure having an objective regulating tendency upon a certain profession. The protective scope of the freedom of profession is at least indirectly interfered with, because of the close connection of the published list with the professional activities of the pharmaceutical companies concerned. Although the exclusion of the corresponding drugs had already been effectuated with the Federal Health Minister's ordinance coming into force, the companies' professional activities were only significantly impaired after the list of preparations was published. To this extent, the Federal Constitutional Court held, the list of preparations was not merely part of the contents of the Act and of the Ordinance regulating the profession, but in fact added to these texts.

Until the amendment in 1993, the Federal Minister of Health had not been authorised to prepare and publish the list of products. The Minister should at least have tried to prompt the Federal Committee to prepare and publish the list before he published it himself.

2. The unconstitutional publication of the list of products was not, however, a compelling reason to accept the constitutional complaint, the Court continued.

The burden on the complainants from the re-proved neglect of competence is, due to the specific regulating mechanism of the 'Negative List', of limited extent only, the Court held. A substantial economic drawback alleged by the pharmaceutical manufacturers is not legally due to the irregular publication of the list of products.

In fact, the corresponding drugs had already been excluded in a legally constitutive manner from the supply by statutory health insurance funds by § 34.3 of the 5th Code of Social Law and by the ordinance of the Federal Minister of Labour and Social Order. The publication of the list of products in October 1991, did therefore in a legal respect, not involve any separate disadvantage for the complainants.

Finally, the complainants have not set forth that the reproved violation of competence had any negative financial effects. Nor did they present evidence showing that the drugs produced and distributed by the complainants had, on the basis of the ordinance, been wrongly included into the list of preparations.

Languages:

German.

Identification: GER-2000-2-006

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 09.03.1999 / **e)** 2 BvR 420/99 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
3.16 **General Principles** – Weighing of interests.
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:

Child, abduction / Child, welfare / Residence, place, return / Exemption provision / Care and custody / Parent, interest / Child, interest.

Headnotes:

In cases of child abduction, it is not unconstitutional if and when the courts, in deciding about the return of the child to its original place of residence, concede priority to the child's welfare over the parents' interest.

Summary:

I. The constitutional complaints are directed against the decisions of Civil Courts ordering that a mother who lives apart from the children's father returns the children to the father.

Until early 1997, the children born in 1993 and 1995 lived with their – unmarried – parents in Sweden. The father is a Swede, the mother a German national; the two children also possess German nationality. The parents, according to the pertinent provisions of the family law, have been attributed joint custody of the children.

After an initial separation of the parents, the mother lived temporarily with the children in Germany; in 1997 she returned to Sweden.

In 1998, the parents separated again; the mother moved into an apartment of her own in Sweden. Initially the children stayed for one week alternately with their father or mother, later the mother had the children live exclusively with her.

The father consented to travel that she and the children made to Germany; they were expected to be back no later than 9 April 1998. Without having consulted the father, the mother then decided to remain with her children in Germany.

The father applied to a competent Swedish Court for a decision ordering the return of the children to Sweden in accordance with the provisions of the Hague Convention on Child Abduction; the Court decided that the children's permanent residence in Germany arbitrarily arranged by the mother was wrongful.

In January 1999, the competent German Family Court ordered that the children be immediately surrendered to their father, who was to bring them back to Sweden. As for its reasons, the Court referred to the final decision of the Swedish court, which sufficiently documented the wrongfulness of the children's retention in Germany. Reasons for an exemption in accordance with the Hague Convention were not evident, the Court held. An appeal from this German decision immediately filed to the Higher Regional Court failed.

II. The Third Chamber of the Second Senate of the Federal Constitutional Court did not accept the constitutional complaints lodged against the decisions of the civil courts. The complaints are neither of fundamental constitutional importance, nor is their acceptance indicated to enforce the rights of the complainants (§ 93a Section 2 of the Federal Constitutional Court Act).

1. The constitutional questions raised in the present case have been settled since the decision of the Second Senate of the Federal Constitutional Court of 29 October 1998 – 2 BvR 1206/98.

2. The restrictive interpretation of the exemption provisions of the Hague Convention on child abduction by the courts of specific fields is not unconstitutional, the Federal Constitutional Court held.

The aim of providing stable living conditions for the child, of ensuring an adequate decision relating to custody at the child's original place of residence, and of counteracting child abduction in general all justify the order as in principle reasonable. Return of a child is precluded only if there is a risk that return would expose the child to physical or psychological harm. This harm to the child's welfare must present itself as extraordinarily serious, concrete and actual.

In the light of these criteria, the decision ordering the children's return to Sweden was in compliance with constitutional law, the Court held. In particular, the mother had not lodged an application with a view to obtaining the return of the children which could result in the children being pushed to and fro as a result of judicial or administrative decisions.

Furthermore, the appreciation by the German Court that, after the children had returned from Germany to Sweden, their habitual residence had once again been established in Sweden, did not violate constitutional law.

In interpreting the exemptions provided in the Hague Convention on Child Abduction, the Higher Regional Court considered the children's actual situation. The result at which the Court arrived after careful consideration, that the stress associated with the children's return to Sweden did not exceed the extent of stress usually associated with such change of place, was constitutionally unobjectionable, the Federal Constitutional Court held.

Nor did the special stress to which the mother would be exposed lead to a different result. She could in principle be reasonably expected to put up with the children's return to their habitual place of residence as a consequence of the abduction. If and when exemptions for reason of the children's welfare even presuppose extraordinarily serious harm to the child, this applies even more to reasons concerning the person of the abducting parent. The mother can be expected to seek protection – if necessary also by court action – against the alleged annoyance by the children's father.

Languages:

German.

Identification: GER-2000-2-007

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 22.03.1999 / **e)** 2 BvR 2158/98 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.15 **General Principles** – Proportionality.
3.19 **General Principles** – Reasonableness.
5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Reasoning.
5.3.33 **Fundamental Rights** – Civil and political rights – Inviolability of the home.

Keywords of the alphabetical index:

Search, necessity / Search, warrant, wording / Crime, suspicion.

Headnotes:

Re: Unconstitutionality of a search of a flat.

Summary:

I. The complainant, whose application for asylum was rejected, had submitted his birth certificate and a document certifying his unmarried status to the registry office. He did not comply with the request of the alien registration office to submit further documents certifying his identity. The Local Court thereupon issued a search warrant which had been substantiated by the 'suspicion of a breach of an administrative rule according to the Foreigners Act'. The Court, furthermore, ordered the seizure of 'any relevant items possibly found during the search, especially birth certificates and documents certifying the unmarried status of the searched' party.

After the search, the complainant lodged an appeal from the decision of the Local Court to the Regional Court.

The appeal was dismissed as unfounded. The Court conceded, however, that because of its stereotyped wording, the search warrant was insufficient; even though, at the time when the warrant was issued, the Court argued, the complainant was suspected of having contravened an administrative rule in accordance with § 93.2.1 read in conjunction with § 40 of the Foreigners Act, because he did not comply with the authority's request to submit documents certifying his identity.

II. The Second Chamber of the Second Senate of the Federal Constitutional Court granted the constitutional complaint because of a violation of Article 13 of the Basic Law (inviolability of the home) in conjunction with the principle of the rule of law, and remitted the case to the Regional Court for retrial and second decision.

1. A search, the Second Chamber ruled, is a serious interference with the constitutionally protected domain of life of the person concerned. It is, therefore, subject to the general legal principle of reasonableness.

It is the duty of the judge to ensure, by suitable wording of the Court's decision within the bounds of possibility and reasonableness, that the interference with the fundamental rights be measurable and controllable.

A search warrant not specifying the offence for which the person to be searched is accused, surely does not measure up to such requirements if and when such specification, according to the result of the investigations, is possible and not detrimental to the purposes of prosecution.

The Second Chamber of the Second Senate held that the decision of the Local Court did not fulfil such requirements.

The decision contained neither factual nor legal information about the offence for which the complainant had been blamed. The mere statement that he was suspected of a breach of an administrative rule according to the Foreigners Act and that birth certificates and documents certifying his family status were to be seized did not allow one to draw a conclusion regarding any specific offence.

2. The decision of the Regional Court continued the violation of the Constitution by the Local Court. Its decision, too, did not adequately specify the offence for which the complainant was blamed. The Court only specified the rule of the Foreigners Act and declared that the complainant had not complied with the authority's request to submit documents certifying his identity. The Court failed to specify the documents to be submitted. Birth certificates and documents certifying the family status surely did not fall under the rule of the Foreigners Act cited by the Regional Court.

The mere assumption, the Second Chamber of the Federal Constitutional Court continued, that the complainant was in possession of documents certifying his identity in the sense of the administrative order imposing a fine, without any additional factual clues, did not justify a search warrant.

Such interference must be in a reasonable relation to the strength of the suspicion and to the seriousness of the offence.

Such a reasonable relation had not observed in the present case, in which breach of an administrative rule was assumed and punished by a fine of up DM 5 000.

Languages:

German.

Identification: GER-2000-2-008

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 20.04.1999 / **e)** 1 BvQ 2/99 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
4.5.6 **Institutions** – Legislative bodies – Law-making procedure.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.

Keywords of the alphabetical index:

Employment, low paid / Regulation, transitional / Newspaper, publisher / Newspaper, distribution.

Headnotes:

Application of the protective scope of the freedom of the press to the distribution of newspapers.

Summary:

I. On 1 April 1999, the Act governing the new regulation of minor employment ('630 DM jobs Act') came into force in Germany. The new regulation applies mainly to second occupations which, from this date on, in principle require the payment of social security contributions and of taxes.

After the new regulation had come into force, altogether nine newspaper publishers and distribution companies applied for an interim order to the effect that the coming into force of the '630 DM Jobs Act' be suspended.

In support of their application, the applicants alleged a violation of the Fundamental Right of the freedom of the press (Article 5.1.2 of the Basic Law) by the fact that the Act had come into force immediately without a transitional regulation.

In view of the profound changes in the legal situation, they alleged, it is no longer sure that the distribution of newspapers, which is within the scope protected by the freedom of the press, can be guaranteed for the following months. As far as the distribution of their newspapers is concerned, however, newspaper publishers are dependent on delivery by newspaper deliverers.

Meanwhile, many newspaper deliverers had given notice of their resignation, or had announced that they would do so, because of low earnings. With contributions to social security insurance and a wage partly tax deducted, a newspaper carrier with gross earnings of DM 600 is possibly left a net of only approximately DM 330.

One does not know, the applicants further alleged, how many of the deliverers presently employed with the

applicants will remain so even if their employment is exempted from wage tax. Because drafts were continuously modified during the legislative procedure, the companies concerned had no chance in any case of preparing themselves for the new legal situation.

II. The First Chamber of the First Senate of the Federal Constitutional Court rejected the application for an interim order as inadmissible.

The applicants, the Court said in its grounds, did not provide sufficient evidence in support of the fact that it was the lack of a transitional regulation that violated their fundamental right of freedom of the press. It was not, however, *a priori* excluded that the '630 DM Job Act' affected the fundamental right of the freedom of the press. Newspaper delivery is amongst those services in which minor employment is usual; the distribution protected by the freedom of the press may hence indeed be rendered more difficult, as the applicants alleged.

However, pertinent arguments presented by the applicants failed to prove, the Court held, that it was the lack of a transitional regulation that violated the Fundamental Right of the freedom of the press. The applicants' allegations, however, referred exclusively to this point.

Irrespective of this, there seemed to be no reason to doubt that the immediate entry into force of the Act did indeed present great adaptive difficulties to the applicants.

Furthermore, rapid preparation of the Act, which included many modifications, did not leave much time to the applicants to prepare themselves for the new legal situation sufficiently in advance. There was, however, no indication, the Court held, that the newspaper delivery had already collapsed because of the new regulation, or that it would collapse in the weeks and months to follow. Newspaper deliverers are usually bound to the publishers or distribution companies by contract, from which they cannot free themselves straight away.

It would certainly require some time – not only of the applicants but also of other trades concerned – to make the internal inquiries necessary to comply with the new regulation; this need could, however, be adequately taken into account by the authorities responsible for the implementation of the Act.

The applicants, meanwhile, had the opportunity of announcing to the newspaper carriers that all efforts would be taken to find an acceptable solution to the changes associated with the new regulation, even if detailed information to this point could not be provided immediately.

Languages:

German.

Identification: GER-2000-2-009

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 27.04.1999 / **e)** 1 BvR 2203/93, 1 BvR 897/95 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.
3.16 **General Principles** – Weighing of interests.
3.17 **General Principles** – General interest.
5.2.1.2.1 **Fundamental Rights** – Equality – Scope of application – Employment – In private law.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.4.9 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Employment, job-creating measure, contribution, subsidy / Labour negotiations, autonomy / Collective labour agreement / Wage, right to negotiate.

Headnotes:

1. Legal regulations linking for a limited period of time subsidies for job-creating measures to the agreement of below-average wages interfere with trade union autonomy in negotiating wages, but may be justified to create additional jobs at times of high unemployment.

2. § 275.2 in conjunction with § 265.1.1 of the Code of Social Law III as well as its preceding regulations are compatible with Article 9.3 of the Basic Law.

Summary:

1. In accordance with the Code of Social Law of the Federal Republic of Germany, the Federal Employment Office subsidises charitable work in order to promote

employment of the long-term unemployed. This work comprises measures intended to secure and improve the environment and to enhance the supply of social and youth welfare services. The extent of the contribution depends upon the average monthly expenditure for unemployment benefits and unemployment relief. The full amount is paid only if the pay agreed upon does not exceed 80% of standard wages for comparable activities in the free labour market.

2. The industrial trade union of metal workers filed a constitutional complaint against these regulations and alleged a violation of its freedom of association. The trade union argued that its wage fixing competence was diminished by the regulation, because, as far as these job creating measures were concerned, wages could no longer be freely negotiated. In this way the trade unions would be compelled to lower the level of collective agreements for persons in promoted employments as compared to the usual (regional or nation-wide) collective agreements.

II. The First Senate did not grant the constitutional complaint.

The regulations objected to indeed restrict the complainant's freedom of association, the First Senate conceded, but this is justified at times of high unemployment in order to create jobs.

1. Article 9.3 of the Basic Law guarantees employees and employers the right to form associations in order to safeguard and improve working and economic conditions. This right includes also the bargaining of collective agreements which in fact is an essential purpose of the association.

The regulations objected to interfere with this scope of protection. They weaken the complainant's position in collective negotiations on the pay of persons employed within the framework of structural adjustment measures. In this field, the complainant has little chance of achieving more than 80% of the normal standard wage for comparable work. As the contribution by the Federal Employment Office decreases to the same extent in which the legal maximum wage is exceeded, each exceeding will mean a double burden to employers. Employers will hardly consent to that in labour negotiations.

2. For predominant reasons of public welfare, however, such an interference is justified, the First Senate held.

a. By the regulations objected to, the State is fulfilling a duty of protection based upon the principle of the social state (Article 20.1 of the Basic Law). The State, furthermore, is helping individual unemployed persons in developing their personality by work and in experiencing respect and self-respect. To this extent, the state's intention is in compliance also with Article 1.1 and Article 2.2 of the Basic Law.

The regulations are intended to ensure that the limited budgets available are spent in such a way that as many as possible unemployed persons can be given a job. In this way, the regulations also serve the constitutional aim of assuring an overall economic equilibrium (Article 109.2 of the Basic Law).

b. The regulations, furthermore, are suitable and also necessary to achieve the purpose of the legislature. The same applies to the question whether the complainant can reasonably be expected to accept the effects upon autonomy in labour negotiations:

Negotiations on standard wages for employees in structural adjustment measures differ fundamentally from normal labour negotiations, the Court explained. Remuneration of work in structural adjustment measures is not primarily intended to guarantee employees a share in the profits resulting from their work. As these measures are restricted to non-profit activities, it is usually only the contribution by the Federal Employment Office that arouses the interest of employers in the work. Without these contributions, employers would not carry through the measure at all or postpone it to a later date.

It should be also taken into account that in this field, the association of employees cannot exert as great a pressure as in usual labour negotiations. Employers, for example, can evade a strike without risking existential loss by refraining from, or postponing a job-creating measure in which they do not have sufficient self-interest.

The consequences of the employer's decision are at any rate borne by the unemployed and, to this extent, will also be to the disadvantage of the employees' side.

With approximately 4 million unemployed, on the other hand, the creation of jobs is a primary social concern. Unemployment frequently leads those concerned into existential distress. The loss of one's economic basis of life may involve loss of self-respect and personal dignity. In a society in which the value of an individual depends largely on his/her professional activities, the experience not to be needed may lead to severe psychic stress. This applies to the long-term unemployed in particular, whose chances of getting a job are very remote.

Finally, it is also of significance that the period of validity of the regulations objected to will expire in 2002. This limitation prompts the legislator to check in due course

whether the actual preconditions which were the reason for the regulations still exist and whether the aims pursued with the regulations have indeed been achieved.

Languages:

German.

Identification: GER-2000-2-010

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 03.05.1999 / **e)** 1 BvR 1315/97 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.15 **General Principles** – Proportionality.
3.19 **General Principles** – Reasonableness.
5.3.13.10 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
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:

Expenses, refunding / Examinational proceedings, duration / Examination, date / Waiting time / Aptitude test / Capacity limit.

Headnotes:

Re: A violation of the Fundamental Right to choose one's occupation freely by unnecessarily long waiting times for a qualifying state examination.

Summary:

I. Upon his application in 1993, the applicant, an interpreter, was admitted to an aptitude test in compliance with § 2.2 of the Hamburg Act governing the public appointment and general swearing-in of interpreters and translators; however a date on which to undergo the examination applied for was not fixed for three years.

After the applicant had brought an action claiming that the test be carried out, the competent authority of the *Freie and Hansestadt Hamburg* summoned him to undergo the test on 24 February 1997.

The Administrative Court thereupon suspended proceedings on the basis of corresponding written statements by all involved declaring that the matter was settled, and awarded the costs against the applicant.

In its reasoning the Court declared that the applicant is not entitled to claim that the test to be carried through on a certain date. The authority sufficiently explained that it had tried to fix an earlier date; its attempts failed due to the limited capacities available and because of the complicated co-ordination of dates among the examiners involved.

The complainant subsequently filed action to the Federal Constitutional Court against the imposition of legal costs.

II. The Second Chamber of the First Senate of the Federal Constitutional Court reversed the disputed cost decision because of a violation of Article 12.1 of the Basic Law (freedom of profession) and remitted the case to the Administrative Court of Hamburg for retrial.

1. In the view of the Chamber, Article 12.1 of the Basic Law demands that certain requirements also be met by the rules governing examination proceedings. These rules have to ensure that examinations are carried out within a reasonable period of time. What is considered to be a reasonable period cannot be generally fixed because its length depends upon the particular field concerned, the necessary personnel, financial and organisational expenses involved and upon the number of candidates. However, the significance of the fundamental right fixed in Article 12.1 of the Basic Law must also be reflected in the rules governing examination proceedings by provisions ensuring that unreasonable waiting times for candidates are avoided.

2. Measured against this, the Administrative Court failed to take the significance and scope of Article 12.1 of the Basic Law duly into account:

The constitutionally guaranteed right to practise a profession with an additional qualification certified by an examination is unreasonably reduced when – as in the present case – more than four years elapse between the candidate's admission to the examination and its realisation.

The length of examinational proceedings required justification with sufficiently essential technical reasons. It is among the administration's duties to arrange that examinations can be taken without unnecessary delay; it rests with the administration to establish rules of examinational proceedings guaranteeing that these requirements are met by available resources.

It is true, the Court held, that occasional bottlenecks are unavoidable; if they arise, candidates can be expected to accept them. Any reasons for imposing a waiting time of four years upon the complainant are not however evident.

Languages:

German.

Identification: GER-2000-2-011

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 12.05.1999 / **e)** 1 BvR 1988/95 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

5.2.2.12 **Fundamental Rights** – Equality – Criteria of distinction – Civil status.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Child, born out of wedlock / Child, born within marriage / Equalisation demand / Periodic payments, father, child born outside of marriage / Subsistence, minimum / Parental rights.

Headnotes:

The right of a child born outside of marriage to claim the reimbursement of the cost of its baby clothing from its father.

Summary:

I. Within the framework of a civil action, a child born outside of marriage demanded the reimbursement of expenses for its baby clothing from its father.

A simultaneously filed application of the child for legal aid was rejected by the Court on the grounds that a child born outside of marriage is not entitled to demand refund of the cost of its baby clothing as a special requirement when the refund is demanded in addition to the obligatory periodic payments by its father according to the pertinent legal regulation. In this case, the Court held, the child is not entitled to refund of the cost because the father's periodic payments, according to the legislator's intent, also include the cost of its baby clothing: for reason of simplification, greater requirements during the first year of life have been taken into account by elevated standard rates for the child's next five years of life.

By its constitutional complaint, the child born outside of marriage objected to the refusal of legal aid and alleged in particular a violation of the principle of equality of children born within and outside of marriage (Article 6.5 of the Basic Law).

II. The Third Chamber of the First Senate did not accept the constitutional complaint for decision merely because the complainant is at liberty to repeat his application for legal aid on the basis of the Court's decision of non-acceptance. Accordingly, and in view of the procedural situation of the present case, the violation of the Fundamental Right is of no special weight.

As far as the issue itself is concerned, however, the Third Chamber of the First Senate made it clear that also children born outside of marriage may demand refund of the cost of their baby clothing in addition to low regular payments for the child's maintenance.

Article 6.5 of the Basic Law obliges both legislation and courts to provide children born outside of marriage with the same opportunities as are enjoyed by those born within marriage. Deviations from the rights of children born within marriage are in principle admitted only to a limited extent, that is in cases for example where a formal equalisation does not do justice to the special social situation of a child born out of marriage.

Measured against this, the legal opinion of the civil courts is not in compliance with constitutional law: because the official standard (reference) rates, which are decisive for the assessment of maintenance to be paid, are the same for both children born within and outside of marriage, it is not even a convincing approach to advise only the baby born outside of

marriage to defray the cost of its layette from the amount of regular maintenance to be paid by the father during the first five years of life.

The standard rates of maintenance of a child born outside of marriage equal a minimum needed, the Court further held; actually, the amounts do not even come up to a child's present subsistence minimum. Given relatively low current maintenance allowances, however, the rejection of an assertion by the child of a single, non-recurrent need already thwarts the legislator's intention – which applies to both children born within and outside marriage – that the total needs of life be covered by maintenance.

Finally, the Court held, it may contradict the social duty of granting protection to mothers fixed in Article 6.4 of the Basic Law when a mother not liable to provide maintenance in terms of money, is required to pre-finance the needs of her child.

Languages:

German.

Identification: GER-2000-2-012

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 19.05.1999 / **e)** 1 BvR 263/98 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
3.15 **General Principles** – Proportionality.
3.16 **General Principles** – Weighing of interests.
3.19 **General Principles** – Reasonableness.
5.2.1.2.1 **Fundamental Rights** – Equality – Scope of application – Employment – In private law.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
5.3.36.2 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Civil law.
5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Equalisation / Employment, part-time / Pension, company / Insurance, old age, supplementary / Payment, retrospective / Collective labour agreement / Justice, material.

Headnotes:

Duty of employers to equalise, in the company pension scheme, part timers on a less than half-a-day basis to those employed full time.

Summary:

1. The applicant, *Deutsche Post Aktiengesellschaft*, appealed to the Federal Constitutional Court to object to decisions of the Federal Labour Court obliging it to accord part timers equal status in the company pension scheme to those fully employed.

The complainant of one of the initial proceedings was employed with the complainant's legal predecessor from 1971 to 1989; she averaged 19.38 weekly working hours in the company's counter service. The applicant of the other initial proceedings has been employed with the applicant and his legal predecessor since 1981; she has been a worker and she has been averaging less than 18 hours per week.

In a dispute brought before the Labour Court, both applicants requested a company pension for the time of their part-time employment to which they were not entitled according to the labour agreement at that time.

The Federal Labour Court found for the initial complainants. As far as company pension schemes are concerned, the Court held, the general principle of equality (Article 3.1 of the Basic Law) requires that part-time and full-time employees be treated equally. For the past, the principle of equality can be complied with only by a supplementary insurance comprising also part-timers on a less than half-a-day basis. The protection of confidence, resulting from the principle of the rule of law (Article 20.3 of the Basic Law), does not lead to a lapse or restriction of the duty to accord part timers equal status either.

In a retroactive change in the jurisdiction, attention must be paid to the fact that the principle of the rule of law comprises not only the principles of the protection of confidence and of the reliability as to law, but also the idea of material justice. The objects of legal protection concerned must be weighed according to the criteria of

reasonableness and adequacy. The complainant's interest in being spared from additional financial burden and administrative expense has no priority over the interest of the disadvantaged employees in the absolute observance of the principle of equality. Accordingly, the existence and extent of supplementary old age provisions are of substantial economic importance.

Any indications of the complainant being overcharged are not evident, the Federal Labour Court held. Protection against overcharging serves the purpose of preventing business enterprises from having their existence endangered or destroyed.

Such a critical situation cannot be assumed to exist in the applicant's case, even if calculations of the extra cost of approximately one billion Deutsche Mark arising from the equalisation of part timers on a less than half-a-day basis in the company pension scheme is assumed to be correct. European law, by the way, does not provide otherwise.

2. By its constitutional complaint, the applicant *Deutsche Post AG* does not object to the duty of equalisation; the company is rather objecting to the unrestricted retroactive effect of this duty. This effect, the complainant alleged, violates the principle of the protection of confidence resulting from the principle of the rule of law (Article 20.3 of the Basic Law). For decades, unequal treatment of those employed full time and of part-timers in the company pension scheme has not been regarded as a violation of the principle of equality by any side. The protection of confidence was ruled out only by judgment of the Federal Labour Court of October 1986.

The judgments now objected to, furthermore, have failed to weigh up the principle of the protection of confidence and the principle of equality; instead, absolute priority was – wrongly – given to the principle of equality. A weighing of the principles should have prompted the Court to limit the time of retrospective application of the principle of equality, the complainant alleged. Retrospective payment by the complainant to the advantage of all part-timers concerned amounts to about 1 billion Deutsche Mark.

II. The Second Chamber of the First Senate did not accept the constitutional complaint for decision because of it lacked sufficient chances of success.

As for the grounds, the Court stated in essence:

The judgments of the Federal Labour Court objected to do not violate the complainant's right to the protection of confidence.

In the case of the one plaintiff who, according to the judgment of the Federal Labour Court, must have supplementary insurance cover for the time period lasting from August 1981 to the end of March 1991, a protection of confidence for the *Post AG* is in any case *a priori* out of the question, the Court held.

The European Court of Justice in Strasbourg had decided already in 1981 that different hourly wages for fully employed and part-timers are an illegal discrimination, if and when they actually only represent an indirect means of lowering the wage level of part-timers for the very reason that this group of workers consists exclusively or predominantly of women. After this decision, no-one could rely upon a regulation, excluding part timers on a less than half-a-day basis from the company old age pension scheme which was repealed.

The same applies, ultimately, to the second case (retrospective claim to equal treatment back to 1971), the Federal Constitution Court continued.

The Federal Labour Court has checked, in the light of the criteria of reasonableness and adequacy, whether the financial burden alleged by the applicant must lead to a restriction of the duty to equalise. The detailed statements on this point by the Court are in compliance with the jurisdiction of the Federal Constitutional Court and take the principle of the protection of confidence sufficiently into account.

The Federal Labour Court has, in favour of the applicant, even considered the cost incurred during the time following the decision of the European Court of Justice dated 1981; the Court did so although the legal situation after this judgment has been clear to the extent that confidence worth being protected in the continuance of a company old age pension scheme discriminating against part-timers no longer exists.

Languages:

German.

Identification: GER-2000-2-013

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Senate / **d)** 01.09.1999 /

e) 1 BvR 264/95, 1 BvR 829/93, 1 BvR 1836/93 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
1.6.5.2 **Constitutional Justice** – Effects – Temporal effect – Limitation on retrospective effect.
3.15 **General Principles** – Proportionality.
3.19 **General Principles** – Reasonableness.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Insurance, health / Insurance, statutory health insurance / Company, pharmaceutical, right / Product, pharmaceutical, price.

Headnotes:

A constitutional complaint shall be declared inadmissible even if a violation of a fundamental right has been found to exist, when the violation is based on a regulation that was repealed in the meantime and when the unconstitutionality of the rule, even if it were assumed to be in force, could have effect only in the future.

Summary:

I. The Safeguarding and Improving the Structure of Statutory Health Insurance Schemes Act of 1992 provided, for 1993 and 1994, markdowns for pharmaceuticals which were subject to sale by pharmacists only and of which the price was not fixed. The markdowns amounted to 5% of the manufacturer's price for drugs available on prescription and 2% for over-the-counter preparations. This regulation was intended by the legislator to provide financial relief for the statutory health insurance schemes.

Several manufacturers of pharmaceuticals that could not or could only to a very limited extent be prescribed at the expense of the statutory health insurance schemes filed a constitutional complaint against this regulation, alleging that a regulation that also included those pharmaceuticals in the price reduction represented an inadmissible restriction of the Basic Right guaranteeing occupational freedom.

II. As to their result, the constitutional complaints were unsuccessful.

a. The First Senate of the Federal Constitutional Court held that the regulations objected to did represent a disproportionate (unreasonable) interference with the complainants' occupational freedom (Article 12.1 of the Basic Law).

In principle, pharmaceutical companies need not accept that drugs that may not or that may be prescribed only partly at the expense of the statutory health insurance schemes should be systematically subjected to a legal markdown As such drugs burden the budgets of statutory health insurance schemes only slightly, if at all, the inclusion of these drugs generally into the markdown for the years 1993 and 1994 is disproportionate to the purpose pursued by the legislator. This applies in particular to oral contraceptives.

Nor can this interference be justified by the argument that it was not possible for practical reasons to restrict the markdown exclusively to those drugs that are prescribed at the expense of the statutory health insurance schemes. It must be conceded that clearing of different prices would have involved great additional expense. However, the Senate held, if a reasonable means of achieving the aims pursued is not available, the legislator must desist from taking the measure intended.

b. The violation of the complainants' Basic Rights in 1993 and 1994 cannot be relieved by the resetting of prices without incurring unreasonable expense. A constitutional objection to the regulation by the Senate – assuming the regulation to be in force – would, therefore, take effect only in the future. As the constitutional complaints are not apt to enforce the Basic Rights of the complainants, they are not to be accepted for decision.

Languages:

German.

Identification: GER-2000-2-014

a) Germany / **b)** Federal Constitutional Court / **c)** First Senate / **d)** 27.10.1999 / **e)** 1 BvR 385/90 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.6.5.4 **Constitutional Justice** – Effects – Temporal effect – Postponement of temporal effect.

3.15 **General Principles** – Proportionality.
3.16 **General Principles** – Weighing of interests.
3.17 **General Principles** – General interest.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right of access to the file.
5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Public hearings.
5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
5.3.25 **Fundamental Rights** – Civil and political rights – Right of access to administrative documents.

Keywords of the alphabetical index:

Record, inspection / Proceedings, *in camera* / Secrecy, interest / File, administrative / File, secret, access by court.

Headnotes:

1. § 99.1.2 in conjunction with § 99.2.1 of the Rules of the Administrative Courts is incompatible with Article 19.4 of the Basic Law to the extent to which it excludes the presentation of records in those cases in which the granting of effective legal protection depends on the knowledge of the administrative records.

2. A restriction of the right to inspect the files of the parties to legal proceedings before an Administrative Court in accordance with § 100.1 of the Rules of the Administrative Courts is compatible with Article 103.1 of the Basic Law when effective legal protection according to Article 19.1 of the Basic Law can be rendered possible only if the restriction is observed.

Summary:

1. The complainant, a public procurement officer, underwent a security check in the late 1980s to which he had given his consent. As a result, the Bavarian Office for the Protection of the Constitution arrived at the conclusion that there were objections to the complainant's authorisation to deal with classified matters.

The officer, who was informed that he could not be further employed in the position he had held so far, terminated his contract of service himself in order to minimise disadvantages in later applications for a position.

His request failed to be informed about the data on which the negative result of the security check was based. Substantiating its negative reply, the Office explained to him that, because of the public interest in effective protection of secrets, no further information could be given on the kind of communication, the circumstances and the persons who had expressed their views on the complainant. The latter had been assured of confidentiality.

Within the framework of the action filed against this decision, the Administrative Court requested the defendant Office to present the complete records in compliance with § 99.1.1 of the Rules of the Administrative Courts. The Bavarian State Ministry of the Interior, in its function as highest supervising authority in accordance with § 99.1.2 of the Rules of the Administrative Courts, refused to present the records which had been the basis of the security check. Upon the complainant's application in compliance with § 99.2.1 of the Rules of the Administrative Courts, the Higher Administrative Court of Bavaria decided as the court of last instance that the refusal to present the files was legally justified. There had been satisfactory proof, the Court held, that the files retained had to be treated as secret.

The complainant appealed to the Federal Constitutional Court from this decision; he essentially alleged a violation of the constitutional guarantee of access to the courts (Article 19.4 of the Basic Law).

II. The First Senate of the Federal Constitutional Court regards the regulation of § 99.1.2 in conjunction with § 99.2.1 of the Rules of the Administrative Courts as to some extent incompatible with the Basic Law.

1. It is necessary, if legal protection is to be effective, that the Court be able to examine both the factual and legal aspects of the request for legal protection in both factual and legal respects and that it have sufficient competence to avert probable future violations of the law or to remedy violations that have already happened, the First Senate explained. The court cannot therefore in principle be bound to the findings and assessments made in the administrative proceedings. The court itself must inquire into the actual situation and reach and substantiate its legal opinion independently of the administration whose decision is objected to.

In the present case, the complainant’s basic right under Article 19.4 of the Basic Law was violated because, as a result of the refusal to present the files, the Administrative Court was unable to find out what the actual basis of the authority's decision was and whether it is suitable to justify the decision.

2. The restriction of effective legal protection by § 99.1.2 in conjunction with § 99.2.1 of the Rules of the Administrative Courts does not stand up to examination in the light of the principle of proportionality.

The purpose of the regulation does not itself give reason for constitutional objections. The secrecy of files of which the disclosure would cause a disadvantage to the Federation or one of the German *Länder* is a legitimate public policy concern.

However, the First Senate held that the regulation objected to is not necessary to achieve the intended aim, because there are possibilities of complying with the legitimate needs of secrecy without curtailing the right of legal protection under Article 19.4 of the Basic Law to the extent to which it is presently curtailed by § 99 of the Rules of the Administrative Courts. The interest in secrecy of certain files on the one side and the right of legal protection of the person concerned on the other could be better reconciled by providing for the presentation of the files – under the obligation of secrecy – to the competent court.

The need of maintaining secrecy, the First Senate declared, would then be met by the fact that the files are brought to the exclusive knowledge of the Court (proceedings *in camera*). The person seeking legal protection would not come to know the individual reasons justifying the refusal to furnish information.

Article 103.1 of the Basic Law does not conflict with such a procedural arrangement, the First Senate held, as the basic right to a hearing may in principle be restricted if this is sufficiently justified by objective reasons. In the present case, an objective reason is constituted by the fact that, in administrative proceedings, the very failure to use an *in camera* arrangement weakens the legal protection of the individual, which is of much greater weight than a restriction of audience. Not only the person seeking to protect their rights, but also the Court lacks any chance of taking notice of relevant information.

As far as the procedural organisation is concerned, the legislator has a large scope of discretion. The legislator may, in particular, take precautions keeping the number of court officials in charge of secrets small and safeguarding the protection of secrets, the First Senate held. To meet the requirements of Article 19.4 of the Basic Law, the legislator is not confined to proceedings *in camera*, however. If there are other possibilities of compensating for the deficit in legal protection caused by § 99 of the Rules of the Administrative Courts without neglecting the interest in secrecy, these may be drawn upon, too.

3. The unconstitutionality of § 99.1.2 in conjunction with § 99.2.1 of the Rules of the Administrative Courts does not mean that the regulation is invalid, but only that it is incompatible with Article 19.4 of the Basic Law. The regulation gives rise to constitutional objections only in those cases in which the granting of effective legal protection, as in requests of information in particular, depends on knowledge of the contents of classified administrative files. To this extent, the First Senate ordered the legislator to establish, by 31 December 2001, a state of affairs that is in compliance with the Constitution. As for the rest, the regulation, also in its present form, retains its scope of application.

The First Senate further ordered that until a new regulation has been implemented, in pending proceedings of the present kind, administrative files must be submitted to the court for review of the lawfulness of the refusal to present files, without allowing the court to lay files open to inspection by the parties involved or to disclose the contents of the files in any other way, such as, for example, in the grounds of the court's decision.

Languages:

German.

Identification: GER-2000-2-015

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Senate / **d)** 17.11.1999 / **e)** 1 BvR 1708/99 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
4.7.8.1 **Institutions** – Courts and tribunals – Ordinary courts – Civil courts.
5.3.13.10 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.
5.3.41 **Fundamental Rights** – Civil and political rights – Right to self fulfilment.

Keywords of the alphabetical index:

Proceedings, civil, duration, excessive / Judicial system, efficiency / Pollution, noise.

Headnotes:

The right to self-fulfilment (freedom of action) guaranteed by Article 2.1 of the Basic Law is violated if legal disputes brought before a court are not settled within an adequate period of time.

Summary:

I. In August 1984, the complainant had initiated a civil action because of noise pollution originating from the apartment above his own. During the years to follow, the Hanseatic Higher Regional Court in Hamburg twice reversed decisions of the Local Court and of the Regional Court which had dismissed the complainant's action for an injunction. In January 1997, the complainant's application to the Regional Court was refused again. The complainant lodged an appeal from this decision to the Higher Regional Court on 12 February 1997, which is still pending. As several inquiries about the state of affairs did not lead to any progress in the proceedings, the complainant appealed to the Federal Constitutional Court. He alleged a violation of his rights according to Articles 2.1 and 20.3 of the Basic Law, on freedom of action and the principle of the rule of law respectively.

II. The Second Chamber of the First Senate allowed the constitutional complaint and declared that the duration of the proceedings before the Higher Regional Court, in view of the overall duration of the proceedings, violated the complainant's rights according to Article 2.1 of the Basic Law in conjunction with the principle of the rule of law.

The principle of the rule of law demands that legal disputes brought before a court be settled within a reasonable time. This was not done in the present case. More than 15 years had passed since the date on which the complainant had filed an application initiating proceedings. During this time the complainant had been exposed to noise pollution which he believed he need not tolerate. The Higher Regional Court has failed to act for a period of three years.

The Chamber, in view of the overall duration of the proceedings, considered this length of time to be excessive. The Higher Regional Court's huge workload did not alter this fact. The principle of the rule of law demands an effective judicial system. This includes adequate staffing of the courts.

The competent court was obliged, therefore, to take suitable measures immediately in order to promote the progress of the proceedings and to work towards their prompt conclusion.

Languages:

German.

Identification: GER-2000-2-016

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Senate / **d)** 19.11.1999 / **e)** 2 BvR 565/98 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.4.3.1 **Constitutional Justice** – Procedure – Time-limits for instituting proceedings – Ordinary time-limit.
1.4.3.3 **Constitutional Justice** – Procedure – Time-limits for instituting proceedings – Leave to appeal out of time.

Keywords of the alphabetical index:

Due care, duty to take / Facsimile transmission.

Headnotes:

A lawyer wishing to send a constitutional complaint to the Federal Constitutional Court by facsimile transmission shortly before the expiration of the time limit must, in view of the fact that it is possible that the telephone line may be occupied, allow for adequate extra time for repeated attempts to transmit the fax until the line is free.

Summary:

I. The complainant, who had lost his case in an administrative proceedings, authorised a lawyer in early 1998 to file a constitutional complaint. The time period to be observed according to § 93 of the Federal Constitutional Court Act expired on Monday 6 April 1998, at midnight.

To send his pleading, which had to arrive at the Court before the deadline, the lawyer used a fax machine and

tried to send the constitutional complaint on 6 April 1998, at 23.54 p.m. for the first time. He was unable to transmit the fax before midnight because the fax line of the Federal Constitutional Court was occupied at that time by another incoming fax.

The lawyer succeeded in sending the text of the constitutional complaint only after expiration of the period on 7 April 1998.

Having explained these facts, the complainant asked for reinstatement in the *status quo ante* because his lawyer had been prevented from observing the deadline without fault on his part.

II. The Third Chamber of the Second Senate declared the constitutional complaint inadmissible and dismissed the application for reinstatement in the *status quo ante* because of expiry of the time limit.

It is true, the Second Senate held, that by sending his pleading by fax the lawyer chose a reliable means of submitting documents for which a deadline must be observed. However, correctly using a functioning fax machine and dialling the addressee's fax number alone are not enough to make sure that the document arrives in time. The lawyer failed in particular to start sending the document early enough to ensure that, under the usual conditions, its transmission could be assumed to be completed before the deadline of 6 April at midnight.

Occupation of the Court's fax line by other transmissions is a circumstance not to be regarded as a technical fault; it is rather a usual event for which the person seeking to protect their rights must be prepared. Because of cheaper tariffs and because of the imminent expiration of time limits, the evening and night hours are frequently used to transmit documents in time by fax. The lawyer should have taken this common usage into account by allowing for some extra time in order to be on the safe side.

The time he had allowed for was so short that he must be reproached for failure to take due care; this reproach was to be attributed to the complainant.

Languages:

German.

Identification: GER-2000-2-017

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Senate / **d)** 25.11.1999 / **e)** 1 BvR 348/98, 1 BvR 755/98 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.16 **General Principles** – Weighing of interests.
5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Offender, criminal, right to respect for honour and reputation / Offender, criminal, identification in television broadcast / Television, station, freedom of broadcasting / Rehabilitation, endangering.

Headnotes:

In television broadcasts on sensational crimes, the general right to respect for one’s honour and reputation has to come second to the freedom to broadcast information when a stigmatisation or negative effects on the offender's rehabilitation in society are not to be feared.

Summary:

1. In a raid on an ammunition depot in Lebach in January 1969, four soldiers of the Federal Armed Forces were killed and another was severely injured.

As early as 1973, the Federal Constitutional Court had provisionally prevented ZDF (a public television company) from broadcasting the documentary “*Soldatenmord von Lebach*” (“The Murder of Soldiers in Lebach”) to the extent to which the then complainant was mentioned by name or shown in the documentary.

In 1996, the television broadcasting company SAT 1 produced the film “*Der Fall Lebach (1969)”* (“The Lebach Case”) as a pilot film of a television series under the title “*Verbrechen, die Geschichte machten*” (“Crimes That Made History”). Except in the film produced by ZDF at the time, the offenders were given fictitious names and their pictures were not shown. The film, furthermore, was not a documentary, but a television play. The action was interrupted several times by a high-ranking police official providing explanatory information on the case. As the film

progressed, increasing weight was placed on the – ultimately successful – measures taken for the search.

A convicted party to the crime who had been released from custody seven years earlier, filed a motion to the competent Regional Court requesting an interim injunction prohibiting the broadcasting of the film. He alleged that the telecast would endanger his – still incomplete – rehabilitation and thus impair his right to respect for his honour and reputation. The Regional Court refused the application. An appeal from the decision to the appellate court was dismissed.

In December 1996, another offender still in prison gained a temporary injunction preventing the television company from broadcasting the film. An appeal by SAT 1 to the competent Higher Regional Court failed.

1. Upon the constitutional complaint of the television station SAT 1, the First Senate of the Federal Constitutional Court reversed the lower courts' decisions prohibiting the broadcasting of the television programme, because of a violation of the freedom of broadcasting (Article 5.1.2 of the Basic Law).

In the present case, the First Senate held, the general right of the person concerned to respect for their honour and reputation on the one side and the freedom of broadcasting of the television station on the other have to be weighed against each other. The weighing by the courts of special fields does not stand up constitutional examination.

It is true, the First Senate argued, that the general right to respect for one's honour and reputation includes protection against stigmatising representations which could make the re-integration of offenders into society much more difficult. However, this does not justify an offender's claim never to be confronted with the crime in public again.

In the case of the ZDF documentary on which the Federal Constitutional Court had to rule in 1973, the particular seriousness of the infringement of the right to respect for one's honour and reputation resulted from the fact that the television report about a sensational crime was to be in the form of a documentary revealing the offender's name and showing his picture. Broadcast at about the same time as the offender's release from custody, the documentary, because of the wide effect and suggestive power of television, would, at the time, have rendered the rehabilitation of the person concerned much more difficult, or could have even prevented it.

In the present case, however, no broadcast "identifying the offender" is planned that may prompt the negative effects feared. According to the findings of the courts of special fields, the person concerned would be identifiable in the SAT 1 broadcast at the most by those persons who know him as one of the parties to the crime anyway. It was, therefore, unlikely, the First Senate held, that the broadcasting of the film would lead to a first or renewed stigmatisation or isolation of the person concerned.

Nor would the broadcasting of the film jeopardise the person's rehabilitation, the First Senate declared. It could be that those already knowing that the person concerned participated in the crime found their opinion or their prejudice confirmed. The way in which the story was presented did not give reason to assume, however, that the film could provoke resentment against the person concerned that did not already exist.

As far as the freedom of broadcasting of the complainant is concerned, the courts have failed to pay sufficient attention to the fact that prohibition of a broadcast always represents a substantial interference with a fundamental right. Even if the broadcast is less of an informative than of an entertaining nature, it includes also aspects of recent history. The crime and the criminals' motivation, the reactions of the prosecuting authorities and of the public in particular also reveal certain aspects of the state of society in 1969. A prohibition, accordingly, prevents the chance of recalling a certain interesting phase of recent history in the form of a film dealing with a crime, and of making it the subject of discussion.

The inadequate definition of the scope of protection of the fundamental rights involved and the court's failure to recognise the differences between the circumstances underlying the 1973 judgement of the Lebach case and the present judgement objected to was also relevant for the decision, the First Senate held. It cannot be excluded that the courts would have arrived at a different result if they had appreciated the significance and scope of the fundamental rights adequately.

2. In the light of these considerations, the constitutional complaint of the party to the crime had no chance of success, the First Senate declared.

In this case, the civil courts were right in explaining that the film did not allow the complainant to be identified and, hence, was not liable to jeopardise the complainant's rehabilitation. In handing down an interim order permitting the broadcast of the film, the Court was correct in referring to the fact that the complainant had been living in freedom under his true name for seven years without experiencing resentment from the people around him.

Because of the very indirect presentation of the complainant, the film did not expose the complainant

publicly. The court's decision, on the basis of these finding, to concede priority to the freedom of broadcasting over the complainant's personal concerns did not infringe the constitutional rules.

Languages:

German.

Identification: GER-2000-2-018

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Senate / **d)** 15.12.1999 / **e)** 1 BvR 505/95 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
5.4.9 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Works council, role / Working hours, change, impact / Co-determination / Employer, rights.

Headnotes:

Participation by the works council in the fixing of working hours of the editors/members of the staff in a newspaper undertaking does not violate the constitutionally guaranteed freedom of the press.

Summary:

I. The complainants – two publishers of daily newspapers and a private radio station – had been trying to change the working hours of editors and other staff members without the participation of their works councils. The reasons for doing so were a reorganisation of the working hours of editors due to the collectively agreed reduction of working hours to 38.5 hours per week, and the introduction of a new distribution concept including a change in proof-printing times and in broadcasting times respectively.

