

EDITORIAL

The dynamic development of constitutional justice constitutes one of the most important innovations in the contemporary European legal practice. As constitutional justice is intimately connected to the principle of the rule of law (Rechtsstaat), the contribution of constitutional courts and courts of equivalent jurisdiction to the recent democratisation process in Central and Eastern European countries should not be underestimated.

Constitutional justice is one of the main fields of activity of the European Commission for Democracy through Law ("Venice Commission"). Since its creation in 1990 it has been working in close co-operation with constitutional courts and courts of equivalent jurisdiction in Europe, as well as in other regions of the world. The Venice Commission regularly organises conferences, from which papers are published in the Science and Technology of Democracy series, and has also successfully organised a series of workshops in co-operation with recently established constitutional courts to assist them in dealing with questions relating to their new existence.

Under the auspices of the Venice Commission, a network of liaison officers of constitutional and other equivalent courts was established. The liaison officers regularly prepare contributions on the case-law of their respective courts, which are published three times a year in the Bulletin on Constitutional Case-Law.

Given that the Bulletin has been published since 1993 and that several courts have joined the project later on, the Venice Commission and the liaison officers from the participating courts considered that the presentation of the case-law in the regular issues remained incomplete without references to previous decisions handed down by the Courts, which often laid the foundation for the current case-law. This is why in 1998 the Commission published a special edition of the Bulletin on the leading case-law of the European Court of Human Rights, which had been handed down before the participation of the Court in the regular issues of the Bulletin. Another issue of this series of leading cases included the most important decisions from the Constitutional Court of the Czech Republic, the Supreme Courts of Denmark, Japan and Norway, the Constitutional Tribunal of Poland, the Constitutional Courts of Slovenia and Ukraine as well as that of the Federal Court of Switzerland. The present issue includes case-law from Belgium, France, Hungary, Luxembourg, Romania and the United States. While these leading cases are already of great value in their printed form, they become even more important once they are integrated into the CODICES database. Together with the decisions published in the regular issues of the Bulletin and already included in CODICES, they will provide an overview of the development of the jurisprudence of these courts from the time of their establishment up to now. The leading case-law of further courts will be presented in future issues of this series.

The information contained in the special editions and the regular issues of the Bulletin on Constitutional Case-Law is available in the CODICES database which has been set up by the Venice Commission. The database exists in English and French, is available on CD-ROM and is also accessible via the Internet. CODICES contains additional information which is not available in the paper versions, such as full texts of constitutions of countries presented in the different volumes of the Special Edition "Basic texts".

*All national contributions were provided by liaison officers from the respective courts. The Venice Commission is grateful for their invaluable contribution, without which the realisation of this ambitious project on comparative constitutional law would not have been possible. **As such, the summaries of decisions and opinions published in the Bulletin do not constitute an official record of court decisions and should not be considered as offering or purporting to offer an authoritative interpretation of the law.***

The Bulletin on Constitutional Case-Law and the Special Editions represent a unique source of information for anyone interested in the development of law and constitutional justice in greater Europe and as well as several non-European states.

G. BUQUICCHIO
Secretary of the Venice Commission

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

THE VENICE COMMISSION

The European Commission for Democracy through Law, also known as the Venice Commission, was established in 1990 pursuant to a Partial Agreement of the Council of Europe. It is a consultative body which co-operates with member States of the Council of Europe and with non-member States. It is composed of independent experts in the fields of law and political science whose main tasks are the following:

- to help new democracies in Central and Eastern Europe to set up political and legal infrastructures;

- to reinforce existing democratic structures;
- to promote and strengthen principles and institutions which represent the bases of true democracy.

The activities of the Venice Commission comprise, *inter alia*, research, seminars and legal opinions on issues of constitutional reform, on draft constitutional charters, electoral laws and the protection of minorities, as well as the collection and dissemination of case-law in matters of constitutional law from Constitutional Courts and other courts.