In the Labour Court proceedings regarding the change in working hours, the present complainants lost their case in the court of the last instance; they were obliged by the Court to comply with the right of participation of the works council in fixing the working hours of editors/staff members.

In their constitutional complaint against the decisions of the Labour Courts, the media companies alleged a violation of Article 5.1.2 of the Basic Law (freedom of the press and of broadcasting). They were of the opinion that § 118.1.1.2 of the Works Council Constitution Act excludes the right of codetermination of the works council. Otherwise, they allege, the works council could influence the tendency of the newspaper/radio station in a way that is incompatible with Article 5.1.2 of the Basic Law.

II. The First Chamber of the First Senate declared the complaints inadmissible.

1. The freedom of the press guarantees the right to determine, maintain or change the editorial policy of a newspaper and to implement this policy. The same applies to the freedom of broadcasting, which guarantees that the selection, contents and organisation of programming remain at the discretion of the broadcasting station and may be based on journalistic criteria. The State is not allowed by legal regulations to subordinate these fundamental rights to outside influences. Under constitutional aspects, also the works council, accordingly, has no right to influence the editorial policy of the newspaper or of the radio station. Such an influence would be one 'from outside'; its existence would lead to a restriction of the freedom of the press and of broadcasting. § 118.1.1 of the Works Council Constitution Act, therefore, excludes codetermination to the extent to which it would restrict the freedom of the press and the freedom of broadcasting. Hence, this provision does not restrict fundamental rights; rather, it protects them; and the manner in which it is interpreted and applied does not depend on the weight of the concerns of employees that are protected under the same provision.

2. The First Chamber of the First Senate found that, in their decisions, the Labour Courts had presupposed, without violating the Basic Law, that the regulation of working hours does not affect the freedom of publishers to define and implement editorial policies. There are no indications in particular that, for example, the time at which the editors' early morning shift ended or the changed organisation of the working hours of the editors could have any direct effect on the topicality and quality of the reports of the

newspaper companies. The same applies to the calculation of required working hours after a change in proof-printing times. Only the aim of implementing the editorial policy unhindered – but not the calculation of required working hours – must be excluded from the codetermination.

Lastly, the First Senate held, the Court decisions objected to do not prevent the complainants, for reasons of the topicality and quality of the press reports, from giving concrete individual instructions, and from temporarily changing the editors' customary working hours in the establishment in general.

Languages:

German.

Identification: GER-2000-2-019

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Senate / **d)** 15.12.1999 / **e)** 2 BvR 1447/99 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.
5.2 **Fundamental Rights** – Equality.
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 pending trial, effect on sentence / Criminal charge, connection / Criminal procedure / Offender, juvenile / Sentence, educational aim.

Headnotes:

Time spent in pre-trial detention for proceedings other than those before the court may be taken into account in calculating the sentence to be served by a convicted person if a sufficient connection exists between the two proceedings.

Summary:

I. In December 1998, the present complainant, an adolescent at the time, was sentenced to one year of youth custody without probation, which he served starting February 1999. In August 1999, the remainder of the sentence was suspended on probation.

The complainant was also under investigation for other criminal offences including rape (time of the alleged offence: March/April 1998). The complainant was remanded in custody during the investigation of these offences from June 1998 until February 1999. On 15 December 1998, the competent Local Court sentenced him, as a result of his conviction on this charge to another one year and six months of youth custody without probation. Following his appeal, the appellate court acquitted the complainant.

By decision of June 1999, the Local Court having jurisdiction over the enforcement of the judgment refused to make allowance for the time spent in pre-trial detention against the sentence of youth custody imposed in the earlier proceedings in which the complainant had been convicted on charges of bodily injury.

§ 51.1.1 of the Criminal Code is applicable neither directly nor by analogy, the Court held. This rule provides that allowance for the time of pre-trial detention is to be granted when a convicted person suffered this pre-trial detention for reason of a criminal offence which has been the subject of criminal proceedings.

In the Court's view, this rule was not applicable to the present case because the convicted person was involved in two different criminal proceedings. Nor was there any factual connection between these two proceedings, the Court ruled.

Upon the complainant's appeal from this decision, the appellate court also refused to take into account the time of pre-trial detention. The fact that both offences would have been subject to cumulative punishment or to global punishment according to the rules of the criminal law relating to young offenders, if the person concerned had been found guilty in both cases, did not constitute a sufficient connection to allow the period of pre-trial detention to be taken into account according to the law.

The adolescent thereupon filed a constitutional complaint against this decision, alleging a violation of the fundamental rights protected by Articles 2.2 and 3.1 of the Basic Law.

II. 1.The Second Chamber of the Second Senate of the Federal Constitutional Court reversed the judicial decisions of the Local Court and of the Regional Court because they violated the fundamental right to personal freedom (Article 2.2 of the Basic Law) in conjunction with the principle of equality before the law (Article 3.1 of the Basic Law) and remitted the case for re-decision to the Local Court.

Decisions allowing time spent in pre-trial detention to be taken into account in the calculation of a sentence for a criminal offence concern the extent to which a prison sentence is executed and, thus, affect the personal freedom which is constitutionally guaranteed by Article 2.2 of the Basic Law. When § 51.1 of the Criminal Code, and, in criminal law relating to young offenders, the corresponding § 52 of the Juvenile Court Law are interpreted and applied, this must, therefore, be done in the light of the great importance which the legislature has attributed to the right of personal freedom, the Second Senate held.

Constitutional law demands that § 51.1 of the Criminal Code as well as § 52a.1 of the Juvenile Court Law be interpreted in such a way that the time spent in pre-trial detention must in principle be taken into account if a functional connection or a factual relationship exists between the offence leading to pre-trial detention and that upon which conviction is based.

In its decisions dated 28 September and 7 November 1998, the Federal Constitutional Court had, therefore, declared unconstitutional certain judicial decisions in which cases prompting pre-trial detention were dropped because of their minor importance as compared with the proceedings that had in fact led to conviction, but in which the time of pre-trial detention had not been taken into account.

2. The decisions of the Local Regional Court against which the appeal was lodged did not sufficiently allow for the fact that the proceedings in which pre-trial detention was served and the offence resulting in the complainant's conviction were closely related. Having regard to the fundamental right of personal freedom, this relationship must not be neglected.

Assuming the complainant were not acquitted of the charge of rape by the Regional Court of second instance, this Court then had to take into account the final conviction of December 1998 (on a charge of bodily injury) and to impose a new global sentence of youth custody.

There can be no doubt that, by imposing a global penalty for the juvenile delinquent, a procedural connection would have been constituted among the offences prosecuted in different proceedings. This connection would have entailed allowance of the time spent in pre-trial detention according to § 52a.1 of the juvenile court law.

The same applies when a person is declared not guilty. It is obvious that a juvenile who was found not guilty cannot be placed in a worse position than if he had been convicted.

Furthermore, the connection necessary for an allowance according to § 52a.1 of the Juvenile Court Law is established not only at the time when a global sentence is actually imposed. Criminal law relating to young offenders demands that the educational aim be given priority, and hence that the legal consequences even of several criminal offences of a young person be confined to the extent necessary to achieve the desired educational effect; this leads *a priori* to a special connection between criminal offences prosecuted in different proceedings. This must be taken into account when § 52a.1 of the Juvenile Court Law is applied and interpreted.

Languages:

German.

Identification: GER-2000-2-020

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Senate / **d)** 22.12.1999 / **e)** 1 BvR 1859/97 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.15 **General Principles** – Proportionality.
4.7.4 **Institutions** – Courts and tribunals – Organisation.
4.7.15.1.4 **Institutions** – Courts and tribunals – Legal assistance and representation of parties – The Bar – Status of members of the Bar.
5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
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.

Keywords of the alphabetical index:

Court, reorganisation, effects / Lawyer, loss of income.

Headnotes:

A Statute providing for the reorganisation of court circuits (in this case, a reduction in size of the court circuit of the Higher Regional Court Celle) violates neither the right to exercise a profession (Article 12.1 of the Basic Law) nor the constitutional guarantee of property (Article 14.1 of the Basic Law).

Summary:

I. By statute of 19 June 1997, the government of one of the *Länder*, Lower Saxony, ordered a reduction in size of the court circuit of the Higher Regional Court Celle to the advantage of the remaining judicial circuits which were extended.

In September 1997, two lawyers filed a constitutional complaint against this statute of reorganisation, alleging they had been admitted as lawyers to the Higher Regional Court Celle only and that, because of the reduction in size of this court circuit, they could no longer represent clients from Göttingen before a Higher Regional Court. Such clients had formed a substantial part of their work, however. To them, the statute objected to hence resulted in an interference, *inter alia,* with their freedom to exercise a profession and with the constitutional guarantee of property.

As from 1 January 1998, the two complainants were admitted to the Higher Regional Court of Braunschweig, allowing them to accept clients from the Regional Court of Göttingen. The complainants, nevertheless, did not withdraw their constitutional complaint.

II. The Second Chamber of the First Senate found the constitutional complaint inadmissible for the following essential reasons:

1. The fundamental right to exercise a profession had not been violated, the First Senate held. This right would be violated only by a rule the effect of which was in fact to regulate a profession. However, the statute providing for the reorganisation of the Court circuit did not relate to the lawyers' occupational practice in such a definite way. It was rather aimed at reducing the differences in size among the circuits of the Higher Regional Courts in Lower Saxony. The continued existence of the Higher Regional Court Braunschweig had, in particular, to be safeguarded. The reorganisational measure taken, furthermore, allowed a higher degree of specialisation in this court.

2. The constitutional guarantee of property was not violated either, the First Senate declared. The continued existence of a court circuit is – with regard to the lawyers admitted to this court – not within the scope of protection of Article 14.1 of the Basic Law.

3. Nor did the reorganisation violate the complainants' general freedom of action, which is protected by Article 2.1 of the Basic Law. The statute, in its form and substance, complied with the constitutional provisions.

The regulation objected to was reasonable in terms of the proportionality between the measure taken and the purpose of the measure.

The statute's intentions – to balance differences in size, to allow greater specialisation in Braunschweig, to prevent the dissolution of the Higher Regional Court, and to bring justice closer to the people – are legitimate purposes for the sake of the public good. The statute is also capable of fulfilling these purposes. The legislator made all necessary effort to make an appropriate and justifiable assessment of the available material in order to estimate the probable effects of the regulation as reliably as possible.

The lawyers affected by the reorganisational measure, furthermore, can also reasonably be expected to accept the regulation, even though this means they may incur temporary losses of income and have to adjust to changed conditions. The need of adapting oneself to changed conditions is one of the challenges self-employed lawyers are regularly confronted with.

Finally, the fact that the statute does not lay down transitional provisions does not give reason for constitutional objections. Their double admission to two Higher Regional Courts ensures the complainants an adequate balance between their private interest in continuance of, and the state interest in a change of, the previous situation.

Languages:

German.

Identification: GER-2000-2-021

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Senate / **d)** 03.03.2000 / **e)** 2 BvR 39/98 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.18 **General Principles** – Margin of appreciation.
5.3.11 **Fundamental Rights** – Civil and political rights – Right of asylum.
5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.

Keywords of the alphabetical index:

Proceedings, resumption, grounds / Judge, duty to inquire into facts / Evidence, court ruling as evidence.

Headnotes:

The right of asylum secured by Article 16a of the Basic Law, imposes certain requirements on judges to inquire into the facts when a second application for asylum is reviewed.

Summary:

I. The complainant, who had entered Germany in 1990, applied once again for asylum in 1995. In substantiation, he referred to his political activities in exile and presented a newspaper article reporting on the detention of a man active in Germany for the Syrian secret service. This man, the complainant alleged, had informed also the Syrian secret service on the complainant's political activities in exile.

In October 1996, the Federal Office for Recognition of Foreign Refugees had declined the complainant's application for asylum on the grounds that the arrest of the Syrian agent did not constitute sufficient indication of political persecution to which the asylum-seeking person could expect to be subjected on his return to Lebanon, as he had not been a prominent opponent of Syrian politics.

The complainant brought an action against the refusal by the Federal Office, alleging that a German criminal court had in the meantime sentenced the Syrian agent to 3 years' imprisonment for foreign secret service activities and compulsion. In the grounds of its judgment dated 20 March 1997, the court found the complete management team of the F.L.F. *(Freiheitlicher Libanesischer Freundeskreis)* to be seriously endangered. He himself had in the meantime been elected president of the F.L.F. and chairman of its successor organisation, F.L.F.-C.N.L.

The Administrative Court dismissed the action. Substantiating its decision, the Court held that the application for asylum was a second application in the sense of § 71.1 of the *Asylverfahrensgesetz*. The preconditions for resumption of the proceedings according to § 51.1-3 of the *Verwaltungsverfahrensgesetz* (Administrative Proceedings Act) were not fulfilled, as there had not been a considerable change in facts. In so far as the asylum-seeking person had referred to the statements made by the Criminal Court in its judgment of 20 March 1997, that the Syrian secret service arrests every recognised government opponent who is entering Lebanon, he had failed to comply with his duty to set forth the facts. Even if the judgment cited by the applicant contained statements concerning the spying on the F.L.F., these were not concrete circumstances directly referring to the complainant person, from which his persecution by Syrians upon his return to Lebanon could be concluded to be highly probable, the Court held.

Nor did the applicant present any new evidence which could prompt the Court to resume proceedings.

The complainant appealed to the Federal Constitutional Court from this decision and from a decision by the appellate court in the same matter; he alleged a violation of the right of asylum (Article 16a.1 of the Basic Law).

II. The First Chamber of the Second Senate allowed the appeal on the following grounds:

1. As far as the legal criterion regarding “person persecuted on political grounds” is concerned, the Federal Constitutional Court has to review whether the lower courts correctly weighed the facts and the law as well as whether the courts' investigations were adequate in the light of the constitutional right of asylum; this review by the Court refers to both ascertainment of the facts themselves and the legal assessment made of them.

A certain discretion must be granted to specialised courts in, *inter alia*, their legal assessment of the facts ascertained. Constitutional objections to an assessment by specialised courts have to be raised however in those cases in which the assessment is not plausible from the grounds given.

Investigations as to whether the legal criterion “person persecuted on political grounds” is satisfied must also be reviewed by the Federal Constitutional Court in terms of whether they are sufficiently reliable and

comprehensive in the light of the specific situation prevailing in matters of asylum.

These principles also apply to the examination of second applications for asylum which are likewise governed by the fundamental right laid down in Article 16a of the Basic Law. The same formal and substantial criteria (following from the fundamental right of asylum) must be applied in both new and renewed proceedings. The Federal Constitutional Court reviews whether the assessment of the preconditions of resumption or an estimation by the specialised court of the prospects of the second asylum proceedings are well founded and plausible.

2. Measured in the light of these criteria, the reasons given by the specialised courts dismissing the complainant's claim for resumption of proceedings do not stand up to constitutional review. The assumption of the specialised court that there is no adequate proof of the asylum-seeking person's argument that the dangerousness of his situation has changed in the meantime, is untenable simply in respect of the judgment by the criminal court quoted by the applicant. The Second Senate held that the specialised court failed to see, in particular, that the judgment of the criminal court could provide new evidence for new facts or facts not known so far.

The specialised court, furthermore, failed to duly consider the fact that the sentence passed by the Higher Regional Court is an abridged judgment in which, according to § 267.4 of the Code of Criminal Procedure, only the verified facts constituting the offence must be put down, but not the details pertaining to the evidence taken, or the evaluation of these. Judging the reasons presented by the person seeking asylum as “irrelevant” hence exceeds the scope of the discretion granted to the specialised court, the Second Senate declared.

Furthermore, the court's view that the complainant, by referring to the judgment of the criminal court, had failed to fulfil his duty to substantiate his second application sufficiently, exaggerated the requirements of his duty to provide evidence on the one hand and, on the other, shifted the court's constitutional duty to inquire into the facts relevant for the granting of asylum onto the applicant.

The court's view of the significance of the statements in the criminal court judgment quoted by the applicant failed to recognise the high probative value of this judgement, albeit an abridged judgment; the court's view hence is not plausible. Not knowing the evidence taken by the criminal court, the court cannot presume that statements as to facts contained in the criminal court's judgment have been made without a sufficient basis. These statements of the criminal court should rather have been a reason for further investigations in the asylum proceedings.

For this reason, the case is remitted to the competent administrative court for a new decision on the complainant's second application for asylum.

Languages:

German.

Identification: GER-2000-2-022

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Senate / **d)** 22.03.2000 / **e)** 2 BvR 426/00 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.13 **General Principles** – *Nullum crimen, nulla poena sine lege*.
3.19 **General Principles** – Reasonableness.

Keywords of the alphabetical index:

Alien, employment, illegal / Offence, criminal, definition / Employment, gainful, prostitution.

Headnotes:

The use of interpretable terminology does not offend against the constitutional requirement that an act may be punished only if it was defined by law as a criminal offence (Article 103.2 of the Basic Law), if and when the risk of punishment is recognisable to the offender.

Summary:

I. The complainant, a Bulgarian national, lives in Germany; she had been granted a residence permit expiring on 23 January 2000. The permit was subject to the condition that she was not entitled to undertake paid work whether in a self-employed or in any other capacity (§ 14.2.2 of the Aliens Act). In 1999 she was fined because, according to the court findings, she worked as a prostitute thus breaching the conditions of her residence permit.

The complainant appealed to the Federal Constitutional Court from the conviction, which had been confirmed by the appellate instance. In her opinion, the provision of the Aliens Act on which the criminal court's decision was based was not sufficiently precise in its definition of "employment". The conviction, she alleged, therefore violated Article 103.2 of the Basic Law.

II. The Third Chamber of the Second Senate rejected the constitutional complaint, finding there had been no violation of the Constitution.

The Court reasoned that the view of the specialised courts according to which the complainant, by working as a prostitute, had practised a gainful occupation within the meaning of the provision, including the risk of punishment, did not exceed the limits of an admissible judicial interpretation.

The necessary definition of a criminal offence does not exclude the use of terms which need to be interpreted. It is sufficient, the Court held, that the risk of punishment be able to be recognised by the persons covered by the provision.

Measured against this criterion, the relevant provision of the Aliens Act meets the requirements of the definition by law. Measured against an objective criterion, i.e. the view of a "reasonable person", the compatibility of the judicial interpretation with everyday usage already excludes any doubt as to the risk of prosecution by a criminal court. According to the findings by the courts there is also no doubt that the complainant herself recognised the risk.

Languages:

German.

Identification: GER-2000-2-023

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Senate / **d)** 31.03.2000 / **e)** 1 BvR 608/99 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Reasoning.
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:

Retail activity, regulation / Trade, regulation / Craftsman, master, certified.

Headnotes:

Constitutional requirements of identifying a trade or business.

Summary:

I. The complainant, a trained electrician, has been running an electrical appliance store since 1985 which opens on five days per week for three hours. He also delivers and connects the appliances sold. In addition, he makes repairs and does other electrical work. Since June 1998, the complainant, because of strongly decreasing turnovers, has also been working in a storehouse.

In October 1998, the local court fined him DM 3 000 because he had inadmissibly run his own business as an electrician and radio and television mechanic with a fixed place of business in accordance with the Handicrafts Regulation Act. He was charged with having run his own business as an electrician and radio and television mechanic with a fixed place of business for a period which could not be precisely determined any more. He was aware of the fact that he was not registered as trader and, therefore, not entitled to run his own business.

After having filed an appeal which was dismissed, the complainant appealed to the Federal Constitutional Court. He alleged, *inter alia*, that the manner in which the courts had interpreted and applied § 3 of the Handicrafts Regulation Act constituted a violation of his right to work. The criminal courts, in particular, had not quantified his different activities. In order to exclude a legally admissible ancillary business on the basis of the turnover ascertained, it would have been absolutely necessary to determine the ratio of "admissible" to "inadmissible" turnovers.

II. The Second Chamber of the First Senate annulled the decision imposing a fine on the complainant because the challenged decisions did not comply with the criteria of Article 12.1 of the Basic Law.

It is true, the First Senate declared, that the relevant provisions of the Handicrafts Regulation Act satisfy this fundamental right to the extent to which, once a certain volume of trade work is undertaken, the danger exists that a business referred to as retail shop does not in fact sell commodities, but rather constitutes the exercise of a trade. However, in order to take the real conditions of economic life into account and to establish fluid transitions between the two spheres, the legislator has defined thresholds in several respects; below the relevant threshold, a self-employed electrician or mechanic is not required to obtain a master craftsman's certificate.

The courts failed to take this adequately into account. In particular, they did not specify whether the complainant's activities were in fact essentially those of a regular trader or those of a small trader, which are not subject to the Handicrafts Regulation Act. The latter could be assumed if and when satellite receiver sets were installed or lights fitted. As far as the retailer's activities were concerned, the courts should have differentiated between the main fields of "electrical trade" and "radio and television trade". This differentiation could be important in assessing whether the so-called limit of irrelevance according to § 3.1 and 3.2 of the Handicrafts Regulation Act had been exceeded.

Finally, the First Senate criticised the fact that, in determining the total turnover of the business, the courts had failed to differentiate between turnovers achieved by trading activities and those achieved by sales.

If the courts had based their interpretation of the Handicrafts Regulation Act, which provides for substantial interferences with the freedom to work, on constitutional principles it cannot be excluded that the rules governing exceptions laid down in § 3 of the Handicrafts Regulation Act would have been given the weight due to them from the constitutional point of view. The criminal courts could then have made the imposition of a fine subject to the provision that all circumstances speaking for the complainant be explored and considered beforehand.

The challenged decisions were annulled. The case was remitted to the local court for a new decision taking the constitutional aspects into account.

Languages:

German.

Identification: GER-2000-2-024

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 10.04.2000 / **e)** 1 BvR 422/00 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.15 **General Principles** – Proportionality.
3.17 **General Principles** – General interest.
3.19 **General Principles** – Reasonableness.
5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Account, settlement, method / Medical services / Diagnose key / Insurance / Patient, data, coding.

Headnotes:

Even if the duty of doctors to encode patient diagnoses represents an interference with the freedom of professional practice, this interference is, for reasons of public interest, justified and reasonable.

Summary:

The 1992 Act governing the structure of the health care system *(Gesundheitsstrukturgesetz)* requires that doctors who operate within the state health care system provide information about patient diagnoses and encode this information according to the key of the International Classification of Diseases (ICD) settling accounts with their associations.

According to a 1996 agreement between the leading associations of general sickfunds, the Federal association of doctors and the German society of hospitals *(Deutsche Krankenhausgesellschaft)*, however, doctors and medical institutions were, at least for the time being, given the option of indicating the diagnoses encoded or in full.

Since the Health Care Reform Act 2000 came into force, all doctors are under the obligation starting 1 January 2000, to encode diagnoses in their

accounting statements intended for the general sickfunds.

The complainant, a specialist in internal medicine admitted to the register of doctors operating within the state health care system, considered the obligation to encode the diagnoses to be an unconstitutional interference with the freedom of the medical profession (Article 12.1 of the Basic Law).

Substantiating his constitutional complaint he alleged *inter alia* that the obligation to encode diagnoses leaves the medical function and the patient histories completely open to controls and checks.

The Second Chamber of the First Panel did not grant the constitutional complaint on the following grounds:

1. As far as the complainant regards the doctor – patient relationship as in danger, he did not sufficiently explain how the relationship which is characterised by the doctor's personal comprehensive knowledge and documentation could be affected by the fact that the doctors' association receives somewhat simplified diagnoses. The constitutional complaint is inadmissible also insofar as the complainant is asserting the right of those insured with general sickfunds to decide themselves about the use of their personal data.

2. An interference with occupational freedom can be assumed to exist to the extent that the accidental documentation of treatment practised so far is now supplemented by a numerical and hence computer-legible documentation of diagnoses. This provides qualitatively different possibilities of control because the medical control bodies are now no longer dependent on a few spot checks and accidental findings. However, this interference is justified by the public interest in the financial stability of the general sickfunds:

Reviews of the economy of the medical care system including doctors are intended to limit the increase in the general sickfunds' expenditures and to provide incentives for economising which have been almost completely lacking due to the structure of the legal relations prevailing in the law governing the general health insurance system.

For this purpose, the legislator has *inter alia* provided that the medical services invoiced be reviewed qualitatively according to the fee items charged per case treated in the light of the diagnosis indicated (random check).

In view of the volume of data to be reviewed it is obvious that the plausibility checks are considerably simplified if and when they are done with the aid of computers.

The legal situation which the complainant has in mind when he evokes the image of a 'transparent doctor' could be regarded by the legislator as a necessary means of influencing doctors' accounting practice to the effect that only necessary and economical treatment and prescriptions are invoiced. The matter is not that, from an individual doctor's point of view, less control would no doubt be a milder means. What matters rather is the functioning of the procedure of settling accounts altogether, and ensuring a just remuneration system for all doctors involved. Measured against the law's purpose, there is no milder means available at present than increasing the efficiency of controls, particularly since the past has shown that the medical profession as a whole has responded to cuts in fees by expanding quantities.

Finally, the Court held that in the present case it was not necessary to rule on the protection of patient social data as the settlement of accounts refers to doctors. To this extent, neither diagnoses nor medical services invoiced are strictly personal data worthy of protection.

Languages:

German.

Identification: GER-2000-2-025

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 05.05.2000 / **e)** 2 BvR 2212/99 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.19 **General Principles** – Reasonableness.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.
5.3.33 **Fundamental Rights** – Civil and political rights – Inviolability of the home.

Keywords of the alphabetical index:

Seizure / Search warrant, specification / Investigation, preliminary / Tax, evasion.

Headnotes:

A judicial search warrant infringes the fundamental rights of a person charged with a criminal offence if it does not furnish any factual information about the subject-matter of the alleged offence.

Summary:

The complainant operates a duty-free shop at an airport.

In the framework of a preliminary investigation instituted against her “on the grounds of tax evasion”, the competent Local Court *(Amtsgericht)* judge ordered the search of her residential, business and other premises. The only reason given in the search order which was the basis of the search was the assumption “that the search” would result “in evidence, especially documents, invoices, etc. being found”.

The complainant's premises were searched on the very same day and business documents were seized.

The complaint against this search was dismissed on the merits by the Regional Court on the following grounds:

It was conceded that the alleged offence might not have been specified precisely enough in the Local Court order. The seizure warrant might have been premature as well, since before the search, it had not been possible to designate the objects to be seized with sufficient precision. However, the Local Court order could have been amended without any problems by listing the relevant elements of the offence. There were, therefore, no grounds for criticising the Local Court order on the merits, as the complainant had, on the basis of fairly specific indications, come under the suspicion of selling duty-free goods to non-authorised customers.

Apart from that, as the seized objects had been returned to the complainant after the termination of the search, and as the preliminary investigation had been stopped, the Regional Court did not see any reason for revising the search order of the Local Court.

By her constitutional complaint, the complainant claimed an infringement of her fundamental rights under Article 13 of the Basic Law.

The Third Chamber of the Second Panel of the Federal Constitutional Court quashed the Local Court order and the Regional Court decision on which the complaint was based and referred the procedure back to the Regional Court, giving, *inter alia*, the following reasons:

Article 13.1 of the Basic Law establishes, in connection with the rule of law principle, the obligation of the judge to ensure, by an appropriate wording of the search order, that the extent of a possible encroachment upon fundamental rights remains measurable and controllable. The protection of the privacy of the person affected cannot solely be left to the searching officers; instead, the judge must ensure from the outset that the extent of the coercive measure is limited in a reasonable way. A search order which does not contain any factual information about the subject matter of the alleged offence committed by the person searched, and which, moreover, does not indicate the type or the possible content of the evidence to be found, does not normally meet these requirements. The search order issued by the Local Court does not meet these constitutional minimum requirements.

Moreover, the Regional Court in its decision continued the infringement of the Constitution committed by the Local Court. In the opinion of the Regional Court, it was sufficient that a reasonably concrete search warrant could have been issued even if it had not actually been issued. This view renders the precautionary judicial protection provided by the Basic Law ineffective.

Moreover, the Regional Court decision infringes the complainant's right to effective protection against acts of a public authority which is as complete as possible. It follows from the precept of effective protection of the fundamental rights that a person can request judicial review of whether a considerable encroachment upon his or her fundamental rights was justified even if this encroachment no longer continues to have an effect. The search of residential premises on the basis of a judicial warrant constitutes such a considerable encroachment upon the fundamental right under Article 13.1 of the Basic Law; by its nature, the encroachment has often already been terminated before a possible judicial review.

One of the constitutional preconditions of a search is a court warrant which meets constitutional requirements. The Regional Court did not examine if such a

warrant existed and thus denied the complainant effective legal protection.

Languages:

German, English (translation by the Court).

Identification: GER-2000-2-026

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 10.05.2000 / **e)** 1 BvR 1864/95 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.3.2 **General Principles** – Democracy – Direct democracy.
3.15 **General Principles** – Proportionality.
3.16 **General Principles** – Weighing of interests.
5.4.10 **Fundamental Rights** – Economic, social and cultural rights – Right to intellectual property.
5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Scientific freedom.

Keywords of the alphabetical index:

Drug, pharmaceutical / Property, guarantee / Invention / Research / Clinical trial / Property, social obligations.

Headnotes:

Taking into account the admissible determination of contents and limits pursuant to sentence 2 of Article 14.1 of the Basic Law, the use of a pharmaceutical drug under patent protection for clinical trials does not infringe any ownership rights of the patentee.

Summary:

In the patent specification of 28 June 1989, the granting of a European patent on the production of a pharmaceutical substance with human interferon characteristics obtained by means of genetic engineering was published. The patent application had been filed on 18 October 1982. After the termination of opposition proceedings instituted against the European patent, the patent holder waived the granting of a German patent in a declaration dated 13 February 1995.

The complainant – a pharmaceutical company – is the exclusive licensee of the European patent for the territory of the Federal Republic of Germany.

At the same time, another pharmaceutical company – B. GmbH – produced a drug for the treatment of chronic polyarthritis using a substance supplied from abroad whose amino acid sequence corresponds to one of the patents which are the subject of the complaint. After being approved by the Federal Health Office, this product was distributed in Germany from January 1989 by a third company under the name of Polyferon. Moreover, B. GmbH conducted clinical trials with the substance Interferon-gamma to examine its potential use for other possible indications with reference to the so-called experiment privilege ("*Versuchsprivileg*") under Article 11.2.b of the Patent Law.

After the issue of a compulsory licence in favour of B. GmbH by the Federal Patents Court, the complainant tried to prevent its use by filing an action, but lost in the last instance at the Federal Court of Justice. This court held that if a patented pharmaceutical substance was used in clinical trials with the aim to ascertain whether, and if so in what form, this substance was suitable for healing or alleviating certain other human diseases, this could be regarded as a lawful act done for experimental purposes. The complaining company lodged a constitutional complaint against this decision claiming an infringement of its fundamental rights under sentence 1 of Article 14.1 of the Basic Law.

As there was no infringement of sentence 1 of Article 14.1 of the Basic Law, there was no sufficient prospect of success as concerns the result of this constitutional complaint. The First Chamber of the First Panel of the Federal Constitutional Court gave the following main reasons:

The privilege accorded by Section 11.2 of the Patent Law constitutes a constitutional determination of the contents of the property concerned pursuant to sentence 1 of Article 14.1 of the Basic Law. Research, science and technology can only be developed by means of trials which are based on the latest research results at a particular point in time. From the constitutional point of view, there are therefore no objections to the legislator giving these matters priority over the patentee's interests in this respect. In its decision, the BGH has taken the constitutional protection of the property aspects of the patent right into consideration. In particular, it has

given due consideration to the importance of sentence 1 of Article 14.1 of the Basic Law when balancing the conflicting interests.

In the decision, it was shown in an understandable way that unlimited protection of the patent pursuant to the principles of freedom of research and the social obligation connected with property is not justified in cases where this hinders technical development. The purpose of patent law, i. e. to promote technical progress and to stimulate inventiveness in a way which is useful to the industry, would be counteracted if trials were precluded which serve research and technical development.

The BGH also recognised that the exclusive use of the patent by the patentee can be impaired considerably, especially if third parties, on account of the results of their trials, strive for and obtain the granting of patents for use.

This is, however, something patentees must tolerate, according to the BGH, as patentees can only be rewarded for their own contribution to technical advancement which the supply of the respective product constitutes. It is not justified to also attribute the full reward to the patentee alone for those types of use of the patentee's product which require previous inventive steps of third parties.

It is only consistent with sentence 1 of Article 14.1 of the Basic Law to expect such losses from the patentee which are justified by reasons of the public good.

Disproportionate losses which are incompatible with the guarantee of ownership would have to be expected if an actual commercialisation of the substance took place due to an abuse of the experiment privilege. In the original proceedings there was no reason for the BGH to discuss the preclusion of such cases of abuse from the experiment privilege.

However, what is of comparatively even greater importance for the patentee are the legal consequences resulting from the granting of patents for use to third parties and their economic exploitation after the successful completion of the trials. In this context, it must be taken into account that the owner of the more recent patent may not exploit it commercially without the consent of the patentee of the product. Thus, the company which is the patentee of the product participates in the economic value of the patent for use, as it will receive adequate payment for its consent. With that, the patentee company receives at the same time a financial compensation for the fact that it had to tolerate the trials which were conducted with the intention to be granted the patent for use. This means that the economic value of the product patent remains associated to its owner – as required as a matter of principle by sentence 1 of Article 14.1 of the Basic Law.

The permission to conduct clinical trials does not lead to a shortening of the patent duration which would be incompatible with sentence 1 of Article 14.1 of the Basic Law. It is true that competitors of the substance patentee which conduct clinical trials during the duration of the patent making use of the experiment privilege can possibly offer competing products after the expiry of the patent duration earlier than if they could only carry out the necessary trials after the expiry of the patent duration. However, from sentence 1 of Article 14.1 of the Basic Law it does not follow under any circumstances that the patentee must be protected from competition even after the expiry of the patent duration. The so-called factual development blocking period subsequent to duration of the patent is a mere expectation of the patentee to be spared competition as long as possible.

Languages:

German, English (translation by the Court).

Identification: GER-2000-2-027

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 05.06.2000 / **e)** 2 BvR 566/00 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.13 **General Principles** – *Nullum crimen, nulla poena sine lege*.

Keywords of the alphabetical index:

Liability, criminal / Liability, criminal, prerequisite / Association, ban.

Headnotes:

The prohibition of *ex post facto* laws *(Bestimmtheitsgrundsatz)* which requires that an act may be punished only if it was clearly defined by law as a criminal offence before the act was committed

(Bestimmtheitsgebot), does not preclude the use of statutory language that requires judicial interpretation, as long as the risk of punishment is recognisable by an objective person.

Summary:

The complainant is a Turkish citizen of Kurdish ethnic origin, who has been living in Germany since 1988. From 1 August 1996 to 18 January 1997, the complainant supported the Kurdistan Workers' Party (PKK) and its affiliate, the National Liberation Front of Kurdistan. The party has been banned since November 1993. In his capacity as a city or neighbourhood officer the complainant participated in fund-raising activities and in the sale of propaganda material to his fellow countrymen and women.

Based on these facts, the competent Regional Court convicted the complainant of violating an enforceable ban on the activities of and membership in an association, pursuant to § 20.1.4 in conjunction with sentence 2 of § 18.2 of the German Association Act. The conviction was conditionally discharged.

In his constitutional complaint, the complainant alleges, *inter alia*, a violation of the prohibition of *ex post facto* laws established by Article 103.2 of the Basic Law. This requirement provides that an act may be punished only if it was clearly defined by law as a criminal offence before the act was committed. In particular, the complainant is of the opinion that the acts which have, in his case, been assessed as the punishable support of a banned association cannot be concretely discerned either in the text of the Association Act or from the Federal Interior Minister's 1993 order banning the PKK.

The Third Chamber of the Second Panel of the Federal Constitutional Court did not admit the constitutional complaint, the main reasons being:

As a special prohibition of arbitrariness in criminal jurisdiction, Article 103.2 of the Basic Law obliges the legislator to delimit the prerequisites of criminal liability in such a precise way as to make the scope and the area of application of the legal elements of a criminal offence objectively discernible. The prohibition of *ex post facto* laws, which requires that an act may be punished only if it was clearly defined by law as a criminal offence before the act was committed does not preclude the use of statutory language that requires judicial interpretation, at least as long as the risk of punishment can be recognised by an objective person.

Applying this test to this case, the question of whether or not a criminal prosecution should be recognised is to be assessed on the basis of the objective criterion of the "citizen's point of view". In this case, doubts concerning the question of whether it should be recognised do not arise from the mere fact that the subject of the ban on activities is not described in detail either in § 18.2 of the Association Act or in the order by which the ban was pronounced.

The constitutional requirement of clarity is fulfilled in this case, to a sufficient extent, by the justification for a ban on the activities of and membership in associations which is established clearly in the reasons for such a ban as provided by law (§ 3.1 and § 14.1 of the Association Act). It is thus possible to obtain, by means of interpretation, a sufficiently reliable description of the behaviour which carries a penalty from the elements of the criminal offence set forth in § 20.1.4 of the Association Act. Such an interpretation complies with the weighing of interests required by the rule of law. The ban on activities itself can also be the starting point of the more precise characterisation of behaviour which constitutes an offence set forth in § 20.1.4 of the Association Act because the ban which carries a penalty can only refer to persons through whom the association, which is otherwise not capable of acting, becomes active on the domestic territory.

This means that the wording of the legal elements of the criminal offence pursuant to § 20.1.4 of the Association Act comprises any behaviour which is: (a) potentially relevant from the point of view of the reasons for the ban, which refers to the banned activity of the concerned association on the domestic territory; and (b) which can be specifically suitable for achieving an advantageous effect concerning the banned activity of the association. In cases in which persons – such as the complainant – are either members of the banned association or act on behalf of such association, propaganda activities and the support through fund-raising activities are part of such behaviour.

Languages:

German.

Identification: GER-2000-2-028

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 04.07.2000 / **e)** 1 BvR 547/99 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.17 **General Principles** – General interest.
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.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Advertising, ban / Promotion, aggressive / Occupation or profession, practice / Professional code / Ethics, professional / Competition, unfair / Dentist, advertisement / Dental treatment.

Headnotes:

A court misjudges the meaning and the scope of the right to occupational freedom if it prohibits any advertisement by a dentist without examining whether the advertisement is still within the bounds of the permissible provision of information.

Summary:

Pursuant to § 27.2 of the Professional Code *(Berufsordnung, BO)* of the Dentists' Council of the state *(Bundesland)* Schleswig-Holstein, dentists are prohibited from making any kind of advertisement and aggressive promotion. In particular, it is impermissible to order the production of or to tolerate publications that aggressively promote doctors and services.

On the basis of this regulation, a dental clinic and a dentist performing dental services offered by the clinic were ordered to refrain from using the advertisement which formed the basis of the complaint on the grounds that the advertisement constituted an aggressive promotion which compromised professional ethics.

The basis of the judgement was a colour leaflet published by the dental clinic which was available on its premises. This leaflet explains the technique and the course of implant treatments, describing them as a method of dental treatment which can secure a higher quality of life than conventional methods.

On account of the application made by a fellow dentist and by the Dentists' Council of the state Schleswig-Holstein, the Federal Court of Justice *(Bundesgerichtshof)* banned the distribution of this leaflet concluding that it constituted an infringement of the Unfair Competition Act *(Gesetz gegen unlauteren Wettbewerb)*.

The complainants lodged a constitutional complaint against the judgement of the Federal Court of Justice which relied on competition law. In particular, the complainants challenged the infringement of their fundamental rights under Article 12.1 of the Basic Law (freedom to practise an occupation or profession).

The Second Chamber of the First Panel of the Federal Constitutional Court *(Bundesverfassungsgericht)* reversed the decision of the Federal Court of Justice, on the ground that it was based on a fundamentally erroneous view of the meaning of occupational freedom under Article 12.1 of the Basic Law.

The interpretation of the provision in the Professional Code for Dentists that prohibits dentists from making use of any “advertisement or aggressive promotion” must be in conformity with the Basic Law. Such an interpretation permits the prohibition of only those advertisements that do not promote justifiable professional interests or do not provide valuable information.

The interpretation of the Federal Court of Justice did not fulfil these requirements. It is not understandable, in the first place, how the leaflets can be regarded as advertisements for services the dentist offers in his private practice when the leaflets were only available in the clinic. The dentist is not mentioned in the leaflet and the leaflet was not available in his private practice. On the other hand, the provision about licensed practitioners' advertising activities set forth in the Professional Code neither applies directly to the clinic which is supposed to make a profit from business activities, nor can its criteria be applied indirectly to a clinic by establishing a link to the dentist who looks after a certain number of patients there, and who, apart from that, maintains his own private practice.

Moreover, no grounds are provided for substantiating the position that, in its presentation of information, the leaflet goes beyond the scope of what is allowed for a clinic on the one hand and the limits a licensed dentist must observe on the other. There is a general

interest in factually correct advertising with its focus on information which is comprehensible for laypersons about the relatively new treatment of implantation.

The present case is not about advertisements that aggressively promote a specific practitioner but about advertising a specific therapy. Apart from that, it must be taken into consideration that the leaflet is only available in the clinic and that it is not mailed, unsolicited, to anyone. Moreover, it cannot be inferred from the challenged decision why licensed practitioners should be prevented from providing information in their private practices, by means of general informative material, about any methods of examination and treatment which they can perform.

Languages:

German.

Identification: GER-2000-2-029

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 20.07.2000 / **e)** 1 BvR 352/00 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
3.15 **General Principles** – Proportionality.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.13.10 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Duty of office, violation / Measure that expedites / Protection, legal, effective / Proceedings, speeding up / Damage / Civil proceedings.

Headnotes:

Article 2.1 of the Basic Law, in conjunction with the principle of the rule of law, is violated if a court does not take effective measures to counteract the excessive duration of civil proceedings.

Summary:

At the beginning of the 1970s the complainant, a building contractor resident in Saarbruecken, planned to build a shopping centre in his home town. The municipality designated, in a draft development plan, the intended location of the building as an area dedicated to non-residential use and had on several occasions conducted negotiations with the complainant about the project, *inter alia* about a development contract. The contract, however, was not concluded and no building permit was granted as the municipality eventually broke off negotiations. In August 1974, the complainant brought an action for damages against the municipality for breaking off negotiations for irrelevant reasons.

The action, which had been unsuccessful before the first two courts to hear the matter, was referred to the Higher Regional Court by the Federal Court of Justice in 1980 following an appeal lodged by the complainant. The complainant again lost in the proceedings before the Higher Regional Court. This judgement was reversed by the Federal Court of Justice in 1983 and again referred to the Higher Regional Court. In July 1984 the Higher Regional Court held on the merits that the defendant municipality was liable for damages. This judgement has been *res judicata* since 1985. In July 1986, a final judgement was issued awarding the plaintiff damages amounting to approximately DM 5 million. In June 1989, the judgement regarding damages was partially reversed, on appeals lodged by both the defendant and the plaintiff with the Federal Court of Justice, and was again referred to the Higher Regional Court. The Higher Regional Court, in its second hearing of the damages issue, took extensive evidence, *inter alia* concerning the extent of the damages. The Higher Regional Court asked for several opinions from judicially appointed independent experts, not all of which had been delivered as of the filing of the complaint before the Federal Constitutional Court. At the end of 1999, the composition of the responsible panel of the Higher Regional Court changed; no judgement had been issued at the time of the present decision.

In his constitutional complaint, the complainant challenged the allegedly excessive duration of the proceedings. He argued that his constitutional right to effective legal protection had been violated. The

complainant claimed that he had been negatively affected in all his business activities, to the point of endangering his economic existence, by the enormity of the damages connected with the case and the resulting financial burden for which he was unable to obtain any compensation on account of the excessive length of proceedings.

The First Chamber of the First Panel of the Federal Constitutional Court *(Bundesverfassungsgericht)* concurred in the complainant's opinion and held that the Higher Regional Court of the Saarland failed to make, in a reasonable period of time, a decision on the amount of the claim for damages, the necessity for which had been determined on the merits.

The grounds for the decision included the following:

Article 2.1 of the Basic Law, in conjunction with the principle of the rule of law, grants effective legal protection in civil law disputes.

Certainly no general rule can establish when a case is disproportionately long. When assessing the issue from the constitutional point of view, all circumstances of the individual case must be taken into consideration, in particular the importance of the matter to the parties, the degree of complexity of the facts of the matter, the parties' behaviour as well as activities of third parties which cannot be influenced by the court, e.g. judicially appointed independent experts. However, with the increasing length of the proceedings as a whole, or with the increasing length of the proceedings before a specific court, the duty of the court to make sustained efforts to speed up and terminate the proceedings intensifies. This obligation on the court is connected with the right to have recourse to a court.

In this case, 26 years have passed since the action was brought, and 11 years since the last referral by the Federal Court of Justice. In this period of time, no decision has been made as regards the amount of the damages to which the complainant is entitled. This definitely exceeds the limits of what is tolerable from the point of view of effective legal protection. Certainly this case involves considerable legal and factual difficulties. The records of the case do not show that the proceedings have been delayed simply due to inaction. Neither do they show, however, that the court has made special efforts to speed up the proceedings. In the present case, the duty to make sustained efforts to speed up and terminate the proceedings is increased by the fact that the legal action affects the economic existence of the complainant. In view of the extraordinarily long duration of the proceedings, the Higher Regional Court, in this final stage of the case, should not have confined itself to treating the proceedings as a usual, albeit complicated, legal action. Rather, the Higher Regional Court should have made use of all possibilities at its disposal to speed up the proceedings. If necessary, the court was required to try to find relief measures within the court.

It is not the responsibility of the Federal Constitutional Court to dictate to the courts specific measures for accelerating proceedings. The decision about the measures to be taken is incumbent on the courts presiding over the respective case. Such measures cannot be made in abstract terms but must be tailored for the specific case, taking into consideration the reasons for the long duration of the proceedings. Even if the court has to rely on the co-operation of judicially appointed independent experts for its ruling, measures expediting the matter seem possible.

Criticism regarding the excessive length of proceedings cannot be based on the claim that a different judicial assessment of the issues of law to be decided could have resulted in a shorter duration of the proceedings. Criticism regarding the excessive length of proceedings may, however, be based on the claims that measures related to case management or the possibility of accessing other resources internal to the court could have led to a shortening of the proceedings. The proper assessment of a case, including the decision regarding which evidentiary methods will be used to establish the facts of the case, rests exclusively in the judgement of the responsible courts.

Languages:

German.

Identification: GER-2000-2-030

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 04.08.2000 / **e)** 1 BvR 1510/99 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.15 **General Principles** – Proportionality.
3.17 **General Principles** – General interest.

5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
5.3.41 **Fundamental Rights** – Civil and political rights – Right to self fulfilment.

Keywords of the alphabetical index:

Transport, public / Contribution, compulsory / Ticket, semester / Student / Student, representation, financial contribution / Membership, compulsory.

Headnotes:

If the possibility for students to use public transport at a reduced rate is financed by compulsorily awarding them a semester ticket, this is not objectionable from the constitutional point of view.

Summary:

The complainant had been registered as a student at the *Gesamthochschule* Duisburg, a university, since 1989. By registering, he had automatically become a member of the *Studierendenschaft*, a body for student representation constituted under public law which compulsorily comprises all students. In the winter semester 1992/93, the *Studierendenschaft* introduced the semester ticket, which, on the basis of a contract between the *Studierendenschaft* and the local public transport company, entitles students to use public transport free of charge with their student card. To finance the semester ticket, the contribution to the *Studierendenschaft* was increased by DM 85 to DM 99.50 per semester.