CONTENTS OF THIS ISSUE

Belgium	5	Romania.....	102
France	33	United States.....	140
Hungary.....	73	Systematic Thesaurus	151
Luxembourg	93	Alphabetical Index.....	169

Editors:

Sc. R. Dürr, T. Gerwien, D. Jones

A. Gorey, M.-L. Wigishoff

Liaison officers:

Albania.....	D. Biba / L. Pirdeni	Liechtenstein	I. Elkuch
Andorra.....	M. Tomàs Baldrich	Lithuania.....	I. Pukanasyte
Argentina	R. E. Gialdino	Luxembourg	J. Jentgen
Armenia	G. Vahanian	Malta.....	A. Ellul
Austria	B. Wagner	Mexico	E. Ferrer Mac-Gregor Poisot / C. Bolivar Galindo
Azerbaijan.....	R. Guliyev	Moldova.....	V. Sterbet
Belarus	S. Chigrinov / V. Shuklin	Monaco.....	D. Chagnollaud
Belgium.....	A. Rasson Roland / R. Ryckeboer	Montenegro	J. Novaković
Bosnia and Herzegovina	Z. Djuricic	Netherlands	M. Chebti / M. van Roosmalen
Bulgaria	M. Panayotova	Norway	C. Ostensen Noss
Canada.....	C. Marquis	Poland	J. Królikowski
Croatia	M. Stresec	Portugal	M. Baptista Lopes / A. Duarte Silva
Cyprus	N. Papanicolaou / M. Nicolatos	Romania	G. Dragomirescu
Czech Republic	E. Wagnerova / S. Matochová / T. Langasek / P. Novackova	Russia	E. Pyrickov
Denmark.....	S. Tolstrup Christensen	Serbia	N. Plavsic
Estonia.....	K. Aule / G. Suumann	Slovakia.....	G. Fet'kova
Finland.....	S.-M. Tarkkanen / G. Möller	Slovenia.....	A. Mavčič
France	M.-C. Meininger / V. Garayalde-Gourrier	South Africa.....	K. O'Regan / J. Rycroft / A. Price
Georgia.....	K. Kipiani	Spain	I. Borrajo Iniesta
Germany.....	B.-O. Bryde / M. Böckel	Sweden	A. Blader / K. Dunnington
Greece.....	T. Ziamou / O. Papadopoulou	Switzerland.....	P. Tschümperlin / J. Alberini-Boillat
Hungary	P. Paczolay / K. Kovács	"The former Yugoslav Republic of Macedonia" T. Janjic Todorova
Iceland.....	H. Torfason	Turkey	A. Coban
Ireland.....	T. Daly	Ukraine	V. Ivaschenko / O. Kravchenko
Israel.....	Y. Mersel	United Kingdom.....	A. Clarke / J. Sorabji
Italy	G. Cattarino	United States of America.....	P. Krug / C. Vasil / J. Minear
Japan.....	A. Takano		
Kazakhstan.....	B. Nurmukhanov		
Republic of Korea.....	B.-Y. Bae		
Kyrgyzstan.....	K. E. Esenkanov		
Latvia.....	L. Jurcena		

European Court of Human Rights..... S. Naismith
Court of Justice of the European Communities..... Ph. Singer
Inter-American Court of Human Rights..... S. Garcia-Ramirez / F. J. Rivera Juaristi

Strasbourg, September 2008

Belgium

Court of Arbitration

Important decisions

Identification: BEL-1985-S-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 28.06.1985 / **e)** 3 / **f)** / **g)** *Moniteur belge* (Official Gazette), 06.07.1985 / **h)** CODICES (French, Dutch).

Keywords of the systematic thesaurus:

1.5.4.4 Constitutional Justice – Decisions – Types – **Annulment.**

1.5.4.5 Constitutional Justice – Decisions – Types – **Suspension.**

3.6.3 General Principles – Structure of the State – **Federal State.**

4.8.2 Institutions – Federalism, regionalism and local self-government – **Regions and provinces.**

4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities.**

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

Keywords of the alphabetical index:

Municipality, association of municipalities / Energy, supply of electricity and gas, regulation.

Headnotes:

By considering implicitly but assuredly that the supply of electricity of gas is and remains a matter of municipal concern, the Decree of the Walloon Region of 1 February 1985 on the rationalisation of the electricity and gas supply sector regulates a matter of municipal and not regional concern.

As regards associations of municipalities, the regulatory powers of the Region are limited to the operating procedures and control of those associations and to designating the areas in which they can operate; the conditions for becoming a member of and withdrawing from such associations remain within the regulatory powers of the State.

Summary:

Judgment no. 3 of 28 June 1985 was the first judgment whereby the Court of Arbitration annulled a legislative norm. In Judgment no. 2 of 5 April 1985, the Court had already suspended that norm.

The legislative norm at issue was a decree of the Walloon Region of 1 February 1985 on the rationalisation of the electricity and gas supply sector. Under that decree, every municipality on whose territory electricity and/or gas was supplied by a number of bodies was required to entrust those public activities to a single body. The municipalities did not have a free choice, but were required to give priority to becoming a member of an intermunicipal entity composed exclusively of public authorities.

The decree was challenged before the Court of Arbitration by the Council of Ministers, which sought suspension and annulment of the decree.

By Judgment no. 2 of 5 April 1985, the Court decided to suspend the decree, because the first plea raised was sound and because the immediate implementation of the decree would have the consequence of creating, in the electricity and gas supply sector, a *de facto* situation that would entail a risk of significant change in the operating conditions in that sector and because those changes might give rise to considerable damage; if the contested decree were subsequently annulled, it would be extremely difficult, if not impossible, to restore the status quo.

In Judgment no. 3 of 28 June 1985, the Court of Arbitration considered that the first plea was well founded and that the decree must be annulled in its entirety.

That first plea alleged violation of a rule on the division of powers set out in Section 6.1.VIII.1 of the Special Law of 8 August 1980 on institutional reform. That provision empowered the Regions to regulate the operating procedures and the control of associations of municipalities and to regulate the determination of the areas in which they could operate and also the application of the institutional laws on those associations.

The Court considered, first of all, that the powers of the Region could not be based on Section 6.1.VII.a and b of the Special Law of 8 August 1980, which granted powers for energy matters to the Regions. As the national legislature had always done, the Walloon Region had considered by its decree, implicitly but assuredly, that the distribution of electricity and/or gas was and remained a matter of municipal concern. The Court therefore had to ascertain whether the powers

of the Region in relation to associations of municipalities had indeed been respected.

Section 6.1.VIII.1 established the division of regulatory powers between the State and the Regions with respect to associations of municipalities. The powers of the Regions were limited to the operating procedures and control of the associations and to determining the areas in which they could operate; the powers of the State covered any other matter relating to those associations, and in particular the conditions of becoming a member of and withdrawing from those associations.

The Court observed that the contested decree was not confined to determining the areas covered by the intermunicipal entities but established conditions for continuing or ceasing to obtain supplies of electricity or gas, thereby moving steadily towards a particular type of intermunicipal entity.

According to the Court, the determination of the areas in which the intermunicipal companies could operate would merely be the possible consequence (where the municipalities chose to obtain supplies from an intermunicipal entity) of the obligation and/or the option, as the case might be, for a municipality to become a member of an intermunicipal entity composed solely of public authorities, and not the starting point for the creation of homogeneous geographical entities for the purpose of the supply of electricity and gas. The Walloon Region had therefore exceeded its powers and the decree was annulled in its entirety.

Supplementary information:

Section 6.1.VIII.1 of the Special Law of 8 August 1980 on the reform of the institutions was amended by the Special Law of 13 July 2001.

Languages:

French, Dutch.



Identification: BEL-1985-S-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 25.10.1985 / **e)** 4, 5, 6 / **f)** / **g)** / **h)** CODICES (French, Dutch).