The complainant regarded the introduction of a semester ticket which is financed by contributions to the *Studierendenschaft* as illegal and therefore instituted proceedings for the reimbursement of the proportion of the contribution to the *Studierendenschaft* which was earmarked for the semester ticket.

As the complainant was unsuccessful in all instances, including before the Federal Administrative Court as the court of last instance, he lodged a constitutional complaint alleging a violation of the principle of equality before the law and a violation of his fundamental right to free development of his personality.

The Second Chamber of the First Panel of the Federal Constitutional Court did not admit the case, giving the following main reasons:

The complainant's personal freedoms were not violated by his compulsory membership in the *Studierendenschaft*. Certainly the University Acts of some German states no longer provide for bodies for student representation which are constituted under public law. However, this does not mean that this institution has become inadmissible from the constitutional point of view.

In so far as the financial burden which the student incurs due to the semester ticket constitutes an encroachment upon his personal freedoms, this encroachment is justified by the public interest pursued by the introduction of the semester ticket.

Moreover, the interpretation of the Federal Administrative Court pursuant to which the financing of the semester ticket by an increase of the students' contributions to the *Studierendenschaft* is consistent with the laws of the state of North Rhine-Westphalia is not objectionable from the constitutional point of view.

Pursuant to the relevant state legislation, the *Studierendenschaft* is also entitled to fulfil tasks which involve the use of services of third parties and which do not equally benefit all students. Applying these criteria to this case, there are no objections against the interpretation that the reduction of fares in public transport serves a social interest directly connected with university studies. In view of the fact that the cost of university studies is to an increasing extent determined by the cost of transport to and from the university, it is not objectionable from the constitutional point of view to regard the reduction of the cost of transport as serving a social interest directly connected with university studies.

In addition, the fact that the introduction of the semester ticket also has an effect on general politics and on the environment does not contradict this interpretation; this is only an unobjectionable secondary effect.

Neither is the financing of the semester ticket a special levy which would be unconstitutional; it rather constitutes a contribution. The consideration consists in the possibility for students to use public transport at considerably reduced fares. In this context it is irrelevant that not all students benefit from this advantage. The question whether the semester ticket is suitable for improving the social situation of students must be answered having regard to the advantages for the entire student population. The financial burden of DM 14 per month is also proportional with regard to the improvement of local environment conditions, the improvement of the difficult situation as regards parking space and the

possibility for students to use the ticket for leisure-time activities.

Languages:

German.

Identification: GER-2000-2-031

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 07.08.2000 / **e)** 1 BvR 254/99 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.15 **General Principles** – Proportionality.
3.17 **General Principles** – General interest.
5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.

Keywords of the alphabetical index:

Occupation or profession, practice / Health profession / Prohibition to practise / Occupational freedom / Optician / Health, risk / Public health / Professional competence / Competition.

Headnotes:

A regulation which restricts the freedom to practise a profession infringes Article 12.1 of the Basic Law if this regulation is not justified by sufficient reasons of public interest.

Summary:

The complainant operates an optician's business in which she, *inter alia*, offers contactless intraocular pressure measurement (tonometry) and a visual field check performed by computerised measurement (perimetry). On account of an application made by the Central Institute for Combating Unfair Competition, the Federal Court of Justice, in the final appeal of the matter, ordered the complainant to refrain from performing and advertising these services in the future.

The Federal Court of Justice based its decision on § 1 of the Health Practitioners' Act pursuant to which anyone who practises an activity which is concerned with the diagnosis of diseases as an occupation or profession or for commercial purposes without being registered as a medical practitioner requires an authorisation to do so. As diagnosing also comprises activities which require specialised medical knowledge and can result in injury to health, the performance of the diagnostic measurements offered by the complainant's optical business constituted, according to the Federal Court of Justice, an illegal practice of medicine under the terms of the Health Practitioners' Act. According to the Federal Court of Justice, it is sufficient in this context that there exists an indirect health risk which may consist of the possibility of the early diagnosis of severe conditions being delayed. Such risks are, according to the Federal Court of Justice, reasonable to assume in the case of tonometry and automatic perimetry.

The requirement that opticians inform their customers that only an examination carried out by an ophthalmologist can reliably rule out disease did not persuade the Federal Court of Justice, even though this requirement had been regarded as a sufficient protection against health risks by other courts.

The Federal Court of Justice proceeded from the assumption that many people who are affected by conditions that are difficult to detect will, relying on the tonometry and automatic perimetry procedures performed by opticians, acquire a false sense of security that they have no eye disease. The risk closely associated with the unjustified confidence that arises from optician-provided tonometry and automatic perimetry is that severe eye diseases in the early stages of development, which would require treatment, will go undiagnosed.

The complainant lodged a constitutional complaint concerning the judgement of the Federal Court of Justice which relied on competition law, and challenged the decision as, *inter alia*, an infringement of Article 12.1 of the Basic Law.

The Second Chamber of the First Panel of the Federal Constitutional Court reversed the decision of the Federal Court of Justice and referred it back.

The grounds for the decision were the following:

The challenged decision infringed the complainant's freedom to practise an occupation or profession. As the Federal Constitutional Court has held on several occasions already, encroachments upon the freedom to practise an occupation or profession are only consistent with Article 12.1 of the Basic Law (1) if

they are justified by sufficient reasons of public interest; (2) if the chosen means are suitable and necessary for achieving the pursued purpose, and (3) if, in an overall weighing, the severity of the encroachment is proportional to the importance of the reasons justifying the encroachment.

If an encroachment upon the freedom to practise an occupation or profession which takes the shape of a prohibition to practise is only justified by invoking indirect risks to public health, the prohibition and the protected good are so far removed from each other that special care is necessary in the weighing of interests. The risks must be reasonably probable and the means chosen to counteract them must show definite prospects of success.

The challenged decision does not meet these requirements. The Federal Court of Justice should have dealt with the following question: to what extent are the purely technical measurement procedures at issue in this case better and more responsibly performed by health practitioners, who are entitled to practise medicine, than they are by opticians who practise a specialised medical auxiliary profession? According to *amicus curiae* opinions regarding this issue, there are no grounds for the assumption that they are.

Moreover, the mere possibility that a necessary consultation with an ophthalmologist may not take place cannot serve as the basis for an indirect health risk that justifies intervention. This risk always exists if a patient is not experiencing any symptoms of disease. The probability of existing or imminent eye diseases being detected after a tonometry or perimetry procedure performed by an optician (i.e. a benefit) should be greater than the risk that, based on the negative results of an examination performed by an optician, the optician's customer who suffers from an eye disease will not consult an ophthalmologist as he or she had originally intended. In light of the *amicus curiae* opinions obtained, it seems rather remote that prohibiting opticians from performing the procedures in question constitutes a contribution to the improvement of public health. At any rate, the general prohibition of these measurements being carried out by opticians as well as the ban on advertising in this context is not required for the protection of the population's health. The protection of the customers' health can be ensured in a far better way, on the one hand, by the examination itself and, on the other hand, by the provision of additional health information before the examination that is required by other bodies.

In view of the lack of awareness of the problem among the general public, which the ophthalmologists' professional association has emphasised as well, an improvement of public health is not to be expected from a prohibition of procedures which are contingent on the provision of additional health information. The danger that serious eye diseases which require treatment at an early stage will go undetected is even higher without the examinations performed by opticians, who, after all, correctly detect a certain proportion of them.

Languages:

German.

Identification: GER-2000-2-032

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 09.08.2000 / **e)** 1 BvR 647/98 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.15 **General Principles** – Proportionality.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
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:

Notary, lawyer / Certificate, made by a notary away from the notary's office / Occupation or profession, practice / Interpretation fundamentally erroneous / Competition.

Headnotes:

Article 12.1 of the Basic Law is infringed if a restriction of the practice of an occupation or profession is based on a fundamentally erroneous interpretation of the meaning and scope of occupational freedom.

Summary:

From 1991 to 1994, the complainant, a lawyer-notary in the German state Lower Saxony, performed a total of 49 certifications as a notary away from his business premises. The president of the Higher Regional Court in Celle used this as an opportunity to impose on the complainant an administrative fine amounting to DM 10 000. The disciplinary order was based on, *inter alia*, the claim that a notary is assigned, by the state's Justice Administration, a specific office location where he or she is to maintain his or her place of business, and that the notary is not entitled to provide, without permission, consultation away from this location or to maintain more than one office. According to the Higher Regional Court, the reasons for this restriction of a notary's professional opportunities are: (1) the notary's independence which is guaranteed by law (§ 1 of the Federal Regulations for Notaries; (2) the notary's duty to provide his or her services in an equitable way; and (3) the government's obligation to ensure that there is a sufficient number of efficiently working notaries' offices at the citizen's disposal everywhere in the country. According to the Higher Regional Court, the prohibition on performing certifications as a notary away from the notary's office is consistent with Article 12.1 of the Basic Law.

As the complainant's appeals against this professional ethics disciplinary measure were unsuccessful, the complainant lodged a constitutional complaint challenging, in particular, an infringement of Article 12.1 of the Basic Law.

The Second Chamber of the First Panel reversed the challenged disciplinary order as well as the subsequent decisions on appeal on the ground that they violated the complainant's fundamental right to occupational freedom.

§§ 10, 10a and 11 of the Federal Regulations for Notaries which regulate the location in which the notary practises his or her profession do not contain an explicit prohibition on performing certifications as a notary away from the notary's office. Nor do other sources provide a sufficient legal basis for such a prohibition. In particular, such a prohibition cannot be inferred from the context of the regulation. Since its decisions on the rules of professional ethics for lawyers issued in 1987, the Federal Constitutional Court has increasingly required that significant restrictions upon occupational freedom be explicitly regulated by the legislator. The legislator is obliged: (1) to assess the threat to a legal interest and the degree to which the legal interest is worthy of protection; and (2) to determine the means by which the legal interest is to be protected. The second sentence of Article 12.1 of the Basic Law requires of a court special restraint when the court seeks to establish, merely from statutory objectives, the choice of the suitable and necessary methods of limiting occupational freedom. Thereby, changes in social circumstances and of the prevailing views in social politics, as well as new conditions in the legal framework, as determined by the legislature, can lead to the withdrawal of a legal interpretation which has long been held to be valid. This was explicitly confirmed by the First Panel of the Federal Constitutional Court in 1998, in its decision concerning partnerships between lawyer-notaries and auditors.

After the Federal Constitutional Court's 1998 decision, the Higher Regional Court could not invoke the regulations mentioned above as the basis for prohibiting, in its jurisdiction, certifications made by notaries outside the notary's office. The room for interpretation in these rules is not to be filled by case law that allows for the restriction of fundamental rights.

As early as in 1991, the notary's certification activity was restricted for the first time to the notary's region of authority when § 10a of the Federal Regulations for Notaries was introduced. A more extensive regulation, restricting the notary's activities to his or her office, was expressly not made in the Regulations.

Such a restriction cannot be justified by invoking the public interest served by the Federal Regulations for Notaries as this measure is neither suitable nor required for protecting the public interest. Modern means of transport and communication ensure that notaries are available even if they occasionally have appointments outside their offices. This is also the reason why a notary is no longer obliged to reside where he or she maintains an office.

Nor can it be inferred that occasional appointments away from the office generally threaten the notary's independence. Preventing competition between the notaries of a region cannot be regarded as a legitimate public interest. In fact, there is competition between notaries within a region as regards their professional services. Competition not only extends to the quality of the counselling itself, but, in the framework established by law, also to the manner in which the service is performed. This can also include a certain flexibility on the part of the notary as long as the appearance of partiality or bias is avoided, the protective purpose of the requirement for a notary's certification is not jeopardised and the notary refrains from any advertising which runs counter to his or her office. Infringements in this respect can be punished individually.

Languages:

German.

Identification: GER-2000-2-033

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 12.09.2000 / **e)** 2 BvR 1466/00 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

1.4.8 **Constitutional Justice** – Procedure – Preparation of the case for trial.
1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Admission, prerequisite / Success, prospect / Abuse, fine imposed / Appeal, instance.

Headnotes:

Prerequisites for imposing a fine for an abuse of the right to lodge a constitutional complaint resulting from the unsubstantiated nature of the constitutional complaint.

Summary:

The complainant, a lawyer, was convicted by the appropriate Regional Court *(Landgericht)* and sentenced to serve a combined one-year prison sentence for fraud, misuse of a title and falsification of documents. From 1990 to 1999, the complainant had borne the title of doctor without the authority to do so. He had done so*, inter alia*, when acting as counsel for the defence in criminal proceedings which involved the very charge of bearing academic degrees without the authority to do so. In this context, he submitted documents to several authorities which had been falsified or which had been issued by agencies which were not authorised to confer doctorates. Moreover, the complainant made the fraudulent representation to three others who were acting in good faith that it was possible for him to procure academic degrees for them. He had received a total of DM 350 000 for this.

In its judgement, the Regional Court reduced the individual punishments for fraud and falsification of documents on account of a delay in the proceedings. It refused, however, to reduce the punishment concerning the offence of “misuse of title”, as the defendant continued committing this offence even during the criminal proceedings instituted against him.

The appeals against the conviction were unsuccessful. In his constitutional complaint the complainant challenged the violation of his fundamental rights, claiming that the Regional Court had violated the principle of equality before the law by not taking the statutes of limitations on prosecution into account.

The Third Chamber of the Second Panel of the Federal Constitutional Court did not admit the constitutional complaint for decision because it found that the constitutional complaint was not sufficiently substantiated.

The judges of the Federal Constitutional Court considered that the complainant did not sufficiently justify why the Basic Law required a reduction of punishment on account of a delay in the proceedings if the pending trial had not prevented the complainant from committing the offence on a permanent basis.

Moreover, a fine of DM 4 000 was imposed on the complainant.

In general, a constitutional complaint is regarded as an abuse of the right to file a constitutional complaint if it is patently inadmissible or unfounded and if any reasonable person would recognise that it has no prospects of success whatsoever. The Federal Constitutional Court need not tolerate hindrances caused by unsubstantiated constitutional complaints when fulfilling its mission to decide fundamental constitutional questions which are of importance for the life of the state and for the general public and, where necessary, to enforce the fundamental rights of the individual.

Applying these criteria, the Chamber held that it was appropriate to impose a fee pursuant to § 34.2 of the Federal Constitutional Court Act for abusing the right to file a constitutional complaint, as the complainant had used the Federal Constitutional Court merely as another appellate instance without raising issues of constitutional relevance.

Languages:

German.

Greece
Council of State

Summaries of important decisions of the reference period 1 May 2000 – 31 August 2000 will be published in the next edition, *Bulletin* 2000/3.

Hungary
Constitutional Court

Statistical data
1 May 2000 – 31 August 2000

- Decisions by the plenary Court published in the Official Gazette: 8
- Decisions by chambers published in the Official Gazette: 7
- Number of other decisions by the plenary Court: 7
- Number of other decisions by chambers: 4
- Number of other (procedural) orders: 16
- Total number of decisions: 42

Important decisions

Identification: HUN-2000-2-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 05.12.1999 / **e)** 13/2000 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 46/2000 / **h)**.

Keywords of the systematic thesaurus:

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.
4.2 **Institutions** – State Symbols.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

National symbol, denigration / Human dignity, as community right.

Headnotes:

It is not against the free speech clause of the Constitution to punish a person who, in front of a large public gathering, uses an offensive or denigrating expression with reference to the Hungarian anthem, flag or coat of arms or commits other similar acts. However, criticising the national symbols, expressing scientific views relating to their history, their value or their significance, their artistic illustration or representation and suggestions on changing these symbols fall within the scope of the free expression clause of the Constitution.

Summary:

The Constitutional Court based its argument upon Articles 75 and 76 of the Constitution. Under these provisions, the national symbols are constitutional values and therefore subjects of constitutional protection. According to the Court, the national symbols have two meanings. First, they are the symbols of the sovereignty of the Hungarian State. Second, these symbols can be used to express one's feelings on belonging to the Hungarian State and community. Therefore, many people would be outraged, shocked and deeply offended by the destruction of symbols which they hold in great respect. In addition, because of the last decade of history in Hungary, as a result of which the importance of the national symbols increased, it is justified to protect these symbols even in the Criminal Code. On the basis of the above, the Court found the challenged criminal provision justified and necessary. As far as the proportionality of the provision protecting the national symbols is concerned, in the Constitutional Court's view, the impact on and consequences for the society of the behaviour prohibited by the challenged provision is so grave that other forms of responsibility, such as the application of the instruments of civil law liability, would be inadequate for dealing with the perpetrators of such behaviour. In addition, the sanctions applied by the criminal provision are the least serious sanctions.

Supplementary information:

Four judges attached concurring opinions to the decision. Justice Erdei held that conviction for using an offensive or denigrating expression against the Hungarian anthem, flag or coat of arms or committing other similar acts was not inconsistent with the free expression clause of the Constitution, for two reasons. First, as the Court emphasised, the freedom of expression in this case met constitutional standards. Second, the legislator restricted free expression in the interest of the community's dignity, in this case that of the Hungarian nation. According to Justice Erdei, the Court should have based its decision partly on the community's right to human dignity.

Justice Harmathy emphasised that the Court should have taken into account those decisions of the European Court of Human Rights which recognised

one's religious faith (others' rights and interests) as a legitimate aim to limit free expression. According to him, the feeling of belonging to a nation is similar to the feeling of belonging to a religion.

Justice Kukorelli noted in his concurring opinion that because the challenged provision of the Criminal Code was too vague to meet the standard set by the Constitutional Court in its earlier decisions, the Court in the instant case should have reduced the excessive broadness of the examined provision by assessing which acts were protected by the constitutional provision of freedom of expression and which were not.

Last, but not least Chief Justice Németh emphasised that the fact that the Constitution included provisions dealing with the national symbols had nothing to do with the constitutionality of the criminal provision in question. According to him, the provision was not contrary to the Constitution, because, as the European Court of Human Rights emphasised in its recently published Rekvényi case, the past decade of history in Hungary justified such a restriction.

Languages:

Hungarian.

Identification: HUN-2000-2-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 05.12.1999 / **e)** 14/2000 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 46/2000 / **h)**.

Keywords of the systematic thesaurus:

2.2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – Hierarchy attributed to rights and freedoms.
3.3 **General Principles** – Democracy.
3.15 **General Principles** – Proportionality.
3.16 **General Principles** – Weighing of interests.
5.1.1 **Fundamental Rights** – General questions – Entitlement to rights.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of opinion.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Symbol, communist / Symbol, nazi / Public order / Human dignity, as community right / Constitution, values.

Headnotes:

The conviction of a person for using, distributing and displaying symbols of the communist and nazi regimes: red square, SS-symbol, swastika, arrow-cross, hammer and sickle in front of a large public gathering is not inconsistent with Article 61 of the Constitution, according to which everyone has the right to freedom of expression.

Summary:

In the petitioners' view, the provision of the Criminal Code under which it is prohibited to use, distribute or display to the public symbols of the communist and nazi regimes violates Article 61 of the Constitution, which guarantees everyone the right to freedom of expression.

The Court, however, did not share the opinion of the petitioners. It reasoned that because it was only ten years since Hungary had begun its transition to democracy the existence of such a provision in the Criminal Code was justified. The other reason why the Court upheld the provision was that in the view of the majority of the Court, in order to protect the dignity of the communities and the public peace it was necessary to prohibit the distribution and dissemination of symbols of the communist as well as the nazi regime.

Maintaining the public order in itself would not be enough reason to restrict one of the most important fundamental rights of the individual; however, when an act breaches the public peace by infringing the dignity of a community determined by democratic values, the legislator has the right to protect the community and through this the public order by the least restrictive available measure. In this case, the Court found, there was no other means available to protect the dignity of the community and to maintain the public order. In addition, the Court pointed out that the challenged criminal provision did not punish those who use, distribute or display the symbols

aiming at educating or informing the public about historical events or in order to illustrate them as an artistic expression.

The Constitution is not a document lacking values. It is based on democratic values and the free expression clause of the Constitution does not protect speech inconsistent with these values. The symbols in question were symbols of political dictatorships and the core idea which could be expressed by wearing these symbols is contrary to Article 2.3 of the Constitution, under which no activity of any organisation of society, state organ, or citizen may be directed at the acquisition or exercise by force of public authority, nor at its exclusive possession. Everyone has the right and obligation to resist such activities in a lawful manner.

Supplementary information:

Justice Holló attached a concurring opinion to the judgment, in which he emphasised that the main reason for criminalising certain uses of the symbols of the communist and nazi regimes was to protect the values enshrined by Articles 2.1 and 3 of the Constitution (democracy and the rule of law). In his opinion, it is within the scope of the free expression clause of the Constitution to use these symbols as a trademark, or to wear them in a coat. The Court, therefore, should have narrowed the scope of the challenged criminal provision in order to harmonise it with the right to freedom of expression.

Based upon Constitutional Court Decision no. 30/1992, in which the Court held that the right of expression has a special place among the constitutional fundamental rights, in effect amounting to the "mother right" of the so-called fundamental rights of communication, Justice Kukorelli argued in his dissenting opinion that the challenged provision restricted the freedom of expression guaranteed in Article 61.1 of the Constitution to an unnecessary and disproportionate degree and was therefore unconstitutional.

According to Justice Kukorelli, the disputed provision of the Criminal Code does not meet the requirements imposed on restrictions of rights. As the Constitutional Court declared in its previous decision, the laws restricting the right to freedom of expression must be strictly construed. The laws restricting this freedom are to be assigned greater weight if they directly serve the realisation or protection of another individual fundamental right, a lesser weight if they protect such rights only indirectly through the mediation of an institution, and the least weight if they merely serve some abstract value as an end in itself (public peace, for instance). In the instant case, the challenged criminal provision limits this fundamental right in the interest of maintaining the public peace. Using, distributing and displaying the symbols of the communist and nazi regime does not violate anyone's right to human dignity. It is, in itself, unable to result in this infringement. Moreover, the right to human dignity is an individual right, and not the right of an unidentifiable group of people. The subject of the right to human dignity is not a group, not a community, but the individual. The fact that using these symbols could very well hurt the feelings of those who survived the communist and the nazi regimes, does not mean that the right to human dignity of these people is at stake. No one has the right to force the state to restrict a kind of speech because it hurts his or her feelings.

The Court in its Decision no. 30/1992 declared that the right to the free expression protects opinions irrespective of the value or veracity of their content. Therefore when someone expresses that he or she agrees with the view represented by the dictatorships of the century, this could not be punished constitutionally. That does not mean that the state could not differentiate between democratic and anti-democratic movements; the state can take steps against the latter without violating the right to freedom of expression.

Last, but not least, in Justice Kukorelli's view the criminal sanctions applied by the challenged provision could not be justified by the unique historical circumstances of Hungary, either. On the contrary, the past of this country would justify greater freedom of expression in order that the public opinion will become more and more tolerant.

Languages:

Hungarian.

Identification: HUN-2000-2-003

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 08.05.2000 / **e)** 1270/B/1997 / **f)** / **g)** *Alkotmánybíróság Határozatai* (Official Digest), 5/2000 / **h)**.

Keywords of the systematic thesaurus:

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.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Advertising, ban / Speech, commercial, freedom.

Headnotes:

Although commercial speech, like non-commercial speech, is protected by the Constitution's freedom of expression clause, in the interest of individual's right to human dignity, privacy and the protection of personal data commercial speech could be subject of state regulation. In the case of advertisements, the state has a broader power to regulate misleading commercial speech in order to protect consumers from serious harm that may be caused by a false advertisement.

Summary:

The petitioners requested the constitutional review of some articles of Act LVIII of 1997 on commercial advertising. In their opinion, Article 4.a of the Commercial Advertising Act, which prohibits advertisements infringing personal rights and the right to protection of personal data restricted the right to freedom of expression in a disproportionate way.

The Court, on the basis of its previous free speech decisions and the related judgments of the European Court of Human Rights (see cross-references) held that although commercial advertising is a constitutionally protected form of speech, taking into account the differences that exist between commercial and non-commercial messages, commercial speech can be subject to greater state regulation than non-commercial speech. Since Article 4.a restricted the right to freedom of expression in the interest of rights closely related to the right to human dignity, and, in addition, the restriction was necessary to avoid violation of personal rights and was proportionate to the aim to be achieved, the Court upheld the provision in question.

In the petitioners' view, Article 15.3 of the Commercial Advertising Act, which makes it possible to settle legal disputes arising in relation to commercial advertising outside of the judicial system, violates Article 70/K of the Constitution, under which claims arising from a violation of fundamental rights, as well as objections to the decisions of public authorities regarding the fulfilment of duties, shall be enforceable in a court of law.

The Court, however, held that the state has a duty emerging from Article 70/K of the Constitution to establish institutions whose task it is to impose penalties for the violation of the consumers' rights. It is up to the legislator to establish a separate forum to protect consumers' rights effectively; however, if the decision of such a forum is enforceable, the legislator should ensure that an opportunity exists for review by the courts of the legality of these decisions.

Supplementary information:

Justice Kukorelli, who delivered the opinion of the Court, attached a concurring opinion to the decision. In this opinion he analysed the content of consumers' rights and the duty of the state to protect consumers from serious harm that could be caused by a false and misleading advertisement. The restriction of freedom of expression in this case is inevitable in order to ensure the constitutional rights of consumers, which are based not only on Article 9.2 of the Constitution, under which the Republic of Hungary recognises and supports the right to enterprise and the freedom of economic competition, but also on the constitutional right to contractual freedom.

Cross-references:

Barthold v. Germany, 31.01.1986, Series A no. 98; *Markt Intern v. Germany*, 20.11.1989, Series A no. 165; *Jacobowski v. Germany*, 23.06.1994, Series A no. 291-A, *Bulletin* 1994/2 [ECH-1994-2-009]; *Casado Coca v. Spain*, 24.02.1994, Series A no. 285-A, *Bulletin* 1994/1 [ECH-1994-1-005]; *X and Church of Scientology v. Sweden*, decision of 05.05.1979 on admissibility, application no. 7805/77.

Languages:

Hungarian.

Identification: HUN-2000-2-004

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 06.06.2000 / **e)** 18/2000 / **f)** / **g)** *Alkotmánybíróság Határozatai* (Official Digest), 6/2000 / **h)**.

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
3.16 **General Principles** – Weighing of interests.
3.21 **General Principles** – Prohibition of arbitrariness.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.1.4 **Fundamental Rights** – General questions – Emergency situations.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Information, false, freedom of expression / Public order / Public peace / Society, openness / Society, tolerant.

Headnotes:

It is against the free speech clause to punish a person who, in front of a large public gathering, asserts or distributes untrue facts or true facts in a way that may threaten to disturb the public order, since imposing penalties for such behaviour restricts freedom of expression in an unnecessary and disproportionate way.

Summary:

A judge of a district court initiated proceedings before the Constitutional Court for a preliminary ruling in a pending case on the basis that she considered one of the applicable provisions of the Criminal Code to be unconstitutional.

The petition asserted that Article 270.1 of the Criminal Code, according to which it was a misdemeanour to assert or to distribute untrue information or true facts in a way that may threaten to disturb the public order, violated Article 61 of the Constitution. Moreover, because the wording of the provision in question was too vague, there was a danger of its being interpreted it in a subjective way, contrary to the principle of prohibition of arbitrariness.

According to the Court, the behaviour subject to criminal penalties – the assertion or distribution of untrue information or true facts in a certain way – falls within the scope of the freedom expression clause. The value of the freedom of expression would be very low if it did not protect a person who distributed false information. The right to free expression protects opinions irrespective of the value or veracity of their contents.

Since the aim of the challenged criminal provision was to protect the public peace, the Court had to examine whether the mere possibility of the disruption of public peace justified the restriction of the right to freedom of expression. The Court cited its previous Decision no. 30/1992 of 26 May 1992, in which the Court had held that “public peace” itself is not unrelated to the conditions surrounding the exercise of the freedom of expression. Where one may encounter many different opinions, public opinion becomes tolerant, just as in a closed society an unusual voice may instigate much greater disruption of the public peace. In addition, unnecessary and disproportionate restriction of the freedom of expression reduces the openness of a society. On the basis of this, the Court in the instant case held that the legal definition of the misdemeanour amounted to an abstract protection of the public order and peace as an end in itself. A misdemeanour would be committed even if under the given circumstances the assertion of false information did not result in even the threat of violating an individual right. But such an abstract threat to public peace was not sufficient justification to permit, in accordance with the Constitution, the use of criminal law sanctions to restrict the right to freedom of expression, a right whose exercise is indispensable for the functioning of a democratic state under the rule of law.

As far as Article 270.2 of the Criminal Code was concerned, the Court held that the provision had to be examined in the light of Article 8.4 of the Constitution. According to Article 270.2 of the Criminal Code, a person who acted as described by Article 270.1 of the Criminal Code in an emergency situation or during a state of war would commit a criminal offence. Under Article 8.4 of the Constitution, during a state of national crisis, state of emergency or state of danger, the exercise of fundamental rights may be suspended or restricted, with the exception of the fundamental rights enshrined in Articles 54, 55, 56, 57.2, 57.3, 57.4, 60, 66, 67, 68, 69 and 70/E of the Constitution. That means that Article 8.4 allows the state to suspend or restrict the fundamental right to freedom of expression ensured by Article 61 of the

Constitution in an emergency situation. But because subsection 2 of Article 270 was not a free-standing provision, the Court had to annul both subsections of Article 270 of the Criminal Code.

In addition, the Court held that Article 270.1 of the Criminal Code did not meet the standard of legal certainty as applied by the Court in its previous decisions, since when applying the challenged criminal provision an ordinary court judge had to take into account several commentaries and cases that were not legally binding, which could very well may lead to an arbitrary interpretation of the statute.

Supplementary information:

One judge attached a dissenting opinion to the judgment, in which he argued that the Court should have had to uphold the challenged criminal provision, since freedom of expression did not protect the dissemination of false information. It is contrary to the desired peace of society if everyone can say deliberately or publish false information.

Languages:

Hungarian.

Italy
Constitutional Court

Important decisions

Identification: ITA-2000-2-003

a) Italy / **b)** Constitutional Court / **c)** / **d)** 08.06.2000 / **e)** 198/2000 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 26 of 21.06.2000 / **h)** CODICES (Italian).

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.
2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.3.13.9 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to be informed about the decision.
5.3.13.20 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Languages.

Keywords of the alphabetical index:

Foreigner, deportation / Immigration, regulation, restrictive interpretation.

Headnotes:

Unrestricted exercise of the right of defence provided for in Article 24 of the Constitution and also guaranteed both by Article 13 of the International Covenant on Civil and Political Rights and by Article 1 Protocol 7 ECHR, treaties to which Italy is a Party, must also be afforded to a foreigner, meaning a stateless person or citizen of a non-member state of the European Union, regardless of whether he is lawfully present on Italian territory.

Recognition of this right implies that any measure by the public administrative authorities seeking to influence the foreigner's situation must be brought to his knowledge in tangible form. It follows that a deportation order made against the foreigner by the Prefect must also be written in the addressee's language or, where that is not possible, in one of the languages which, being the most widespread, may be regarded as the most likely to be understood by the addressee. The legislation complies with this principle by providing for the deportation order to be notified to the person concerned at the same time as an indication of the appeals procedure and a translation into a language that he or she understands or, where that is not possible, in French, English or Spanish.

Summary:

The Court rejected as unfounded the question as to the compliance with the Constitution of one clause of the single text of the provisions governing immigration in relation to citizens of states which are not members of the European Union and stateless persons, which stipulated a time-limit of 5 days for appealing against a deportation order. The Court, rejecting the restrictive interpretation proposed by the judge who raised the question, ruled that the impugned provision did permit a late appeal (ie one lodged after the 5-day time-limit) where the subject of the deportation order showed that the absence of a translation of the order had made it impossible for him or her to lodge an appeal within the prescribed time-limit. So interpreted, the provision did not infringe the right of defence which was provided for in Article 24 of the Constitution and was one of the fundamental individual rights protected "by domestic law, international conventions and generally recognised principles of international law" which Article 2 of the single text guaranteed to foreigners "however they came to be present either at the frontier or on Italian territory".

Cross-references:

See Judgment no. 341 of 1999 (*Bulletin* 1999/2 [ITA-1999-2-008]) on defence safeguards in criminal trials.

Supplementary information:

Domestic law appears to afford foreigners greater protection than is offered by the international instruments mentioned in the headnotes, while the International Covenant on Civil and Political Rights and Protocol 7 ECHR protect foreigners lawfully present on the state's territory, the single text of the provisions governing immigration protects foreigners however they came to be present at the frontier or on Italian territory.

Languages:

Italian.

Identification: ITA-2000-2-004

a) Italy / **b)** Constitutional Court / **c)** / **d)** 22.06.2000 / **e)** 250/2000 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 28 of 05.07.2000 / **h)** CODICES (Italian).

Keywords of the systematic thesaurus:

5.2.2.12 **Fundamental Rights** – Equality – Criteria of distinction – Civil status.
5.3.32.1 **Fundamental Rights** – Civil and political rights – Right to family life – Descent.
5.3.32.2 **Fundamental Rights** – Civil and political rights – Right to family life – Succession.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Child, born out of wedlock / Donation, natural child.

Headnotes:

The Civil Code article concerning the revocation of gifts upon the advent of children is unconstitutional insofar as it provides – upon the advent of a natural child – that the gift may be revoked only if the natural child was recognised within two years following the donation.

Summary:

The Court held that the Civil Code provision whereby a gift may be revoked within two years following recognition of a natural child is contrary to Articles 3 and 30.3 of the Constitution. This provision appears to reflect traditional disapproval of illegitimate descent and is incompatible with the principle laid down in Article 30.3 of the Constitution which seeks to afford children born out of wedlock every legal and social protection compatible with the rights of the legitimate family. At the same time, it also breaches Article 3 of the Constitution on the two counts of difference in

treatment and irrationality. On the first count, the unequal treatment between natural children on the one hand and legitimate or adopted children on the other is evident: upon the advent of the latter, revocation is open to the legitimate or adoptive parents without any limitation in time. The irrationality of the limitation is also manifest through its incapability of protecting the recipient: on the one hand, in order to oppose revocation, he or she can prove that the donor knew of the existence of the child recognised subsequently; on the other hand, he can attack recognition for "lack of veracity".

Languages:

Italian.

Identification: ITA-2000-2-005

a) Italy / **b)** Constitutional Court / **c)** / **d)** 14.07.2000 / **e)** 281/2000 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 30 of 19.07.2000 / **h)** CODICES (Italian).

Keywords of the systematic thesaurus:

2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.
2.2.1.6.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Primary Community legislation and domestic non-constitutional legal instruments.
3.16 **General Principles** – Weighing of interests.
4.8 **Institutions** – Federalism and regionalism.
5.4 **Fundamental Rights** – Economic, social and cultural rights.
5.5.1 **Fundamental Rights** – Collective rights – Right to the environment.

Keywords of the alphabetical index:

Waste, disposal, from other regions / Waste, disposal, optimum territorial area / Waste, dangerous.

Headnotes:

Prohibition of the disposal of waste from other regions cannot be applied to waste regarded as dangerous.

Recourse must therefore be had, where the disposal of dangerous waste is concerned, to the criterion of specialised plant, coupled with that of proximity, taking into account the geographical context, so as to reduce the movement of waste to the indispensable minimum.

Summary:

The Court ruled that prohibition of the disposal of dangerous waste from other regions, as legislated for by Piedmont Region, infringes Article 117 of the Constitution, in that it breaches the fundamental principles of state legislation contained in Legislative Decree no. 22 of 1997.

The Court – previously – in a legislative decree of 1997, concerning the disposal of waste from other regions, identified the principle of the need for planning to achieve "self-sufficiency in the disposal of non-dangerous urban waste" in optimal territorial areas generally coinciding with the provinces of the production region.

However, while the self-sufficiency principle is fully applicable to non-dangerous waste, even as regards the prohibition of disposal of waste from other regions, a different criterion must prevail with regard to highly dangerous waste, ie the need for appropriate 'specialised' plants capable of providing a high degree of protection of the environment and public health. The power to define these general criteria and the technical management regulations lies with the state, and not with the regions.

Regarding waste whose disposal is considered dangerous, an optimum territorial area, which the region might – in the abstract – be thought to constitute, cannot readily be determined in advance, firstly because dangerous waste is produced in locations which are not necessarily homogeneous and in any case cannot readily be foreseen; secondly, the provision of specialised plants for their disposal is particularly onerous, having regard in particular to the quantities involved.

This interpretation of regional waste disposal provisions – whether concerning non-dangerous urban waste or dangerous waste – seems to accord with the principles that may be deduced from Community regulations as interpreted by the Court of Justice of the Communities. Community regulations

give priority to the protection of natural resources and of health. This explains the special protection also provided for dangerous waste by Community regulations which, while authorising states to introduce measures for the total or partial prohibition of the dispatch of waste for disposal, make an exception for dangerous waste produced in the dispatching country in such limited quantities that the provision of new specialised disposal plant in that state would be uneconomical.

Cross-references:

Concerning identification in Legislative Decree no. 22 of 1997 of the principle of the need for planning to achieve "self-sufficiency in the disposal of non-dangerous urban waste" in optimal territorial areas generally coinciding with the provinces of the production region, the Court refers to its previous Decision no. 196 of 1998.

The Court also refers to a similar case by citing the judgment of 9 July 1992 of the Court of Justice of the European Communities in case C-2/90, in which, interpreting Directive 84/631, it found that that the prohibition by the Walloon Region of Belgium of the disposal of dangerous waste from other regions was incompatible with the Community law then in force.

In the judgment in question, an EEC regulation and several Directives are also cited in support of the decision adopted.

Languages:

Italian.

Identification: ITA-2000-2-006

a) Italy / **b)** Constitutional Court / **c)** / **d)** 17.07.2000 / **e)** 293/2000 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), no. 31 of 26.07.2000 / **h)** CODICES (Italian).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Weighing of interests.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
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.

Keywords of the alphabetical index:

Morality, common sense / Images or writings, shocking or frightening.

Headnotes:

Article 21.6 of the Constitution prohibiting immoral publications leaves it for a law to establish suitable machinery and instruments for the prevention and punishment of breaches of the constitutional rule.

Human dignity is a constitutional value which informs positive law and must accordingly influence the interpretation of that part of the impugned provision which refers to the common sense of morality.

Summary:

In the judgment in question, the Court rejected as unfounded the question as to the constitutionality of Article 15 of the Law on the Press (no. 47) of 8 February 1948, referring *inter alia* to the alleged violation of freedom of expression, provided for in Article 21 of the Constitution.

Article 15 of the 1948 Law on the Press, extended in 1990 to the public and private radio and television system, does not seek to go further than the literal meaning of the words when prohibiting writings which may "offend the common sense of morality", ie not only what is common to different value systems of the day, but also the many ethical attitudes which co-exist in contemporary society; this minimum content is no other than respect for the person, a value which underlies Article 2 of the Constitution.

Application of the law is set in motion only when the community is made negatively aware of, and is shocked by, publications containing writings and images with details that shock and frighten, offending against the dignity of human beings in general and are felt to do so by the entire community.

The trial during which this question was raised by the Court of Cassation arose from the publication by a weekly of photographs of a corpse (the body of a female member of the Roman aristocracy found in a Rome residential park). Following this publication,

criminal proceedings were taken against three persons for the publication of shocking or frightening photographs of a nature to offend the common sense of morality.

This offence is provided for in Article 15 of the Law on the Press, the question as to whose constitutionality was declared unfounded by the Court.

Languages:

Italian.

Latvia
Constitutional Court

Statistical data
1 April 2000 – 31 August 2000

Number of judgments: 3

Important decisions

Identification: LAT-2000-2-002

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 10.05.2000 / **e)** 2000-01-04 / **f)** On the Conformity of the Decrees of the Cabinet of Ministers on Reorganisation of the Latvian University and the Latvian Medical Academy and on Liquidation of the Riga Civil Aviation University with the Higher Education Law and the Law on the Structure of the Cabinet of Ministers / **g)** *Latvijas Vestnesis* (Official Gazette), 169, 11.05.2000 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

4.6.2 **Institutions** – Executive bodies – Powers.
4.6.10.1 **Institutions** – Executive bodies – Sectoral decentralisation – Universities.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Scientific freedom.

Keywords of the alphabetical index:

University, autonomy / University, restructuring.

Headnotes:

The autonomy of universities is not absolute but restricted by the rights of other state institutions and also by the right of the Cabinet of Ministers to make a decision on reorganisation and liquidation of a state university.

Summary:

The case was initiated:

1. by 24 members of parliament who questioned the conformity of the Decree of the Cabinet of Ministers on Reorganisation of the Latvian University and the Latvian Medical Academy with the Higher Education Law and the Law on the Structure of the Cabinet of Ministers;

2. by 21 members of parliament who questioned the conformity of the Decree of the Cabinet of Ministers on Liquidation of the Riga Civil Aviation University with the same laws.

The Cabinet of Ministers in the first Decree had established that the Medical Academy was to be joined to the Latvian University; in the second it had established that the Civil Aviation University was to be liquidated.

The applications include the statement that the autonomy of a university is expressed in its right to determine independently its own organisational and administrative structure; therefore, in the applicant's view, the Cabinet of Ministers, when issuing the disputed Decrees, had violated the rights of the universities. The applicants expressed the view that the disputed decrees had been passed by violating the procedure laid down in the Higher Education Law, the Law on the Structure of the Cabinet of Ministers and the Rules of Procedure of the Cabinet of Ministers.

The Latvian Medical Academy was subordinated to the Ministry of Welfare, whereas the Latvian University and the Civil Aviation University fell under the auspices of the Ministry of Education and Science. These higher educational institutions were state-funded and mainly received financing from the state budget. The Cabinet of Ministers accomplishes different administrative functions in the sector of education. Thus the Higher Education Law establishes that "the decision on reorganisation or liquidation of a higher education institution after the proposal of the Minister of Education and Science shall be adopted by the Cabinet of Ministers".

The state has to respect the autonomy of universities and take into account the self-governance principle of universities, but the autonomy of universities is not absolute and unlimited. The main objective of this autonomy is to ensure academic freedom at universities. The right of a university to determine its own organisational and administrative structure as well as the status of a self-governing institution can be realised to the extent that it is not restricted by the competence of the state institutions. The above rights do not extend to the process of reorganisation and liquidation of a state university; the Cabinet of Ministers and not the university itself is entitled to make a decision on this issue.

Although the Cabinet of Ministers violated the prescribed procedure in issuing the disputed decrees, the violation was not so essential as to cause the Decrees to be declared null and void.

The Constitutional Court ruled that the disputed decrees were in conformity with the Higher Education Law and Article 151 of the Law on the Structure of the Cabinet of Ministers.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2000-2-003

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 27.06.2000 / **e)** 2000-05-05 / **f)** On Conformity of the Decree of the Prime Minister on Initiating a Disciplinary case against the Director of the State Chancellery with the Law on the Structure of the Cabinet of Ministers and the Law on Public Civil Service / **g)** *Latvijas Vestnesis* (Official Gazette), 242/243, 28.06.2000 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

4.6.2 **Institutions** – Executive bodies – Powers.
4.6.4.3 **Institutions** – Executive bodies – Composition – Status of members of executive bodies.
4.6.11.2 **Institutions** – Executive bodies – The civil service – Reasons for exclusion.

Keywords of the alphabetical index:

Civil servant, disciplinary proceedings.

Headnotes:

According to the law only the Cabinet of Ministers may initiate a disciplinary case against the Director of the State Chancellery and to suspend his/her activities during the period in which the disciplinary

case is being reviewed. The Prime Minister has the right to propose to the Cabinet of Ministers the initiation of a disciplinary case against the Director of the Chancellery.

Summary:

The case was initiated by 21 members of parliament, who questioned the conformity of the Decree of the Prime Minister on Initiating a Disciplinary Case against the Director of the State Chancellery with the Law on the Structure of the Cabinet of Ministers and the Law on the Civil Service.

On 15 February 2000 the disputed decree was passed by the Prime Minister. On the same day at the meeting of the Cabinet of Ministers the information expressed by the Prime Minister on initiating a disciplinary case against the Director of the State Chancellery and on the suspension of his activities for the period in which the disciplinary case was being reviewed was taken into consideration by the Cabinet of Ministers. The Cabinet of Ministers adopted a decision in the form of a Protocol Decision of the meeting of the Cabinet of Ministers.

According to the Law on the Civil Service the State Chancellery is a state civil service office. If a civil servant has committed a disciplinary violation, disciplinary sanctions provided for by the Law on the Civil Service and the Regulations on Disciplinary Sanctions may be applied. The head of a state civil service institution has the right to initiate a disciplinary case against a civil servant and suspend him/her from his/her activities.

The duties of the head of a state civil service institution concerning the State Chancellery are performed by the Cabinet of Ministers. For this reason only the Cabinet of Ministers may initiate a disciplinary case against the Director of the State Chancellery and to suspend his activities. The Prime Minister has the right to propose the initiation of a disciplinary case against the Director of the Chancellery and his/her suspension from his/her activities.

The Constitutional Court decided that the Prime Minister's Decree was only a proposal, but the disciplinary case against the Director of the State Chancellery had been initiated and his activities suspended by the government's Decision. The Court declared that the Decision of the government complied with the Law on the Structure of the Cabinet of Ministers and the Law on the Civil Service.

Languages:

Latvian, English (translation by the Court).

Liechtenstein
State Council

Statistical data
1 January 2000 – 30 April 2000

Number of decisions: 21

Statistical data
1 May 2000 – 31 July 2000

Number of decisions: 17

Important decisions

Identification: LIE-2000-2-002

a) Liechtenstein / **b)** State Council / **c)** / **d)** 07.06.2000 / **e)** StGH 1999/57 / **f)** / **g)** / **h)** CODICES (German).

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

Keywords of the alphabetical index:

Impartiality, objective / Bias, question, review.

Headnotes:

In order to assess the independence, and hence the impartiality, of the judiciary, as enshrined in Article 33.2 of the Constitution and Article 6.1 ECHR, it is first of all necessary to examine whether there is genuine impartiality from an objective viewpoint. It is not enough for the judge concerned to have the subjective impression of being biased, although this may be a strong indication of a real lack of objectivity. Conversely, if there are objective grounds for bias, the fact that the judge does not have the subjective impression of being biased is immaterial. The outward appearance of bias is sufficient.

Examination of questions concerning bias should not therefore relate to the subjective impression of the judge concerned, but rather to whether it is impossible to avoid the mere appearance of bias, based on objective grounds. In view of this, stringent criteria must be applied if there have already been grounds for bias on a previous occasion. Consequently, the lapse of a relatively short period of time would generally not appear to justify reviewing whether there are grounds for bias. Broadly speaking, the existence of objective grounds for bias cannot be swept aside in a sufficiently convincing manner to dispel suspicions entirely after a relatively short period of three years.

The fact that a judge knows the applicant and his or her brothers and sisters personally cannot in itself represent a ground for bias; otherwise, the proper administration of justice would be seriously jeopardised, especially in a small country such as Liechtenstein. However, circumstances in which the applicant has sought a legal opinion from the judge on several previous occasions may constitute objective grounds for bias.