Keywords of the systematic thesaurus:

1.1.1.1.2 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Sources – **Institutional Acts.**

1.1.2.2 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Number of members.**

1.1.2.5 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointment of the President.**

1.1.2.7 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Subdivision into chambers or sections.**

1.1.3.2 Constitutional Justice – Constitutional jurisdiction – Status of the members of the court – **Term of office of the President.**

1.4.10 Constitutional Justice – Procedure – **Interlocutory proceedings.**

1.4.11.1 Constitutional Justice – Procedure – Hearing – **Composition of the bench.**

1.5.1.1 Constitutional Justice – Decisions – Deliberation – **Composition of the bench.**

1.5.1.2 Constitutional Justice – Decisions – Deliberation – **Chair.**

1.5.1.3.2 Constitutional Justice – Decisions – Deliberation – Procedure – **Vote.**

1.5.4.1 Constitutional Justice – Decisions – Types – **Procedural decisions.**

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

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

Keywords of the alphabetical index:

Constitutional Court, functioning, chamber, composition / Constitutional Court, plenary, tied vote, casting vote.

Headnotes:

Cases brought before the Court of Arbitration are allocated to a panel of seven members, according to an objective criterion determined in advance, namely the order in which they are received. That panel can be altered only where the law so provides.

Where the Court sits in plenary, it is composed of ten or twelve judges. In the event of a tied vote, the President "in function" at the time when the vote is taken has the casting vote.

Summary:

The Court of Arbitration was founded in 1984 and delivered its first judgments in 1985. A number of provisions of the Institutional Law of 28 June 1983 establish and organise the mandatory principle of linguistic parity within the Court, the annual alternation of the Presidency and the composition of the panel of seven judges. The Court of Arbitration is composed of twelve judges, six French-speaking judges and six Dutch-speaking judges. Each language group elects its President. Each President in turn is President "in function" for a period of one year, commencing on 1 September of each year.

The allocation of cases to a particular panel is regulated in a binding manner by Sections 48, 49 and 57 of the Institutional Law of 28 June 1983. The ordinary panel consists of seven members, the two Presidents and five judges designated by the President "in function" at the time when the case arrives at the Court, in strict compliance with the order established on the two lists of judges which each President draws up on 1 September of each year and on which judges from the higher courts or the universities alternate with judges who were formerly Members of Parliament.

Judgments nos. 4, 5 and 6 of 25 October 1985 concerned three cases brought before the Court of Arbitration in December 1984. The panels which were to deal with those cases had been fixed by the President then "in function", the Dutch-speaking President. The panels were composed of, in addition to the Presidents, three Dutch-speaking judges and two French-speaking judges, in accordance with the pre-established lists. The hearings in those cases took place in September 1985. Certain parties then raised an objection and requested that the panel be modified and made up of, in addition to the Presidents, three French-speaking judges and two Dutch-speaking judges. The parties in question claimed that the panel should be modified in that way following the entry "into function" of the French-speaking President on 1 September 1985.

The Court decided that the objection in the three cases should be dealt with in plenary. In its three judgments, the Court considered that the panel, which was designated at the time when the case was brought before the Court, in accordance with an objective criterion determined in advance, namely the order in which the cases reached the Court, could be

modified only where the law so provided: namely where a Member of the Court was absent, was prevented from taking part, was successfully challenged or withdrew from the case. No other legal provision derogated from that principle of the immutability of the panel, even where a case was still pending after the 31 August following its entry on the list. As far as the composition of the panel of seven members was concerned, the alternation of the majority was applicable only for new cases lodged after 1 September.

The Court then set out the consequences of alternation of the majority for cases dealt with in plenary. Section 46.2 of the Law of 28 June 1983 provides that each President may refer a case to the Court in plenary. Where the votes are evenly divided, the President "in function" has a casting vote. The Court stated that, for the purpose of determining which President had a casting vote, it was necessary to have regard to the time when the vote was taken. The alternation rule therefore took full effect for the Presidency as from 1 September: the Presidency, with all its powers – and therefore also the casting vote where the votes were evenly divided, when the Court sat in plenary, was exercised by each President in turn for a period of one year.