Summary:

In a criminal case in which a prisoner's application for release on parole after serving two-thirds of a sentence was rejected, an objection to the judge on grounds of bias was overruled at last-instance level. The State Council *(Staatsgerichtshof)* upheld the constitutional appeal lodged against the decision, finding that the existence of objective grounds for bias had resulted in an infringement of the right to a lawful judge, as enshrined in Article 33.1 of the Constitution and Article 6.1 ECHR.

Languages:

German.

Lithuania
Constitutional Court

Statistical data
1 May 2000 – 31 August 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:

- Procedural safeguards and fair trial: 1
- Freedom of conscience and expression: 1
- Right to compensation for damage caused by the State: 1
- Right to property: 1

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

Important decisions

Identification: LTU-2000-2-005

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 08.05.2000 / **e)** 12/99, 27/99, 29/99, 1/2000, 2/2000 / **f)** On undercover operations involving the simulation of a criminal act / **g)** *Valstybės Žinios* (Official Gazette), 39-1105 of 12.05.2000 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
4.4.4.1.1 **Institutions** – Head of State – Liability or responsibility – Legal liability – Immunities.
4.5.12 **Institutions** – Legislative bodies – Status of members of legislative bodies.
4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
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:

Police, undercover operation / *Agent provocateur*.

Headnotes:

The Preamble to the Constitution, which states that the Lithuanian nation strives for an open, just and harmonious civil society and a state governed by the rule of law, presupposes that every individual and society as a whole must be safe from unlawful infringements. One of the duties of the state and one of its primary tasks is to ensure such safety. Therefore the state is compelled to implement various specific lawful means permitting the curbing of crime.

One of such lawful means is to undertake undercover police operations involving the simulation of a criminal act. This means undertaking authorised acts exhibiting criminal characteristics aimed at protecting the key interests of the state, the public or an individual. This method is a special form of operational activities. The undercover participants in such activities perform actions which formally correspond to the definitions of particular crimes. Using this method allows for more favourable conditions to be created for the detection or investigation of serious or complex crimes. Certain crimes, e. g. cases of corruption, would be extremely difficult to detect without using such methods.

Summary:

The petitioners – the Vilnius Regional Court and the Vilnius City Court of the First District – questioned whether undercover police operations involving the simulation of a criminal act could be carried out at all. The petitioners maintain that the Law on Operational Activities does not define the contents, intensity or mechanism of accomplishing such actions, as well as other issues: all this is left to the person and officers conducting the activities. Therefore, the disputed provisions of the law do not protect the person who is the object of such activities from provocation and active inducement. Furthermore, the petitioners were of the opinion that such methods might only be used with prior authorisation by a court or a judge, but not by the Prosecutor General or the Deputy Prosecutor General designated by him.

The group of Parliament *(Seimas)* members that also petitioned the Court argued that under the meaning of Article 11 of the law undercover police operations involving the simulation of a criminal act may be used against any person. The law therefore restricts the guarantees of personal immunity conferred on certain categories of persons. Under the law, such opera-

tions may be used against the President of the Republic as well as parliament members, whereas the provisions of the Constitution regarding the immunity of these persons guarantee their protection against possible (unlawful) provocation. In the opinion of the petitioner, Article 11 of the law unreasonably narrows the immunity of the President of the Republic and of parliament members.

The Constitutional Court emphasised that such activities may only be carried out with the aim of "connecting oneself" to permanent or continuing crimes. Such criminal deeds continue even without the efforts of participants in undercover police operations. The undercover participants only imitate the actions of preparation of a crime or those of a crime which is being committed. It is not permitted for undercover police operations to incite or provoke the commission of a new crime nor to incite the commission of a criminal deed which was merely prepared and only later terminated by an individual. Thus, under the law the actions performed by police in undercover operations are held to be lawful where the established limits of such actions are not overstepped. Disregard of these limits established in the law, provocation of the commission of a crime or any other abuse by means of such operations makes them unlawful. Thus the Court ruled that this type of action may be used.

The Constitutional Court also noted that the immunity of the President of the Republic is very broad while he or she is in office. Thus, the Constitutional Court concluded that no forms of police operations, including undercover operations involving the simulation of a criminal act, may be used against the President of the Republic. The provisions of the Constitution do not, however, prohibit the enactment of legal regulations providing for undercover and similar police operations to be used against other persons including members of the parliament.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2000-2-006

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 13.06.2000 / **e)** 23/98 / **f)** On education / **g)** *Valstybės Žinios* (Official Gazette), 49-1424 of 16.06.2000 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
3.9 **General Principles** – Rule of law.
5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

Church, autonomy / Church, self-administration / Religious community.

Headnotes:

One of the fundamental freedoms of the individual is enshrined in Article 26.1 of the Constitution: freedom of thought, conscience and religion shall not be restricted. This freedom guarantees an opportunity for people holding various views to live in an open, just and harmonious civil society. Not only is this freedom an inherent value of democracy but it is also an important guarantee that the other constitutional human rights and freedoms will be properly implemented.

Article 43.7 of the Constitution establishes the principle of the secular state in Lithuania. This constitutional provision read in combination with the provision that there are traditional churches and religious organisations in Lithuania means that the tradition of religion is not to be identified with its belonging to the state system: churches and religious organisations do not interfere with the activity of the state, its institutions and that of its officials, nor do they form state policy, while the state does not interfere with the internal affairs of churches and religious organisations; they function freely according to their canons and statutes (Article 43.4 of the Constitution).

The principle of the separation of the state and the church is established in the Constitution. This principle is the basis of the secularity of the state of Lithuania, its institutions and their activities. This principle, along with the freedom of convictions, thought, religion and conscience which is laid down in the Constitution, together with the constitutional

principle of equality of all persons and the other constitutional provisions, lay down the neutrality of the state in matters of opinions and religion.

Summary:

The petitioner – a group of members of the Parliament *(Seimas)* – requested the Court to investigate whether some provisions of the Law on Education were in conformity with the Constitution.

The Court emphasised that Article 40.1 of the Constitution provides that state and local government teaching and education establishments shall be secular. This constitutional provision presupposes a requirement that these establishments be tolerant, open and accessible to people of all religions as well as those members of society who are non-believers. The term "secular" employed in Article 40 of the Constitution means that the Constitution establishes a presumption that teaching in state and local government establishments of teaching and education should be secular in content.

The Court found the following provisions to be in conflict with the Constitution:

Article 10.4 of the Law on Education, to the extent that in state or local government educational establishments classes or groups may be co-founded with traditional religious associations recognised by the state, as well as the provision of Article 10.4 that states: "coordinated with traditional religious associations recognised by the state"; the provision of Article 32.2.1 of the Law on Education, providing that in order to appoint and dismiss heads of state and local government educational establishments a recommendation of the traditional religious association is necessary; and Article 32.2.2 and 32.2.3 of the same law; Articles 32.2 and 34.2 of the Law on Education, to the extent that the right is granted to traditional religious associations recognised by the state to supervise not only how religion is taught in state and local government educational establishments but also all other activities of these establishments.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2000-2-007

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 30.06.2000 / **e)** 30/98-13/99 / **f)** On the Law on Compensation for Damage Inflicted by Unlawful Actions of Interrogatory and Investigatory Bodies, the Prosecutor's Office and Court / **g)** *Valstybės Žinios* (Official Gazette), 54-1587 of 05.07.2000 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Compensation, right / Damage.

Headnotes:

In accordance with the Constitution, the state is obliged to respect human rights and freedoms and to guarantee their protection from any unlawful infringement or restriction by legal, material or organisational means.

State institutions and their officials must protect and defend human rights and freedoms, and, while discharging the functions entrusted to them, they must not violate human rights and freedoms themselves.

One of the main ways of protecting violated rights and freedoms is by providing compensation for damage inflicted by unlawful actions. Article 30.2 of the Constitution lays down the duty of the legislator to pass a law or laws providing for compensation for damages to be paid to a person who has suffered material or moral damage through unlawful actions. The laws must provide for genuine protection of violated human rights and freedoms, and this protection must be coordinated with the protection of the other values enshrined in the Constitution.

Summary:

Article 3.1 of the Law on Compensation for Damage Inflicted by Unlawful Actions of Interrogatory and Investigatory Bodies, the Prosecutor's Office and Courts provides that persons who have been unlawfully temporarily detained, unlawfully detained,

unlawfully convicted, unlawfully arrested or subject to administrative arrest or correctional labour unlawfully shall have the right to compensation for damage where there are bases for it established in Article 4 of this law. Article 4.1.1 of the law provides that persons shall have the right to compensation for damage where material or moral damage is inflicted on them by unlawful actions of state institutions and where there is an effective procedural decision to reverse the decision by which the person has been convicted and criminal punishment has been imposed on him, or the case has been dismissed or the convicted person has been acquitted on the ground that a new or newly discovered circumstance shows conclusively that there has been a miscarriage of justice, unless it is proved that the non-disclosure of the said circumstance in time is wholly or partly attributable to the convicted person.

The petitioner – the Kaunas Regional Court – questioned whether the above-mentioned provisions were in compliance with the Constitution. In the opinion of the petitioner, under Article 4.1.1 of the law, compensation for damages may be awarded to an individual due to his unlawful conviction only in cases where the effective judgment of conviction is reversed. Thus, under the law, in cases where a conviction which has not gone into effect is reversed, the person has no right to claim compensation for damages. The other petitioner – the Court of Appeal – requested that the Court investigate the compliance of Article 3.1 and 4.1 of the law with the Constitution. This Court noted that a person who had not been detained or arrested but who had nonetheless been charged with an offence and tried in court, after which the non-effective conviction against him had been reversed following appeal proceedings and he was then acquitted by a court's decision, would have no right to compensation for damage, as he would not meet a single condition for the appearance of this right, i.e. there must have been an effective judgment of conviction which subsequently ought to have been reversed.

The Constitutional Court emphasised that Article 4.1.1 of the law provides for the right to compensation for damage only with respect to persons regarding whom a conviction comes into effect and is subsequently reversed, and thus the right to compensation for damage is denied to those who also suffer material or moral damage due to being the subject of a conviction that is reversed before it ever comes into effect, i.e. thanks to appeal proceedings. The Court noted that, under the Constitution, the right of a person to compensation for damage may not be dependent on the manner – whether through cassation or appeal proceedings – in which the conviction is reversed.

The right of persons to compensation for damage inflicted on them through the violation of their rights and freedoms may not be differentiated according to other differences in their legal situation. However, under the disputed provisions of the law, persons who suffered material or moral damage due to a miscarriage of justice in the course of adoption of the judgment of conviction are treated differently depending on the type of procedural decision by which the miscarriage of justice was notified and the judgment of conviction was reversed.

The Constitutional Court ruled that the disputed provisions were in conflict with the Constitution and also violated the principle of equality.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2000-2-008

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 05.07.2000 / **e)** 28/98 / **f)** On intellectual property / **g)** *Valstybės Žinios* (Official Gazette), 56-1669 of 12.07.2000 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.17 **General Principles** – General interest.
5.1.2.2 **Fundamental Rights** – General questions – Effects – Horizontal effects.
5.3.37 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Intellectual property / Copyright.

Headnotes:

Article 23 of the Constitution secures the protection of the rights of ownership. Inviolability of property as established in this article obliges other persons not to infringe the rights of the owner, while it obliges the state to safeguard and protect the rights of ownership. Intellectual property enjoys protection under Article 23 of the Constitution as well.

The protection of the rights and interests of authors is also provided for by Article 42.3 of the Constitution, which lays down that the law shall protect and defend the spiritual and material interests of authors which are related to scientific, technical, cultural, and artistic work.

Summary:

Article 214.10 of the Code of Administrative Violations of the Law ("the Code") provides that the illegal reproduction, circulation, public performance or other use by any means for commercial purposes of works of literature, science or art (including computer software and data bases) and/or video recordings (i.e. without permission of the author, the producer of audio and/or video recording, or their successors) as well as their storage for the said purposes shall incur a fine together with seizure of the items illegally produced, reproduced, circulated or otherwise used or stored.

The petitioner – the Vilnius City District Court of the Third District – questioned whether the above provision was in compliance with the Constitution. In the opinion of the petitioner, video recordings, as things, are regular subjects of the right of ownership. The law does not provide for special rules or restrictions on the acquisition or sale of video or audio recordings; therefore they may be freely disposed of as one's property.

The Constitutional Court noted that the illegal reproduction, circulation, public performance or other use by any means for commercial purposes of works of literature, science or art (including computer software and data bases) and/or video recordings (i.e. without permission of the author, the producer of audio and/or video recording, or their successors) as well as their storage for the above purposes infringed the rights of authors (copyright) and those of subjects of related rights. The defence of the author's rights and interests from infringements is in the public interest, so the legislature may provide for civil, administrative or criminal liability for infringements of an author's rights or interests. Article 214.10.1 of the Code lists the actions by which the rights of authors (copyright) and those of subjects of related rights may be infringed. These infringements incur the seizure of the items illegally produced, reproduced, circulated or otherwise used or stored as well as that of the equipment of the illegal reproduction. If the said items were not seized, the person in question would be able to use them in a way that may inflict damage on other persons and society.

Thus the Constitutional Court ruled that Article 214.10.1 of the Code was in compliance with Article 23 of the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Malta
Constitutional Court

Summaries of important decisions of the reference period 1 May 2000 – 31 August 2000 will be published in the next edition, *Bulletin* 2000/3.

Moldova
Constitutional Court

Important decisions

Identification: MDA-2000-2-004

a) Moldova / **b)** Constitutional Court / **c)** Plenary session / **d)** 18.05.2000 / **e)** 22 / **f)** Constitutional review of the Government Decision no. 747 of 03.08.1999 on the introduction of control on the imported goods before their dispatch, or on the regulation of goods' import-export procedure / **g)** *Monitorul Oficial al Republicii Moldova* (Official gazette) / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.6.2 **Institutions** – Executive bodies – Powers.
4.6.3.1 **Institutions** – Executive bodies – Application of laws – Autonomous rule-making powers.
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

Keywords of the alphabetical index:

Good, imported / Custom regulation / Custom, clearance, effectiveness / Incompetence, negative / Interference, litigious / Appreciation, power, excess / Regulation, limited validity.

Headnotes:

Article 126.2 of the Constitution stipulates that the state must ensure the regulation of economic activity, and the administration of public property owned by it, under the law, as well as the protection of national interests involved in economic, financial and currency exchange activities.

Both parliament and government, pursuant to the Supreme Law, are entitled to regulate and promote the external economic activity, according to their legal powers. Thus, the parliament approves the main directions of the external economic activity and the principles of foreign loans and credits use, but the government ensures the protection of national

interests involved in external economic activity, and promotes either a free-trade policy or a protectionist one following the demands of national interest (Article 129 of the Constitution). Article 102.2 of the Constitution lays down that the government issues decisions and orders for law implementation.

Summary:

On 3 August 1999, the government adopted the Decision no. 747 on the introduction of control on the imported goods before their dispatch, pursuing the aim to improve the mechanism of goods' evaluation in custom-houses, statistic accounting and the control on the quality and conformity of imported goods, by means of which the way of implementing and monitoring the control on imported goods before their dispatch, is settled down.

The Court was asked to rule on the constitutionality of the Government Decision no. 747, by which, in the petitioner's opinion, the government submitted a new procedure of implementing and monitoring the control on the imported goods before their dispatch, namely the regulation of an export-import activity, violating the constitutional rules and assigning to itself improper obligations.

The petitioner considers that the decision has not been adopted in the view of implementing of some provisions of a concrete law, as provided for by Article 102.2 of the Constitution. The above-mentioned fact follows neither of the Law no. 1380-XIII of 20 November 1997 on the customs tariff, having been referred in the preamble of the contested decision.

The applicant argues that since the control on the imported goods to the Republic before their dispatch is within the area of external economic activity, the latter should be ascertained by a law, the adoption of which is within the exclusive power of the parliament.

The Court established that according to Article 66.d and Article 129 of the Constitution, the parliament is the body to approve the main directions of foreign and domestic policy of the state, and of its external economic activity. Article 96.1 of the Constitution lays down that the government is endowed to carry out the domestic and foreign policy of the state and exercises the general control over public administration. The normative acts of the government, by which the discharge of its duties are safeguarded, according to the Supreme Law are issued for law's application (Article 102.2 of the Constitution).

It is worth mentioning that the control on the imported goods is foreseen neither by the Republic legislation, no regulated by the Law on the customs tariff, which is referred in the preamble of the contested decision.

The Constitutional Court pointed out that the government while adopting the Decision no. 747 and introducing the control on the goods before their dispatch, in case of the juridical aspect's ignorance, exceeded its powers described by the constitutional rules, and violated the principle of separation and cooperation of powers, as provided for by Article 6 of the Constitution.

According to the constitutional rules, the Decisions of the government cannot include primary judicial norms and cannot also establish general and mandatory norms. They must be subsequent to the laws previously adopted by the parliament.

It is also worth mentioning that the parliament by the Budget Law of 2000, no. 918-XIV of 11 April 2000, in Article 14.7 instituted the control on the imported goods (imported products), but according to Article 61.b of the Constitution, the government has been compelled to work out in term of two months the relevant normative acts and to set up the date of the mentioned in Article 14.7 control, informing in this way foreign business partners.

In spite of all these facts, the Constitutional Court cannot rule on the constitutionality of the contested Decision, on the reason that the Budget Law on 2000 does not set up any legal framework adequate for a static regulation of a whole mechanism of control on the imported goods before their dispatch. Moreover, in the view of application of the above-mentioned law, the government has been assigned the task of working out the relevant normative acts.

Exercising its power of constitutional review, the Court ruled on non-compliance with the Constitution of the Government Decision no. 747 of 3 August 1999 on the introduction of control on the imported goods before their dispatch.

Languages:

Romanian, Russian.

Identification: MDA-2000-2-005

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 08.06.2000 / **e)** 25 / **f)** Constitutional review of Articles 7 and 7^1 of the Civil Code in the wording of Law no. 564-XIV of 29.07.1999 on the amendment of some legislative acts / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

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.
3.16 **General Principles** – Weighing of interests.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2 **Fundamental Rights** – Equality.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of opinion.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.23 **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.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Honour and dignity, defence / Prejudice, moral, removal / Compensation / Information, denial.

Headnotes:

By reformulating provisions on “The defence of honour and dignity” and “Compensation for moral prejudice” of the Civil Code, the legislator abided by the general constitutional principles. There were also observed the rights, freedoms and fundamental duties laid down in Article 1 “Equality”, Article 20 “The free access to justice”, Article 28 “Private and family life”, Article 34.1 and 34.4 “Right of access to information” of the Constitution.

The provisions in question of the Civil Code are in compliance with Articles 12 and 19 of the Universal Declaration of Human Rights and Article 10 ECHR.

Summary:

The ground for file’s examination was considered the application lodged with the Court by the members of parliament which sought the constitutional review of Articles 7 and 7^1 of the Civil Code of the Republic of Moldova, in the wording of Law no. 564-XIV of 29 July 1999 on the amendment of some legislative acts.

On 29 July 1999 the parliament adopted the organic Law no. 564-XIV on the amendment of some legislative acts, introducing a new wording to Article 7 “The defence of honour and dignity” and Article 7^1 “Compensation for moral prejudice” of the Civil Code, endorsed by the Law of the Soviet Republic of Moldova of 26 December 1964.

Article 7 “The defence of honour and dignity” of the Civil Code in the wording of Law no. 564-XIV of 29 July 1999 on the amendment of some legislative acts stipulates:

Any natural and legal person is entitled to request by trial the denial of any kind of information which may harm the honour and dignity, if the person who spread out such information can bring no prove of its corresponding to reality.

In case the information was delivered to the public by one of mass-media means, the ordinary court charges the editorial staff with the obligation to issue in term of 15 days from the date of entrance into force of the court’s decision, a denial of information at the same column, on the same page, the same program or series of programs. In case such kind of information is delivered in a document issued by an institution, the court of law coerces the relevant institution to replace the document in question.

Article 7^1 “Compensation for moral prejudice” of the Civil Code in the same wording stipulates:

The moral prejudice, caused to any person as a follow-up from spreading of some information which do not correspond to the reality and which may harm the honour and dignity of the latter, can be repaired in the plaintiff’s benefit by a legal or natural person who spread out the information.

The amount of compensation is established by the court of law in each of the cases, from 75 to 200 subsistence wages, in case the information was spread out by a legal person, and from 10 to 100 subsistence wages, in case the latter was spread out by a natural person.

The operative issuing of the apologises and denials for the improper information, until the delivering of the court of law decision, constitutes the ground for decreasing of the amount of compensation or exoneration from the responsibility to pay for it.

Article 32 of the Constitution lays down that:

All citizens are guaranteed the freedom of opinion as well as the freedom of publicly expressing their thoughts and opinions by way of word, image or any other means possible.

The freedom of expression may not harm the honour, dignity or the rights of other people to have and express their own opinions or judgements.

The law forbids and prosecutes all actions aimed at denying and slandering the state or the people, as well as the instigation to sedition, war, aggression, ethnic, racial or religious hatred, the incitement to discrimination, territorial separatism, public violence, or other actions threatening constitutional order.

The applicants asserted that the questioned rules of the Civil Code, in spite of their delivering in a new wording, continued to regulate with out-of-date notional-judicial instruments the civil relationships in a state governed by the rule of law, as provided for by Article 1.3 of the Constitution, the justice and political pluralism represent supreme values, which are guaranteed.

While considering Articles 7 and 7^1 of the Civil Code in the wording of Law no. 564-XIV with reference to the constitutional provisions of Articles 1.3, 16, 20, 24.1, 32, 34, 54 and 55 of the Constitution, the Court concluded that the law-making body, by the mentioned articles, did not bring prejudice to the fundamental rights and liberties as guaranteed by the Constitution.

The Court argued that Articles 7 and 7^1 of the Civil Code in the wording of Law no. 564-XIV are in compliance with the constitutional rules which guarantee the most important social values and which lay down that the foremost duty of the state is to respect and protect the human being (Article 16 of the Constitution), thus, safeguarding the right of citizen to obtain effective protection from competent courts of jurisdiction against actions infringing on his/her legitimate rights, freedoms and interests (Article 20 of the Constitution).

The Court disagreed with the petitioner's assertion regarding the provisions of Articles 7 and 7^1 of the Civil Code, by which the application of the freedom of expressing one's thoughts and opinions proclaimed by the Constitution has been prejudiced, on the reason that the contested provisions do not regulate such kind of social relationships with reference to the citizen's right to defence, as guaranteed by Article 26.1 and 26.2 of the Constitution. According to this constitutional article, every citizen has the right to respond independently by appropriate legitimate means to an infringement of his/her rights and freedoms, the clause which was emphasised in Article 7 "The defence of honour and dignity" of the Civil Code.

As a follow-up to the disputed issues, the Court ruled on the constitutionality of Articles 7 and 7^1 of the Civil Code of the Republic in the wording of Law no. 564-XIV of 29 July 1999 on the amendment of some legislative acts.

Languages:

Romanian, Russian.

Identification: MDA-2000-2-006

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 03.08.2000 / **e)** 32 / **f)** Interpretation of the provisions of Article 85 of the Constitution / **g)** *Monitorul Official al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

3.3 **General Principles** – Democracy.
4.5.3.3.1 **Institutions** – Legislative bodies – Composition – Term of office of the legislative body – Duration.
4.5.3.4.2 **Institutions** – Legislative bodies – Composition – Term of office of members – Duration.
4.5.7 **Institutions** – Legislative bodies – Relations with the Head of State.
4.5.12 **Institutions** – Legislative bodies – Status of members of legislative bodies.

Keywords of the alphabetical index:

Parliament, dissolution, conditions.

Headnotes:

Within the period of issuing the President's Decree on the dissolution of parliament and the date of legal meeting of a new parliament, the legislator, namely the members of parliament pursues its activity but, no amendment can be brought to the Constitution, and no organic law can be adopted, changed or abrogated.

The curtailing of the legislature's powers, ascertained for the parliament, should be imposed at the day of expiration of a 4-year term mandate, or at the day of entrance into force of the President's Decree on the dissolution of parliament and lasts until the legal session of a new parliament. The mandate of the member of parliament ceases at the date of legal assembly of the newly elected parliament.

Summary:

A member of parliament lodged an appeal with the Court seeking the interpretation of the provisions of Article 85 of the Constitution.

The petitioner requested the interpretation of Constitution considering two aspects:

Whether the dissolved parliament, pursuant to Article 85 of the Constitution has the right to pursue its activity, while adopting laws, decisions and motions.

Whether the mandate of the member of parliament ceases with the dissolution of the parliament.

Article 60.1 of the Constitution stipulates that parliament is the supreme representative body of the people and the sole legislative authority of the state. The members of parliament are elected for a 4-year term, which is in compliance with general principles of the constitutional democracy, according to which the members of parliament are to be elected at an equal period of time, safeguarding accordingly the exercise of national sovereignty and people's will (Article 63 of the Constitution).

Article 63.1 of the Constitution stipulates that the term of office of a member of parliament is of 4 years, thus, the duties of the members of parliament are to be exhaustively discharged only within this period, or in case the mandate of the member of parliament is extended by organic law, in the event of war or national disaster.

Article 69 of the Constitution provides that powers ascribed to any member of parliament cease with the lawful assembly of the newly-elected parliament, on resignation, mandate suspension, also in cases of incompatibility or death.

Article 85 of the Constitution ascertains the fact of dissolution of parliament by the President of the Republic.

At the examination of the provisions of Article 85 of the Constitution in the view such as requested by the petitioner, the Court held that the case of the parliament's dissolution by the President of the Republic is provided for by the Constitution.

Article 85.1 of the Constitution lays down that the dissolution of parliament can occur, following the consultations of parliamentary groups, in case of an impossibility to form a government, or in case of a deadlock of the adopting procedure of laws within the period of three months. Article 85.2 of the Constitution stipulates that the parliament can be dissolved if the vote of confidence to form a new government within the term of 45 days following the first request has been rejected, and after the disclaim of at least two vested requests.

Pursuing the aim of implementation of Article 61.3 of the Constitution, the term of office of the member of parliament begins with the election of the members of parliament, being in compliance with the provisions of Article 62 of the Supreme Law on the validation of the member of parliament mandate, and ceases after 4 years with the legal rally of a newly elected parliament.

The powers of the members of parliament and their mandates are to be suspended following the date of issue of the President's Decree on the dissolution of parliament, but the powers of the members of parliament, according to Article 63.3 of the Constitution cease at the date of legal meeting of a new parliament.

Languages:

Romanian, Russian.

Netherlands
Supreme Court

There was no relevant constitutional case-law during the reference period 1 May 2000 – 31 August 2000.

Norway
Supreme Court

Important decisions

Identification: NOR-2000-2-002

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 23.06.2000 / **e)** Inr 30B/2000 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2000, 996 / **h)** CODICES (Norwegian).

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.
5.3.13.10 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.
5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.

Keywords of the alphabetical index:

Tax, additional / Tax, evasion, intentional, grossly negligent.

Headnotes:

Article 6.1 ECHR is applicable to the proceedings conducted by the taxation authorities when an additional tax for intentional or grossly negligent tax evasion is imposed.

Summary:

A. was the owner and managing director of a company that marketed and arranged cruises in the Oslo-fjord. In August 1988 he was charged with falsifying accounts under particularly aggravating circumstances and omission of value added tax (VAT), and he was detained until October 1988.

The same autumn the regional taxation authority conducted an audit in the company and A. was notified in June 1989 that his personal assessment would be altered for the years 1985-87 and that a surtax would be imposed on him for intentional or grossly negligent tax evasion.

Additional tax will ordinarily amount to 30% of the tax amount that has been evaded. If the taxpayer has acted intentionally or with gross negligence, the taxation authorities can impose an additional tax of up to 60%.

In January 1991 A. was sentenced to one year and six months imprisonment for taxation and accountancy offences, including personal tax evasion for the years 1985-87.

The local taxation authorities notified him in August 1992 that his assessment for the years 1987 and 1988 would be amended, and that an additional tax would be imposed on him. Not until November 1995 did the Tax Assessment Board make a decision in the amendment case and impose an additional tax of 60% for intentional tax evasion on A. After complaint, the assessment for 1987 was upheld and the income tax for 1988 was lowered, but the additional tax was upheld with the same percentage.

The reason why it took so long before the decision was made was partly due to the fact that the case was wrongly filed for one year and that nothing happened from January 1993 until January 1995.

A. filed a case in February 1997 concerning the validity of the assessments for 1987 and 1988, and in a judgment of 9 June 1998 the District Court ruled in favour of the State. In February 1999 the Court of Appeal confirmed the judgment of the District Court.

A. lodged an appeal with the Supreme Court. The appeal was limited to the additional tax. He argued that Article 6.1 ECHR – which states that a criminal charge shall be decided within a reasonable time – had been violated, because the taxation authorities had spent an unreasonably long time imposing the additional tax. He also pleaded that imposing an additional tax on him for 1987 after he had been convicted of the same violation infringed Article 4.1 Protocol 7 ECHR which prohibits punishing a person for the same offence twice.

The Supreme Court in plenary session unanimously decided that the additional tax for 1987 should be dropped and reduced the additional tax for 1988 to 30%.

The Supreme Court ruled in favour of A. as regards his claim that Article 6.1 ECHR was applicable to the taxation authorities' procedures concerning additional tax for intentional or grossly negligent tax evasion. The Court stated that Article 6.1 ECHR had been violated for both years because the additional tax had not been decided within a reasonable time.

For 1987 the lapse of time started with the notification in June 1989 and for 1988 with the notification in August 1992. The time ran up to the pronouncement of the Supreme Courts' judgment. A procedure of approximately 11 years for the additional tax for 1987 and nearly 8 years for 1988 was unreasonably long.

The Supreme Court also discussed whether the prohibition in Article 4 Protocol 7 ECHR against punishing a person twice for the same offence was infringed when the additional tax was imposed on A. for 1987 after he had been convicted of intentional tax evasion for the same year. The Supreme Court held that this question only arises when an additional tax is imposed after a final conviction, not the opposite.

The Supreme Court did not take a final stance on this question since the additional tax for 1987 in any case had to be dropped as a consequence of the unreasonably long proceedings.

However, the Court pointed out the considerable consequences of the prohibition in Article 4 Protocol 7 ECHR if it was applicable in all cases where a final conviction is followed by administrative sanctions of a penal character.

Languages:

Norwegian.

Poland
Constitutional Tribunal

Statistical data
1 May 2000 – 31 August 2000

I. Constitutional review

Decisions:

- Cases decided on their merits: 20
- Cases discontinued: 0

Types of review:

- *Ex post facto* review: 20
- Preliminary review: 0
- Abstract reviews (Article 22 of the Constitutional Tribunal Act): 8
- Courts referrals ("legal questions"), Article 25 of the Constitutional Tribunal Act: 2

Challenged normative acts:

- Cases concerning the constitutionality of statutes: 19
- Cases on the legality of other normative acts under the Constitution and statutes: 1

Holdings:

- The statutes in question to be wholly or partly unconstitutional (or the acts of lower rank to violate the provisions of superior laws and the Constitution): 9
- Upholding the constitutionality of the provision in question: 11

II. Universally binding interpretation of laws

- Resolutions issued under Article 13 of the Constitutional Tribunal Act: 20
- Motions requesting such interpretation rejected: 0

Important decisions

Identification: POL-2000-2-010

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 28.03.2000 / **e)** K 27/99 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 31.03.2000, item 291; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 2, item 62 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.
3.19 **General Principles** – Reasonableness.
5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.

Keywords of the alphabetical index:

Retirement, age, gender, discrimination.

Headnotes:

Provisions which establish a lower compulsory retirement age for female teachers than male teachers is contrary to the Constitution. The different situation introduced by the provisions shall be treated as sex discrimination.

Summary:

The Tribunal examined the case as a result of a motion introduced by the Ombudsman. The Ombudsman argued that the examined provisions refer to social insurance law. As a result of the reference, the employment relationship with a female teacher terminates five years earlier than the employment relationship with a male teacher. Consequently, the provisions breach the equality and social justice rule.

The Tribunal noted that it is obvious that the laws in force cannot differentiate between the legal situation of men and women, unless the differentiation is based on reasonable, constitutional grounds. If not, such differentiation becomes discrimination and is contrary to the constitutional rule on equality.

The Tribunal emphasised that the Constitution prohibits, *inter alia*, regulations differentiating between the rights of women and men in terms of "employment and promotion". However, such regulations are introduced by the examined provisions.

The Tribunal pointed out that the status of teacher guarantees certainty of employment. As a result of the examined provisions, a female teacher must not only stop performing her job five years earlier, but she must do so in a situation where a male teacher continues his job benefits from the guarantee of certainty of employment.

Cross-references:

Decision of 24.09.1991 (Kw 5/91).
Decision of 16.12.1997 (K 8/97).
Decision of 06.07.1999 (P 8/98).

Languages:

Polish.

Identification: POL-2000-2-011

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 11.04.2000 / **e)** K 15/98 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 3, item 86 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

4.10.7 **Institutions** – Public finances – Taxation.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.34 **Fundamental Rights** – Civil and political rights – Inviolability of communications.
5.3.40 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Taxation, proceedings / Tax authority, rights / Banking secrecy / Information, individual, banks, disclosure.

Headnotes:

The rights of a tax authority's director to demand, in connection with tax proceedings commenced by the authority, disclosure by banks, stockbrokers, investment funds and trust funds of information protected as a banking secret, concerning a party which does not carry out a business activity, and against which criminal or criminal fiscal proceedings have not been commenced are concordant with the constitutional right to privacy, the rule of the inviolability of communications and the right to non-disclosure of information. The same applies to the rights of the same body to directly ask the party concerned for the same information for the purpose of identification of tax obligations.

Summary:

The Tribunal noted that the Constitution imposes on a citizen an obligation to bear public encumbrances and services, including taxes provided for by law. The tax authorities' duty is to enforce realisation of these obligations by citizens. In the Tribunal's opinion, there is no doubt that the rights given to tax authorities under the examined provisions are to ensure the efficiency of tax control carried out by the authorities. Not only the rights and freedoms of citizens but also their constitutional obligations should be taken into account in order to assess the constitutionality of the provisions in question.

The Tribunal emphasised that the purpose of introducing banking secrecy should be taken into account while assessing the constitutionality of the rights given to the tax authorities. The purpose was to ensure the security of funds and people collecting their money and carrying out transactions. This fundamental purpose is not, in the Tribunal's opinion, infringed or threatened by enabling the tax authorities to inquire, in justified situations, into information covered by banking secrecy.

Supplementary information:

Two dissenting opinions were delivered (Jadwiga Skórzewska-Łosiak and Andrzej Mączyński).

Cross-references:

Decision of 25.04.1995 (K 11/99).
Decision of 21.11.1995 (K 12/95), *Bulletin* 1995/3 [POL-1995-3-016].
Decision of 24.04.1996 (W 14/95), *Bulletin* 1996/2 [POL-1996-2-008].

Languages:

Polish.

Identification: POL-2000-2-012

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 17.04.2000 / **e)** SK 28/99 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 3, item 88 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Customs authority, property, confiscation.

Headnotes:

The provisions of the Customs Law, providing for the right of customs authorities to decide on the confiscation of property, are, to the extent that they are in force after a new Customs Code became effective, contrary to the Constitution.

Summary:

The case was examined by the Tribunal as a result of a constitutional claim brought by a natural person. It concerned the possibility of the customs authorities to decide on the confiscation of property.

The examined provisions granted the customs authorities the right to decide on the confiscation of property by way of an administrative decision issued on the basis of the Code of administrative procedure. The provisions introduced an exception to the rule of the exclusive jurisdiction of the courts to decide on the confiscation of property, which is contrary to the Constitution.

The Tribunal noted that the Constitution provides that property can only be confiscated in situations described by law and on the basis of a legally valid court judgement. The Constitution does not provide for any exception to the foregoing rule and does not provide any possibility to introduce such an exception into the law.

In the Tribunal's opinion the purpose of such a resolution was to ensure that any interference by public authorities with the freedoms and property of a citizen would be carried out in a manner consistent with the law. Providing that courts should decide certain matters ensures a just and comprehensive examination of the case, prevents unlawful decisions and protects an entity from illegal and excessive interference.

Cross-references:

Decision of 06.10.1998 (K 36/97), *Bulletin* 1998/3 [POL-1998-3-017].

Languages:

Polish.

Identification: POL-2000-2-013

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 10.05.2000 / **e)** K 21/99 / **f)** / **g)** *Orzecznictwo Trybunału Kostytucyjnego. Zbiór Urzędowy* (Official Digest), 2000, no. 4, item 109 / **h)** CODICES (Polish).

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.
4.6.11 **Institutions** – Executive bodies – The civil service.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.25 **Fundamental Rights** – Civil and political rights – Right of access to administrative documents.
5.4.7 **Fundamental Rights** – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Information, confidential / Secret, state / Verifying procedure.

Headnotes:

Provisions of the Law on the protection of confidential information, which exclude use of the provisions of the Code of administrative procedure and provisions concerning the right to appeal to the Supreme Administrative Court in relation to verifying procedures, are contrary to the constitutional rule on access to courts and the constitutional prohibition on preventing access to court procedures in relation to infringed freedoms and rights. Furthermore, they prevent access to courts in the area of access to a public service and make it impossible to control the legality of verifying procedures.

They are also contrary to Article 13 ECHR because they deprive the verified person of the only effective means to appeal the refusal to issue a security certificate.

Summary:

The Tribunal examined the case as a result of a motion introduced by the Ombudsman. The verifying procedures provided for by the Law on the protection of confidential information end with the issuance of a security certificate or with a refusal to issue such a certificate. A verified person has no right to appeal against the refusal to issue the security certificate. In the Ombudsman's opinion such a regulation breaches the constitutional rule on access to courts and the prohibition on preventing access to court procedures in relation to infringed freedoms and rights.

The Tribunal noted that the main purpose of the examined law is the protection of confidential information constituting a state or official secret. This purpose is achieved through the verifying procedures, *inter alia*, which ascertain whether an individual person gives a guarantee of keeping a secret. The refusal to issue a security certificate excludes, in relation to the verified person, the possibility to disclose confidential information and access to work or performance of a public service.

In the Tribunal's opinion, both the certificate and the refusal to issue the certificate should be treated as an administrative act. Furthermore, the Tribunal emphasised that disputes arising from administrative relationships are covered by the constitutional rule on access to courts. The result of the verifying procedure directly influences one of the constitutionally protected civil rights. It decides whether a particular person is going to be admitted to work or to serve on a certain post. The rights of the verified persons should be treated as constitutional rights and freedoms, to which an absolute prohibition on preventing access to court procedures refers.

Cross-references:

Decision of 14.06.1999 (K 11/98), *Bulletin* 1999/2 [POL-1999-2-021].
Decision of 16.03.1999 (SK 19/98), *Bulletin* 1999/1 [POL-1999-1-007].

Languages:

Polish.

Identification: POL-2000-2-014

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 15.05.2000 / **e)** SK 29/99 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 19.05.2000, item 474; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 4, item 110 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Legality.
5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Scope – Non-litigious administrative procedure.
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:

Land ownership, act, challengeability / Act, unlawful effective vindication of claims / Procedure, extraordinary / Appeal, extraordinary procedure.

Headnotes:

Excluding by law the possibility to challenge acts on the ownership of the land issued in the form of an administrative decision, after a sufficient period has passed within which it was possible to make claims in respect of any breach of rights, is not contrary to the

constitutional right to appeal against decisions and judgements issued in first instance and does not preclude a possibility to vindicate violated rights and freedoms in a court action.

Summary:

The case was examined by the Tribunal as a result of a constitutional claim brought by a natural person. It concerned the possibility under the Law on agricultural properties owned by the State Treasury to exclude the right to challenge acts on the ownership of the land, which resulted in there being no possibility to examine decisions and judgements adopted under the law.

In the Tribunal's opinion, the examined provisions indirectly lead to a situation where it is impossible to control the lawfulness of acts on the ownership of land and to vindicate claims for damage caused by acts issued in breach of the law.

The foregoing does not automatically mean, in the Tribunal's opinion, that in-court proceedings in a meaning defined by the Constitution are closed. The parties had ten years to commence extraordinary procedures to verify the decisions. Consequently, the acts on the ownership of the land could have been annulled or their illegality could have been ascertained. The Tribunal mentioned that this period of time was sufficiently long as to allow an injured party to apply for compensation, not only with the administrative authorities but also with the courts.

The Tribunal referred to its previous decision, in which it held that there is no constitutional rule providing that final administrative decisions can be challenged for an unlimited period of time. The Tribunal also noted that the examined provisions do not breach the right to appeal in administrative proceedings, nor do they prevent a party from appealing against a decision to discontinue proceedings relating to a verification of the act on the ownership of land adopted by an authority in the first instance.

Cross-references:

Decision of 22.02.2000 (SK 13/98), *Bulletin* 2000/1 [POL-2000-1-006].

Languages:

Polish.

Identification: POL-2000-2-015

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 14.06.2000 / **e)** P 3/2000 / **f)** / **g)** *Orzecznictwo Trybunału Kostytucyjnego Zbiór Urzędowy* (Official Digest) / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
3.21 **General Principles** – Prohibition of arbitrariness.
4.6.11.2.1 **Institutions** – Executive bodies – The civil service – Reasons for exclusion – Lustration.
5.3.36 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law.

Keywords of the alphabetical index:

Public post, resignation / Lustration, carried out after resignation from post.

Headnotes:

Subjecting to a lustration procedure a person who, confident in the operation of law, resigned from a public service post or aspired to take such a post, expecting that the lustration procedure will not be carried out, pursuant to the laws in force at the time of resignation, is contrary to the constitutional democracy rule.

Summary:

The Tribunal examined the case as a result of a legal question introduced by the Lustration Department of a Court of Appeal.

The Tribunal emphasised that the certainty of law is one of the main rules relating to relations between the state and its citizens in a democratic country. In the Tribunal's opinion this rule enables an individual to decide how to behave in full knowledge of the conditions according to which the state authorities act and the legal consequences of such behaviour. Such values are breached if the law is changed and the new regulation may not have been foreseen by an individual. This is particularly the case where the legislator, while adopting new provisions, could have assumed that an individual would have made a

different decision if he had foreseen the change in the law.

In the Tribunal's opinion, legal security may collide with other values, whose implementation requires the introduction of changes in the legal system. However, an individual has a right to expect the legal regulation will not be changed to his disadvantage in an arbitrary way. Subjecting to lustration procedures people who on the basis of previously binding provisions, resigned from their public posts, withdrew from being a candidate to such posts or were removed from such posts infringes the rules on the certainty of law and legal security of the individual. Even though the above-mentioned persons acted according to the provisions of law, the consequences provided for in the provisions, in the form of discontinuation of the lustration procedures, have not been carried out.

Supplementary information:

Four judges delivered dissenting opinions (Zdzisław Czeszejko-Sochacki, Andzrej Mączyński, Marek Safjan, Janusz Trzciński).

Cross-references:

Decision of 02.03.1993 (K 9/92).
Decision of 24.05.1994 (K 1/94), *Bulletin* 1994/2 [POL-1994-2-008].

Languages:

Polish.

Identification: POL-2000-2-016

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 21.06.2000 / **e)** K 2/99 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 04.07.2000, item 631 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.3 **General Principles** – Democracy.
5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
5.2.2.8 **Fundamental Rights** – Equality – Criteria of distinction – Physical or mental disability.
5.2.3 **Fundamental Rights** – Equality – Affirmative action.
5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Pension, old-age / Disabled, military / Disabled, war / Pension, valorisation.

Headnotes:

Provisions of the Law on old-age pension of military and war disabled and their families, providing that the base amount used for calculating a pension under provisions of the act on general old-age pension of employees and their families, which is binding at the moment the pension is granted, constitutes the basis for determining pensions of military and war disabled, are not contrary to the constitutional democracy rule, the equality rule and the rule concerning the special protection to be given by the state to veterans, in particular military and war disabled.

Summary:

The case was examined by the Tribunal as a result of a constitutional claim brought by the Ombudsman. The Ombudsman claimed that the examined provisions violate the Constitution to the extent that they fix the basis for determining a pension for disabled according to the date the pension was granted. In his opinion, as a result of making the level of pension dependent on the base amount binding at the date the pension was granted, pensions granted later are higher than those granted earlier. Furthermore, in his opinion, a change of the rules of valorisation of pensions resulted in differences between the bases for determining pensions of military and war disabled.

The Tribunal noted that the provisions of the Constitution do not state how far the preferential nature of provisions concerning pensions for military and war disabled should go. The use of uniform rules of valorisation in relation to all pensioners, including military and war disabled, does not breach the equality rule even though as a result pensions granted earlier do not reach the level of pensions currently granted.

In the Tribunal's opinion the equality rule does not mean that any changes in legal status are forbidden. Such changes result in differences of legal position before and after the new provisions came into force. Therefore, it should be ascertained that an introduction of more beneficial rates of measurement of the

basic amount does not breach the equality rule and democracy rule. The Constitution guarantees that pensions already granted maintain their actual value. It does not however guarantee that all regulations concerning calculation of pensions determined in the future will also be used in relation to pensions which have already been granted.

Cross-references:

Decision of 20.11.1995 (K 23/95).
Decision of 17.07.1996 (K 8/96).

Languages:

Polish.

Identification: POL-2000-2-017

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 28.06.2000 / **e)** K 25/99 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 07.07.2000, item 648 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.3 **General Principles** – Democracy.
3.12 **General Principles** – Legality.
4.10.5 **Institutions** – Public finances – Central bank.
4.15 **Institutions** – Exercise of public functions by private bodies.

Keywords of the alphabetical index:

National Bank, management Board, rights / Monetary policy / Bank, commercial, policy, dependence.

Headnotes:

Provisions of the Law on the National Polish Bank, which authorise the Monetary Policy Committee to issue internal acts (on the basis of rules and in the limits described in the Constitution) are concordant with the Constitution, whereas the provisions of the same law which give the Management Board of the Bank authorisation to provide, in the form of a resolution, for procedures and detailed rules concerning giving the National Polish Bank data necessary to determine a monetary policy and different kind of reports and balances by certain entities is contrary to the constitutional democracy rule and the legality rule.

Summary:

The case was examined by the Tribunal as a result of a constitutional claim brought by a President of the Supreme Control Chamber. He claimed that only ordinances, issued by authorities mentioned in the Constitution, constitute universally binding executive acts. The Constitution does not mention the National Polish Bank *(Narodowygo Bank Polskii NBP)* or its Management Board in this regard. Executive acts issued by an authority of the *NBP*, which are subject to examination, have the form of a resolution. According to relevant provisions of the Constitution, resolutions may only constitute a source of internal law.

The Tribunal emphasised that analysis of the Constitution, confirmed by expert opinion, leads to the conclusion that the Constitution provides for "a system of limited sources of universally binding laws" (it enumerates the sources of universally binding law and determines the entities authorised to introduce such laws). The authorities of the *NBP* are not mentioned in the Constitution. In the Tribunal's opinion clear legal grounds must exist in order to justify public tasks of public authorities and institutions. Such grounds are examined very carefully, especially when the authorisations they provide for are directly connected with freedoms.

However, the Tribunal also noted that the lack of authorisation for authorities of the *NBP* to issue universally binding laws does not mean that there are no legal measures by means of which the *NBP* can adjust the activity of commercial banks to the monetary policy it adopts. After analysis of the examined resolutions of authorities of the *NBP*, the Tribunal decided that they could be treated as internal laws within the system of banking law. The role of the *NBP* as a central bank allows it to prescribe a functional dependence of commercial banks on the monetary policy adopted by the *NBP*.

During examination of the above-mentioned provisions, the Tribunal noticed that there are some other provisions of the Law on the *NBP* which are contrary to the Constitution. The provisions in question referred to an unclear notion of "the detailed rules". The Tribunal recalled that it derives from its earlier judgements that the definition of "a rule" means that it is a settlement of certain criteria, means and conditions relating to the performance of certain rights and obligations. The Law on the *NBP* does not

clarify the content of the above-mentioned detailed rules and, in particular, does not provide for the character and objective scope of this notion. It widely describes the entities to which this notion refers, which is typical for universally binding normative acts. In the Tribunal's opinion, the authorities of the *NBP* can only issue internal acts which should be issued in accordance with the rules and limits provided for in the relevant provisions of the Constitution. As a result of the fact that the examined provisions exceed the limits of internal dependence and that the notion of "detailed rules" they include may result in a new normative act, the Tribunal concluded that they are contrary to the democracy and legality rule.

Cross-references:

Decision of 22.04.1987 (K 1/87).
Decision of 17.08.1988 (Uw 3/87).

Languages:

Polish.

Identification: POL-2000-2-018

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 28.06.2000 / **e)** K 34/99 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 07.07.2000, item 649*; Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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.
5.3.28 **Fundamental Rights** – Civil and political rights – Freedom of assembly.

Keywords of the alphabetical index:

Security / Public order / Road traffic, law.

Headnotes:

Provisions of the Law on road traffic, which authorise the Minister of Internal Affairs and Administration to issue, in consultation with the Ministry of Transport and Sea Economy, an ordinance concerning the manner of assuring security and public order during events taking place on roads, the conditions of such events and the procedure relating to the foregoing issues are contrary to rules relating to the issue of ordinances provided for by the Constitution. The provisions delegate issues which are significant from the point of view of implementing constitutional rights and freedoms to be regulated by ordinance. In addition, they authorise executive authorities to create legal norms which go beyond the limits described in relation to provisions issued only for the purpose of implementing a law. Furthermore, the examined provisions do not include directions as to the content of an act.

Summary:

The Tribunal examined the case as a result of a motion introduced by a group of deputies. They claimed that the examined provisions give an authorisation to issue an ordinance but do not include directions as to its content. Additionally, they argued that any limitations on the freedom to assemble must be introduced by law.

The Tribunal noted that according to its earlier judgements, the obligation to formulate directions as to the content of the ordinance means that the law must provide guidelines as to the material scope of the regulation which is going to be included in the ordinance. The law must contain certain directions concerning the issues to be included or excluded in the ordinance. It is possible to provide for such directions in other provisions of the law than those authorising issue of the ordinance, if they precisely allow the content of the directions to be identified. However, if such identification is not possible, the provisions on authorisation will have to be treated as unconstitutional.

The Tribunal emphasised that according to the provisions of the Constitution, an ordinance is an act issued for the purpose of implementing a law. This means that issues which are significant from the point of view of human freedoms and rights guaranteed by the Constitution cannot be regulated by ordinance. Such issues must be provided for by law. In the Tribunal's opinion, the examined provisions are of significant importance for the freedom to assemble and cannot be provided for by an ordinance.

Cross-references:

Decision of 26.10.1999 (K 12/99), *Bulletin* 1999/3 [POL-1999-3-027].

Languages:

Polish.

Portugal
Constitutional Court

Statistical data
1 May 2000 – 31 August 2000

Total: 132 judgments, of which:

- Abstract *ex post facto* review: 12 judgments
- Appeals: 57 judgments
- Complaints: 67 judgments
- Political parties and coalitions: 3 judgments
- Political parties' accounts: 1 judgment

There was no relevant constitutional case-law during the reference period 1 May 2000 – 31 August 2000.

Romania
Constitutional Court

Important decisions

Identification: ROM-2000-2-010

a) Romania / **b)** Constitutional Court / **c)** / **d)** 18.11.1999 / **e)** 186/1999 / **f)** Decision on the constitutionality of the provisions of Article 278 of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 213/16.05.2000 / **h)**.

Keywords of the systematic thesaurus:

1.6.3.1 **Constitutional Justice** – Effects – Effect *erga omnes – Stare decisis*.
1.6.4 **Constitutional Justice** – Effects – Effect *inter partes*.
1.6.6 **Constitutional Justice** – Effects – Influence on State organs.
1.6.8 **Constitutional Justice** – Effects – Consequences for other cases.
2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.
4.7.8 **Institutions** – Courts and tribunals – Ordinary courts.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

Constitution, direct application, objection on grounds of unconstitutionality / *Inter partes* / Judicial authority, constitutional provisions, direct application.

Headnotes:

1. Anyone dissatisfied with the response to his application under the procedure before the public prosecution services is entitled to apply to the trial court, in accordance with Article 21.1 of the Constitution, which lays down the principle of unrestricted access to justice and is directly applicable. Consequently, the provisions of Article 278 of the Code of Criminal Procedure are unconstitutional in that they do not allow persons dissatisfied with state prosecution services, response to their application to turn to the courts.

2. Judicial authorities are bound to apply the provisions of the Constitution directly where there are no statutory implementing regulations or the unconstitutionality of the existing regulations is established. Constitutional provisions can and must be directly applied by judicial authorities, also in the event that the unconstitutionality of the existing statutory provisions has been established by a Constitutional Court decision and the legislator has not yet acted to amend or if necessary to repeal those provisions.

3. Constitutional Court decisions delivered in connection with the settlement of issues of unconstitutionality are universally binding (*erga omnes*).

4. Judicial authorities are empowered by law to make a reasoned interlocutory decision declaring admissible or inadmissible a party's or the prosecutor's request to lodge an objection on grounds of unconstitutionality. The consequences of such a decision are a stay of proceedings and referral of the objection to the Constitutional Court for decision.

Summary:

1. By interlocutory decision of 18 May 1999, the Satu Mare Court asked the Constitutional Court to rule on an objection challenging the constitutionality of the provisions of Article 278 of the Code of Criminal Procedure.

The Constitutional Court ruled on the constitutionality of the provisions of Article 278 of the Code of Criminal Procedure in Decision no. 486/1997. In hearing the objection of unconstitutionality it found Article 278 of the Code of Criminal Procedure constitutional in the strict sense of not impeding action before a court, in accordance with Article 21 of the Constitution, which was directly enforceable, by a person dissatisfied with the outcome of his complaint against the measures or acts ordered by or performed as instructed by the prosecutor and not coming before the courts. The objection to Article 278 of the Code of Criminal Procedure on constitutional grounds was rejected as inadmissible.

2. Even the court before which the issue of unconstitutionality was raised, in expressing its opinion, held that Article 257 of the Code of Criminal Procedure contravened the provisions of Article 21 of the Constitution but did not abide by Constitutional Court Decision no. 486/1997 and asked the Constitutional Court to settle the issue.

In so doing, the court did not directly apply the provisions of Article 21 of the Constitution, did not comply with the provisions of the first part of the first

sentence of Article 145.2 of the Constitution, or with the provisions of Section 23.3 and 23.6 of Act no. 47/1992 on the organisation and functioning of the Constitutional Court. The claimed exclusion of direct application of the constitutional provisions by judicial authorities relied on arguments relating to the special nature of the action of justice, as provided by Articles 123.1, 123.2 and 125.3 of the Constitution, and on contentions that the decisions of the Constitutional Court were actually an overture to the legislator to make appropriate changes in the current legislation criticised by the Constitutional Court decisions. Therefore the decisions of the Constitutional Court allegedly could not be raised against the judicial authorities directly but only through the incorporation of these rulings into positive law by the legislator.

The Court held that constitutional provisions could and must be applied directly by judicial authorities where the legislator had not enacted laws laying down a detailed procedure for the application of the constitutional text. Enactment of such laws by the legislator was necessary as a rule, but their absence must not prevent immediate fulfilment of the constituent legislator's intention.

As to the nature of the effects of Constitutional Court decisions delivered in order to resolve issues of unconstitutionality raised before judicial authorities, the Court held that such decisions did not merely have relative effects *(inter partes)* for the purposes of the proceedings in which the issue was raised, but also absolute, or universally binding, effects *(erga omnes).*

The Court further held that, as could be inferred from Section 23.3 and 23.6 of Act no. 47/1992, purely *inter partes* effects (relative effects) arose from Constitutional Court decisions dismissing objections of unconstitutionality. In further proceedings, the objection could be raised once again, thereby enabling the Constitutional Court to reconsider the same issues of unconstitutionality following submission of fresh grounds or the occurrence of new developments prompting change in the Court's practice.

As a consequence of the universally binding character of the Constitutional Court's decisions declaring a law or an order unconstitutional, the impugned statutory provision may no longer be applied by any legal person, its subsequent effects automatically lapsing as from the date of publication of the decision in the *Monitorul Oficial al României* (Official Gazette).

Likewise, having regard to the provisions of Articles 11 and 20 of the Constitution, legal responsibility for non-compliance with a decision of the Constitutional Court may be determined in a European Court of Human Rights judgment against the state authorities, in so far as the conditions prescribed by the European Convention on Human Rights are fulfilled.

As to the question regarding the manner in which judicial authorities should proceed when the statutory provisions crucial to the settlement of the case have previously been ruled unconstitutional by the Constitutional Court, the judicial authorities are competent to find a request by the prosecutor or by a party to enter a constitutional objection admissible or inadmissible, as provided by law, in a reasoned interlocutory decision, with the effect of staying the proceedings and bringing the issue of unconstitutionality before the Constitutional Court for settlement. In the event that a judicial authority allows a request which is inadmissible, the Court finds that the referral is not lawful and by a decision of its own motion dismisses the objection as inadmissible. Where the referral to the Court is in order because the objection was admissible, its competence to declare the objection admissible or inadmissible is exclusive, in accordance with Section 23.3 and 23.6 of Act no. 47/1992.

Languages:

Romanian.

Identification: ROM-2000-2-011

a) Romania / **b)** Constitutional Court / **c)** / **d)** 07.12.1999 / **e)** 224/1999 / **f)** Decision on the constitutionality of the provisions of Sections 1 and 2 of Government Emergency Order no. 40/1999 concerning protection of tenants and fixing of rent for housing facilities / **g)** *Monitorul Oficial al României* (Official Gazette), 76/21.02.2000 / **h)**.

Keywords of the systematic thesaurus:

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 **Fundamental Rights** – Equality – Scope of application.
5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Right to housing.
5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Tenancy, contracts, extension / Citizen, equality, different situations.

Headnotes:

The provisions of Sections 1 and 2 of Government Emergency Order no. 40/1999 on protection of tenants and fixing of rent for housing facilities are in accordance with the Constitution.

These provisions represent a legislative policy measure consistent with the provisions of the Constitution as a whole.

The difference in the period for which tenancy contracts are extended, 3 and 5 years respectively, is explained by the concern of the state to minimise restrictions on exercise of the right of property in the case of real estate restored to the former owners, whereas in the case of housing owned by the state itself, protection of tenants should be preponderant.

Summary:

By interlocutory decision of 30 April 1999, the Constitutional Court had been requested to rule on an objection challenging the constitutionality of the provisions of Sections 1 and 2 of Government Emergency Order no. 40/1999 on protection of tenants and fixing of rent for housing facilities.

The statement of grounds for the objection to these provisions contends that they formalise a discriminatory system of protection of private property infringing Article 41.2 of the Constitution which stipulates equal protection of such property by law irrespective of the title-holder. The discrimination is claimed to arise from the differing period for which tenancy contracts are extended: 5 years for state-owned property and not more than 3 years in the case of property recovered by its former owners or their successors. The alleged inequality in the system of protection of private property also relates to the terms on which tenancy contracts are extended. On the one hand, this is done as of right in the case of state-owned buildings, and on the other hand solely at the tenant's request in the case of dwellings owned by individuals. These aspects, in the opinion of the parties lodging the objection, also infringed the provisions of Articles 16 and 21 of the Constitution respectively concerning equality of citizens before the law and unrestricted access to justice.

The Court held that the regulation of the tenancy contract had no bearing on the property regime.

The Court held that measures for the protection of tenants instituted by Government Emergency Order no. 40/1999 had their constitutional justification in the provisions of Articles 43.1 and 134.2.f of the Constitution, to the effect that:

Article 43.1 - The state is bound to take measures of economic development and social protection such as will ensure a decent living standard for its citizens.

Article 134.2.f - The state shall secure the creation of all necessary conditions to increase the quality of life.

Quality of life is a concept whose substance should be examined in relation to the situations contemplated by the legislator, and also with regard to international human rights provisions, which are binding according to Articles 11 and 20 of the Constitution.

In this connection, according to Article 25 of the Universal Declaration of Human Rights, the right to an adequate standard of living also embodies the right to housing, and Article 11 of the International Covenant on Economic, Social and Cultural Rights requiring states to recognise the right of everyone to an adequate standard of living for himself and his family explicitly refers to housing as well.

The Court held that the legislator, in applying these provisions and in defining the substance of the right of property and its limitations, took into account not only the owners' interests but also those of the tenants to whom the legislator is bound to secure a right to housing, thereby striking a balance between the two constitutional imperatives.

Nor did the challenged statutes create privileges or distinctions between citizens, or disregard the constitutional principle of equality of citizens' rights set forth in Article 16 of the Constitution, equal treatment being mandatory only for citizens found to be in identical situations. The principle of equality did not in fact signify uniformity; whereas equal situations

would demand correspondingly equal treatment, the legal approach to differing situations must necessarily differ.

As to Article 21 of the Constitution concerning unrestricted access to justice, which the parties lodging the objection claimed was infringed by the provisions of the impugned statute, the Court observed that the latter was not material to the case.

Supplementary information:

According to Constitutional Court Decision no. 6/1992 published in the *Monitorul Oficial al României*, first part, no. 48/1993, the regulations applying to tenancy contracts do not concern the property regime.

Constitutional Court Decision no. 70/1993 published in the *Monitorul Oficial al României*, first part, no. 307/1993 and Decision no. 49/1998 published in the *Monitorul Oficial al României* no. 161/1998 rule on the principle of citizens' equality in their rights.

The terms of Sections 1 and 2 of Government Emergency Order no. 40/1999 on protection of tenants and fixing of rent for housing facilities are as follows:

Section 1: The duration of tenancy contracts in respect of rental premises owned by the state or by its administrative units, under construction at the effective date of this Emergency Order and intended to be used as dwellings or by educational services, by socio-cultural institutions, by legally registered political parties as their headquarters, by trade unions or by non-governmental organisations, shall be extended as of right for a period of five years beginning at the date on which this Emergency Order comes into effect.

Section 2: The duration of tenancy contracts entered into after extension or renewal of the tenancy contracts under Act no. 17/1994 in respect of dwellings recovered by the former owners or their successors prior to the entry into force of this Emergency Order shall be extended at the tenant's request for a maximum period of three years beginning at the date on which this Emergency Order comes into effect.

Languages:

Romanian.

Identification: ROM-2000-2-012

a) Romania / **b)** Constitutional Court / **c)** / **d)** 20.12.1999 / **e)** 234/1999 / **f)** Decision on the constitutionality of the provisions of government emergency Order no. 13/1998 concerning restitution of certain immovable property formerly owned by communities of citizens of Romania's national minorities / **g)** *Monitorul Oficial al României* (Official Gazette), 149/11.04.2000 / **h)**.

Keywords of the systematic thesaurus:

1.6.3 **Constitutional Justice** – Effects – Effect *erga omnes*.
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.
3.9 **General Principles** – Rule of law.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
4.6.8 **Institutions** – Executive bodies – Relations with the courts.
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.
5.3.43 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Government, Emergency Order, “exceptional cases”, entry into force / Redress, measure, delay.

Headnotes:

1. It is not permissible for the government to issue an emergency order disposing of property no longer owned by the state but under private ownership. Compulsory transfer of the ownership of certain classes of private property to the state may be effected by means of expropriation or confiscation under the conditions prescribed by Articles 41.3, 41.5 and 41.8 of the Constitution securing the right of private property.

2. Within the conditions prescribed by the first sentence of Article 114.4 of the Constitution, the “exceptional case” warranting the issue of a government emergency order is established in the instant case by the contents of the explanatory memorandum to the order and corroborated by the known fact that there had been a delay in enacting measures of redress concerning buildings wrongfully taken over by the communist dictatorship.

Summary:

By interlocutory decision of 18 December 1998, the Constitutional Court had been requested to give a preliminary decision on the constitutionality of the provisions of Government Emergency Order no. 13/1998 on restitution of immovable property formerly owned by the communities of citizens of Romania's national minorities.

In pleading its objection, the objecting party invoked three grounds of unconstitutionality: the government had issued the Emergency Order despite a lack of facts substantiating the exceptional situation warranting its intervention in the legislature's sphere of competence, and had thereby infringed the provisions of Article 114.4 of the Constitution, which provide that in exceptional cases the government may adopt emergency orders. These come into force only after their submission to parliament for approval. If parliament is not in session, it must be convened by law.

Second, it was claimed that the violation of a semi-public, public and private commercial company's right of private ownership in respect of the building whose restitution had been ordered was contrary to the provisions of Articles 41.1, 41.2 and 135.6 of the Constitution.

Article 41.1 and 41.2 of the Constitution provides that:

1. The right of property, as well as claims on the state, are guaranteed. The content and limitations of these rights shall be established by law.

2. Private property shall be equally protected by law, irrespective of its owner. Foreigners and stateless persons may not acquire the right of land property.

Article 135.6 of the Constitution provides that private property shall, in accordance with the law, be inviolable.

The third ground concerns the violation of the provisions contained in Title III Chapter VI of the Constitution on judicial authority resulting from the Alba Iulia appeal court's ruling, not subject to review, that there was no succession in title of the commercial company “Magyar House SA” and of the former public limited company “Magyar House”.

1. The Court did not accept the allegation of unconstitutionality founded on non-compliance with the provisions of Article 114.4 of the Constitution, under which the possibility of the government's employing this form of legislative delegation is contingent on the existence of an exceptional case.

The contents of the explanatory memorandum to the order, corroborated by the known fact that their had been a delay in enacting measures of redress concerning buildings wrongfully taken over by the communist dictatorship, were apt to warrant the issuing of this emergency order under the conditions prescribed in the first sentence of Article 114.4 of the Constitution.

According to the explanatory memorandum to the order, the exceptional case was justified by the numerous steps which certain persons had taken after the fall of the communist regime to recover immovable property confiscated or nationalised from 1940 onwards by totalitarian governments, and by the obligations which Romania had incurred, among them the restitution of property to communities of citizens belonging to the national minorities, also contemplated in the reports of international bodies.

The Court nevertheless held that the provisions of Government Emergency Order no. 13/1998 were unconstitutional as concerned the restitution to Romania's Magyar community of a building covered by the protection of private property instituted by Articles 41.1, 41.2 and 135.6 of the Constitution. Regarding private property, Constitutional Court plenum Decisions no. 1 of 7 September 1993, no. 37 of 3 April 1996, no. 9 of 22 January 1997 and no. 18 of 14 March 1994 may be cited.

This solution was based on the following arguments:

According to the items in column 6 of the appendix to the order, Decrees nos. 218/1960 and 712/1966, together with Act no. 15/1990, are designated as the official acts pursuant to which the building became state property.

It was intended, by effect of Decree no. 218/1960 amending Decree no. 167/1958 on the extinguishment of rights and obligations and Decree no. 712/1966 on property coming under the provisions of Section III of Decree no. 218/1960, to create a semblance of legality for abuses committed

to the detriment of private ownership, it being established that the state was the owner of property which had come into its possession prior to the publication of Decree no. 218/1960, either without any title or under the procedure laid down by Decree no. 111/1951 regulating the status of all classes of property subject to confiscation in the absence of heirs or of the owner, together with certain assets no longer used by the budgetary institutions.

The Court stressed that Act no. 15/1990 on reorganisation of the state economic entities as independent public corporations and commercial companies, also specified as a basis for state ownership, did not constitute the legal instrument transferring the building to state ownership, but rather the prescriptive instrument under which the commercial companies set up following conversion of the former state economic entities had become the owners of the assets found in their holdings, as provided by Section 20.2 of the Act. According to these provisions, assets forming part of the holdings of commercial companies are their property, except for those acquired under a different title. This statutory instrument has come under constitutional review, the Court having ruled that the assets of independent public corporations and of commercial companies are not state property but private property. The state is an ordinary shareholder in these assets, owning a proportion of the registered capital. This being so, it is not permissible for the government to issue an emergency order disposing of such property which is no longer state-owned. At the same time, the Court held that in accordance with the constitutional provisions governing the right of property, compulsory transfer to state ownership of certain privately owned property could be effected by expropriation, under the conditions prescribed by Article 41.3 and 41.5 of the Constitution, or by confiscation in the case of assets intended for, used in or accruing from criminal or petty offences, subject to the conditions prescribed by Article 41.8 of the Constitution. These constitutional provisions are guarantees for the right of private property, and cannot be evaded by the expedient of an emergency order, even though it is plainly not possible to call into question the right of Romania's Magyar community to reparation of the injustice done to it by the wrongful transfer to state ownership, during the period of communist government, of the building in dispute.

The Court also held that in a state based on the rule of law, in accordance with Article 1.3 of the Constitution, redress of an unjust act could be achieved only through legal procedures that were not incompatible with constitutional provisions or with obligations deriving from the treaties and international instruments accepted by the state of Romania, compliance with which is mandatory according to the terms of Articles 11 and 20 of the Constitution.

In consequence, the Court acknowledged that the provisions of Article 17 of the Universal Declaration of Human Rights, and of Article 1.1 Protocol 1 ECHR, which Romania had ratified by Act no. 30/1994, were applicable.

The unconstitutionality of the restitution of the building in question must be admitted, notwithstanding that the terms of Section 3 of the Order might suggest possible compensation, for in the present case the requirements of Article 41.3 of the Constitution, namely that no one may be expropriated, except on grounds of public utility, established according to the law and against just compensation paid in advance, were not met.

The Court could not accept the contention of the objecting party that there was interference by the executive in the affairs of the judiciary in so far as the government had nullified the effects of a court decision. Indeed, a reading of the order, appendix included, did not disclose that the building in question need be restored to the commercial company “Magyar House SA”.

Supplementary information:

1. This decision was delivered by a majority of votes and dissenting opinions were entered, both with regard to the materiality of the exceptional case and with regard to the non-compliance of the provisions of Government Emergency Order no. 13/1998 with the provisions of Article 41.1, 41.2 and 135.6 of the Constitution protecting private property.

2. In accordance with Section 25.1 and 25.4 of Act no. 47/1992 on the organisation and functioning of the Constitutional Court,

(1) Decisions establishing the unconstitutionality of a law or an order or a provision of a law or order in force shall be final and binding [...]

(4) Decisions delivered under the terms of paragraph 1 shall be notified to both houses of parliament and to the government.

The present decision was notified by the Constitutional Court to these public authorities.

Regarding the binding character and *erga omnes* effects of Constitutional Court decisions, see Decision no. 186 of 18 November 1999, *Bulletin* 2000/2 [ROM-2000-2-010].

Languages:

Romanian.

Russia
Constitutional Court

Statistical data
1 May 2000 – 31 August 2000

Total number of decisions: 5

Types of decisions:

- Rulings: 5
- Opinions: 0

Categories of cases:

- Interpretation of the Constitution: 1
- Conformity with the Constitution of acts of State bodies: 4
- Conformity with the Constitution of international treaties: 0
- Conflicts of jurisdiction: 0
- Observance of a prescribed procedure for charging the President with high treason or other grave offence: 0

Types of claim:

- Claims by State bodies: 2
- Individual complaints: 3
- Referral by a court: 0

Important decisions

Identification: RUS-2000-2-007

a) Russia / **b)** Constitutional Court / **c)** / **d)** 07.06.2000 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 21.06.2000 / **h)**.

Keywords of the systematic thesaurus:

3.1 **General Principles** – Sovereignty.
3.6 **General Principles** – Federal State.
4.8.1 **Institutions** – Federalism and regionalism – Basic principles.
4.8.3.1 **Institutions** – Federalism and regionalism – Institutional aspects – Deliberative assembly.

4.8.3.4 **Institutions** – Federalism and regionalism – Institutional aspects – Administrative authorities.
4.8.5.1 **Institutions** – Federalism and regionalism – Distribution of powers – Principles and methods.

Keywords of the alphabetical index:

Federation, entities / Republic within the Federation, sovereignty / Republic, autonomous, powers.

Headnotes:

According to the Federal Constitution, sovereignty rests exclusively with the country's multinational people, which is the sole source of authority, and as a consequence there can be no form of state sovereignty other than the sovereignty of the Federation. The sovereignty of the Federation excludes the possibility of two tiers of sovereignty in a single system of paramount and independent state authority, and therefore precludes the sovereignty of the constituent republics of the Federation.

Summary:

The applicant, the Head of the Republic of Altai – Chairman of the Government of Altai, asked for a ruling on the constitutionality of certain articles of the Constitution of the Republic of Altai and of the Federal Act on the general principles governing the legislative, representative and executive powers of the subjects of the Federation.

The Court found that the provisions of the Altai Constitution concerning the sovereignty of the Republic of Altai were incompatible with the Federal Constitution. Sovereignty only exists at federal level and is linked to the expression of the wishes of the multinational people of Russia, which is the sole and unique source of authority in the Federation. Sovereignty is not subject to the wishes and agreement of the republics, as members of the Federation. The Republic does not have authority to grant itself powers or sovereignty. However, this does not concern all the powers of the autonomous Republic outside the limits of the Federation's jurisdiction. The Constitutional Court also declared unconstitutional the following provisions of the Altai Constitution, concerning federal authority or the shared authority of the Federation and its subjects:

- the statement that all the natural resources in the territory of Altai are the property of the Republic of Altai;

- the prohibition on storing nuclear waste and toxic materials in the Republic of Altai;

- the dismissal of the Head of the Republic of Altai, Chairman of the Government of Altai, if he or she commits a serious premeditated offence, since such a finding must be confirmed by the Supreme Court of the Republic of Altai;

- the establishment and organisation of municipal and regional courts in accordance with an act of the Republic of Altai;

- the appointment and dismissal of ministers or heads of committees by the Head of the Republic, with the agreement of the Republic's State Assembly;

- the right to dismiss the Head of the Republic, if he is shown to have lost popular confidence in a referendum or commits a serious breach of the Federal Constitution, the Constitution of the Republic of Altai, federal legislation, legislation of the Republic of Altai or the provisions of the Federal Act on the general principles governing the legislative, representative and executive powers of the subjects of the Federation relating to the dismissal of senior officials (heads of executive authorities) of subjects of the Federation before the expiry of their term of office in the event of their dismissal by the electors, because these provisions do not lay down requirements to establish strict legal grounds for dismissal.

The Court found that the provisions of the Altai Constitution are compatible with those of the Federal Constitution concerning parents' duty to ensure that their children receive a full secondary education, and with the Federal Constitution and the Federal Act on the general principles governing the legislative, representative and executive powers of the subjects of the Federation concerning the need for parliamentary consent to the appointment of heads of local offices of federal executive bodies, subject to two conditions, namely that cases where such consent is required should be specified in federal legislation and that the bodies in question should exercise joint federal and republic responsibilities.

Languages:

Russian.

Identification: RUS-2000-2-008

a) Russia / **b)** Constitutional Court / **c)** / **d)** 27.06.2000 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 04.07.2000 / **h)**.

Keywords of the systematic thesaurus:

1.6.3 **Constitutional Justice** – Effects – Effect *erga omnes*.
3.12 **General Principles** – Legality.
3.21 **General Principles** – Prohibition of arbitrariness.
5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right of access to the file.
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:

Counsel, for the defence, access to files / Arrest, warrant, notification / Search.

Headnotes:

The provisions of the Code of Criminal Procedure that only grant persons suspected of committing a criminal offence the right to the assistance of a lawyer after they have been questioned by police or remanded in custody pending the bringing of charges against them, and not immediately after they have been detained, are unconstitutional, because they limit everyone's right during the pre-judicial stages of criminal proceedings to the assistance of a lawyer in all cases where their rights or freedoms are or may be significantly affected by actions and measures arising from such proceedings.

Summary:

The applicant, a citizen, asked for a ruling on the constitutionality of Articles 47.1 and 51.2 of the Code of Criminal Procedure.

A search was carried out in October 1997 in the applicant's home in connection with criminal proceedings, and the applicant was then forcibly conducted to the regional department of the criminal police. He was detained for sixteen hours, questioned as a witness and subjected to other forms of investigative measures. The investigating officer refused to allow him to see a lawyer because under Article 47.1 of the Code of Criminal Procedure such assistance is only authorised once accused persons have been notified of the charges against them, or in the case of suspects of their police custody or detention on remand. In this case, the applicant was only a witness at the time. He was only later notified that he was being detained in police custody as a suspect.

After the applicant was notified of the charges, the investigating officer also refused to allow his lawyer to consult the records of the investigation, drafted before the notification, or to take notes, on the grounds that under Article 51.2 of the Code of Criminal Procedure the lawyer is not entitled to do so until after the end of the investigation stage.

The applicant lodged a number of complaints against the investigation proceedings. The Court of Cassation ruled that the refusal to allow the lawyer to consult the records of the investigation of his client and to take notes was illegal.

The Constitutional Court ruled that Article 47.1 of the Code of Criminal Procedure is unconstitutional, on the grounds that it only grants persons suspected of committing a criminal offence the right to the assistance of a lawyer after they have been questioned by police or remanded in custody pending the bringing of charges against them, and therefore limits the right during the pre-judicial stages of criminal proceedings to the assistance of a lawyer.

Pending the adoption of new regulations by the Federal Parliament, Article 48.2 of the Constitution, as interpreted in this decision, is directly applicable.

Article 51 of the Code of Criminal Procedure is compatible with the Constitution, since according to a constitutional interpretation it does not restrict a defending lawyer's right to consult the record of an investigation affecting his client and drafted before the notification of charges, or to take notes on any information contained in it.

Languages:

Russian.

Identification: RUS-2000-2-009

a) Russia / **b)** Constitutional Court / **c)** / **d)** 11.07.2000 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 21.07.2000 / **h)**.

Keywords of the systematic thesaurus:

4.4.3.3 **Institutions** – Head of State – Term of office – Incapacity.
4.4.3.4 **Institutions** – Head of State – Term of office – End of office.
4.4.4.1.1 **Institutions** – Head of State – Liability or responsibility – Legal liability – Immunities.

Keywords of the alphabetical index:

President, functions, exercise, incapacity / President, state of health, information / President, immunity.

Headnotes:

The termination of the exercise of the President's powers before the expiry of his term of office on grounds of permanent incapacity caused by ill-health is not provided for in the constitutional provision on presidential immunity.

Summary:

Article 91 of the Constitution stipulates that the President of the Russian Federation shall have immunity. Under Article 92.2 of the Constitution, the President's powers shall be terminated in the event of, *inter alia*, his permanent incapacity to discharge his powers for reasons of health.

The State Duma requested an interpretation of the relationship between these provisions since it did not consider that the President's immunity necessarily precluded questions and information about his state of health for the purposes of deciding whether he was permanently incapable of discharging his powers for reasons of health.

Bearing in mind the place that the President occupies in the system of government and his constitutional status, the Constitution provides for presidential immunity and other legal safeguards to ensure the free and responsible exercise of his constitutional powers and the continuity of the role of head of state.

The meaning and purpose of Article 92.2 of the Constitution, concerned with the termination of the President's functions before the expiry of his term of office in the event of his permanent incapacity, are not affected by the reference to his immunity in Article 91 of the Constitution.

The early termination of the presidential functions in the aforementioned circumstances calls for a special procedure to establish objectively whether the President really is permanently and irreversibly incapable of taking decisions arising from his constitutional authority or of otherwise exercising his constitutional powers. In such a case, given the extraordinary nature of the post under consideration, the President's agreement need not be a prerequisite of the early termination of his functions. The procedure in question may not be initiated until all other avenues concerning the President's temporary relinquishment of his powers or his voluntary resignation have been exhausted.

The early termination of the President's powers in the circumstances in question is an aspect of his constitutional status. The legal provisions governing the procedure for the termination of the President's functions therefore have to comply with the requirements of the Constitution concerned with ensuring continuity and stability in the exercise of his powers and exclude any elements that would prevent the normal functioning of the institutions of state.

The procedure for the early termination of the President's powers may not be curtailed or simplified in this case. It must not be transformed into a means of dismissing the President or of enabling another body or person to pre-empt the President's powers. In drawing up such a procedure, the principle of balance and co-operation between all the branches of government must be observed.

Languages:

Russian.

Slovakia
Constitutional Court

Statistical data
1 May 2000 – 30 August 2000

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 3
- Decisions on the merits by the panels of the Court: 14
- Number of other decisions by the plenum: 6
- Number of other decisions by the panels: 72
- Total number of cases submitted to the Court: 205

Important decisions

Identification: SVK-2000-2-003

a) Slovakia / **b)** Constitutional Court / **c)** Plenary / **d)** 04.07.2000 / **e)** PL.ÚS 4/00 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.10 **General Principles** – Certainty of the law.
4.5.2 **Institutions** – Legislative bodies – Powers.
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.
5.3.37.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Law, restitution, limits / Property, restitution in kind / Municipality, property rights.

Headnotes:

A law on the restitution of property must take account of the constitutional requirements relating to cases of expropriation.

Summary:

On 21 April 1993 parliament adopted Law no. 107/1993 which restored directly to Matica Slovenska, a legal entity, the immovable property listed in the appendix to that law, which had been confiscated from this organisation during the period from 25 February 1948 to 31 December 1989 and which, until the date on which the law was adopted, had belonged to the two municipalities of Čadca and Bratislava-Staré Mesto.

The Attorney-General of the Slovak Republic entered an appeal alleging that this law was incompatible with Articles 1, 2.2, 12.1, 12.2, 13.2, 13.4, 20.1 and 20.4 of the Constitution on the grounds that the basic condition for the return of property, namely that Matica Slovenska's property had been unlawfully confiscated and its ownership unlawfully acquired by the municipalities concerned, had not been met.

The Constitutional Court upheld the appeal and affirmed that the law was incompatible with these articles. In this connection it stressed the following points:

- under Article 20.1 of the Constitution, the property rights of local authorities (municipalities) property rights enjoy the same protection as those of any owner. The municipalities concerned had been granted ownership of the immovable property in question under legislation passed in 1991. This therefore occurred subsequent to the period of "non-freedom", when there had been violations of the principles of a democratic state governed by the rule of law;

- in its substance, the law in question violated the principle of legal certainty and that of the protection of property acquired in good faith, which follows from Article 1 of the Constitution;

- although parliament is free to legislate in the area of restitution, it cannot go beyond the limits imposed by the Constitution. By adopting the law in question, it was in breach of the requirement to protect the basic rights and freedoms set forth in Article 20.4 of the Constitution. In accordance with the limits specified in that provision (expropriation must be in the public interest, necessary and justly compensated), parliament may only pass legisla-

tion laying down legal conditions for expropriation, compliance with which must be verifiable under a procedure guaranteeing objectivity. Under Article 46.2 of the Constitution, moreover, the lawfulness of such a procedure, which in principle is an executive matter, must be subject to scrutiny by the courts because expropriation concerns a fundamental right, namely, that of ownership. The law in question fails to comply with the constitutional limits and conditions governing expropriation. Furthermore, in this case parliament assumed powers falling to the executive and the judiciary.

Languages:

Slovak.

Identification: SVK-2000-2-004

a) Slovakia / **b)** Constitutional Court / **c)** Panel / **d)** 15.06.2000 / **e)** III.ÚS 16/00 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

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.
3.4 **General Principles** – Separation of powers.
4.6.8 **Institutions** – Executive bodies – Relations with the courts.
4.7.4.1.5 **Institutions** – Courts and tribunals – Organisation – Members – Incompatibilities.
5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Impartiality.

Keywords of the alphabetical index:

Judge, impartiality, objective / Judge, duties at the Ministry of Justice.

Headnotes:

Under no circumstances may a person with duties at the Ministry of Justice simultaneously sit as a judge in a court of law.

Summary:

The appellant, M.M., was on trial for murder before B. regional court. During proceedings he challenged the independence and impartiality of judge I.S., a member of the court, on the grounds that I.S. was simultaneously employed at the Ministry of Justice. The Supreme Court threw out this objection on the grounds that the judge in question had been temporarily relieved of his duties at the ministry in order to bring to a conclusion cases pending in the court of which he had been a member before his appointment to a post at the Ministry. Following the Supreme Court ruling, the regional court tried the appellant's case in the same composition, found him guilty and sentenced him to thirteen years' imprisonment without remission.

The appellant lodged a complaint (podnet) with the Constitutional Court, alleging that the right guaranteed to him under Article 48.1 of the Constitution – namely, that no one may be removed from the jurisdiction of his or her lawful judge – had been violated. The Constitutional Court upheld the complaint and ruled that the Supreme Court decision and the regional court's retention of the judge had violated the appellant's fundamental right under this article of the Constitution.

The Constitutional Court noted in particular that the function of judge is a constitutional office and that the holding of such office is incompatible with the holding of any other constitutional office, including one in a government department. This principle derives from the principle of separation of powers and is intended, from the point of view of judicial independence and impartiality, to ensure that court decisions are not influenced by other bodies of the state.

Referring to the case-law of the European Court of Human Rights – principally the judgments in the cases of *Delcourt v. Belgium* (1970) and *Ferrantelli and Santangelo v. Italy* (1996) – the Constitutional Court stressed that the key issue in the case in question was that of inadequate objective impartiality. It observed that the judge whose objectivity was contested in the appellant's case, in which the state was one of the parties, simultaneously held a government post as director-general of the criminal law department at the Ministry of Justice. In the view

of the Court, this situation legitimately gave rise to concern about the judge's capacity for impartiality.

In this connection, the Court noted that the duties of the director-general of the criminal law department at the Ministry of Justice entailed entering into various relations which, among other things, had numerous repercussions in the exercise of judicial functions. In the view of the Court, it was unacceptable to combine the two offices, even where a judge was temporarily relieved of his or her duties at the Ministry of Justice in order to decide pending cases.

Cross-references:

Delcourt v. Belgium, 17.01.1970, Series A no. 11, *Special Bulletin ECHR* [ECH-1970-S-001]; *Ferrantelli and Santangelo v. Italy*, 07.08.1996, *Reports* 1996-III.

Languages:

Slovak.

Slovenia
Constitutional Court

Statistical data
1 May 2000 – 31 August 2000

The Constitutional Court held 16 sessions (9 plenary and 7 in chambers) during this period. There were 420 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 440 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 May 2000). The Constitutional Court accepted 103 new U- and 169 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 74 cases (U-) in the field of the protection of constitutionality and legality, in which the Plenary Court made:
  - 21 decisions and
  - 53 rulings;
- 12 cases (U-) cases joined to the above mentioned cases for common treatment and adjudication.

Accordingly the total number of U- cases resolved was 86.

In the same period, the Constitutional Court resolved 114 (Up-) cases in the field of the protection of human rights and fundamental freedoms (8 decisions issued by the Plenary Court, 106 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 Association of Constitutional Courts using the French language (A.C.C.P.U.F.);

- 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/eusds.html");

- in the CODICES database of the Venice Commission.

Important decisions

Identification: SLO-2000-2-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 18.05.2000 / **e)** U-I-72/96 / **f)** / **g)** *Uradni list RS* (Official Gazette), 54/2000; *Odločbe in sklepi Ustavnega sodišča* (Official Digest), IX, 2000 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (Slovenian, English).

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.
3.17 **General Principles** – General interest.
5.2.2.7 **Fundamental Rights** – Equality – Criteria of distinction – Age.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights of the child.
5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

Education, primary, examination / Education, levels, differentiation.

Headnotes:

External differentiation between pupils in the eighth and ninth grades of a primary school and final examinations in such a school, as determined by the Primary School Act, are not inconsistent with the Constitution.

Summary:

Primary school lessons are not organised as a whole only on one level of education, but can be and even are compulsorily organised, to a greater or smaller extent, on more levels of education.

Article 57 of the Constitution determines that primary education is compulsory and financed from the public funds. According to an interpretation by the Constitutional Court, it follows from this provision that a primary school organised and financed by the State must be established in such a manner as to enable all pupils, regardless of their ability, to successfully fulfil their Primary school obligation. However, it does not follow from this provision that any kind of differentiation concerning Primary school lessons is constitutionally admissible. This also follows from the United Nations Convention on the Rights of the Child, which determines in Article 29 the duties of signatory States as regards the directing of children's education.

In the Constitutional Court's opinion, such a differentiation also does not follow from Article 57.3 of the Constitution determining that the State shall provide opportunities for all citizens to obtain a proper education. This provision applies to the entire area of education.

It would be unconstitutional if the statute based the differentiation of primary-school lessons on some personal circumstance (Article 14.1 of the Constitution), or if any level of education were not accessible to all pupils in a primary school on equal grounds. However, this does not follow from the challenged Primary School Act provisions.

For the review of the constitutionality of the provision on the external differentiation of levels of education in the eighth and ninth grades it is important whether pupils themselves may choose the level of education they want to pursue, or whether they are just placed by others in one or another level of education. It clearly follows from Article 40.5, in conjunction with Article 41.1, of the Primary School Act that pupils themselves decide on the level of education they would like to attend at the end of the seventh grade. Thus, a pupil can change the type of education at the end of an examination period. Pursuant to Article 41.2, a pupil may do so on the basis of their grades. However, in such a case, the change in a level of education is their own choice.

On the basis of the last paragraph of Article 40 of the Primary School Act, the Rules on detailed conditions for the organisation of the different level education system in a nine-year primary school (Official Gazette RS, no. 27/99) regulate the question of the selection of and change in the level of education in the eighth and ninth grade and in this regard entirely respect the statutory provision determining that the choice is granted to the pupil. Thus, such a right is also recognised within the executive regulations system.

The petitioner's assertions that the challenged provisions of Article 40 of the Primary School Act select and therefore discriminate against pupils are not substantiated. As it is impossible to interpret Article 14.2 of the Constitution, which determines that all are equal before the law, as requiring that the legislature regulate equally even factual situations which are evidently different, so also the provisions on creating opportunities for citizens to obtain a proper education (Article 57.3 of the Constitution), which concretise the principle of equality before the law in the area of education, cannot be understood as meaning that the State is obliged to offer all citizens only one type of primary education irrespective of their individual abilities and interests. Although this is more demanding than a school organised on an egalitarian basis, Article 57.3 of the Constitution imposes on the State the duty to organise a school such as to enable every citizen to obtain an education appropriate as much as possible to his or her learning abilities. The differentiation determined in Article 40 of the Primary School Act pursues such a requirement and, therefore, does not violate the mentioned constitutional provision.

Article 64 of the Primary School Act determined compulsory examinations for pupils at the end of three periods. Following the provision of the first paragraph of this article, the meaning and purpose of such examinations is to examine the minimum standards of pupils' knowledge. The same purpose is intended for examinations at the end of the third period, when, pursuant to Paragraph 5 of the same article, pupils' knowledge of the Slovenian language, mathematics, a foreign language and two mandatory subjects (final examinations) is examined according to a standard procedure in cooperation with external examiners. In accordance with Article 72.1 of the Primary School Act, pupils successfully complete their ninth grade if they obtain positive grades from all subjects and successfully pass final examinations.

Examination is a constitutive part of the primary education process, and final examinations are also part of this process. Examination is intended for the pupil and their parents, as well as the school. In particular, it is intended for the State, which guarantees the existence of a primary school and free access to it, and is also responsible for its effectiveness.

The Constitutional Court cannot judge, from a professional point of view or as regards the question of whether they are appropriate or to be recommended, the enacted final examinations in comparison with other regulations which the first petitioner considered more appropriate. The different regulation of this question indicates that such an issue can be regulated in more than one constitutionally admissible manner. It should be left to the legislature's discretion to select one of these possibilities.

The challenged Article 64 of the Primary School Act is, therefore, not inconsistent with Article 57 of the Constitution which provides that education is free in general, that primary education is mandatory and financed from public funds, and that the State create the opportunities for citizens to obtain a proper education. The assertion that final examinations exploit or abuse some or all pupils and are inconsistent with Article 56.2 of the Constitution is also unsubstantiated.

The negative consequences that might develop from the challenged regulation in the future, which do not follow from such a regulation but might occur due to the consequences of such a regulation's implementation, can be a sound reason for an amendment to or omission of such a regulation and thus a good argument for professional circles and the public to force the legislature to change it. A threat expressed in advance or a conclusion that such consequences might occur in the future is not sufficient to find these challenged provisions to be unconstitutional.

Supplementary information:

Legal norms referred to:

- Articles 14, 56, 57 of the Constitution.
- Article 21 of the Constitutional Court Act.

Languages:

Slovenian, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-2000-2-006

a) South Africa / **b)** Constitutional Court / **c) / d)** 31.05.2000 / **e)** CCT 8/2000 / **f)** Minister for Welfare and Population Development v. Fitzpatrick and Others / **g)** 2000 (3) *South African Law Reports* (Official Gazette) 422 (CC) / **h)** 2000 (7) *Butterworths Constitutional Law Reports* 713 (CC); CODICES (English).

Keywords of the systematic thesaurus:

3.17 **General Principles** – General interest.
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, non-citizen / Child, best interest / Child, trafficking, protection against.

Headnotes:

A law that proscribes the adoption of a child born of a South African citizen by certain non-citizens, without regard to the best interests of the child, violates the Constitution. The Constitution provides that a child's best interests should be of paramount importance in every matter concerning the child. Where an order of invalidity would not leave a legal lacuna and would in fact harm the best interests of children, that order should not be suspended.

Summary:

Section 18.4.f of the Child Care Act 74 of 1983 (the Act) prohibits the adoption of a child born to a South African citizen by a non-citizen or by a person who has the necessary residential qualifications but has not applied for a certificate of naturalisation. The first and second respondents, British citizens residing in South Africa and wishing to adopt a child born to a South African citizen, challenged the constitutionality

of Section 18.4.f. The High Court found the section to be unconstitutional but suspended the order of invalidity for a period of two years to enable parliament to correct the defect in the legislation. The Minister for Welfare and Population Development, the applicant, supported the order of the High Court and sought confirmation by the Constitutional Court pursuant to Section 172.2.a of the Constitution.

Goldstone J, writing for a unanimous Court, held that Section 18.4.f of the Act violated the constitutional rights of the child contained in Section 28.2 of the Constitution. Section 28.2 provides that a child's best interests are of paramount importance in every matter concerning the child. While Section 28.1 details a list of the rights of the child, Section 28.2 must be read to extend beyond those enumerated rights. According to the plain language utilised in Section 28.2, it is applicable to every matter concerning the child, including adoptions. Applying that reasoning to the case before it, the Court determined that Section 18.4.f of the Act proscribed certain adoptions without regard to the best interests of the child. In fact, the Court noted a host of hypothetical examples where the best interests of the child would be served by an adoption that the statute would prohibit. Accordingly, the Court confirmed the invalidity of Section 18.4.f of the Act.