The Court stated, last, that even on the assumption that Article 6 ECHR was applicable to proceedings before the Court of Arbitration, the Law of 28 June 1983 in any event ensured that the case was dealt with fairly and in public, within a reasonable time, by an independent tribunal.

Supplementary information:

The rules on the composition of the panels of the Court and on the plenary are now contained in Sections 54 to 60bis of the Special Law of 6 January 1989, but the principles described above remain unchanged.

Languages:

French, Dutch.



Identification: BEL-1986-S-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 30.01.1986 / **e)** 9, 10 / **f)** / **g)** *Moniteur belge* (Official Gazette), 12.02.1986 / **h)** CODICES (French, Dutch).

Keywords of the systematic thesaurus:

3.6.3 General Principles – Structure of the State – **Federal State.**

4.8.1 Institutions – Federalism, regionalism and local self-government – **Federal entities.**

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

4.8.5 Institutions – Federalism, regionalism and local self-government – **Definition of geographical boundaries.**

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

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

5.3.40 Fundamental Rights – Civil and political rights – **Linguistic freedom.**

Keywords of the alphabetical index:

Federal State, entity, powers / Language, use in employment matters, criteria of location, business headquarters / Federal entity, territorial powers, principle of exclusivity.

Headnotes:

Article 129 of the Constitution (before 1994 Article 59bis) determined an exclusive allocation of territorial powers whereby each Community may, for the matters within its remit, regulate the use of languages in employer-employee relations and also in the business acts and documents required by law and by regulation. Such a system presumes that the subject-matter of any norm adopted by a Community legislature can be located in the territory for which it is competent, so that every relationship and every specific situation is regulated by a single legislature.

The Communities may determine the criteria for location. Those criteria are subject to review by the Court, which must ensure that each Community respects its material and territorial powers.

Summary:

Article 129.1.3 of the Constitution (before 1994 Article 59bis.3.3) grants the French Community and the Flemish Community (called at the material time

the Dutch Cultural Community) power to regulate the use of languages in employer-employee relations and also in the business acts and documents required by law and by regulation. Article 129bis.2 of the Constitution (before 1994 Article 59bis.4.2) defines the territory on which each Community is competent; this is the corresponding linguistic Region, with the exception of certain municipalities where the law confers linguistic facilities on the inhabitants. The Flemish Community and the French Community have implemented that power. The Dutch Cultural Community and the French Community adopted the corresponding decrees, the former on 19 July 1973 and the latter on 30 June 1982. Each of those decrees was the subject of an action for annulment brought by the Government of the other Community. The pleas raised concerned respect for the territorial powers of the Communities and also, in the case of the first decree, respect for their material powers. This summary will deal only with the problem of territorial powers. For the purpose of delimiting the territorial powers of the Communities, the decrees established the criteria of location, such as an undertaking's registered office or business headquarters, the fact of hiring or employing staff on the territory of the linguistic Region or the fact of employing workers who spoke the language of the Region.

The Court of Arbitration acknowledged that the Community could fix such criteria, but held that those criteria were subject to review by the constitutional court, which must ensure that each Community respected its material and territorial powers.

The Constitution determines an exclusive division of territorial powers. Such an arrangement presupposes that the subject-matter of any norm adopted by a Community legislature can be located within the territory for which it is competent, so that every specific relationship and every specific situation is regulated by a single legislature.