The Court next addressed the contention that the order of invalidity be suspended. The applicant argued that the failure to suspend the order would create a lacuna in the law so that it would not ensure sufficient protection against child-trafficking, and would not provide for thorough background investigations of foreign applicants wishing to adopt South African children, and adequate consideration of South African applicants who should be given priority to adopt South African children. The Court determined however, that the existing provisions of the Act and the infrastructure created by the Act sufficiently addressed each of the applicant's concerns. Accordingly, the Court found no reason to suspend the order of invalidity. Moreover, the Court determined that such a suspension would harm the child in question as well as similarly-situated children. This result would itself be counter to Section 28.2 of the Constitution. As such, the Court ordered that the suspension of the order of invalidity be set aside and Section 18.4.f was struck down with immediate effect.

Cross-references:

Best interest of the child: *Fraser v. Naude and Others* 1999 (1) *SA* 1 (CC), 1998 (11) *BCLR* 1357 (CC).

Suspension order: *Fraser v. Children's Court, Pretoria North and Others* 1997 (2) *SA* 261 (CC), 1997 (2) *BCLR* 153 (CC), *Bulletin* 1997/1 [RSA-1997-1-001].

Languages:

English.

Identification: RSA-2000-2-007

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 07.06.2000 / **e)** CCT 35/99 / **f)** Dawood and Another v. Minister of Home Affairs and Others; Shalabi and Another v. Minister of Home Affairs and Others; Thomas and Another v. Minister of Home Affairs and Others / **g)** 2000 (3) *South African Law Reports* (Official Gazette) 936 (CC) / **h)** 2000 (8) *Butterworths Constitutional Law Reports* 837 (CC); CODICES (English).

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
3.10 **General Principles** – Certainty of the law.
5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
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:

Administrative authority, discretionary power / Spouses right to cohabit / Marriage, right.

Headnotes:

A law which effectively forces a citizen to choose between remaining in the Republic without her foreign spouse and leaving the Republic with the foreign spouse while the latter's application for an immigration permit is being considered, violates the right to dignity. Such a law causes a substantial impediment to the right to marry and the right to family life and is unconstitutional.

Summary:

The first applicants in this case were South African citizens married to foreign spouses who were neither citizens nor permanent residents of South Africa. The foreign spouses were refused an extension of their temporary residence permits and were required to leave the Republic in order to apply for immigration permits. The central issue concerned the constitutional right of spouses to cohabit free from government interference.

Section 25.9 read with Section 23 of the Aliens Control Act 96 of 1991 (the Act) requires that immigration permits only be granted to applicants outside of South Africa at the time when the application is made. Section 25.9.b of the Act creates an exception for spouses, dependant children and destitute, aged or infirm family members of South African citizens and permanent residents: such persons may remain in South Africa pending the outcome of their applications for immigration permits, provided they are in possession of valid temporary residence permits. Furthermore, Sections 26.3 and 26.6 of the Act authorise immigration officials and the Director-General of Home Affairs (the DG) to issue and extend temporary residence permits, but provide no guidance as to the circumstances in which it would be appropriate to refuse to issue or extend such permits. There is no automatic entitlement to temporary residence permits: each application has to be considered on its merits. An immigration official or the DG could therefore refuse to grant or extend a temporary residence permit also to a foreign spouse.

The effect of such a refusal would be to force the South African spouse to choose between going abroad with her foreign spouse and remaining in South Africa alone, pending the outcome of the immigration permit application. Enforced separation places strain on any relationship. That strain may be particularly serious where spouses are indigent and not in a position to afford international travel, or where there are children born of the marriage.

O'Regan J, writing for a unanimous Court, observed that even though there is no express provision in the Bill of Rights protecting the right to family life or the right of spouses to cohabit, this did not mean that such rights would not receive constitutional protection. After noting that marriage and the family are of vital importance to society, she reiterated the fundamental importance of human dignity (Section 10 of the Constitution) to South African society and to constitutional interpretation and adjudication. Human dignity is a cornerstone of democracy in South Africa, in recognition of the past when dignity was routinely and cruelly denied to many persons.

The Court held that there was no more specific right that protected individuals who wished to enter into and sustain permanent intimate relationships than the right to dignity. The decision to enter into and sustain such relationships is a matter of defining significance for many people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. It is not only legislation that prohibits the right to form a marriage relationship, but also legislation that significantly impairs the ability of spouses to honour their right and duty to live together, that violates the right to dignity. Having regard to the general prohibition against remaining in the Republic pending the outcome of an application for an immigration permit, the power to refuse the temporary permit is one that limits the right of cohabitation of spouses.

There may be circumstances in which there are constitutionally acceptable reasons for refusing to grant or extend a temporary residence permit. But those circumstances were not identified in the Act at all. In a constitutional democracy the responsibility to protect constitutional rights in practice is imposed both on the legislature and on the executive and its officials. The legislature must take care when legislation is drafted to limit the risk of an unconstitutional exercise of the discretionary powers it confers, as it has a constitutional obligation to "respect, protect, promote and fulfil the rights in the Bill of Rights" (Section 7.2 of the Constitution). The failure of the Act to identify the criteria relevant to a refusal to grant or extend temporary residence permits introduced an element of arbitrariness that was inconsistent with the constitutional protection of the right to marry and establish a family. The Court accordingly declared Section 25.9.b read with Sections 26.3 and 26.6 of the Act to be inconsistent with the Constitution and invalid.

In her order, O'Regan J held that it is not for the Court, but for the legislature, to identify the policy considerations that would render a refusal of a temporary permit justifiable and accordingly suspended the order of invalidity to give the legislature time to cure the constitutional defects. Interim relief was however necessary to protect constitutional rights adequately pending the amendment or replacement of the Act. The Court thus issued a mandamus requiring immigration officials and the DG when exercising their discretion to take into account the constitutional rights of the people affected by the relevant provisions, and to issue or extend temporary residence permits to them unless good cause existed to refuse to do so. Good cause would be established, for example, were it to

be shown that the issue or extension of a temporary permit would constitute a real threat to the public.

Cross-references:

National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others 2000 (2) *SA* 1 (CC), 2000 (1) *BCLR* 39 (CC), *Bulletin* 2000/1 [RSA-2000-1-001]; *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].

Languages:

English.

Identification: RSA-2000-2-008

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 09.06.2000 / **e)** CCT 2/2000 / **f)** South African Commercial Catering and Allied Workers Union and Others v. Irvin and Johnson Ltd (Seafoods Division Fish Processing) / **g)** 2000 (3) *South African Law Reports* (Official Gazette) 705 (CC) / **h)** 2000 (8) *Butterworths Constitutional Law Reports* 886 (CC); CODICES (English).

Keywords of the systematic thesaurus:

3.19 **General Principles** – Reasonableness.
5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Impartiality.

Keywords of the alphabetical index:

Appeal Court, procedure / Judge, participation in previous process / Recusal / Judge, bias, reasonable suspicion / Judge, bias, burden of proof.

Headnotes:

A person applying for the recusal of a judge hearing a case bears the onus of rebutting the presumption of judicial impartiality based on cogent or convincing evidence of a reasonable apprehension of bias.

Summary:

Following disciplinary enquiries, the individual applicants in this case were dismissed for participating in a march held on 21 June 1995 at the premises of the respondent (the employer). In response to the dismissals the trade union organised protest action between 25 and 31 August 1995. A second group of thirty-five employees was consequently dismissed. The two groups of dismissed employees brought separate proceedings claiming unfair labour practices in the industrial Court.

The thirty-five dismissed for the August protests were the first to reach trial. Of these, the industrial Court confirmed the dismissal of seventeen who were already under final written warning for having participated in the June march, and reinstated the remaining eighteen. Both the respondent and the trade union took this matter on appeal. Three judges of the Labour Appeal Court dismissed the appeals of the seventeen employees who had failed in the industrial Court, but allowed the employer's cross-appeal in respect of the eighteen who had succeeded, thus confirming all thirty-five dismissals.

Some weeks later the industrial Court heard the matter of those employees dismissed following the June march, and refused their application. Their appeal to the Labour Appeal Court was subsequently set down to be heard before three judges, two of whom had decided the previous matter. The employees applied for the recusal of the two judges. This application was refused in the Labour Appeal Court and the applicants applied to the Constitutional Court for leave to appeal. The Court heard both the application for leave to appeal and the appeal simultaneously. It had already been established that judicial recusal was a constitutional matter.

Cameron AJ, on behalf of the majority, granted leave to appeal but dismissed the appeal on the basis that the applicants, who bore the onus of rebutting the presumption of judicial impartiality had failed to put forth cogent or convincing evidence that a reasonable person in the circumstances of the applicants would reasonably have apprehended bias. The applicants, in the Labour Appeal Court, had argued that the appeal was based on the fact that there were identical issues and witnesses as in the previous case. The judges had already made certain crucial findings on these issues and had pronounced on the credibility of three of the witnesses. Furthermore, they had made certain factual findings regarding the occurrences of the June march. However, the applicants did not dispute the correctness of the court's assessment of the June events.

The majority of this Court found that the refusal of the recusal application by the Labour Appeal Court was justified. The principle that applied, duly modified in the context of appellate proceedings, was that a judge should recuse herself because a fair-minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after she has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credibility of a witness whose evidence is of significance on such a question of fact. The Court held that there was no live and significant issue in the pending appeal on which, or about the credibility of a witness significant to which, the judges had expressed clear views in the first matter.

In the Constitutional Court, the applicants argued that the tone of the Labour Appeal Court with regard to the June events was indicative of a reasonably apprehended bias. But this had not been argued before the Labour Appeal Court and therefore, these concerns could not be regarded as cogent or convincing evidence upon which the applicants based their case. Furthermore, the judges in the Labour Appeal Court were denied the benefit of commenting on this argument and hence the Constitutional Court could not consider the validity of such argument.

Mokgoro and Sachs JJ dissented. In their view the issue in this case was not whether the judges in the Constitutional Court had a reasonable apprehension that the two judges concerned in the Labour Appeal Court would fail to handle the appeal before them with appropriate professionalism and impartiality. Nor was the issue whether, in fact, bias existed. The issue was the apprehension of the lay litigant alleging bias and the reasonableness of that apprehension based on the actual circumstances of the case. The reasonableness of the apprehension also required a judge to assess the lay litigant in his or her context.

In the present matter the lay litigant was a factory worker dismissed for misconduct and participating in an unlawful work stoppage, and who was a member of a minority union. The two events were closely inter-related and led to two sets of dismissals. The circumstances appeared to overlap so closely that the applicants feared that they would not get the “fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”, as guaranteed by Section 34 of the Constitution. The minority held that any litigant in the position of the applicants would have entertained such an apprehension, and that in the circumstances of the case, where forceful pronouncements by the judges concerned had been made on crucial matters in issue, they would not have held such an apprehension unreasonably.

Cross-references:

Recusal of judges: *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others* 1999 (4) *SA* 147, 1999 (7) *BCLR* 725 (CC), *Bulletin* 1999/2 [RSA-1999-2-005].

Standard of reasonableness: *S v. Manamela and Another* (Director-General of Justice Intervening) 2000 (3) *SA* 1 (CC), 2000 (5) *BCLR* 491 (CC).

Languages:

English.

Identification: RSA-2000-2-009

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 09.06.2000 / **e)** CCT 15/2000; CCT 07/2000 / **f)** First National Bank of South Africa Ltd v. Land and Agricultural Bank of South Africa and Others; Sheard v. Land and Agricultural Bank of South Africa and Another / **g)** 2000 (3) *South African Law Reports* (Official Gazette) 626 (CC) / **h)** 2000 (8) *Butterworths Constitutional Law Reports* 876 (CC); CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.17 **General Principles** – General interest.
3.19 **General Principles** – Reasonableness.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

Debtor, right to access courts / Loan / Property, protection, procedure / Execution of movables.

Headnotes:

Legislative provisions that authorise the Land Bank of South Africa to attach and sell debtors’ movable or

immovable property in execution, and which give that bank a preferential right to the proceeds of a sale in execution of movables without recourse to a court of law, violate the constitutional right of access to courts which is fundamental to a democratic society that adheres to the rule of law. The Land Bank of South Africa's interest in saving time and money by bypassing the courts in this manner did not justify the violation of the right and the relevant statutory provisions are unconstitutional.

Summary:

In these two cases, heard together, the Court had to adjudicate on certain provisions in Sections 34 and 55 of the Land Bank Act 13 of 1944 (the Act). These sections authorise the Land Bank of South Africa (the Land Bank) to recover its debts by attaching and selling debtors' property in execution without recourse to a court of law. Section 34.5 grants the bank a preferential right to the proceeds of a sale in execution of movables. The Land Bank conceded the unconstitutionality of the impugned provisions to the extent that they infringed the debtor's right of access to courts. In the First National Bank case, the Land Bank sought a suspension of the order of invalidity so as to preserve the statutory security it enjoyed over the proceeds of a sale of movable property in execution while allowing the relevant authorities time to correct the constitutional defects.

Mokgoro J, writing on behalf of a unanimous Court, confirmed that the debt recovery procedure provided for by the Act was unconstitutional. The process of execution sanctioned by the Act was essentially the same as that contained in Section 38.2 of the North West Agricultural Bank Act 14 of 1981 which the Constitutional Court had struck down in Lesapo v. North West Agricultural Bank and Another, as an impermissible infringement of the right of access to courts contained in Section 34 of the Constitution. The impugned sections in the Act constituted a form of self-help inimical to the rule of law. Contrary to the ordinary civil process of execution, the Act empowered the Land Bank to take the law into its own hands, to serve as judge in its own cause and to usurp the inherent powers and functions of the courts by deciding its own claims and relief. The Land Bank's interest in reducing the risk of loss through time- and cost-saving measures which bypass the judicial system, could not justify infringing the right of individuals to have justiciable disputes settled by a Court of law.

Turning to the question whether the order of invalidity ought to be suspended, the Court recognised that Section 34 loans enable the Land Bank to make short and medium term advances to farmers without contractual security, pledges or collateral security, on the strength of the bank's statutory security. Section 34 of the Act therefore renders the Land Bank a preferred creditor and to strike down the section with immediate effect would prejudice the Land Bank financially and force it either to raise interest rates or decline future advances. This would undermine the role of the Land Bank which is to provide accessible financial services to small-scale and struggling farmers, as well as beneficiaries of land reform programmes. The Court accordingly held that it was reasonable, in the interests of sound public policy, to preserve the current form of security by suspending the order of invalidity for a period of two years. In the interim the Land Bank was prohibited from attaching and selling the property of debtors in the absence of a court order.

Cross-references:

Access to court: *Lesapo v. North West Agricultural Bank and Another* 2000 (1) *SA* 409 (CC), 1999 (12) *BCLR* 1420 (CC).

Suspension of orders of invalidity: *Fraser v. Naude and Others* 1999 (1) *SA* 1 (CC), 1998 (11) *BCLR* 1357 (CC).

Languages:

English.

Identification: RSA-2000-2-010

a) South Africa / **b)** Constitutional Court / **c) / d)** 18.08.2000 / **e)** CCT 4/2000 / **f)** Christian Education South Africa v. Minister of Education / **g)** 2000 (4) *South African Law Reports* (Official Gazette) 757 (CC) **/ h)** 2000 (10) *Butterworths Constitutional Law Reports* 1051 (CC); CODICES (English).

Keywords of the systematic thesaurus:

3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
3.16 **General Principles** – Weighing of interests.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.

5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights of the child.
5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

School, corporal punishment.

Headnotes:

A law which prohibits corporal punishment in all schools does not violate the Constitution. When all the factors in favour of the individual and group exercise of the freedom of religion are weighed against the interest that the state has in protecting the rights, dignity, and physical and moral integrity of the child, the balance favours upholding the generality of the law in the face of a claim for a constitutionally compelled exemption based on the freedom of religion.

Summary:

Section 10 of the South African Schools Act 84 of 1996 prohibits corporal punishment in all schools. The appellant was a voluntary association of 196 independent Christian schools with a total of approximately 14 500 pupils. It claimed that "corporal correction" was an integral part of the Christian ethos in its schools. The appellant's principal contention was that the blanket legislative prohibition on corporal punishment infringed the Constitution by limiting the individual and community rights of parents (Sections 15 and 31 of the Constitution respectively) to practice their religion. The Minister of Education (the respondent) argued primarily that the infliction of corporal punishment violated Section 28 of the Constitution, which enshrines children's rights, as well as their rights to human dignity, and freedom and security of the person contained in Sections 10 and 12 of the Constitution respectively. Alternatively, that if the impugned provision limited the appellant's religious rights, such limitation was reasonable and justifiable in terms of Section 36 of the Constitution.

Sachs J, on behalf of a unanimous Court, assumed that the appellant's right to freedom of religion had been infringed and the case was decided on the question whether that infringement was justifiable. The Court found that Section 36 of the Constitution requires a proportionality analysis which would balance the overlapping and competing rights and interests, and declined to apply the more stringent test of strict scrutiny used in other jurisdictions. In a country where there is a vast overlap between religious and secular activities, the balancing process is difficult for two reasons. First, problems arise in weighing considerations of faith against those of reason. Secondly, it is difficult to separate those aspects of religious activity that are protected by the Bill of Rights from those that are secular and open to regulation in the ordinary way. In general, members of a democratic society cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state, where reasonably possible, should avoid forcing believers to choose between being true to their faith and respecting the law.

The Court found that the respondent had established that the prohibition on corporal punishment was an integral part of a national programme to transform the education system and bring it in line with the Constitution, by refusing to countenance the use of physical force in achieving scholarly correction. The impugned provision had a principled and symbolic function manifestly intended to promote respect for the dignity of all children, as well as their physical and emotional integrity. Furthermore, in terms of its international law obligations, the state is under a duty to take appropriate measures to protect children from violence, abuse and degradation. Courts throughout the world protect children from what they regard as potentially injurious consequences of their parents' religious practices.

These factors do not undermine the court's regard for the sincerity of the appellant's beliefs or the spiritual integrity with which religious activities are pursued, but they are relevant to the degree of legitimate concern that the state may have in a sensitive area in not making exemptions even for the most honourable of persons. Although the practice of corporal correction in schools is an important facet of the self-definition and ethos of the religious community in question, such schools of necessity function in the public domain so as to prepare their learners for life in the broader society. Just as it is not unduly burdensome to oblige them to accommodate secular norms regarding national examination standards, the payment of rates and taxes and so forth, so too it is not unreasonable to expect them to adapt to non-discriminatory laws that impact on their codes of discipline. Parents are not thereby obliged to choose between obeying the law and following their conscience. They can do both simultaneously. What

they are prevented from doing is to authorise teachers, acting in their name and on school premises, to fulfil what they regard as their religious responsibilities. Similarly, save for this one aspect, the appellant's schools are not prevented from maintaining their specific Christian ethos.

The Court ultimately held that in weighing up all these factors, the limitation of the appellant's right to freedom of religion was justifiable. The appeal was dismissed.

Supplementary information:

The judgment left undecided the question whether moderate corporal correction by parents in the home would violate the Constitution.

Cross-references:

Freedom of Religion: *S v. Lawrence*; *S v. Negal*; *S v. Solberg* 1997 (4) *SA* 1176 (CC), 1997 (10) *BCLR* 1348 (CC).

Human Dignity: *S v. Williams and Others* 1995 (3) *SA* 632 (CC), 1995 (7) *BCLR* 861 (CC); *S v. Makwanyane and Another* 1995 (3) *SA* 391 (CC), 1995 (6) *BCLR* 665 (CC).

Languages:

English.

Identification: RSA-2000-2-011

a) South Africa / **b)** Constitutional Court / **c) / d)** 25.08.2000 / **e)** CCT 1/2000 / **f)** The Investigating Directorate: Serious Economic Offences and Others v. Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) Ltd and Others v. Smit NO and Others / **g) / h)** 2000 (10) *Butterworths Constitutional Law Reports* 1079 (CC); CODICES (English).

Keywords of the systematic thesaurus:

2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.16 **General Principles** – Weighing of interests.
3.17 **General Principles** – General interest.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Search, premises / Seizure, of information / Warrant, legislative provisions authorising issue.

Headnotes:

A law which authorises a judicial officer to grant a warrant of search and seizure for the purposes of investigating criminal activity constitutes a reasonable and justifiable limitation of the right to privacy if it can be interpreted so as to provide certain criteria on the basis of which the judicial officer must exercise that power.

Summary:

The respondents (including an individual and a group of companies) applied to the High Court for relief following a raid on their offices during which a large quantity of documents and computer records were seized in terms of the National Prosecuting Authority Act 32 of 1998 (the Act). The Act grants extensive search and seizure powers to an Investigating Director in the office of the National Director of Public Prosecutions when the latter conducts a 'preparatory investigation' or an 'inquiry' relating to the commission of certain specified offences (Sections 28.13 and 23.14 read with Section 29 of the Act). A preparatory investigation is a preliminary step which can be instituted to enable the Director to determine whether there are reasonable grounds to conduct an inquiry. In terms of Section 29.4 of the Act, these search and seizure powers can be exercised once a judicial officer has issued a warrant. Section 29.5 prescribes that it must appear to the judicial officer that there are reasonable grounds for believing that anything connected with the preparatory investigation is, or is suspected to be, on the targeted premises. These grounds must relate to (a) the nature of the preparatory investigation; (b) the suspicion that gave rise to the preparatory investigation; and (c) the need for a warrant with regard to the preparatory investigation.

Langa DP, writing for a unanimous Court, held that the search and seizure operation envisaged by the Act clearly violated the right of individuals and legal persons to privacy (Section 14 of the Constitution). The only question was whether the violation could be justified under Section 36 of the Constitution. The

answer depended in the first place on the proper meaning of Section 29.5 of the Act. Section 39 of the Constitution requires a court, when called upon to consider the constitutionality of legislative provisions, to examine the objects of an Act and read its provisions in conformity with the Constitution, provided that such an interpretation can be reasonably ascribed to those provisions.

The Court held that on a proper construction of Section 29.5 of the Constitution, in light of several factors, including its legislative history, it was clear that the legislature must have intended that judicial officers would not issue a warrant in the absence of a reasonable suspicion that an offence has been committed. The warrant may only be issued where the judicial officer has concluded that there is a reasonable suspicion that a specified offence has been committed, that there are reasonable grounds to believe that objects connected with an investigation into that suspected offence may be found on the relevant premises, and in the exercise of her discretion, the judicial officer considers it appropriate to issue a search warrant. These were considerable safeguards protecting the right to privacy.

The Court held that the purpose of the provisions in the Act authorising the Directorate to engage in preparatory investigations was to assist the Director to cross the threshold from a mere suspicion that a specified offence had been committed to a reasonable suspicion that such an offence had been committed, which is a pre-requisite for the holding of an inquiry. In view of the complexities of organised crime and the difficulty of identifying criminal conduct which may or may not constitute a specified offence, there was a clear need for the Investigating Directorate to have search and seizure powers. Under those circumstances, a search warrant may properly be obtained, on the basis of a reasonable suspicion that an offence has been committed, provided that the judicial officer is of the opinion that the search and seizure might establish that such an offence is a specified offence.

Ultimately, since the importance of the purpose of granting search and seizure powers in these circumstances had been established and given that the Act struck a balance between the need for search and seizure powers and the right to privacy, the limitation of the privacy right was reasonable and justifiable.

Cross-references:

Right to privacy: *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]; *Mistry v. Interim Medical and Dental Council of South Africa and Others* 1998 (4) *SA* 1127 (CC), 1998 (7) *BCLR* 880 (CC) *Bulletin* 1998/2 [RSA-1998-2-006]; *Case and Another v. Minister of Safety and Security and Others*; *Curtis v. Minister of Safety and Security and Others* 1996 (3) *SA* 617 (CC), 1996 (5) *BCLR* 609 (CC), *Bulletin* 1996/1 [RSA-1996-1-006]; *Bernstein and Others v. Bester and Others* NO 1996 (2) *SA* 751 (CC), 1996 (4) *BCLR* 449 (CC), *Bulletin* 1996/1 [RSA-1996-1-002].

Constitutional interpretation: *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others* 2000 (2) *SA* 1 (CC), 2000 (1) *BCLR* 39 (CC), *Bulletin* 2000/1 [RSA-2000-1-001]; *De Lange v. Smuts NO and Others* 1998 (3) *SA* 785 (CC), 1998 (7) *BCLR* 779 (CC), *Bulletin* 1998/2 [RSA-1998-2-004]; *Mistry v. Interim Medical and Dental Council of South Africa and Others* 1998 (4) *SA* 1127 (CC), 1998 (7) *BCLR* 880 (CC), *Bulletin* 1998/2 [RSA-1998-2-006]; *S v. Bhulwana*; *S v. Gwadiso* 1996 (1) *SA* 388 (CC), 1995 (12) *BCLR* 1579 (CC), *Bulletin* 1995/3 [RSA-1995-3-008].

Languages:

English.

Spain
Constitutional Court

Statistical data
1 May 2000 – 31 August 2000

Type and number of decisions:

- Judgments: 103
- Decisions: 92
  - Inadmissibility: 27
  - Discontinued proceedings: 12
  - Other resolutions: 52
- Procedural decisions: 1960
- Cases submitted: 2155

Important decisions

Identification: ESP-2000-2-016

a) Spain / **b)** Constitutional Court / **c)** First Chamber / **d)** 05.05.2000 / **e)** 107/2000 / **f)** Federación de Comisiones Obreras del metal contra Entretenimiento de Automóviles, S.A. / **g)** *Boletín oficial del Estado* (Official Gazette), 136, 07.06.2000, 18-25 / **h)** CODICES (Spain).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Weighing of interests.
5.1.2.2 **Fundamental Rights** – General questions – Effects – Horizontal effects.
5.2.1.2.1 **Fundamental Rights** – Equality – Scope of application – Employment – In private law.
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:

Working condition, collective determination by workers / Freedom of contract / Salary, increase, trade union, condition.

Headnotes:

Any firm making a unilateral adjustment of its employees' wages infringes the right to found and join trade unions freely (Article 28.1 of the Constitution) from the angle of the right to bargain collectively, wherever the firm's decision is imposed after an inadequate collective bargaining process.

Labour relations do not necessitate the stipulation of equal treatment (Article 14 of the Constitution) in the strict sense, as they provide some latitude for exercising freedom of contract. Moreover, wage rises comply with objective criteria, and the wage rises in question in this case were unrelated to the trade union position of the persons concerned.

Summary:

The respondent firm decided, after several meetings held with the shop stewards representing its employees for the purpose of negotiating the collective agreement, to adjust the 1993 salaries of its entire staff unilaterally. Applying objective work evaluation criteria, it raised wages for 416 employees (by 3-6%) and maintained them for the other 63 employees. The trade union filed a complaint against the firm before the labour court, contending that the negotiations had been nothing but a travesty. The complaint was dismissed by the judicial authorities on the ground that the parties had not reached any understanding on renewal of the collective agreement, which justified the firm's decision. The Constitutional Court took the opposite view that in so doing the firm had infringed the right to form and join trade unions freely (Article 28.1 of the Constitution). Workers' unions discharge an important function in a democratic state by essential means which include, in particular, collective bargaining to settle working conditions (Articles 7 and 37.1 of the Constitution). A firm may in no circumstances, not even under cover of individual agreements with its employees, evade or impede the participation of the shop stewards who bargain collectively. The firm's conduct should be assessed having regard to the importance of the working conditions in question and to the circumstances of the negotiation conducted before adjusting the wages. The brief round of meetings staged between the managers and the unionists had ended in a “final and irrevocable” wage offer by the firm; furthermore, no conciliation process had been employed in an effort to end the dispute. The Court held that a semblance of negotiation did not suffice to honour the right of the trade union to act in defence of the employees' interests.

On the other hand, this judgment does not take the line that the differences between the wage rises of

the various employees infringed the right to equal treatment (Article 14 of the Constitution). In labour matters, the principle of the freedom of the various private entities to contract precludes any stipulation of absolute equal treatment. Moreover, the wage differences were founded on objective criteria of performance, and it had not been proved that they were linked with the consideration whether or not the employees belonged to the union.

Supplementary information:

The law concerning the Workers' Statute (1980, amended), Sections 41.1 and 64.1, lays down the various collective bargaining procedures and dispute resolution methods.

Cross-references:

Freedom to bargain collectively: Constitutional Court Judgments nos. 187/1987, 108/1989, 184/1991, 105/1992, 208/1993 and 74/1996 (*Bulletin* 1996/1 [ESP-1996-1-012]). Relationship between the collective agreement and individual freedom: Constitutional Court Judgments nos. 105/1992 and 208/1993.

Languages:

Spanish.

Identification: ESP-2000-2-017

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 10.05.2000 / **e)** 120/2000 / **f)** Simple imprudencia / **g)** *Boletín oficial del Estado* (Official Gazette), 136, 07.06.2000, 97-102 / **h)** CODICES (Spain).

Keywords of the systematic thesaurus:

4.7.3 **Institutions** – Courts and tribunals – Decisions.
5.2 **Fundamental Rights** – Equality.
5.3.5.1.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Arrest.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.

Keywords of the alphabetical index:

Penalty, restricting freedom, aims / Arrest, short-term / Criminal procedure, victim, prior complaint / Criminal procedure, civil action / *Ius ut procedatur* / Hearing, judge's obligation to mention relevant constitutional provisions.

Headnotes:

The penalty of short-term arrest is not contrary to Article 25.2 of the Constitution, since it impedes neither the re-education of the culprit nor the achievement of other equally legitimate aims of criminal sanctions.

The fact that criminal prosecution of torts causing physical injuries is subject to the prior lodging of a complaint by the victim by no means constitutes an arbitrary criterion established by the legislator (Article 9.3.7 of the Constitution) even where the complaint is based on a request for the payment of compensation, since the Spanish legal system, having regard to the criteria of effectiveness and good functioning of justice, allows compensation to be obtained in criminal proceedings.

The ordinary court procedure for hearing the submissions of the parties to the case before referral to the Constitutional Court is of great importance; without becoming mired in formalism, it should enable the parties to have their contentions heard, and accordingly the judge should specify the constitutional provisions which are deemed essential.

Summary:

The investigating court of Gavá (Barcelona Province) raised an issue of unconstitutionality concerning a provision of the Penal Code prescribing as a penalty for the infliction of physical injuries through sheer carelessness or negligence short-term arrest in addition to a fine (Article 586 bis of the 1973 Penal Code, repealed in 1995). This court held that a penalty so briefly restricting freedom (one to thirty days), intended to be served at the convicted persons' home without judicial supervision in practice, did not advance the aims of re-education and social rehabilitation prescribed by Article 25.2 of the Constitution. Furthermore, by making the action of criminal justice subject to the prior lodging of a complaint by the victim, this provision was deemed to countenance unjust and discriminatory situations. The Constitutional Court, however, ruled that the challenged statutory provision was not unconstitutional.

It is permissible under the Constitution for criminal sanctions to have a number of lawful aims apart from the re-education of the convicted person mentioned in Article 25.2. Furthermore, the application of short-term penalties can undeniably advance that aim.

Article 25.2 of the Constitution provides a yardstick for assessing the system of enforcement of penalties as a whole, not one specific penalty which restricts freedom. The possibility of serving a term of arrest at the convicted person's home is intended to avoid uprooting him and to assist his re-education.

The law may make the criminal prosecution of any type of tort contingent on the victim's lodging a complaint, although in practice the payment of compensation has a certain effect on the lodging of complaints. Spanish law allows civil damages to be obtained under criminal procedure, having regard to the criteria of effectiveness and good functioning of justice which, not being devoid of rational explanation, are by no means arbitrary.

The lodging of a complaint against a tort does not place the *ius puniendi* of the state in the hands of a private individual, as this punitive authority is strictly within the jurisdiction of the courts which form part of the judiciary; the complaint has the sole effect of opening the criminal proceedings through the exercise of a *ius ut procedatur*.

As regards the procedural law aspects of the case, the constitutional ruling stresses the importance of the hearings which the judge must afford the parties before deciding whether or not there is cause to raise a question of unconstitutionality in respect of the law which he is required to enforce. Failure to mention at the start of the proceedings whichever constitutional provision may be relevant prevents the judge from subsequently founding the constitutional issue on that provision, if this silence in itself prevents the parties from knowing the precise nature of the question in order to avail themselves of their right to raise a defence. Consequently, the present ruling does not advert to the alleged infringement of the principle of equality before the law (Article 14 of the Constitution).

Cross-references:

Lawful aims of criminal sanctions: Constitutional Court Judgments nos. 150/1991 and 234/1997. Rights of victims of offences: Constitutional Court Judgments nos. 157/1990, 31/1996 (*Bulletin* 1996/1 [ESP-1996-1-006]) and 138/1999. Arbitrary criterion of the legislator: Constitutional Court Judgments nos. 108/1988, 65/1990, 239/1992 and 73/2000 (*Bulletin* 2000/1 [ESP-2000-1-011]). Hearing prior to the raising of issues of unconstitutionality: Constitutional Court Judgment no. 126/1997 (*Bulletin* 1997/2 [ESP-1997-2-016]).

Languages:

Spanish.

Identification: ESP-2000-2-018

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 29.05.2000 / **e)** 138/2000 / **f)** María Dolores Cabezas López / **g)** *Boletín oficial del Estado* (Official Gazette), 156, 30.06.2000, 16-30 / **h)** CODICES (Spain).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Legality.
4.6.11.1 **Institutions** – Executive bodies – The civil service – Conditions of access.
5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.
5.4.7 **Fundamental Rights** – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Professor, university access / Merit, condition of access / Discretion, technical.

Headnotes:

Selection of a candidate on a criterion designated as an additional merit by the regulations governing the selection procedure is contrary to the right of access to public functions under conditions of equality (Article 23.2 of the Constitution). The conditions stipulated for access to public functions must be laid down in a provision with force of law (Articles 23.2 and 103.3 of the Constitution). This constitutional principle does not prevent clarifications from being made in the regulatory provisions but does outlaw the stipulation of further conditions devoid of any legal sanction, whether under regulations or by applying the law or provisions governing access to certain public service posts, for this would be tantamount to establishing new criteria of distinction in an area

where the law draws no distinctions and would thus contravene the egalitarian criterion sanctioned by law. Neither the right to effective judicial protection (Article 24.1 of the Constitution) nor the right of access to public functions under conditions of equality (Article 23.2 of the Constitution) embodies any right to exemption from judicial review concerning what is known as technical discretion. The fact that the judicial authorities do not arrange any specific procedure for examining the parties' contentions and rule according to arguments other than those submitted by the complainant but contemplated by the respondent in its contentions in no way constitutes a case of deprivation of liberty. Where, besides infringement of the right to effective judicial protection (Article 24.1 of the Constitution), infringement of a material fundamental right is alleged, in deciding whether or not the latter right has been secured it does not suffice to find that the judicial decision reasonable; it must also be determined whether the decision complained of interferes with the material right invoked.

Summary:

After winning a competition organised by the University of Granada for a lectureship in the pharmacy department, the appellant was proposed by the qualification board and then appointed by the university vice-chancellor. However, her appointment was subsequently set aside by the administrative court on an appeal filed by another candidate. The decision was founded on the fact that the assessment criteria published by the qualification board required candidates to have a certain amount of teaching experience which the winner of the competition lacked, having been engaged exclusively in research until then.

The Constitutional Court allowed the present application for constitutional protection on the ground that Article 23.2 of the Constitution had been breached. It held that the administrative court, in accepting teaching experience as a condition of access to the lectureship, had stipulated a condition not prescribed by law and thus devoid of any legal sanction. In this case it was teaching experience which, according to the regulations governing this type of competition, constitutes an additional merit to be taken into consideration. Its stipulation as a condition for access to the past was tantamount to depriving a person of the enjoyment of a right where no restriction in that regard was prescribed by law.

Article 23.2 of the Constitution secures to all citizens the right of access to public functions under conditions of equality, presupposing firstly that discriminatory conditions of access or specific personalised references may not be applied, and secondly that it is mandatory to ensure the compliance of all the required conditions with the principles of merit and ability (laid down in Article 103.3 of the Constitution). The conditions of equality referred to in Article 23.2 of the Constitution reflect not only on the laws themselves but also on their application and interpretation. This does not mean, however, that the constitutional provision in question establishes a fundamental right to the strictest observance of the law as regards access to public functions.

The Constitutional Court nevertheless dismissed the allegations of breaches of Article 24.1 of the Constitution (right to effective judicial protection). Indeed, no inconsistency was found in this respect because, contrary to the claims made in the application for constitutional protection, the impugned judicial decision does indeed give the applicant an answer to the question raised. The Court also denied the existence of any circumstances depriving her of a defence; although the judicial authority had availed itself of arguments other than those raised by the applicant, she could not be deprived of a defence having regard to the fact that the arguments in question had been raised by the respondent in its rejoinder.

Languages:

Spanish.

Identification: ESP-2000-2-019

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 29.05.2000 / **e)** 141/2000 / **f)** Pedro Carrasco Carrasco / **g)** *Boletín oficial del Estado* (Official Gazette), 156, 30.06.2000, 40-46 / **h)** CODICES (Spain).

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.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
3.16 **General Principles** – Weighing of interests.

5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.
5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
5.3.42 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Marital separation / Child, minor, paternal rights / Sect, religious / Proselytism, of minor children.

Headnotes:

The placing of excessive restrictions on the access of a father separated from his minor children on the grounds of his religious beliefs is in breach of the right to freedom of religion (Article 16 of the Constitution).

Minors enjoy full entitlement to their fundamental rights. The exercise of these rights and the faculty of choice in their regard do not depend entirely on the decisions of those who have parental authority over or custody and care of a minor; they must reflect the child's level of maturity and the different stages of his/her capacity to act as recognised in law.

Minors have the right to freedom of religion and protection from psychological duress. It follows that they have the right not to share their parents' beliefs and not to be exposed to their proselytising. For this reason, where conflict exists between the rights of parents and minor children, it must be settled with regard firstly to the interests of the latter.

Justification must be given for all restrictions imposed by the authorities on freedom of religion.

Summary:

The applicant's wife had sought marital separation on the grounds *inter alia* that ever since her husband had joined the organisation known as the "Gnostic Christian Universal Movement of Spain" he had consistently failed to comply with his obligations towards his family, had placed conditions on the couple's intimacy and had pressurised her to join the movement. The court at first instance had ruled for separation and granted custody of the children to the wife, although parental authority was awarded to both parents.

Under the terms of this ruling, the father had access on alternate weekends and for half of all holidays. He was also explicitly barred from exposing the children to his religious beliefs or making them attend gatherings associated with those beliefs. Granting an application brought by the wife, the Provincial Court of Appeal *(Audiencia Provincial)* drastically curtailed the father's access, limiting it to weekends only with no rights during holidays and placing an absolute prohibition on the children spending the night in his home. The Court of Appeal based its decision on a psychosocial report introduced into the file which stated that the movement to which the father belonged could be identified as a destructive sect and that measures should therefore be taken to prevent the father, as a member of this organisation, from exposing his children to his beliefs.

The father lodged an appeal for constitutional protection, alleging that the Provincial Court of Appeal decision to restrict his right of access to his minor children because of his membership of the Gnostic Christian Universal Movement of Spain contravened his freedom of religion. The Constitutional Court allowed the father's appeal, set aside the restrictions imposed by the Court of Appeal and reinstated the access decreed by the trial court.

The Court held that parents' freedom of religion and their right to proselytise their children were limited by the children's own freedom of religion and right to protection from psychological duress. Children had the right not to share their parents' beliefs or to be exposed to their proselytising. For this reason, where these rights were in conflict the interests of minors must always be given priority (Articles 15 and 16 of the Constitution, in the light of Article 39).

The Court held as a general rule that the freedom of religion established in Article 16 of the Constitution meant that one could lawfully profess the beliefs of one's choice, behave as dictated by those beliefs, argue them with other people and engage in proselytism. The nature of this freedom varied according to whether it related to the conduct itself or to the religious freedom of others. In the first case, freedom of religion as laid down in Article 16 of the Constitution afforded total protection which ended only where this freedom overlapped with other fundamental rights and interests which were constitutionally guaranteed. However, where freedom of religion impinged on other people it was limited not only by the restrictions mentioned above and by those necessary for the statutory preservation of law and order, but also by the right of others not to believe and not to be involved in or subjected to proselytism by third parties (a negative demonstration of religious freedom). The right not to be subjected to

psychological duress (Article 15 of the Constitution) placed a further restriction on the right to freedom of religion. In no circumstances could differences in belief result in different treatment under the law.

In the present case, the Constitutional Court found that the disputed court decision to restrict freedom of religion was legitimate in its purpose. Nonetheless, the disproportionate nature of the restrictions imposed by the Provincial Court of Appeal involved discrimination against the applicant on grounds of his beliefs. The Constitutional Court judgment indicated that the decision by the court at first instance to prohibit the children's exposure to their father's beliefs (a decision which was not contested) was sufficient to prevent the threat which these beliefs posed for them. Any further restriction on the father's freedom of religion would have required specific evidence that it was necessary, and such evidence did not exist in the preliminary civil proceedings.

Supplementary information:

Article 14 of the United Nations Convention on the Rights of the Child.

European Parliament resolution on the European Charter on the Rights of the Child (Resolution A3-0172/92 of 8 July 1992, paragraphs 25 and 27 § 8).

Organic Law no. 1/1996 of 15 January 1996 on the legal protection of minors.

Cross-references:

Freedom of religion and ideology: Constitutional Court Judgments nos. 19/1985, 20/1990, 292/1993, 173/1995, 166/1996 (*Bulletin* 1996/3 [ESP-1996-3-026]) and 177/1996.

Judgments of the European Court of Human Rights of 25.05.1993 in the case of *Kokkinakis v. Greece* (*Special Bulletin on the ECHR* [ECH-1993-S-002]) and of 24.02.1998 in the case of *Larissis and others v. Greece*.

Languages:

Spanish.

Identification: ESP-2000-2-020

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 01.06.2000 / **e)** 149/2000 / **f)** Judicial supervision of electoral procedure / **g)** *Boletín oficial del Estado* (Official Gazette), 156, 30.06.2000, 88-94 / **h)** CODICES (Spain).

Keywords of the systematic thesaurus:

1.2.4 **Constitutional Justice** – Types of claim – Initiation *ex officio* by the body of constitutional jurisdiction.
4.5.3.1 **Institutions** – Legislative bodies – Composition – Election of members.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

Election, judicial authority / Election, administration / Judicial supervision, exclusion.

Headnotes:

Any electoral law prohibiting judicial supervision of electoral commission acts and provisions is in breach of the right to effective judicial protection (Article 24.1 of the Constitution) and, by extension, of the principle of judicial supervision of administrative decisions (Article 106.1 of the Constitution).

Internal referral of a charge of unconstitutionality can in no way resolve issues falling to the preliminary review of constitutionality in pending proceedings on constitutional protection.

Summary:

The First Chamber of the Constitutional Court decided to refer a case to the Plenary for a ruling on a charge of unconstitutionality in respect of Section 21.2 of the organic Law on general electoral procedure. Since this section provided for no form of judicial appeal against certain acts of the Central Electoral Commission, it could be in breach of Articles 24.1 and 106.1 of the Constitution.

The plenary Constitutional Court found that the words "or judicial" in the last paragraph of the provision contested by the Court's First Chamber were unconstitutional and therefore void.

The use of Section 21.2 of the organic Law on general electoral procedure to rule out the possibility

of administrative or judicial appeal assumed the existence of an area of administrative immunity. However, the Constitutional Court acknowledged the distinctive nature of the electoral authority (owing to the history of its development, its unusual composition and above all its specific duties) and the peculiarity of the electoral process. The Constitution itself acknowledged all these facts, since in Article 70.2 it made the validity of the certificates of election and credentials of members of parliament subject to judicial supervision "under the terms to be established by the electoral law".

In the light of all these circumstances, the Constitutional Court judgment distinguished between two functions of electoral commissions. The first concerned acts which were an integral part of the electoral procedure, such as determining the key stages and dates in the election process, while the second related to acts and provisions which were not directly connected with the election process. Acts devolving from electoral procedure could be made free of autonomous or independent judicial supervision without prejudice to the bringing of ordinary proceedings concerning an election. However, in no circumstances could the exemption from judicial supervision be extended to provisions and acts of the Central Electoral Commission, since this body played no direct part in electoral procedure. The categorical exclusion of any form of judicial appeal against these acts and provisions was plainly in breach of the constitutional right to effective judicial protection with the guarantee of defence (Article 24.1 of the Constitution).

From the angle of procedural law, it was held that the procedure provided for at Section 55.2 of the organic Law on the Constitutional Court could in no way resolve an issue arising in the course of proceedings that was a matter for preliminary review, as was generally the case when a charge of unconstitutionality was raised by a court. In the case in question, the charge was raised following an appeal for constitutional protection on which a ruling had already been given. Nonetheless, as regards the sufficient nature of the judgment on admissibility, the Constitutional Court held that in this case the charge derived from the Court's finding in Judgment no. 103/1996 that there had been restrictions on freedom in administrative proceedings which, in the absence of an ordinary court, should have adhered to the guarantees given in Article 24.1 of the Constitution.

Supplementary information:

Two dissenting opinions were registered in respect of this judgment. The first concurred with the decision but not with the judicial arguments of the majority, while the other disagreed on the basis that the declaration of unconstitutionality could have been avoided through an interpretation in context of the electoral Law in the light of the Law on jurisdiction in administrative proceedings.

Cross-references:

Constitutional Court Judgment no. 103/1996.

Languages:

Spanish.

Identification: ESP-2000-2-021

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 26.06.2000 / **e)** 179/2000 / **f)** John Fayiar Faryo / **g)** *Boletín oficial del Estado* (Official Gazette), 180, 28.07.2000, 50-55 / **h)** CODICES (Spain).

Keywords of the systematic thesaurus:

5.1.1.2.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
5.3.13.2.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts – *Habeas corpus*.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.

Keywords of the alphabetical index:

Foreigner, deprivation of freedom at borders / Deprivation of freedom at borders, maximum period / Asylum, request, refusal.

Headnotes:

In accordance with their fundamental right to personal freedom, as laid down in Article 27.1 of the Constitution, foreign nationals whose asylum requests have been refused by the authorities may not be held at an international airport and placed under police

surveillance to prevent their entering Spanish territory for any longer than is strictly necessary for the purpose of returning them to their country of origin.

A *habeas corpus* court may not deliver a ruling concerning the lawfulness of a measure removing a person's freedom without first giving a hearing to the person who requested its intervention.

Summary:

The Ministry of the Interior had declared inadmissible the asylum request made by Mr Fayiar Faryo on his arrival at Madrid Barajas International Airport on 2 December 1999. The final decision, which ruled out all possibility of reviewing the request, was communicated to the applicant on 9 December. On 13 December, the lawyer officially assigned to represent Mr Faryo filed a *habeas corpus* application in the custodial court. On the same date the Madrid Court declined to open proceedings, on the grounds that the extension of the applicant's detention was a result of his own actions to dispute the refusal of his asylum request and that the one and only purpose of his *habeas corpus* application was to postpone his deportation.

The Constitutional Court found that the foreign national had indeed been deprived of his freedom, but not so as to breach the limits set by the Constitution. In this case there was no call for the 72-hour time limit stipulated in Article 17.2 of the Constitution to be taken literally, since it applied only in the case of detention on remand in connection with criminal proceedings. Nonetheless, deprivation of freedom at borders must never last longer than was strictly necessary for the purpose of deporting a foreign national to his/her country of origin or be maintained for a period of time which could in itself be considered to exceed the time necessary to enforce this measure in normal circumstances.