A review of constitutionality is carried out by reference to the provisions which allocate material powers and which contain the elements on the basis of which the validity of the criteria can be assessed; it is necessary to have an appreciation of the subject-matter, the nature and possibly the aim of the material powers allocated in order to determine precisely that the subject-matter of the norm which has been enacted is located in the area of competence. In the present case, this means that the criterion selected must make it possible to identify the place where the employer-employee relations mainly occur and to fix that place exclusively in the area of competence of the legislature that adopted the decree. The only criterion not amenable to a review of

constitutionality is the criterion of the business headquarters, that is to say of the place of establishment or centre of activity having a certain character of stability. It is in that place, in principle, that the business relations between employer and employees take place and that the business acts and documents can be located.

The other criteria are subject to a review of constitutionality.

Languages:

French, Dutch.



Identification: BEL-1986-S-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 22.10.1986 / **e)** 27 / **f)** / **g)** *Moniteur belge* (Official Gazette), 13.11.1986 / **h)** CODICES (French, Dutch).

Keywords of the systematic thesaurus:

3.6.3 General Principles – Structure of the State – **Federal State.**

3.16 General Principles – **Proportionality.**

4.8.8.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods.**

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

Keywords of the alphabetical index:

Federal State, region, autonomy / Privilege, attribution, competence / Mortgage, attribution, competence.

Headnotes:

The constitutional authors and the special legislature, insofar as they did not provide otherwise, conferred on the Communities and the Regions unlimited powers to adopt the rules appropriate to the matters transferred to them, without prejudice to their making use where necessary of the implicit powers recognised by Section 10 of the Special Law on institutional reform.

Each legislature may take the view that it must provide for a privilege or a mortgage to protect a claim arising from the provisions which it has adopted for the purpose of regulating a matter attributed to it. Where they establish the rank of a privilege, the different legislatures must weigh up, on the one hand, the interest which they seek to protect by providing for a privilege and, on the other, the other interests protected by privileges provided for by other legislatures.

Summary:

The Council of Ministers brought an action before the Court of Arbitration for annulment of a decree of the Flemish Region of 24 January 1984 concerning measures for the management of subterranean waters. In order to ensure that a Fund for the prevention and compensation of damage caused by the extraction of subterranean waters could recover the advances it had made to victims of damage caused by those extractions, the decree established a statutory mortgage and a privilege for the purposes of that Fund.

The Council of Ministers maintained that the Flemish Region was not competent to amend the Law of 16 December 1851 on mortgages.

The Court of Arbitration rejected that plea. It considered, first of all, that the constitutional authors and the special legislature, insofar as they had not provided otherwise, had conferred on the Communities and the Regions unlimited power to adopt rules appropriate to the matters which had been transferred to them, without prejudice to their making use where necessary of Section 10 of the Special Law on institutional reform, which establishes the principle of implicit powers.

It followed that the Flemish Region, which is competent to regulate matters relating to the production or distribution of water, could in that regard adopt such provisions as it might deem necessary in order to implement its policy in that sphere.

In this case, the Flemish Region had intended to adopt provisions designed to make good damage caused by the extraction of subterranean water, to set up a special Fund which would approve advances to the victims of that damage and to ensure that the advances approved could be recovered so that the Fund's resources would remain at a level which would allow it to operate effectively, by establishing for the purposes of the fund a statutory mortgage and a privilege guaranteeing reimbursement of the advances.

The Court of Arbitration considered that where a legislature acted within its powers, it may provide for a privilege or a mortgage to protect a claim arising from the provisions which it had adopted. Where it fixed the rank of the privilege which it had established, when several legislatures were empowered to provide for privileges which must be capable of being incorporated in the same order, each legislature must weigh up, on the one hand, the interest which it sought to protect and, on the other, the other interests which were protected by privileges provided for by other legislatures. In this particular case, that proportionality constituted an aspect of the powers of the legislature.

Languages:

French, Dutch.



Identification: BEL-1987-S-001

a) Belgium / b) Court of Arbitration / c) / d) 29.01.1987 / e) 32 / f) / g) / h) CODICES (French, Dutch).

Keywords of the systematic thesaurus:

1.1.2.4 Constitutional Justice – Constitutional jurisdiction – Composition, recruitment and structure – **Appointment of members.**
 1.4.10.6.2 Constitutional Justice – Procedure – Interlocutory proceedings – Challenging of a judge – **Challenge at the instance of a party.**
 2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**
 2.1.2.2 Sources – Categories – Unwritten rules – **General principles of law.**
 2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**
 5.3.13.1.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Constitutional proceedings.**
 5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality.**

Keywords of the alphabetical index:

Constitutional Court, judge, challenging, participation in adoption of law examined.

Headnotes:

The fact that a Member of Parliament who has now become a judge at the Court of Arbitration took part in the debate and vote of a norm forming the subject-matter of a preliminary question does not constitute a ground for challenging that judge either under the Institutional Law on the Court of Arbitration or under Article 6 ECHR, or in application of the general principles of law.

Summary:

The Court of Arbitration is composed of twelve judges, six French-speaking and six Dutch-speaking. In each linguistic group, three judges must have been Members for eight years (now five years) of the Chamber of Representatives, the Senate or a Community or Regional Parliament.

The Court was requested to give a preliminary ruling on the constitutionality of the Flemish Decree of 2 July 1981 on waste management. Three judges were asked to withdraw on the ground that they had participated in the debate and the vote of that norm at a time when, before the Court of Arbitration was established (in 1984), they were still Members of the Flemish Parliament.

In the Court's view, the grounds of challenge laid down in the Institutional Law on the Court of Arbitration do not provide for a judge to be challenged on the ground that before becoming a judge he or she participated, as a Member of Parliament, in the decision-taking process that led to the promulgation of a norm when he or she is subsequently required to assess whether that norm is consistent with certain provisions of the Constitution.

That ground of challenge was not listed in the law, which must be interpreted strictly, and, moreover, was expressly excluded by the legislature, whose intention was apparent both from the drafting history of the Institutional Law and from the provisions determining the rules on the composition of the panel.

The Court of Arbitration further considered that Article 6.1 ECHR was not applicable to it as a constitutional court. In preliminary reference proceedings, the Court merely responds to an abstract question, in isolation from the facts of the case before the referring court, as to whether the

norms to be applied to those facts might violate the constitutional rules determining competence. Furthermore, the dispute which the referring court must determine, and which concerns the merits of a criminal charge or the determination of civil rights and obligations, does not in any way constitute the subject-matter of the dispute which is referred to the Court of Arbitration. Taking account, among other authorities, of the European Court of Human Rights Judgment *Buchholz v. Germany* (6 May 1981, Series A, no. 42) and the Judgment *Deumeland v. Germany* (29 May 1986, Series A, no. 100; *Special Bulletin – Leading Cases ECHR* [ECH-1986-S-001]), the Court acknowledged, however, that its intervention on a preliminary reference influences the assessment of a reasonable time, as the preliminary proceedings have the effect of delaying, by the length of time which they take, the time when a definitive decision can be given on the dispute which gave rise to the preliminary question referred to it.

The Court held, moreover, that the application in the proceedings before it of the rule in Article 6.1 ECHR as a general principle of law would not always provide a ground for challenging the three judges in question.

The fact of having participated, as a Member of Parliament, in the decision-taking procedure which led to the promulgation of a decree and then, after having ceased to be a Member of Parliament, being required to assess, as a constitutional judge, whether that decree was consistent with the rules on competence was not comparable to or capable of being assimilated to the fact of having intervened on two occasions as a judge, in different capacities, in the same case.

More generally, the fact of having previously expressed a view in public – in any capacity whatsoever, provided that there was no connection with the facts or the proceedings in question – on a point of law which again arose in those proceedings did not affect the independence or the impartiality of the judge. To decide otherwise would mean that a judge could not deal with a case giving rise to a point of law which had already been settled by him in other cases.

The Court stated, last, that recourse to a general principle of law did not exempt the judge from applying the written law governing a particular matter; in this case, the Institutional Law on the Court of Arbitration governed in detail the independence and impartiality of the Court.