The applicant initially refused to take his flight to Dakar on 10 December. When he filed a *habeas corpus* application on 13 December, he was preparing to take another flight. He was finally returned to his country of origin on 15 December after the Court had declared his request inadmissible. There was therefore no violation of his right to personal freedom.

However, it was found that there had been violation of his right to *habeas corpus* on the grounds that, as established by legal precedent, the court had no authority to rule on the validity of a measure removing a person's freedom while a case was being prepared, that is, before the applicant had appeared before the court.

Supplementary information:

Requests for asylum are examined as provided in the 1984 Asylum Act (as amended in 1994).

Cross-references:

The precedent for this judgment, in which the Court gave an opposite ruling, is Judgment no. 179/1999.

Languages:

Spanish.

Identification: ESP-2000-2-022

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 29.06.2000 / **e)** 181/2000 / **f)** Baremo de daños / **g)** *Boletín oficial del Estado* (Official Gazette), 180, 28.07.2000, 68-96 / **h)** CODICES (Spain).

Keywords of the systematic thesaurus:

3.21 **General Principles** – Prohibition of arbitrariness.
4.7.1 **Institutions** – Courts and tribunals – Jurisdiction.
5.1 **Fundamental Rights** – General questions.
5.2 **Fundamental Rights** – Equality.
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 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.

Keywords of the alphabetical index:

Damage, statutory scale / Accident, road / Damage, complaints, access to the courts / Compensation, for non-pecuniary damage / Dignity, human / Justice, higher value / Decision, court, discretion, range of results / Judicial authority, principle of exclusive jurisdiction / Legislative freedom, weight of legislation / Damage, individual assessment in judicial proceedings.

Headnotes:

Taken as a whole, the law establishing a binding system for assessing damage resulting from road accidents does not lack reasonable justification and is therefore not in breach of the principle prohibiting all arbitrary action by the authorities (Article 9.3.7 of the Constitution).

The statutory scale of damages applies to all damage resulting from the circulation of motor vehicles. It governs a sector which is defined objectively and neutrally and makes no distinction between different categories of people or groups. It is therefore not in breach of the principle of equality (Article 14 of the Constitution).

In accordance with the right to life and the right to protection from physical and psychological duress (Article 15 of the Constitution), the law is bound to offer compensation which is adequate – that is, which has due regard for people's inherent dignity and, with no unwarranted exceptions, preserves the integrity of their whole being.

The higher value of justice (Article 1.1 of the Constitution) cannot be described in terms of specific definitions of what is just. It is an open-ended, multi-dimensional concept which complements other material factors, especially the principle prohibiting all arbitrary action by the authorities.

The statutory scale is limited to damage caused to persons and leaves the quantitative assessment of damage to property entirely to the discretion of the courts. This distinction is not arbitrary, since the difficulty of assessing physical and non-pecuniary damage does not apply in the case of property, which is covered by legal provisions.

The legal rules governing civil liability produce no arbitrariness in situations where civil liability in respect of personal damage results from the risk or danger inherent in the use of motor vehicles.

The law's provision for a basic level of compensation in respect of psychological, physical and non-pecuniary damage is not in breach of the Constitution. Assessments made by courts enjoying discretion had previously led to an unwelcome range of results.

The statutory definition of pecuniary damage suffered as a consequence of temporary injury resulting from an accident in which there was fault rather than risk sets an unreasonable limit on the victim's right to compensation. This part of the law is therefore arbitrary.

The statutory scale is not in breach of the principle of the exclusive jurisdiction of the courts and tribunals (Article 117.3 of the Constitution), since it in no way limits their jurisdictional powers. The Constitution places no restrictions on the freedom of the legislature to determine the extent to which any area whatsoever should be regulated.

In the proceedings in question, the rule governing compensation in respect of temporary injury fails to satisfy legitimate claims for compensation from victims or those who have suffered prejudice. Its finality and exclusiveness preclude any individual assessment of the true extent of damage. It is therefore in breach of the right to effective judicial protection (Article 24.1 of the Constitution).

The charge of unconstitutionality may be raised by a court during proceedings to enforce a decision if application of the disputed law is seen to be necessary at that point.

The declaration that the legal provision is unconstitutional and void is partial only; it does not apply to damage arising from a significant fault established by the courts.

Summary:

In this judgment, the Constitutional Court ruled on eight charges of unconstitutionality raised by various tribunals and provincial courts of appeal *(Audiencias provinciales)* which were handling civil and criminal proceedings brought following various road accidents. In order to determine the compensation payable by the drivers found to be at fault (or, more correctly, their respective insurance companies), the courts were obliged to apply the damage assessment scale approved by a 1995 act. In contrast with previous legislation, which had provided scales for indicative purposes, the rules currently in force established an exhaustive, inflexible system for the assessment of personal damage: death, permanent injury and temporary incapacity. The only exception allowed under the law concerned damage resulting from an intentional offence, which must be compensated in full as freely assessed by the court.

The courts held that the statutory scale was in breach of various constitutional principles and provisions, such as the principle of equality with regard to the higher value of justice and the prohibition of all arbitrary action by the authorities (Articles 14.1.1 and 9.3.7 of the Constitution), the right to life and the right not to be subjected to physical or psychological duress (Article 15 of the Constitution), the right to effective judicial protection (Article 24.1 of the Constitution) and the principle that the courts have

exclusive jurisdiction (Article 117.3 of the Constitution).

The Constitutional Court partially allowed the applicants' charges of unconstitutionality. It held that the statutory system was valid as a whole and also approved the validity of several of its constituent parts, including the uniform assessment of personal damage (death, permanent or temporary incapacity, loss of limb and after-effects) and even non-pecuniary damage *(pretium doloris)*. However, it declared one disputed part of the system unconstitutional, namely, that concerning the assessment of damage to property resulting from the temporary incapacity of accident victims.

Four members of the Court registered three dissenting opinions in respect of this judgment, arguing that the act was entirely constitutional.

Supplementary information:

The disputed provision appeared in various provisions of a 1968 Act on the circulation of motor vehicles (Section 1.2, its supplementary provision and several paragraphs from the appendix) which had been introduced by Act no. 30/1995 on the authorisation and supervision of private insurance.

Many constitutional cases are currently pending on different aspects of the statutory system for assessing civil liability in connection with the circulation of vehicles.

Cross-references:

The principle prohibiting all arbitrary action by the authorities: Constitutional Court Judgments nos. 108/1986, 65/1990, 66/1990, 142/1993, 212/1996 (*Bulletin* 1996/3 [ESP-1996-3-031]) and 116/1999 (*Bulletin* 1999/3 [ESP-1999-3-014]).

The principle of equality before the law: Constitutional Court Judgments nos. 75/1983, 144/1988, 222/1992 and 164/1995 (*Bulletin* 1995/3 [ESP-1995-3-030]).

The duty of the legislature to protect life as a legal interest is raised in Constitutional Court Judgments nos. 53/1985 and 129/1989.

Charges of unconstitutionality are subject to criteria whose interpretation must be flexible: Constitutional Court Judgments nos. 76/1982 and 110/1993.

Languages:

Spanish.

Identification: ESP-2000-2-023

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 10.07.2000 / **e)** 188/2000 / **f)** Francisco Tous Aguiló contra Ministerio Fiscal / **g)** *Boletín oficial del Estado* (Official Gazette), 192, 11.08.2000, 41-44 / **h)** CODICES (Spain).

Keywords of the systematic thesaurus:

4.7.2 **Institutions** – Courts and tribunals – Procedure.
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.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rights of the defence.

Keywords of the alphabetical index:

Criminal procedure, hearings / Evidence, *ex officio judicis* / Witness, hearing.

Headnotes:

In certain well-defined circumstances the law allows judges to call evidence in the course of a criminal hearing. Unless this practice is combined with inquisitorial action or reflects a bias in favour of either the prosecution or the defence, it does not violate either the right to judicial impartiality or the adversarial principle.

Summary:

Mr Tous Aguiló was tried on several charges of fraud and obtaining by illegal means. In the course of the hearing, the criminal court summoned as a witness a person who was involved in the facts of the case and had been mentioned by various individuals but whom neither the prosecution nor the defence had called to give evidence. The defendant was ultimately convicted as charged.

The Constitutional Court ruled that the criminal court's action did not violate either the basic right to judicial impartiality, which is part of the right to a trial with all

guarantees, or the adversarial principle (Article 24.2 of the Constitution).

The court's power in exceptional circumstances to propose that evidence be taken is legally enshrined in Article 729.2 of the Code of Criminal Procedure. There is no reason to believe *per se* that this provision violates the constitutional rights in question, in that its purpose is to enable the accuracy of substantive elements to be verified so that the court may establish, with all relevant guarantees, the material necessary to reach a decision by exercising its jurisdictional power (Article 117.3 of the Constitution). However, this is not to say that the court's *ex officio* power to call evidence as provided in law may not be abused; in order to determine whether the court has exceeded the limits of the adversarial principle and thereby violated judicial impartiality or even the right to due process, consideration must be given to the specific circumstances of each case.

In the present case there was no violation of constitutional guarantees because the court's action was not at all surprising or unexpected and in no way formed part of a preconceived plan by the judge; on the contrary, the decision was reasonably based on the fact that a new source of evidence emerged during the course of the hearing which might in all fairness be expected to provide some substantive corroboration for the case, the aim being not to find for or against the defendant but to achieve the necessary degree of certainty for a ruling on the matter. Moreover, the court's proposal was taken up by the prosecution.

Languages:

Spanish.

Identification: ESP-2000-2-024

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 19.07.2000 / **e)** 194/2000 / **f)** Diferencias de valor / **g)** *Boletín oficial del Estado* (Official Gazette), 192, 11.08.2000, 91-104 / **h)** CODICES (Spain).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Legality.
3.13 **General Principles** – *Nullum crimen, nulla poena sine lege*.
4.5.6.3 **Institutions** – Legislative bodies – Law-making procedure – Right of amendment.
4.10.1 **Institutions** – Public finances – Principles.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Scope – Non-litigious administrative procedure.
5.3.40 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Tax, property transfer / Value, real / Right of amendment, Senate / Setting aside, effect on later legislation / Penalty, administrative, concept / Procedure, administrative, just procedure / Presumption, absolute, tax fraud / Capacity, financial, principle.

Headnotes:

The property transfer tax Act, which establishes an absolute presumption of fraud when the declared property value is substantially inferior to the "real value" calculated by the authorities, and which provides for substantial tax penalties, violates the financial capacity principle which is inherent in any just tax system (Article 31.1 of the Constitution).

Were this taxation measure instead an administrative penalty in the form of an increased tax burden, it would be in breach of the *lex certa* requirement in the principle of the legality of punishment and of due process in administrative disciplinary procedures (Articles 25.1 and 24.2 of the Constitution).

The Senate is authorised to introduce amendments to bills first adopted by the Congress of Deputies *(Congreso de los Diputados)* and thus to alter existing rules or even to introduce new ones, as is the case of the rule at issue (see Article 88 of the Constitution).

The declaration of unconstitutionality and nullity in respect of the disputed provision, which is part of a 1989 Act, must extend to the royal legislative decree of 1993 which implemented it and repealed the previous law in the context of reforms to various pieces of tax legislation.

Summary:

The 1989 Act on public taxation and prices was contested by 78 deputies in the Spanish Parliament *(Cortes Generales)*. The deputies alleged unconstitu-

tionality of the act, claiming that its fourth supplementary provision, which was introduced as a Senate amendment, violated the Constitution on substantive and procedural grounds. The Constitutional Court dismissed the charge that the legislative procedure followed in this case was in breach of the Constitution but ruled that the provision's content was unconstitutional.

Property transfer tax is levied as a percentage of the "real value" of property purchased, donated or transferred in any legal form. The value is declared by the parties to the transaction. The disputed provision had been adopted in order to counter the practice of declaring a value significantly inferior to the real value. Where the authorities noted a difference greater than 20% (or two million pesetas) between the declared value and the real value, the rule provided that the shortfall was liable not only to property transfer tax but also to the tax on donations (in the case of natural persons) or corporation tax (for legal persons). This represented a considerable increase in the tax burden.

Under the terms this judgment, it is entirely lawful to seek to combat tax fraud. Parliament is authorised to promote this goal by means of a wide range of tax measures aimed both at encouraging tax-payers to meet their obligations to the tax authorities and at discouraging them from failing to comply with these obligations. Within constitutional limits, parliament can also impose penalties to suppress or punish certain acts.

The disputed provision imposed a considerable tax burden in cases where the tax authorities deemed that the "real value" differed from the "declared value". The latter term referred to the property value declared by the parties concerned on the legal document certifying the sale, donation or other legal transaction in accordance with which the ownership of property changed hands. The provision thereby relied on an absolute presumption (one which allows for no contrary evidence) that the difference in assessment resulted from an attempt to defraud the tax authorities. It therefore subjected very different actions to the same heavy penalties.

The provision gave rise to situations which were incompatible with the just tax system referred to in Article 31.1 of the Constitution and, more specifically, with the principle of financial capacity. When exercising their freedom to enact legislation, lawmakers reach decisions on taxation by weighing different factors and circumstances. These considerations must reflect the real financial standing of those subject to the tax in question, not a non-existent or imaginary wealth such as that taken into account by the disputed provision. Tax contributions cannot be governed by situations which are not based on genuine financial capacity.

The increased taxation provided for in the disputed provision would be no less unconstitutional if it took the form of an administrative penalty rather than a tax. As it stood, the provision made it impossible for citizens to predict with sufficient accuracy what behaviour constituted an offence. Given the great difficulty of establishing the "real value" of property, the authorities could enjoy substantial room for manoeuvre. While this was entirely lawful in the case of tax legislation, it would not be in connection with a disciplinary measure. The provision's lack of clarity was in breach of the precision requirement in the principle of the legality of punishment (Article 25.1 of the Constitution).

Had the fourth supplementary provision imposed a penalty rather than increased the tax burden, it would also have constituted a violation of due process (Article 24.2 of the Constitution). Its literalness would have required the immediate enforcement of an administrative penalty with no procedure for citizens to appeal or bring evidence in their defence.

With regard to the legislative procedure followed in this case, the Court found that there was no violation of constitutional provisions (Article 88 of the Constitution). Bills are submitted by the government to the Congress of Deputies, the lower chamber of the Spanish Parliament, which tables and provisionally adopts amendments before forwarding them to the Senate. For its part, the upper chamber is empowered to introduce any amendments which it deems appropriate in accordance with the Constitution and its rules of procedure, even if they are substantively new or modify existing laws.

In unconstitutionality proceedings, Section 39 of the organic Law on the Constitutional Court allows the declaration of nullity in respect of the disputed provision to be extended by analogy or consequentially to other provisions "of the same law". The fact of the matter is that the disputed provision of the 1989 Act was repealed by the amended taxation act, which the government adopted in 1993 by means of a royal legislative decree which was not contested. The Constitutional Court also annulled this last provision, which was in force at the time of the constitutional ruling. The Court noted that the 1993 Act was in fact adapted from several previous legal instruments and used almost exactly the same wording as the disputed provision, which was annulled. Were an amended law including statutory provisions which had been declared unconstitutional and void to be retained in the legal system, this would be tantamount

to approving an element of uncertainty of the law, which the Constitutional Court is bound in the exercise of its duties to avoid.

Supplementary information:

The only previous occasion on which a tax Law was set aside on the merits was in the case of Judgment no. 46/2000 (*Bulletin* 2000/1 [ESP-2000-1-007]).

Cross-references:

Lawfulness of combating tax fraud and measures to achieve it: Constitutional Court Judgments nos. 76/1990 and 164/1995 (*Bulletin* 1995/3 [ESP-1995-3-030]).

Principles of a just tax system: Constitutional Court Judgments nos. 209/1988, 221/1992, 214/1994, 182/1997 (*Bulletin* 1997/3 [ESP-1997-3-022]), 233/1999 (*Bulletin* 1999/3 [ESP-1999-3-028]) and 46/2000 (*Bulletin* 2000/1 [ESP-2000-1-007]).

Lex certa requirement in respect of penalties: Constitutional Court Judgments nos. 133/1987, 116/1993 and 53/1994.

Guarantees under administrative disciplinary procedure: Constitutional Court Judgments nos. 18/1981 and 14/1999.

Legislative procedure: Constitutional Court Judgment no. 99/1987.

Setting aside of statutory provisions by analogy or in consequence: Constitutional Court Judgment no. 196/1997.

Languages:

Spanish.

Identification: ESP-2000-2-025

a) Spain / **b)** Constitutional Court / **c)** Second Chamber / **d)** 24.07.2000 / **e)** 202/2000 / **f)** María Renshaw Sandoval contra Ministerio Fiscal / **g)** *Boletín oficial del Estado* (Official Gazette), 203, 24.08.2000, 41-45 / **h)** CODICES (Spain).

Keywords of the systematic thesaurus:

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 **Fundamental Rights** – Civil and political rights – Individual liberty.
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:

Silence, right / Evidence, circumstantial / Correspondence, opening, affidavit.

Headnotes:

The right to remain silent and to refrain from self-incrimination is closely linked with the right to the presumption of innocence. It is also an essential part of the right to a fair trial and amounts to a genuine functional guarantee of due process.

Refusal to explain questionable conduct, as part of the legitimate exercise of the right to remain silent, may be used by a court as grounds for conviction provided that the prosecution has brought evidence of guilt and that the defendant can justifiably be expected to give an explanation. It may in no case be so used where the decision is not substantiated, the grounds given are unreasonable or arbitrary or they rely solely on the fact that the defendant remained silent in the presence of the police.

Where the defendant denies involvement and no direct evidence exists, proof that he/she committed an offence may rest on facts which have been fully proved or on circumstantial evidence from which guilt can be deduced by a process of reasoning which relies on human discernment. This process must be duly explained in the court decision by which the defendant is convicted. No conviction supported in this way by circumstantial evidence at all undermines the right to the presumption of innocence.

The principles in Article 9.3 of the Constitution cannot be cited or defended in the context of a claim for constitutional protection (Article 53.2 of the Constitution and Section 41.1 of the organic Law on the Constitutional Court). Moreover, the purely rhetorical pleading of rights likely to benefit from constitutional

protection need not be taken into consideration in Constitutional Court judgments.

Summary:

Ms Renshaw Sandoval was taken into custody after visiting a post office to retrieve a parcel addressed to her, which contained cocaine. Having originated in Brazil, the parcel had aroused the suspicion of the police, who had opened it to ascertain its contents before passing it on to its recipient. The prisoner refused to sign the affidavit drawn up in the presence of the judge who had authorised the operation to the effect that the parcel had been opened. After her transfer to the offices of the customs service, where the investigation was to continue, she also refused to make any statement to the police. The prisoner's hearing concluded with her conviction by the Madrid Provincial Court *(Audencia Provincial)* of an offence against public health, following a court decision confirmed on appeal by the Supreme Court.

Conviction in this case was based on the finding that the defendant's knowledge that the parcel contained drugs had been proved. Different circumstantial evidence was given for this: the parcel had been sent to the address of a business under her management, her surname was wrongly spelt in such a way as to indicate its oral transmission and she had refused to make a statement and co-operate with the police.

The Constitutional Court rejected the defendant's claim to the protection of the constitution. The Court rejected all charges that the appellant's right to remain silent and her right to the presumption of innocence had been violated. It did this despite the fact that her silence in the presence of the police had been used as evidence against her.

In accordance with the case-law of the European Court of Human Rights, there was no violation of the right to remain silent, which is acknowledged in Article 17.3 of the Constitution, on the grounds that the arresting officers had duly respected the defendant's refusal to speak. Evidence for this lay in the fact that the appellant's complaint, namely that the court decision against her found that there was proof of her complicity in the crime, related to a later time. Accordingly, the fundamental right at issue in this case was that of the presumption of innocence (Article 24.2 of the Constitution).

Having given a detailed explanation of its doctrine in this area, and in light of the external controls which it has to carry out, the Constitutional Court ruled that the criminal court decision was substantiated and neither unreasonable nor arbitrary. With regard to the circumstantial evidence of guilt brought by the prosecution, the courts were able to use the absence of any explanation concerning the defendant's conduct, although this was based on the legitimate right to remain silent, as grounds for conviction. In the present case, the circumstantial evidence supplemented other evidence, was substantiated and in no way arbitrary and did not rely solely on the fact that the appellant had chosen to remain silent. Her fundamental right had therefore been duly respected.

Cross-references:

Close connection between the right to remain silent and the right to the presumption of innocence: Constitutional Court Judgment no. 127/2000.

Principle of ascertaining the sufficient and reasonable nature of grounds used in connection with the presumption of innocence: Constitutional Court Judgment no. 220/1998.

In this field, the case-law of the European Court of Human Rights is crucial: European Court of Human Rights Judgments of 25.02.1993 in the case of *Funke v. France* (*Special Bulletin ECHR* [ECH-1993-S-001]), of 08.02.1996 in the case of *John Murray v. the United Kingdom* (*Bulletin* 1996/1 [ECH-1996-1-001]) and of 17.12.1996 in the case of *Saunders v. the United Kingdom* (*Bulletin* 1997/1 [ECH-1997-1-001]).

Languages:

Spanish.

Sweden
Supreme Court

Important decisions

Identification: SWE-2000-2-002

a) Sweden / **b)** Supreme Court / **c)** / **d)** 07.07.2000 / **e)** B 29-99 / **f)** / **g)** / **h)** CODICES (Swedish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Information, dissemination / Contempt, towards population group.

Headnotes:

According to Chapter 1 Article 2 of the Fundamental Law on Freedom of Expression every Swedish citizen is assured of the right to communicate information on any subject whatsoever to authors, publishers, editorial bodies, news agencies and enterprises for the production of films or sound recordings for publication in radio programmes, films or sound recordings. S/he also has the right to procure information on any subject whatsoever for the purpose of such communication of information or for publication. No other restrictions may be made on these rights than as follow from the Fundamental Law.

Summary:

In this case, an assistant university lecturer had invited a member of a Swedish Nazi-organisation to present his ideology within a lecture at the university. On account of his statements at this lecture the Nazi-sympathiser was sentenced for persecution of a population group by expressing contempt for a population group or other such group by allusion to its race, skin colour, national or ethnic origin, or religious faith. As a consequence the assistant university lecturer was sentenced for aiding this crime.

In the Supreme Court the defendants argued that the lecture was recorded on videotape and that the intention had been to distribute this tape. They claimed that to sentence them for persecution of a population thus would be a breach of Chapter 1 Article 2 of the Fundamental Law on Freedom of Expression.

The Supreme Court held that the lecture could not be considered as a part of communication of information for publication. There was no such connection between the lecture and the intended publication which protected them from criminal prosecution according to Chapter 1 Article 2 of the Fundamental Law on Freedom of Expression.

Languages:

Swedish.

Sweden
Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 May 2000 – 31 August 2000.

Switzerland
Federal Court

Important decisions

Identification: SUI-2000-2-004

a) Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 21.01.2000 / **e)** 2A.373/1998 / **f)** J. Spring v. Confederation of Switzerland / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 126 II 145 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.4.6 **Constitutional Justice** – Procedure – Grounds.
1.4.14.3 **Constitutional Justice** – Procedure – Costs – Party costs.
3.15 **General Principles** – Proportionality.
5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Time-limit, expiry / Limitation period / Alien, refusal of entry / War, second world war / Asylum, policy / Refugee / State, liability.

Headnotes:

Action against the state for damages by a Jewish fugitive who was denied entry and handed over to the German authorities during the second world war.

Summary:

Joseph Spring was born in Berlin in 1927. Following an anti-Jewish decree he lost his Polish citizenship and emigrated to Belgium in 1939. In 1942 he fled to France, where he had an identity card in the name of Joseph Dubois, protestant, born in Metz.

At age 17, in November 1943, he attempted to cross the border into Switzerland in the company of two cousins and a French citizen. They were all sent back to France by the Swiss border guards, who warned them that if they were caught again they would be handed over to the German authorities. A few days

later, as they made another attempt to cross the border, they were arrested by the Swiss and handed over to the German authorities. The Swiss border guards allegedly also handed over to the German authorities not only their forged papers but also their real papers, stating their Jewish origin. Joseph Spring and his two cousins were incarcerated in France, then deported to Auschwitz. Both cousins were allegedly dead on arrival in Auschwitz. Joseph Spring survived.

In 1998 Joseph Spring, who now lives in Australia, applied to the Confederation for damages for non-pecuniary injury, on the basis of the federal law on the liability of the Confederation, its authorities and its public servants. The Federal Council rejected the application. Joseph Spring then brought proceedings against the Confederation before the Federal Court, claiming 100 000 francs for non-pecuniary damages. The Federal Court rejected the case but awarded 100 000 francs in expenses.

The Federal Court noted firstly that action for damages brought against members of the Federal Council and the parliament must be judged under administrative law, even if the alleged act was perpetrated by a border guard; from this point of view, therefore, the case was admissible.

Under Article 20.1 of the Law on the Liability of the Confederation, the time-limit for claims against the Confederation concerning deeds done by customs officials during the second world war lapsed long ago, insofar as the ten-year time-limit provided for therein is not at variance with the principle of good faith.

The principle that a longer time-limit provided for under criminal law also applies to actions for damages does not apply to claims based on Article 3 (under which the Confederation is liable for damages wrongfully done to third parties by public servants in the course of their duties) and Article 6 (payment of fair compensation for non-pecuniary damages) of the Law on the Liability of the Confederation.

Swiss policy on asylum and refugees during the second world war was not at variance with the law of nations at the time. A possible violation of national law (the principle of proportionality) does not justify the waiving of the time-limit. Only in the event of actual participation in genocide would this be an option, and no such participation has been demonstrated. For these reasons the claim was rejected. The exceptional circumstances of this particular case – including the handing over to the German authorities, the complexity of the case, the problems involved in taking action from Australia and the applicant's refusal to participate in the American Class Action procedure – justify the awarding of expenses to the applicant, even though he lost.

Languages:

German.

Identification: SUI-2000-2-005

a) Switzerland / **b)** Federal Court / **c)** Second Civil Law Chamber / **d)** 30.03.2000 / **e)** 5P.407/1999 / **f)** D. v. Roman Catholic Church of the canton of Lucerne and the Lucerne Cantonal Court / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 126 I 144 / **h)** CODICES (German).

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.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

ECHR, applicability / Civil right / Liability, state / Collective labour agreement.

Headnotes:

Liability of the Canton; incomplete examination of the claim for damages in an action against the state for refusal to award a building contract.

Article 6.1 ECHR is applicable to actions for damages against the state. It requires the facts and legal aspects of the claim to be fully examined by a court. There was a violation of the Convention in this case as, under paragraph 4.2 of the cantonal Law on Liability, the courts of the canton of Lucerne did not rule on the question of illegality but based their decision on the State Council's finding that the contract had been lawfully awarded to another firm. Such limited examination by the courts would have

been in conformity with Article 6.1 ECHR only if the contract decision had been brought before a court which itself met the requirements of Article 6.1 ECHR.

Summary:

In conformity with the cantonal law in force at the time, the Roman Catholic Church of the canton of Lucerne submitted a construction job to tender. Builder D. submitted a tender that was not selected. He lodged an appeal with the State Council of the canton of Lucerne, but it was dismissed on the grounds of D.'s inability to guarantee compliance with the provisions of the collective labour agreement.

On the strength of the cantonal law on the liability of the canton, D. sued the Roman Catholic Church for 25 000 francs in damages, alleging that his tender had been rejected illegally. The court of first instance and the Cantonal Court rejected the claim, the lawfulness of the tender procedure having been confirmed by decision of the State Council.

In a public-law appeal, D. applied for the Federal Court to set aside the ruling of the Cantonal Court for violation of Article 6.1 ECHR. The Federal Court allowed the public-law appeal.

As the liability of the state is in question, the application for damages falls within the scope of Article 6.1 ECHR, which requires all the facts and the legal aspects of the case to be examined by a court fully empowered to do so. This was not the case in this instance, as it was not possible under the law in force at the time to bring the impugned decision before a court. The only recourse possible was before the State Council, which is not a judicial authority. The legality of the rejection of D.'s tender should have been examined by a court in the proceedings against the state. This was not done. The cantonal courts merely referred to the decision of the State Council, but did not themselves examine the legality of the tender process or the factual and legal arguments submitted by the builder. The latter therefore did not have access to a court within the meaning of Article 6.1 ECHR.

Languages:

German.

Identification: SUI-2000-2-006

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 05.04.2000 / **e)** 1A.104/1999 / **f)** Swiss Online AG v. Public Prosecutor's Services of the district of Dielsdorf and the canton of Zurich / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 126 I 50 / **h)** CODICES (German).

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.
3.15 **General Principles** – Proportionality.
3.17 **General Principles** – General interest.
3.21 **General Principles** – Prohibition of arbitrariness.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.34.2 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Telephonic communications.
5.3.34.3 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Electronic communications.

Keywords of the alphabetical index:

E-mail, privacy / Internet, access provider.

Headnotes:

Privacy of telecommunications, surveillance of e-mail ordered as a coercive measure in criminal proceedings. Article 13.1 of the Federal Constitution (telecommunications privacy), paragraphs 103 and 104 ff of the Code of Criminal Procedure of the canton of Zurich.

The legal grounds for violating the privacy of telecommunications lie not in the federal Law on Telecommunications but in the corresponding provisions of the Code of Criminal Procedure (recital 2).

It is unreasonable to require an Internet access provider, on the basis of paragraph 103 of the Zurich Code of Criminal Procedure, to search and divulge data concerning the sender and time of sending of a falsified e-mail message (recital 4).

Identification of participants in telephone conversations is a breach of telecommunications privacy and must fulfil the requirements laid down in the Constitution and the law (recital 5b).

The telecommunications privacy guaranteed by the Constitution also applies to communication by e-mail on the Internet; conditions to be met for breach of this privacy (recital 6a).

The searching and divulging of technical data (origin, identification) concerning an e-mail message requires a legal justification and the approval of a judge (recitals 6b and 6c).

Summary:

The Dielsdorf District Public Prosecutor opened criminal proceedings for attempted blackmail by e-mail message, certain formal characteristics of which (such as the date and the name of the sender) had been falsified. Swiss Online AG, as the Internet access provider, was instructed to reveal the true identity of the sender and the date on which the message was sent. Swiss Online AG appealed but the Public Prosecutor of the canton of Zurich confirmed the decision of the district public prosecutor, stating that paragraph 103 of the Zurich Code of Criminal Procedure was adequate legal justification and that the a judge's approval was unnecessary.

Swiss Online AG lodged an appeal under administrative law and under public law for the Federal Court to set aside the Zurich Public Prosecutor's decision, on the grounds of breach of Federal law, abuse of authority and violation of telecommunications privacy. The Federal Court rejected the administrative appeal but admitted the public-law appeal.

Federal law on telecommunications regulates the transmission of information using telecommunications technology; all providers of telecommunications services are required to respect their users' privacy, surveillance of telecommunications being reserved to the police and the criminal justice authorities. However, federal law does not provide legal grounds for specific cases of surveillance of telephone or any other type of electronic communications.

Under paragraph 103 of the Code of Criminal Procedure of the canton of Zurich, the investigating authorities have the right to seize or confiscate property. The information requested of the access provider does not fall within the scope of the property to which this provision refers. The Code of Criminal Procedure was therefore applied arbitrarily.

Article 13 of the Federal Constitution and Article 8 ECHR guarantee the privacy of telecommunications and telephone correspondence. Exceptions are permitted provided that they are based on proper legal grounds and are in the public interest and proportional to the aim pursued. The Swiss Criminal Code thus authorises the surveillance of telecommunications for criminal investigation purposes when the crime or offence is serious enough or when the specific circumstances warrant such action, subject to the approval of a competent judge.

Telecommunications privacy covers not only telephone conversations but also electronic messages sent via the Internet. Just as identifying participants in telephone conversations is a breach of this fundamental right, revealing the identity of the sender of an e-mail is a violation of telecommunications privacy. It therefore requires a legal basis and the approval of a competent judge. As no such approval was sought in the instant case, the appeal by Swiss Online AG was well-founded and the impugned decision was set aside. It will be for the criminal justice authorities to consider whether the identity of the sender of an e-mail message may be disclosed on the basis of the provisions of Zurich's Code of Criminal Procedure relating to telephone tapping and whether the authorisation of a competent judge should be required.

Languages:

German.

"The former Yugoslav Republic of Macedonia"
Constitutional Court

Important decisions

Identification: MKD-2000-2-003

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 23.05.2000 / **e)** U.br.6/2000 / **f)** / **g)** / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
4.4.3.4 **Institutions** – Head of State – Term of office – End of office.
4.5.2 **Institutions** – Legislative bodies – Powers.
5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.

Keywords of the alphabetical index:

Public service / State office, nature / Term of office, specific rights, after expiration.

Headnotes:

The absence of an explicit constitutional mandate for the Assembly of the Republic of Macedonia to pass a particular statute in order to regulate certain issues (the rights of the President of the Republic after expiration of his or her term of office) is not an obstacle to the adoption of the statute, when it is determined to be useful.

A law which determines the rights and status of the State President after expiration of his or her term of office differently from other citizens does not violate the principle of equality, which presupposes equal conditions.

Summary:

On a petition lodged by an individual from Skopje, the Court did not commence proceedings for assessing the constitutionality of the Law on the rights of the President of the Republic of Macedonia after expiration of his or her term of office. The petitioner challenged the constitutionality of this law on the grounds of a lack of constitutional basis for its adoption and because it violated the principle of citizens equality, enshrined in Article 9 of the Constitution.

An analysis of the contents of the disputed law showed that it stipulates several rights to which the President of the state is entitled after expiration of his or her term of office. The State President is entitled to a presidential pension equal to the President's salary; to office and professional staff; to personal security and protocol status; to burial costs; to costs up to 8% of budgetary funds scheduled for the President of the Republic; and family members are entitled to a pension of up to 70% of the Presidential pension.

In the Court's opinion, the Assembly of the Republic of Macedonia, as legislative body, has general authorisation to pass statutes in order to regulate relations in all domains of social life. Besides, in some cases it is obliged to adopt certain laws, sometimes with a two-thirds majority. Therefore, although there isn't a clear, direct constitutional authorisation for the Assembly to regulate this particular area by passing a law, it is still its constitutionally based right.

The privileged status this law offers to the state President after expiration of his or her office in relation to other citizens is the second argument on which the petitioner based his petition. The disputed statute determines the rights and status of the state President after expiration of his or her office differently from other citizens. Nonetheless, the Court judged that the function and aims of the disputed law, including the fact that the principle of equality presupposes equal conditions, are commencing criteria essential for judging its constitutionality. Besides, the Court judged that the purpose of this law is not to grant privileges to individual persons after expiration of the President's office, but to regulate the status and dignity of the office itself. Thereby, the status of those who held this office is guaranteed. The disputed law shows the state approach towards the President of the Republic. Therefore, the question of equality of ex-presidents of the Republic with other citizens cannot be treated as an abstract relation, irrespective of the specific conditions that generate distinct treatment.

Languages:

Macedonian.

Identification: MKD-2000-2-004

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 14.06.2000 / **e)** U.br.140/99 / **f)** / **g)** / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

1.3 **Constitutional Justice** – Jurisdiction.
3.4 **General Principles** – Separation of powers.
4.6.2 **Institutions** – Executive bodies – Powers.
4.6.6 **Institutions** – Executive bodies – Relations with the Head of State.
4.6.12.2 **Institutions** – Executive bodies – Liability – Political responsibility.

Keywords of the alphabetical index:

Foreign affairs, competencies / Foreign policy / Diplomatic relations, establishment.

Headnotes:

An Act passed by the government establishing diplomatic relations with a certain state does not have the features of a ratified international agreement which is part of the internal legal order. It is an act through which a state, i.e. its authorised bodies, demonstrates its political will to establish diplomatic relations with another state. Therefore, it cannot be subject to judicial review, only political control exercised within the framework of parliamentary democracy.

Summary:

The Court rejected the petition lodged by an individual challenging the Government Decision establishing diplomatic relations between the Republic of Macedonia and the Republic of China.

The petition was based on several grounds:

- that the decision in question disputed and was contrary to acts adopted previously (UN Resolution no. 2758 of 1971 which, upon succession, became part of the internal legal order and the common bilateral communiqué signed between the Republic of Macedonia and the Republic of China (Taiwan), as a binding international act);

- several international agreements ratified with the Republic of China (Taiwan), including clauses regarding its territorial unity.

Thus, the petitioner claimed that the disputed act distorted the legal hierarchy and the validity of laws and ratified international agreements.

The petitioner also argued that the decision in question was contrary to Article 119 of the Constitution, according to which the President of the Republic is vested with the power to conclude international agreements on behalf of the state. In the petitioner's opinion this right derives directly from the Constitution and means that the government has such a mandate only if provided by law.

In deciding the case, the Court found it necessary to consider not only the form of the disputed Decision, but also its essential characteristics, which determine its nature in relation to Articles 91.8, 91.9, 118 and 119 of the Constitution.

According to Article 91.8 and 91.9 of the Constitution, the Government of the Republic is vested with the power to recognise states and governments and to establish diplomatic and consular relations with other states. government acts through which these authorisations are administered have a political character, as those for conducting specific international policy. Although they produce consequences of a legal nature, they are not part of the internal legal order, either as legal sources (regulations) or as acts whose contents are legally defined (except in relation to the power for their adoption).

On the contrary, Articles 118 and 119 of the Constitution refer to another area of international relations, international agreements, which under certain circumstances become part of the internal legal order and can thus be subject to judicial review. In this situation, the government is in a different position from that enshrined in Article 91.8 and 91.9 of the Constitution (here it is determined by the Constitution and law).

Taking all this into consideration, the Court found that the disputed decision cannot be considered as falling within Articles 118 and 119 of the Constitution. The nature of government authorisation stipulated in Article 91 determines the very nature of the disputed decision. It is an act through which a state, i.e. its authorised bodies, expresses its political will to establish diplomatic relations with another state, without having the character of a regulation which is part of the internal legal order. Therefore, the Court found that it was not competent to judge the constitutionality of this act, which can be subject to political control within the framework of parliamentary democracy.

Languages:

Macedonian.

Identification: MKD-2000-2-005

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 12.07.2000 / **e)** U.br.220/99 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), no. 57/2000 / **h)** CODICES (Macedonian).

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.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.1.2.1 **Fundamental Rights** – Equality – Scope of application – Employment – In private law.
5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.
5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.

Keywords of the alphabetical index:

Employer, employee, relations / Holiday, religious / Religion, affiliation, evidence.

Headnotes:

The enjoyment of a statutory based right (the right to leave during a religious holiday) which derives from exercising a certain freedom (freedom of religion) has to be based on objective facts supported by evidence. The rule of law, understood as the supremacy of objective legal norms over subjective will and the existence of relatively objective criteria for ascertaining a citizen's affiliation to a certain religious belief, requires the determination of objective facts related to such a right being enjoyed.

Summary:

The Court refused an individual's request for protection from discrimination based on religious affiliation resulting from a judgment of the Court of Appeal. Due to a lack of procedural presumption for decision-making, stated by the Rules of procedure of the Court (expiration of two months after delivery of the act), it rejected the request in part dealing with singular acts, which in the petitioner's opinion violated his right.

The petitioner's request was based both on procedural and substantive grounds. The procedural ground referred to the constitutional protection of human rights and freedoms before regular courts and the Constitutional Court, through a procedure based upon the principles of priority and urgency (Article 50 of the Constitution). The substantive ground took into consideration several principles:

- the principle of equality of citizens in enjoying their rights and freedoms (Article 9 of the Constitution);
- the constitutional right of citizens freely to express their confession (Article 19 of the Constitution);
- the impossibility of individual rights and freedoms being withheld because of affiliation to or practice of a certain religion, including the impossibility of a ban on becoming a member of a religious community (Article 4 of the Law on religious communities and religious groups);
- Articles 9 and 14 ECHR, which guarantee everyone the freedom to manifest his/her religion, provided that the enjoyment of rights and freedoms is without discrimination based on any religion.

The facts of the case were as follows. The petitioner, a Macedonian who celebrated Christian holidays, left his office two working days on the first days of *Ramazan Bajram* and *Kurban Bajram* – holidays in the Muslim religion. Since he did not obtain leave, in first instance he was dismissed, which was later replaced with a fine. The petitioner justified the leave on the ground that he accepted the Muslim religion. Therefore, those days were not working days for him (according to the Law on holidays in the Republic of Macedonia) and he could not be made to bear any damaging consequences on that account. However, neither the employer nor the courts in two instances accepted his claim that he accepted the Muslim religion, and considered that his leave was unjustified.

The fact that the petitioner's claim that he is affiliated to the Muslim religion was not accepted and that he was asked to prove such religious belief meant that the petitioner felt discriminated against. In his opinion, the Constitution guarantees the freedom of religion as a personal conviction, the expression of which is part of one's privacy and therefore no one is obliged to prove it. The petitioner based the protection of his rights and freedoms only on his claim that he was affiliated to the Muslim religion indicating that neither he nor anyone else should be required to prove such an assertion.

In making its decision, the Court found it crucial to settle the following preliminary question: is the expression of the citizen's will sufficient to enjoy a certain right deriving from a freedom or must the citizen rely on objective facts which should be supported by evidence?

Taking into account that the rule of law is one of the fundamental principles of the constitutional order and that there are objective criteria for ascertaining a citizen's affiliation to a particular religion, the Court judged that objective facts related to the enjoyment of a right have necessarily to be verified. Taking the rule of law as the supremacy of objective legal norms over subjective will, and after a public hearing and several consultations had been held, and especially bearing in mind the petitioner's statement, the Court found that the contents and form of his religious belief did not objectively correspond to that of the Muslim religion on several grounds. For example, he did not know the basic premises of that religious system, through which the essence of such belief is expressed; nor did he know how to enter this belief. Therefore, the Court found that the petitioner had not been discriminated against by the Court of Appeal's judgment, i.e. the fact that the court entered into fact-finding and determined objective facts had not put the petitioner in a disadvantageous position in comparison to other citizens based on his religious belief.

Languages:

Macedonian.

Identification: MKD-2000-2-006

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 12.07.2000 / **e)** U.br.32/2000 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 79/2000 / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Burial, decent, right / Custom, respect / Humanity, principle / Identity, right.

Headnotes:

Safeguarding human dignity is a fundamental human right and a pre-condition for implementing humanity, a fundamental principle of the constitutional order. Human dignity does not relate only to living people; its protection also covers deceased persons. Making it a crime to place photographs, statements or other memorial on the tomb of deceased persons who were enemies during World War II or enemies of the social and political system of the Republic, infringes the right to be buried in a normal, decent way. It also violates without justification fulfilment of the moral duty of persons related to the deceased to bury a relative in such a way.

Summary:

The Constitutional Court partially annulled a provision of the Law on offences against public order and peace, finding it contrary to constitutional provisions related to human dignity and reputation.

Article 18.a.2 of the law provided for imprisonment for a term of between 40 and 60 days for anyone who places on a tomb or other public place, a statement, photograph or other memorial to a person who died as an enemy to the national liberation war or to the social and political system of the Republic.

While making its decision, the Court took into consideration constitutional provisions related to human dignity and reputation and to the principle of equality.

Article 8.8 of the Constitution defines humanity amongst the fundamental principles of the constitutional order. According to Article 9 of the Constitution, all citizens of the Republic are equal in their freedoms and rights irrespective of sex, race, colour of skin, national and social origin, political and religious beliefs, property and social status. In addition, all citizens are equal before the Constitution and laws. Article 11 of the Constitution defines the human right to moral and physical integrity as irrevocable. Article 25 of the Constitution safeguards respect for and protection of the privacy of every citizen's personal and family life and of his/her dignity and reputation.

Bearing in mind the above, the Court found that the disputed provision had implications for human dignity, a constitutional value which is enshrined within the constitutional concept of human rights and freedoms. While human dignity requires protection in respect to living people, it cannot be detached from those deceased. Although respect towards deceased can be shown in different stages and forms, the Court found that an elementary condition for respecting the human dignity of the deceased is for a person to be buried according to existing practice and legal principles, irrespective of that person's merits or sins with regard to the social community. It also includes the right of the deceased's relatives not to be prevented from burying a relative in a normal, decent way.

According to current regulation (the Law on graveyards), a decent and proper burial, bearing in mind differences related to religious and national affiliation, includes placement of signs, photographs, inscriptions, memorials or cenotaphs.

Therefore, the Court found that making it a crime to place photographs, inscriptions or cenotaphs on the tomb of deceased persons who were enemies of the national liberation war or the social and political system of the country, violates the elementary respect for human dignity in two ways: by depriving the deceased of his/her right to be buried in a decent and proper way; and by violating the moral duty of the deceased's relatives to bury him/her in such a way.

Languages:

Macedonian.

Ukraine
Constitutional Court

Summaries of important decisions of the reference period 1 May 2000 – 31 August 2000 will be published in the next edition, *Bulletin* 2000/3.

United States of America
Supreme Court

Important decisions

Identification: USA-2000-2-004

a) United States of America / **b)** Supreme Court / **c)** / **d)** 22.03.2000 / **e)** 98-1189 / **f)** Board of Regents of the University of Wisconsin System v. Southworth / **g)** 120 *Supreme Court Reporter* 1346 (2000) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.3.2 **General Principles** – Democracy – Direct democracy.
3.21 **General Principles** – Prohibition of arbitrariness.
5.2.2.9 **Fundamental Rights** – Equality – Criteria of distinction – Political opinions or affiliation.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Purpose, germane / Viewpoint neutrality.

Headnotes:

The right of free speech, guaranteed under the First Amendment to the U.S. Constitution, is implicated by a university's imposition of a fee program that compels students to provide financial support to organisations engaged in expressive activity.

In the setting of a university, where the institutional goal is to stimulate the exchange of a broad range of ideas, the First Amendment permits imposition of a compulsory student fee to support organisations participating in that exchange, so long as the institution's allocation of funding support is administered on a viewpoint neutral basis.

In assessing the validity of a compulsory fee imposed on university students for the support of organisations participating in the exchange of a broad range of ideas, the First Amendment standard is not whether the expressive activity of those organisations is germane to the purposes of the university.

Summary:

A group of students at the University of Wisconsin, claiming violation of their rights of free speech guaranteed under the First Amendment to the U.S. Constitution, challenged in federal court the University's requirement that all students pay a special monetary fee to support registered student organisations. A number of those organisations engage in a range of diverse expressive activities, and the students alleged that the fee in effect compelled them to subsidise the expression of political and ideological views that might be offensive to their own beliefs. They asked the court to order the University to offer students the opportunity to choose those organisations to which they would provide financial support. The First Amendment, which is made applicable to the states by means of the Fourteenth Amendment's Due Process clause, states that "Congress shall make no law... abridging freedom of speech, or of the press". The University of Wisconsin is a public institution of the state of Wisconsin.

The first instance court concluded that the fee was invalid, grounding its decision on U.S. Supreme Court decisions holding that fees imposed by labour unions and professional associations could be used to fund speech germane to the purposes of those organisations, but not to fund the organisations' own political expression. The court therefore ordered the University to refrain from using the student fees to fund organisations engaged in political or ideological speech. The Court of Appeals, concluding that the fee program was not germane to the University's mission and did not further a vital University policy, upheld the lower court's decision.

The U.S. Supreme Court reversed the decision of the Court of Appeals. Although the Court agreed that the students' rights were implicated under its earlier decisions relied upon by the lower courts, it found that the "germane" speech standard was not workable in the context of student speech at a university. The Court noted that the University's requirement was for the sole purpose of stimulating the free and open exchange among its students of the entire universe of ideas. To insist upon asking what speech is germane in such a setting would be contrary to the very goal that the University seeks to pursue.

At the same time, the Court stated that the objecting students' First Amendment interests must be protected by a requirement that the University allocate the funding support on a viewpoint neutral basis – in other words, that the University not favour particular viewpoints at the expense of others. In this regard, the Court noted that the parties had agreed to

a stipulation that, as a factual matter, the University's process for reviewing and approving organisations' funding requests was administered in a viewpoint neutral fashion.

On one point, however, the Court did identify a potential constitutional problem in the University's program. The program also provided for an alternate route by which an organisation could qualify for funding from the compulsory student fees – by means of a student referendum. The Court noted that the factual record on this question was not adequately developed, and therefore it remanded this aspect of the case back to the court of first instance. If the further development of the facts were to indicate that the referendum alternative could substitute majority determinations for a system of viewpoint neutrality, the Court stated, such a step could be an impermissible infringement on the free speech rights of students opposed to paying for the support of the organisations in question.

Cross-references:

The Supreme Court's case law establishing the "germane" standard includes the following decisions: *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) [required service fee paid by non-union employees to a labour union]; and *Keller v. State Bar of California*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990) [fees paid by lawyers required to join a state professional [bar] association].

Languages:

English.

Identification: USA-2000-2-005

a) United States of America / **b)** Supreme Court / **c)** / **d)** 15.05.2000 / **e)** 99-5, 99-29 / **f)** United States v. Morrison / **g)** 120 *Supreme Court Reporter* 1740 (2000) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.5.2 **Institutions** – Legislative bodies – Powers.

4.8.5.2.1 **Institutions** – Federalism and regionalism – Distribution of powers – Implementation – Distribution *ratione materiae*.
5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.

Keywords of the alphabetical index:

Commerce, interstate / Impact, aggregate / Violence, gender-motivated.

Headnotes:

Under the federalism scheme in the U.S. Constitution, the regulatory authority of the federal legislature is not unlimited; instead, every federal law must be based on an allocation of power enumerated in the Constitution.

Federal legislative authority includes the power to regulate economic activities that substantially affect interstate commerce.

The scope of federal legislative authority may not be extended so as to embrace effects upon interstate commerce so indirect that to rely upon them would effectually eliminate the distinction between what is national and what is local and create a completely centralised government.

Gender-motivated crimes of violence are not economic activity, and the federal legislature may not regulate non-economic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce.

Federal authority to enact legislation implementing constitutional guarantees against denial of due process of law or denial of equal protection of the laws is limited to regulation of the acts of the states and state actors, not those of private persons.

Summary:

A female plaintiff brought suit in federal court against two male defendants, alleging that the two men raped her while they were students at a university in the state of Virginia. She alleged that the attack caused her to become severely emotionally disturbed and depressed, and shortly afterward she stopped attending classes and withdrew from the university.

The plaintiff based her legal action on a federal statute: the Violence Against Women Act (Chapter 42 of the U.S. Code, § 13981), enacted by the Congress in 1994. The Act provides an injured party with civil compensatory and punitive damages remedies

against a defendant who committed a crime of violence motivated by gender.

The court of first instance, in a decision affirmed by the Court of Appeals, ruled that the plaintiff's complaint stated a legally-recognised claim under § 13981, but dismissed the complaint because it concluded that the Congress lacked authority to enact the section.

The U.S. Supreme Court affirmed the conclusion of the lower courts that § 13981 was an unconstitutional assertion of federal legislative power. In doing so, it examined and rejected both of the constitutional grounds upon which Congress had acted in enacting § 13981. The first of those grounds was the Commerce Clause, located in Article I.8.3 of the United States Constitution, which provides that Congress shall have the power to regulate commerce "among the several states." In rejecting the Commerce Clause as a valid basis for § 13981, the Court first concluded that gender-motivated crimes of violence are not economic activity. Moreover, the Court declined to rely on congressional findings of the aggregated impact on the national economy of gender-motivated violence – findings that were based on an extensive, detailed factual record concerning the impact of such violence on victims and their families. While acknowledging this factual record, the Court did not find it relevant for resolving the central question of federalism found in this case: the identification of a distinction between what is truly national and what is truly local. That distinction in this case, the Court held, is found in the constitutional authors' undeniable allocation of the police power (suppression of violent crime and vindication of its victims) to the states. The problem with the aggregated impact approach of the statute's proponents, the Court said, is that such reasoning would allow the Congress to regulate any crime whose nationwide impact has substantial effects on employment, production, transit, or consumption, and indeed would permit Congress to extend its authority over other areas of state regulation such as family law, due to the aggregated effect of divorce on the national economy. In sum, the Court concluded that Congress may not regulate non-economic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce.

The Court also rejected arguments that congressional authority in this field can be based on § 5 of the Fourteenth Amendment to the U.S. Constitution. That Amendment, in § 1, prohibits the states from depriving any person of life, liberty, or property without due process of law or from denying any person equal protection of the laws. Section 5 permits the Congress to enforce by appropriate legislation these guarantees. In rejecting the assertion of congressional authority under § 5, the Court recognised that Congress had assembled a "voluminous" record to demonstrate pervasive bias in various state justice systems against victims of gender-motivated violence; however, the Court observed, the Fourteenth Amendment places limitations on the manner in which Congress may attack discriminatory conduct. Foremost among these, the Court said, is the principle that the Amendment prohibits only state action, not private conduct, and in the instant case § 13981's civil remedy is directed at individuals who have committed criminal acts motivated by gender bias, not at a state actor.

Supplementary information:

Four members of the nine-judge Supreme Court dissented from the opinion in this case. The dissenting judges emphasised the extensive factual record demonstrating the connection between gender-based violence and interstate commerce. Because they found § 13981 to be a valid exercise of Commerce Clause power, they did not discuss in detail the question of congressional authority under § 5 of the Fourteenth Amendment. However, in his dissenting opinion, Justice Breyer stated that he doubted the Court's reasoning rejecting that source of authority.

This case illustrates the on-going debate among the Supreme Court justices on the scope of federal legislative authority under the Commerce Clause, and is evidence of what might be a new direction in the Court's jurisprudence on this aspect of federalism. Since the 1930's, the Supreme Court generally upheld federal legislation grounded in the Commerce Clause. For example, in the 1964 decision *Heart of Atlanta Motel v. United States*, it upheld federal legislation outlawing racial discrimination in places of public accommodation. In its 1995 decision in *United States v. Lopez* (*Bulletin* 1995/1 [USA-1995-1-007]) and in *United States v. Morrison*, however, the Court has demonstrated that it will impose greater scrutiny on congressional claims of a causal connection between the regulated activity and its effect on interstate commerce. In *United States v. Lopez* (*Bulletin* 1995/1 [USA-1995-1-007]), the Court held that the Gun-Free School Zones Act of 1990, that made it a federal offence for an individual knowingly to possess a firearm in a school zone, was an unconstitutional assertion of federal legislative authority.

Cross-references:

Heart of Atlanta Motel v. United States, 379 U.S. 241, 85 S. Ct. 348, 13 L.Ed. 2d 258 (1964);
United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), *Bulletin* 1995/1 [USA-1995-1-007].

Languages:

English.

Identification: USA-2000-2-006

a) United States of America / **b)** Supreme Court / **c)** / **d)** 19.06.2000 / **e)** 99-62 / **f)** Santa Fe Independent School District v. Doe / **g)** 120 *Supreme Court Reporter* 2266 (2000) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.2.3 **Constitutional Justice** – Jurisdiction – Type of review – Abstract review.
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.
5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.

Keywords of the alphabetical index:

Invalidation, facial / Religion, establishment.

Headnotes:

A court's review of a public policy challenged as an establishment of religion is not necessarily premature even if the policy has not yet been applied; instead, a court may examine the policy for its potential subtle effects even before its full implementation.

While a governmental unit's assertion of a secular purpose for an arguably religious policy is entitled to some deference, a reviewing court must make its own determination, by examining the effects of that policy, as to whether it indeed is secular in purpose.

A public school's sponsorship of a religious message is impermissible because it sends a message to those members of the audience who do not adhere to the message that they are not full members of the political community.

The exercise of constitutional rights may not be submitted to an electoral process; it can not depend on the outcome of an election.

The constitutional provisions governing state and religion do not prohibit all religious activity in public schools; instead, voluntary prayer by students is permissible at any time before, during, or after the school day.

Summary:

Certain students and graduates of a public secondary school in the state of Texas, and their parents, filed a lawsuit in federal court under the Establishment Clause in the First Amendment to the U.S. Constitution, challenging the local school district's policy regarding the presentation of student-led "invocations" over the stadium's public address system prior to the beginning of high school football games. The Establishment Clause states that the U.S. Congress "shall make no law respecting an establishment of religion," and it is applied to the respective states and their subdivisions by means of the Due Process Clause in the Fourteenth Amendment to the U.S. Constitution. A local school district is a subdivision of a state.

The school district's policy, which was adopted in 1995 to replace an earlier practice in which the high school's student council chaplain delivered an invocation before each football game, provided for two student elections. The first election would ask students to decide whether invocations should be delivered at football games. If the majority ruled in favour, then the policy called for a second election to select the student who would deliver them.

The first instance court ruled on this question after the two elections had been held, but before any invocations were given pursuant to the policy. The Court ordered that the student invocations be limited solely to non-sectarian, non-proselytising statements, so as to protect the constitutional rights of those in the audience who might not subscribe to the beliefs of the speaker. Reviewing this decision, the Court of Appeals held that, even as modified by the court of first instance, the school district's policy was unconstitutional.

The U.S. Supreme Court affirmed the decision of the Court of Appeals. In response to the school district's

argument that the plaintiffs' challenge was premature because invocations pursuant to the elections had not been delivered, the Court concluded that a finding of constitutional invalidity is not foreclosed simply because the policy had not yet been fully applied. The Court said that the district was incorrect in assuming that the Establishment Clause is concerned only with the actual injury that occurs when a student is required to participate in an act of religious worship. Instead, the Court observed that Establishment Clause values can be eroded in many subtle ways; therefore, the policy on its face was susceptible to review as to its validity. The Court's approach was to examine the policy in light of the school district's history of sponsoring prayer at school events and to determine whether its mere adoption created the perception of a governmental purpose to establish religion.

The Court examined several arguments advanced by the district to demonstrate the policy's compliance with constitutional requirements. Citing its case law under the Establishment Clause, the Court stated that, at a minimum, the First Amendment guarantees that the government shall not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way that establishes a state religion or tends to do so. It rejected the school district's argument that the policy avoided these constitutional problems because the invocations were private student speech, as opposed to public speech. The Court, however, cited a number of indicia that ran counter to the characterisation of the invocations as private speech: they were made on school property, at school-sponsored events, over the school's public address system, by a speaker representing the student body, under the supervision of the school's faculty, and pursuant to a school policy that explicitly and implicitly encouraged public prayer.

As public speech, the Court concluded that the invocations could not be constitutionally valid because the policy did not show an intent on the part of the school district to open the pre-game ceremony to indiscriminate use by the student body in general. Instead, the policy allowed only one student (the same person for all games in the football season) to give the invocations, and the majoritarian election process inherently prevents any minority candidates from expressing their views.

In addition, the Court found that the policy had religious content. The Court noted that the word “invocation” is a term that primarily describes an appeal for divine assistance, and under previous policies of the school district at the high school such invocations had always entailed a focused religious message.

The Court also rejected the school district's argument that the policy did not coerce students to participate in religious observances. Noting that a purpose of the establishment Clause is to remove debate over these questions from governmental supervision or control, the Court said that the decision to hold the elections was clearly a choice made by the public authorities. In addition, the Court was not persuaded that coercion was absent because the football games are not mandatory school events. For one thing, the Court observed, that argument minimises the immense social pressure that many students experience regarding attendance at such events. In this regard, the First Amendment demands that schools not force students to make the difficult choice whether to attend such events or risk facing a personally offensive religious ritual.

While concluding that the policy was facially invalid, the Court also stated that the establishment Clause does not impose a complete prohibition on all religious activity in public schools. For example, the Court said that voluntary prayer by any student is permissible at any time before, during, or after the school day.

Supplementary information:

Three justices dissented from the Court's opinion. They disagreed that the district's policy was inevitably invalid, regardless of how it might have been applied if invocations pursuant to it had ever been made.

Languages:

English.

Identification: USA-2000-2-007

a) United States of America / **b)** Supreme Court / **c)** / **d)** 26.06.2000 / **e)** 99-5525 / **f)** Dickerson v. United States / **g)** 120 *Supreme Court Reporter* 2326 (2000) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.6.3.1 **Constitutional Justice** – Effects – Effect *erga omnes* – *Stare decisis*.

2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.
2.2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution – Hierarchy attributed to rights and freedoms.
2.2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources – The Constitution and other sources of domestic law.
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:

Precedent, judicial, review / Statement, voluntary, in-custody / *Stare decisis*, persuasive force.

Headnotes:

A legislative act is inferior to the Constitution in the hierarchy of sources of law; therefore, it cannot supersede a judicial rule resulting from a court's interpretation and application of constitutional norms.

The judiciary's authority to create and enforce non-constitutional rules of procedure and evidence for the federal courts exists only in the absence of relevant federal legislative acts; therefore, the federal legislature has the power to modify or set aside those judicially-created rules of evidence and procedure that are not required by the Constitution.

The U.S. Supreme Court does not hold general supervisory power over the courts of the particular states, and its power to review proceedings in state courts is limited to enforcing the commands of the federal Constitution.

The Supreme Court's rule, requiring the presentation of certain warnings to criminal suspects before they give statements to the authorities while in custody, is one of constitutional dimension and can not be superseded by a legislative act.

The doctrine of *stare decisis*, or judicial precedent, is of such great persuasive weight that the Supreme Court will depart from it only when such departure is supported by some special justification and subsequent case law has undermined the doctrinal basis of the rule in question.

Summary:

A criminal defendant, charged with conspiracy to commit bank robbery and related crimes under federal law, made a statement of confession while in custody to agents of the Federal Bureau of Investigation (FBI). Subsequently, before his trial, he filed a motion with the trial court to suppress the statement, so that it would not be part of the evidentiary record. He based his motion on the grounds that he had not received a so-called "Miranda warning" before the beginning of the interrogation by the FBI agents. The claim that issuance of a Miranda warning is a condition to the admissibility of a defendant's in-custody statement into evidence stems from the 1966 U.S. Supreme Court decision in *Miranda v. Arizona*, in which the Court held that certain warnings must be given to a suspect before he or she makes a statement during custodial interrogation. These warnings include statements to the suspect that he or she has a right to remain silent, and that anything the suspect says can be used against him or her in a court of law.

The court of first instance granted the defendant's motion. The U.S. government appealed, and the Court of Appeals reversed the lower court's ruling. The Court of Appeals acknowledged that the defendant had not received Miranda warnings, but grounded its decision on a federal statute (Chapter 18 of the U.S. Code, § 3501), enacted by the Congress in 1968, after the Supreme Court's *Miranda v. Arizona* decision. Under § 3501, which does not include a warning requirement, an in-custody statement can serve as admissible evidence if it is made voluntarily. The Court of Appeals concluded that the defendant in the instant case had made his confession voluntarily, and that the applicable congressional norm was controlling because *Miranda v. Arizona* was not a holding of constitutional dimension and therefore could be overruled by a legislative act.

The U.S. Supreme Court reversed the decision of the Court of Appeals. The Court acknowledged that Congress intended § 3501 to overrule Miranda, but rejected the determination of the Court of Appeals that Congress had the constitutional authority to do so. In addition, the Court declined to overrule its *Miranda v. Arizona* decision. On the first question, the Court stated that while Congress has the ultimate authority to modify or set aside judicially-recognised rules that are not constitutionally required, it does not have the power to overturn judicial decisions interpreting and applying the Constitution. In this regard, the Court held that the Miranda rules were of such superior constitutional dimension; the Court observed that it had consistently applied Miranda to proceedings in state courts, even though its authority over those courts is not a general supervisory power but is limited to enforcing the Federal Constitution. In addition, the Court's opinion in Miranda is filled with statements indicating that the majority Justices

thought they were announcing a constitutional rule grounded in the protections for criminal suspects and defendants found in the Fifth Amendment to the Constitution.

On the second question, the Court grounded its refusal to overrule Miranda on the principle of *stare decisis*: the rule that attaches great weight to precedent and requires that a departure from precedent must be supported by some special justification. Therefore, the Court said that whether or not it would agree with the reasoning and rule in Miranda in the first instance, it would be ignoring the persuasive force of *stare decisis* to overturn the rule now, where there is not any special justification to do so. In this regard, the Court observed that while it has overruled its own precedents when subsequent decisions have undermined their doctrinal bases, this has not occurred in the circumstances governed by Miranda.

Supplementary information:

The Fifth Amendment to the U.S. Constitution states (in part) that an individual in criminal proceedings shall not be "compelled to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law."

Cross-references:

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Languages:

English.

Identification: USA-2000-2-008

a) United States of America / **b)** Supreme Court / **c)** / **d)** 28.06.2000 / **e)** 99-699 / **f)** Boy Scouts of America v. Dale / **g)** 120 *Supreme Court Reporter* 2446 (2000) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.2.11 **Fundamental Rights** – Equality – Criteria of distinction – Sexual orientation.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Organisation, view / Organisation, member, forced acceptance / Homosexuality.

Headnotes:

Implicit within the constitutional guarantee of freedom of speech is a right of members of a group to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural pursuits.

In order to fall within the protection of the constitutional right of expressive association, a group must engage in some form of public or private expression.

The freedom of expressive association is implicated when the state seeks to force inclusion of an unwanted person in a group if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.

An interference with the freedom of expressive association must be subject to strict judicial scrutiny and will be constitutional only if the regulation serves a compelling state interest, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

Summary:

An adult assistant scoutmaster in a local chapter of the Boy Scouts of America (BSA), following his public declaration that he is a homosexual, was expelled from the organisation. The BSA, a private organisation, based its decision on its belief that homosexual conduct is inconsistent with the system of values that it seeks to instil in young people. The former scoutmaster filed suit in the courts of the state of New Jersey, seeking a ruling that the BSA's action violated a state statute that prohibits discrimination on the basis of sexual orientation in places of public accommodation. The New Jersey Supreme Court ruled that the BSA violated the state public accommodation law by revoking the plaintiff's membership based on his declared sexual orientation. In so doing,

the New Jersey court held, among other things, that application of the statute did not violate the BSA's constitutional right of expressive association.

The U.S. Supreme Court reversed the decision of the New Jersey Supreme Court, holding that application of the public accommodation statute to require the BSA to admit the plaintiff to membership was a violation of the right of expressive association guaranteed under the First Amendment to the U.S. Constitution. The First Amendment guarantees the right to freedom of speech, and the Court's jurisprudence recognises that implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural pursuits. This expressive association right, the Court has stated, is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas. Such imposition can take the form, along others, of requiring a group to accept certain people as members. The Court has also held that the right of expressive association is not absolute, and that it can be overridden by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

In the instant case, the Court examined the question of whether the BSA was protected by the associational right, which is limited only to groups that engage in expressive association. While noting that the right is not reserved only for advocacy groups, the Court stated that a group must engage in some form of expression, public or private, in order to fall within its zone of protection. The BSA, the Court concluded, is a protected group because its adult leaders strive to inculcate its young members with a certain value system.

The next question confronting the Court was whether the state's requirement that the plaintiff be admitted to membership constituted an interference with the BSA's ability to advocate public or private viewpoints. The Court found an interference because the BSA asserts that homosexual conduct is inconsistent with its values and has stated that it does not want to promote such conduct as a legitimate form of behaviour. The Court concluded that the plaintiff's presence as an assistant scoutmaster would significantly burden the expression of these views.

The Court then determined that the interference was unconstitutional. The Court subjected New Jersey's application of its public accommodations law to strict scrutiny rather than a less stringent standard of review and found that the state interests advanced by the law did not justify the degree of interference in the BSA's freedom of expressive association. The Court sought to emphasise that it was not guided by a view as to whether the BSA's teachings about homosexuality are right or wrong, and stated that public or judicial disapproval of an organisation's views does not justify a state effort to compel the organisation to accept members in contradiction of those views.

Supplementary information:

The Supreme Court's decision was decided on a 5-4 vote. Two of the minority justices filed dissenting opinions.

Cross-references:

The Supreme Court applied the First Amendment test for interferences with the right of expressive association adopted in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 115 S.Ct. 2338, 132 L. Ed. 2d 487 (1995), *Bulletin* 1995/2 [USA-1995-2-008].

Languages:

English.

Identification: USA-2000-2-009

a) United States of America / **b)** Supreme Court / **c)** / **d)** 28.06.2000 / **e)** 99-830 / **f)** Stenberg v. Carhart / **g)** 120 *Supreme Court Reporter* 2597 (2000) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
3.16 **General Principles** – Weighing of interests.
4.8.3.3 **Institutions** – Federalism and regionalism – Institutional aspects – Courts.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Abortion / Foetus, viability / Law, exceptions.

Headnotes:

During the pre-viability stage in pregnancy, the U.S. Constitution prohibits the state's placement of an undue burden on a woman's right to choose whether to have an abortion; during the post-viability stage, the stage may regulate or even prohibit abortion in the interest of promoting the potentiality of the foetus, except where the procedure is necessary, in appropriate medical judgment, to preserve the life or health of the mother.

If a prohibited abortion procedure carries less risk to the woman's health during the post-viability stage of pregnancy than alternate methods, the statute must provide an exception for abortions necessary to protect the woman's health in order to escape constitutional invalidity.

If a statutory proscription aimed at one abortion procedure can be construed to include other methods as well, the statute places a constitutionally impermissible obstacle in the path of a woman seeking an abortion during the pre-viability phase of pregnancy.

The Supreme Court normally follows lower federal court construction of state statutes.

An opinion of a state's top legal officer construing a statute is not afforded controlling weight when such opinions do not bind the state's courts.

Summary:

A physician challenged in federal court the constitutionality of a state statute that made it a crime to perform “partial birth” abortions unless necessary to save the life of the mother. The statute, enacted by the state of Nebraska, defined a “partial birth” abortion as a procedure in which the doctor “partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.” Some thirty other states in the United States have enacted similar statutes.

Under the jurisprudence of the Supreme Court, which recognises that the right to privacy in the U.S. Constitution offers basic protection to a woman's right to choose whether to terminate her pregnancy, a distinction is made between state regulations that seek to protect foetal life before and after “viability”. The standard of viability is subjective, not objective. It is a medical determination to be made by the doctor in each individual case, and is not established at a specific time frame in the course of a woman's pregnancy. Any state regulation that places an undue burden on a woman's decision whether to terminate her pregnancy before viability – that is, a state act that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion during the pre-viability stage, is unconstitutional. After viability, the state in promoting an interest in protecting the potentiality of human life may choose to regulate and even prohibit abortion except when it is necessary, in appropriate medical judgment, to preserve the life or health of the mother.

In the instant case, the court of first instance, affirmed by the Court of Appeals, held that the statute was unconstitutional. The U.S. Supreme Court affirmed the decisions of the lower courts, ruling that the statute was unconstitutional on two grounds: that it lacked any exception for abortions in the post-viability stage deemed necessary to protect the health of the mother, and that it placed an undue burden on a woman's right to choose whether to have an abortion in the pre-viability stage.

Because the basic aim of the statute in question was to ban a particular abortion procedure – that known as the “dilation and extraction” method (ordinarily associated with the term “partial birth abortion”) – the Court examined several different abortion procedures in considerable detail. As to the absence in the legislation of an exception for protection of the mother's health during the post-viability stage of pregnancy, the Court cited the factual record in rejecting the state of Nebraska's argument that such an exception was not necessary because safe alternative methods are available and a ban on the dilation and extraction procedure therefore would not pose a risk to women's health. The testimony of medical experts demonstrated, the Court concluded, that alternate abortion procedures in some circumstances could pose a greater risk than the dilation and extraction method; therefore, an exception to the statute allowing for this possibility was necessary.

Regarding the second basis for its finding of unconstitutionality, the Court concluded that the wording of the statutory prohibition could also be construed to apply to abortion methods other than just the dilation and extraction procedure. The factual record made it evident, the Court determined, that other abortion methods also can involve the pulling of substantial portions of a still living foetus into the vagina prior to the death of the foetus. Therefore, the statutory prohibition placed a constitutionally impermissible undue burden on a woman's right to choose whether to have an abortion during the pre-

viability stage because it covered a much broader category of procedures. In making this determination, the Court rejected a narrower interpretation of the statute by the Nebraska Attorney General because the Court normally follows lower federal court interpretations of state law and because Attorney General interpretive opinions do not bind the state courts under Nebraska law.

Supplementary information:

Reflecting the differences of opinion in this controversial area of constitutional law, the decision in *Stenberg v. Carhart* was decided in a 5-4 vote of the Supreme Court. Three of the majority justices wrote separate concurring opinions, and each of the minority justices filed separate dissenting opinions.

Cross-references:

A constitutional right to abortion was first recognised in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The most recent articulation of the Court's current approach in this field is found in Planned Parenthood of *Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

Languages:

English.

European Court of Human Rights

Important decisions

Identification: ECH-2000-2-005

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 27.06.2000 / **e)** 22277/93 / **f)** Ihlan v. Turkey / **g)** / **h)** CODICES (English, French).

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.
5.3.2 **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.
5.3.15 **Fundamental Rights** – Civil and political rights – Rights of victims of crime.

Keywords of the alphabetical index:

Gendarme, violence / Prosecutor, investigation, refusal / Effective remedy.

Headnotes:

The absence of death of the victim does not exclude an examination of the applicant's complaints under Article 2 ECHR. However, in the circumstances of this case, the Court examined the maltreatments by gendarmes further under Article 3 ECHR below. Having regard to the severity of the ill-treatment suffered by Abdüllatif Ilhan and the surrounding circumstances, the Court found that he was a victim of torture. Finally, the applicant did not have any effective remedy to complain against his brother's injuries contrary to Article 13 ECHR.

Summary:

The applicant, Nasir Ilhan is a Turkish citizen. On 26 December 1992 gendarmes carried out an operation at Aytepe village. Abdüllatif Ilhan, the applicant's brother, and another villager saw the soldiers approaching the village and ran to hide. The

applicant claimed that when the gendarmes found the men they beat and kicked them. His brother Abdüllatif Ilhan was allegedly hit with rifle butts, at least one blow hitting his head. The gendarmes took Abdüllatif Ilhan into custody. The captain of the Mardin gendarmerie took a statement from him during the day of 27 December 1992. Thirty-six hours after his apprehension, Abdüllatif Ilhan was admitted for treatment at Mardin State Hospital, where he was found to be suffering from left hemiparesis and to be in a life-threatening condition. He was taken to Diyarbakir State Hospital, where his condition was found to be fair, though risk to life remained, with symptoms of concussion and left hemiplegia, a cerebral oedema and left hemiparesis. On 11 June 1993, a medical report stated that he was suffering from 60% loss of function on his left side.

On 11 February 1993, the public prosecutor issued a decision not to prosecute anyone in respect of Abdüllatif Ilhan's injuries, as they had resulted from an accident for which no-one was at fault. On the same day, the public prosecutor drew up an indictment charging Abdüllatif Ilhan with the offence of resistance to officers contrary to Article 260 of the Turkish Penal Code, namely, that during an operation Abdüllatif Ilhan had run away from the security forces, ignoring their orders to stop. On 30 March 1993, Abdüllatif Ilhan appeared in court, before the Mardin Justice of the Peace, who found that he had failed to comply with an order to stop and had thus resisted the officer contrary to Article 260 of the Turkish Penal Code. He was sentenced to a fine of 35,000 Turkish lira, which was suspended.

The Court had to consider whether the applicant's brother was the victim of a life-threatening assault and torture in violation of Articles 2 and 3 ECHR and whether he did not have any effective remedy, in violation of Article 13 ECHR, due to the defects in the investigation.

The Court recalled that although the force used against Abdüllatif Ilhan was not lethal, this did not exclude an examination of the applicant's complaints under Article 2 ECHR in exceptional circumstances. However, the Court was not persuaded in the circumstances of this case that the use of force applied by the gendarmes when they apprehended Abdüllatif Ilhan was of such a nature or degree as to breach Article 2 ECHR. It did however examine these aspects further under Article 3 ECHR.

The Court found that Abdüllatif Ilhan had been kicked and beaten and struck at least once on the head with a G3 rifle. This resulted in bruising and two injuries to the head, which caused brain damage and long-term impairment of functions. Notwithstanding the visible injuries to his head and the evident difficulties which Abdüllatif Ilhan had in walking and talking, there was a delay of some 36 hours in bringing him to a hospital. Having regard to the severity of the ill-treatment suffered by Abdüllatif Ilhan and the surrounding circumstances, including the significant lapse in time before he received proper medical attention, the Court found that he had been subjected to serious and cruel suffering that may be character-ised as torture.

The Court found that the government was responsible under Article 3 ECHR for the torture of Abdüllatif Ilhan; accordingly the authorities had been under an obligation to carry out an effective investigation into the circumstances. However, although the public prosecutor was aware that Abdüllatif Ilhan had suffered serious injuries which had required hospitalisation, the public prosecutor took no independent investigative step, accepting the inconsistent and somewhat implausible version of events produced by the gendarmes. He did not seek to hear Abdüllatif Ilhan's or Ibrahim Karahan's version of events, nor did he seek clarification from the relevant doctors about the extent and nature of the injuries. Furthermore, the medical report made no reference to the cause of the injuries as explained by the victim and did not refer to the other injuries and marks on his body. This highlighted the importance of adequate follow-up by the public prosecutor in ascertaining the cause and extent of Abdüllatif Ilhan's injuries. For these reasons, no effective criminal investigation could be considered as having been conducted in accordance with Article 13 ECHR. Therefore no effective remedy had been provided in respect of Abdüllatif Ilhan's injuries and thereby access to any other available remedies, including a claim for compensation, had also been denied. Accordingly, there had been a violation of Article 13 ECHR.

Cross-references:

Akdivar and Others v. Turkey, 16.09.1996, *Reports* 1996-IV, p. 1214;
Cardot v. France, 19.03.1991, Series A, no. 200, p. 18;
Worm v. Austria, 29.08.1997, *Reports* 1997-V;
Yasa v. Turkey, 02.09.1998, *Reports* 1998-VI;
Open Door and Dublin Well Woman v. Ireland, 29.10.1992, Series A, no. 246, *Special Bulletin ECHR* [ECH-1992-S-006];
Wassink v. the Netherlands, 27.09.1990, Series A, no. 185;
Aksoy v. Turkey, 18.12.1996, *Reports* 1996-VI, p. 2275, *Bulletin* 1996/3 [ECH-1996-3-017];
Mahmut Kaya v. Turkey, 28.03.2000, *Reports* 2000;
Kiliç v. Turkey, 28.03.2000, *Reports* 2000;

McCann and Others v. the United Kingdom, 27.09.1995, Series A, no. 324, *Bulletin* 1995/3 [ECH-1995-3-016];
Osman v. the United Kingdom, 28.10.1998, *Reports* 1998-VIII;
L.C.B. v. the United Kingdom, 09.06.1998, *Reports* 1998-III, p. 1403, *Bulletin* 1998/2 [ECH-1998-2-008];
Assenov v. Bulgaria, 28.10.1998, *Reports* 1998-VIII;
Tekin v. Turkey, 09.06.1998, *Reports* 1998-IV;
Ireland v. the United Kingdom, 18.01.1978, *Special Bulletin ECHR* [ECH-1978-S-001];
Selmouni v. France, 28.07.1999, *Reports* 1999, *Bulletin* 1999/2 [ECH-1999-2-008];
Labita v. Italy, 06.04.2000, *Reports* 2000, *Bulletin* 2000/1 [ECH-2000-1-002];
Aydin v. Turkey, 25.09.1997, p. 1895, *Bulletin* 1997/3 [ECH-1997-3-016];
Kaya v. Turkey, 19.02.1998, *Reports* 1998-I, p. 329, *Bulletin* 1998/1 [ECH-1998-1-004];
Boyle and Rice v. the United Kingdom, 27.04.1988, Series A, no. 131, p. 23;
Çakici v. Turkey, 08.07.1999, *Reports* 1999.

Languages:

English, French.

Identification: ECH-2000-2-006

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 27.06.2000 / **e)** 27417/95 / **f)** Cha'are Shalom Ve Tsedek v. France / **g)** / **h)** CODICES (English, French).

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.
3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
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:

Slaughter, ritual, religious ceremony / Religious body, certified / Cult, practice.

Headnotes:

Freedom to manifest one's religion, guaranteed by Article 9 ECHR, does not necessarily include the freedom to perform ritual slaughter in accordance with the very strict religious prescriptions of the applicant as long as the members of the applicant association could still obtain meat in conformity with religious standards.

Summary:

In 1987 the applicant association asked the Minister of the Interior to submit a proposal to the Minister of Agriculture recommending that it be given the official approval it needed in order to be able to perform ritual slaughter in accordance with the very strict religious prescriptions of its members, for whom meat is not kosher unless it is "glatt". Meat from slaughtered animals cannot be "glatt" if an examination of their lungs reveals the slightest blemish. The application was refused at final instance by the *Conseil d'État* in a judgment of 25 November 1994 on the ground that the applicant could not be considered a "religious body" within the meaning of Article 10 of the Decree of 1 October 1980, which permits exemption from the obligation to stun animals before they are slaughtered only in the case of ritual slaughter carried out by ritual slaughterers authorised by an approved religious body.

The Court had to consider whether the refusal of the application for approval infringed the applicant association's freedom to manifest its religion through observance, guaranteed by Article 9 ECHR.

In the Court's opinion, there would have been interference with the freedom to manifest one's religion only if the illegality of performing ritual slaughter had made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable. But that was not the case. The applicant association can easily obtain supplies of "glatt" meat in Belgium. Furthermore, it was apparent from the written depositions and bailiffs' official reports produced by the interveners that a number of butcher's shops made meat certified "glatt" available to Jews. It emerged from the case file as a whole, and from the oral submissions at the hearing, that Jews who belonged to the applicant association could thus obtain "glatt" meat. Admittedly, the applicant

association argued that it did not trust the ritual slaughters authorised by the ACIP as regards the thoroughness of the examination of the lungs of slaughtered animals after death. But the Court took the view that the right to freedom of religion guaranteed by Article 9 ECHR cannot extend to the right to take part in person in the performance of ritual slaughter and the subsequent certification process given that, as pointed out above, the applicant association and its members are not in practice deprived of the possibility of obtaining and eating meat considered by them to be more compatible with religious requirements.

On those grounds the Court held that the refusal of approval complained of had not constituted an interference with the applicant association's right to freedom to manifest its religion.

Cross-references:

The Cean catholic church v. Greece, 16.12.1997, *Reports* 1997-VIII, p. 2856;
Kalaç v. Turkey, 01.07.1997, *Reports* 1997-IV, p. 1209, *Bulletin on freedom of religion and beliefs* [ECH-1997-R-001];
Manoussakis v. Greece, 29.09.1996, *Reports* 1996-IV, p. 1364;
Marckx v. Belgium, 13.06.1979, Series A, no. 31, p. 16, *Special Bulletin ECHR* [ECH-1979-S-002].

Languages:

English, French.

Identification: ECH-2000-2-007

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 27.06.2000 / **e)** 30979/96 / **f)** Frydlender v. France / **g)** / **h)** CODICES (English, French).

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.
4.6.11 **Institutions** – Executive bodies – The civil service.
5.1.1 **Fundamental Rights** – General questions – Entitlement to rights.
5.3.13.10 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Civil servant, temporary, renewal of contract / *Ultra vires*, public body / Dismissal, professional incompetence.

Headnotes:

Article 6 ECHR is applicable to the situation of a temporary civil servant posted to an economic development office who has not participated in activities designed to safeguard the general interests of the state. The duration of the proceedings concerning the dismissal of the applicant did not satisfy the "reasonable time" requirement.

Summary:

The applicant was recruited in July 1972 as a temporary civil servant by the Economic Development Department of the Ministry for Economic Affairs. On 27 December 1985 the Minister informed Mr Frydlender that, owing to his professional incompetence, his contract would not be renewed when it expired on 13 April 1986. By a letter of 9 January 1986, the Minister informed him of his final decision not to renew the contract. The applicant lodged an application for judicial review of this decision with the Paris Administrative Court, complaining that it was *ultra vires*. In a judgment of 6 January 1989, the Administrative Court dismissed the application. On 24 October 1989 the applicant gave notice of an appeal to the *Conseil d'État* on points of law. In a judgment of 10 May 1995, which was served on the applicant on 26 October 1995, the *Conseil d'État* dismissed the appeal, holding that it had been lawful for the Minister to dismiss the applicant on the grounds of professional incompetence.

The court had to consider whether Article 6 ECHR was applicable and whether the proceedings satisfied the requirement of a hearing within reasonable time.

The Court observed that its Pellegrin judgement of 8 December 1999 had been intended to restrict cases in which civil servants could be denied the protection afforded to them by the Convention, and in particular by Article 6 ECHR. The Court had to adopt a restrictive interpretation of the exceptions to the safeguards afforded by Article 6.1 ECHR.

Applying this case, the Court examined whether, on account of the nature of his duties and the level of his responsibilities, the applicant might in practice have participated in activities designed to safeguard the general interests of the State. In view of the nature of the duties performed by the applicant and the relatively low level of his responsibilities (posted in an economic development office as head of an autonomous section, to handle more specifically the promotion of French wines, beers and spirits), the Court considered that he was not carrying out any task which could be said to entail duties designed to safeguard the general interests of the State.

As a consequence, the Court considered that Article 6 ECHR was applicable in the present case to the dispute over a civil right between Mr Frydlender and the French State.

The Court noted that the length of the proceedings complained of, which had begun on 28 February 1986 with the first application to the Paris Administrative Court and ended on 26 October 1995 when the *Conseil d'État*'s judgment was served on the applicant, had been nearly nine years and eight months. The Court considered that neither the complexity of the case nor the applicant's conduct explained the length of the proceedings. It pointed out that the *Conseil d'État* had given judgment nearly six years after the case was referred to it and that the government had not supplied any explanation of this delay, which seemed manifestly excessive. In the light of the criteria laid down in its case-law and having regard to all the circumstances of the case, the Court considered that the length of the proceedings complained of had been excessive and had failed to satisfy the reasonable-time requirement. There had accordingly been a violation of Article 6.1 ECHR.

Cross-references:

Pellegrin v. France, 08.12.1999, *Bulletin* 1999/3 [ECH-1999-3-009];
Obermeier v. Austria, 28.06.1990, Series A, no. 179;
Caleffi v. Italy, 24.05.1991, Series A, no. 206-B;
Caillot v. France, 04.06.1999;
Comingersoll S.A v. Portugal, 06.04.2000;
Neigel v. France, 17.03.1997, *Reports* 1997-II, p. 410.

Languages:

English, French.

Identification: ECH-2000-2-008

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 11.07.2000 / **e)** 29192/95 / **f)** Ciliz v. The Netherlands / **g)** / **h)** CODICES (English).

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:

Residence permit, extension / Family ties, break / Visit, right, child, procedure.

Headnotes:

The Netherlands authorities, through their failure to co-ordinate various proceedings touching on the applicant's family rights, had not acted in a manner that enabled family ties between the applicant and his son to be developed after the divorce of the parents. The decision-making process concerning both the question of the applicant's expulsion and the question of the applicant's access to his son had not afforded the requisite protection of the applicant's rights to respect for family life.

Summary:

The applicant, Mehmet Ciliz, a Turkish national, had a residence permit for the Netherlands which enabled him to live there with his wife. A son was born on 27 August 1990. In November 1991 the applicant and his wife separated. Under Dutch law the applicant was entitled to one year to seek employment, but when after that year, he had not found a job, the authorities rejected his request for an extension of his residence permit on 3 February 1993. The applicant challenged this decision but, in a judgment of 24 May 1995, the Hague Regional Court sitting in Amsterdam rejected his appeal. A new objection lodged by the

applicant, against the refusal to extend his residence permit, was rejected on 6 November 1995. The applicant was expelled to Turkey on 8 November 1995, at a time when the child care authorities were still investigating whether or not he could have access to his son.

The applicant complained that his right to respect for family life guaranteed under Article 8 ECHR had been breached.

The Court noted that even if the relationship between the applicant and his son, following the separation of the spouses, were not established on a regular basis, the events subsequent to the separation of the applicant from his wife did not constitute exceptional circumstances capable of breaking the ties of family life between the applicant and his son.

The Court considered that the decision not to allow the applicant a continued residence and to expel the applicant although proceedings with regard to his visitation rights were still pending had interfered with the exercise of the applicant's right to respect for his "family life".

The Court has no difficulty in accepting that the decision to refuse the applicant continued residence had a basis in domestic law.

Furthermore, the impugned measure was aimed at the preservation of the economic well-being of the country and thus served a legitimate aim within the meaning of Article 8.2 ECHR.

However, the Court concluded that the failure of the Dutch authorities to co-ordinate the various proceedings touching on the applicant's family rights, have not acted in a manner enabling family ties to be developed after the divorce. The decision-making process concerning both the question of the applicant's expulsion and the question of access did not afford the requisite protection of the applicant's interests as safeguarded by Article 8 ECHR. The interference with the applicant's right under this provision was, therefore, not necessary in a democratic society.

Cross-references:

Keegan v. Ireland, 26.05.1994, Series A, no. 290, *Bulletin* 1994/2 [ECH-1994-2-008];
Ahmut v. The Netherlands, 28.11.1996, *Reports* 1996-IV, p. 2030;
W. v. the United Kingdom, 08.07.1987, Series A, no. 121;
Mc Michael v. the United Kingdom, 24.02.1995, Series A, no. 307-B, *Bulletin* 1995/1 [ECH-1995-1-004].

Languages:

English.

Identification: ECH-2000-2-009

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 13.07.2000 / **e)** 39221/98, 41963/98 / **f)** Scozzari and Giunta v. Italy / **g)** / **h)** CODICES (English, French).

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.
3.16 **General Principles** – Weighing of interests.
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:

Child, mother, separation / Child, violence / Parental authority, suspension / Child, care, refusal / Child, guarantee, security.

Headnotes:

Although the decision to withdraw the first applicant's parental authority was justified in the present case, the authorities must nevertheless strike a fair balance between the protection of children's welfare and respect for family life. The impossibility for a mother to see her children and resume a normal family life with them constituted a violation of Article 8 ECHR.

Furthermore, the authorities, by failing to supervise adequately the community into whose care the children were entrusted and allowing its directors to contribute to the children's permanent separation from their mother, had not guaranteed the effective protection of the parents' and children's right to

respect for their family life, thereby violating Article 8 ECHR.

Summary:

The first applicant, Dolorata Scozzari, is a Belgian and Italian national and the mother of two children, G., aged thirteen and M., aged six.

The second applicant, Carmela Giunta, is an Italian national. She is the first applicant's mother.

On 9 September 1997, in view of the dramatic situation in the first applicant's home, a situation that had been largely brought about by the violence of the first applicant's husband towards both her and the children and the fact that the elder child had been subjected to sexual abuse by a "social worker" who, it was later revealed, was a paedophile, the Florence Youth Court suspended the first applicant's parental rights, ordered the children's placement with the "*Il Forteto*" community, near Florence, and authorised the parents to visit only their younger son. Two of the main leaders of the "*Il Forteto*" community had previously been convicted of ill-treatment and sexual abuse.

It was only on 29 April 1999, after protracted legal proceedings, that the first applicant was able to visit her children. A second visit took place in September 1999, but social services decided to suspend all visits thereafter.

The first applicant complained that her right to respect for family life under Article 8 ECHR had been breached, first through the suspension of her parental rights and the removal of the children, second because she had been prevented from seeing her children, and finally through the decision to place the children with the "*Forteto*" community. The second applicant alleged a violation of Article 8 ECHR, on the one hand because of the decision of the Italian authorities not to entrust the children to her care and on the other hand because of the delay in implementing of the Youth Court's order concerning contact with her grandchildren.

The Court took the view that the impugned measures were applied in accordance with the law and pursued a legitimate aim within the meaning of Article 8 ECHR, in particular that of protecting the welfare of the first applicant's children as well as their rights and freedoms.

With regard to the first applicant, the Court noted that she suffered from serious behavioural problems and even after separating from her former husband she was incapable of managing a complex family situation. The authorities' decisions to suspend her parental authority and remove the children were based on relevant and sufficient reasons. There had been no violation of Article 8 ECHR on that account.

With regard to the fact that she had been prevented from seeing her children, the Court considered that the decision to exclude the elder son from all contact with his mother entailed a partial breakdown in family relations, and did not tally with the declared aim of bringing about the resumption of relations with the mother.

Furthermore, the decision of the Youth Court on 6 July 1998 to suspend the visits had been based on the mere possibility, unsupported by any objective evidence, that the scope of the investigation concerning the father's children might be enlarged to include the mother.

Finally, there had been only two visits, in almost three years, despite the Youth Court's order of 22 December 1998. In fact, the social services adopted a negative attitude towards the first applicant and played an inordinate role in the implementation of the Youth Court's decisions. The relevant authorities failed in their duty to exercise a constant vigilance to ensure the implementation of its decisions.

Consequently, the Court considered that the authorities failed to strike a fair balance between the interests of the children and the applicant's rights under Article 8 ECHR.

Furthermore, the Court considered that the fact that two of the principal leaders of "*Il Forteto*" had been convicted in 1985 of ill-treatment and sexual abuse and continued to hold positions of responsibility within the community could not be regarded as innocuous and were a cause of concern. Furthermore, the negative impact on the prospects of rebuilding a relationship with the mother of the attitude and conduct of the people responsible for the children at "*Il Forteto*" had been partly responsible for depriving the first applicant of any serious prospect of one day being reunited with her children.

Consequently, the children's placement at "*Il Forteto*" did not satisfy the requirements of Article 8 ECHR, not just concerning the first applicant, but also with regard to the superior interests of the children.

Regarding the second applicant, the Court considered that the evidence on the case file indicated she would have had substantial difficulty in looking after the child properly. Consequently, the authorities' decision not to entrust the children into the second

applicant's care had been based on relevant and sufficient reasons.

In addition, the second applicant's conduct betrayed a lack of enthusiasm for seeing her grandchildren again, a factor which offset the authorities' delay in implementing the Youth Court's order.

The Court concluded that there had been no violation of Article 8 ECHR as regards the second applicant.

Cross-references:

Olson v. Sweden, 24.03.1988, Series A, no. 130, *Special Bulletin ECHR* [ECH-1988-S-002];
Hokkanen v. Finland, 23.09.1994, Series A, no. 299-A, *Bulletin* 1994/3 [ECH-1994-3-015];
Vogt v. Germany, 26.09.1995, Series A, no. 323, *Bulletin* 1995/3 [ECH-1995-3-014];
Erikson v. Sweden, 22.06.1989, Series A, no. 156, *Special Bulletin ECHR* [ECH-1989-S-002];
B. v. The United Kingdom, 08.07.1987, Series A, no. 121.

Languages:

English, French.