Supplementary information:

When it replaced the Institutional Law of 28 June 1983, the special legislature expressly provided that the fact that a judge had participated in the preparation of a norm forming the subject-matter of an action for annulment or of a decision to refer the matter to the Court of Arbitration did not in itself constitute a ground for challenging that judge (Section 101 of the Special Law of 6 January 1989).

However, the Court has qualified its position on the inapplicability of Article 6 ECHR to a constitutional court, in the light of the Judgment of the European Court of Human Rights “*Ruiz Mateos v. Spain*” of 23 June 1993 (Series A, no. 262; *Special Bulletin – Leading Cases ECHR* [ECH-1993-S-003]). See *Bulletin* 1994/2 [BEL-1994-2-009].

Languages:

French, Dutch.



Identification: BEL-1987-S-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 03.12.1987 / **e)** 43 / **f)** / **g)** *Moniteur belge* (Official Gazette), 19.12.1987 / **h)** CODICES (French, Dutch).

Keywords of the systematic thesaurus:

3.6.2 General Principles – Structure of the State – **Regional State.**

3.6.3 General Principles – Structure of the State – **Federal State.**

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

4.8.1 Institutions – Federalism, regionalism and local self-government – **Federal entities.**

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

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

Keywords of the alphabetical index:

Federal State, region, criminal competence / Criminal offence, determination, competence of region / Statute of limitations, change by region.

Headnotes:

Section 11 of the Special Law of 8 August 1980 conferred on the regional legislature criminal competence which, essentially, can be exercised only by reference to the disruption of public order. By providing that a breach of a particular provision which it adopts constitutes a criminal offence, the regional legislature establishes that that breach disrupts public order. That competence also allows it to assess and determine the period during which a penalty should be imposed for such a breach and, accordingly, the time from which the offence should no longer be prosecuted.

Summary:

I. Two individuals were prosecuted before the Charleroi District Court, sitting as a criminal court, for offences against the legislation on hunting. The Court noted that the limitation period laid down in the Law of 28 February 1982 had been amended by a decree of the Walloon Region of 18 July 1985, which extended that period to one year, whereas it had previously been three months. The District Court asked the Court of Arbitration whether the Walloon Region had the power to amend a limitation period in that way.

II. The Court observed, first of all, that the limitation period for a public prosecution was governed by the Code of Criminal Procedure, but that the provisions of the Criminal Code were applicable to offences provided for by specific laws only insofar as those laws did not derogate from the Code. Such a derogation had been provided for by Section 28 of the Law of 28 February 1982 on hunting. Those provisions had been amended by a decree of the Walloon Region of 18 July 1985, which had extended the initial period of three months to one year commencing on the date of the offence.

The Court of Arbitration observed that the competence of the Region was based on Section 6.1.III.5 of the Special Law of 8 August 1980 on institutional reform, which empowered the Regions to regulate hunting, with the exception of the manufacture of, trade in and possession of hunting weapons. That provision might be taken in conjunction with Section 11 of the Special Law, under which a regional legislature may provide that any breach of the provisions which it lay down constituted

a criminal offence. Such criminal competence could, in essence, be exercised only by reference to the disruption of public order. By providing that a breach of such a provision which it had adopted constituted a criminal offence, the legislature established that that breach disrupted public order.

The Court of Arbitration considered that Section 11 of the Special Law also allowed the legislature to assess and determine the duration of the period during which a sanction should be imposed for such a breach and, accordingly, the time from which the offence should no longer be prosecuted. In effect, the power to provide that a breach of public order constituted an offence implied by its very nature the power to determine the period during which the breach of public order merited prosecution. By regulating the limitation period for a public prosecution for an offence which it established, the regional legislature determined an aspect of the "cases provided for by law" within the meaning of Article 7 of the Constitution (*nullum crimen sine lege*) in which criminal proceedings may be brought.

The Court concluded that the regional legislature had therefore not exceeded its powers by extending the limitation period for hunting offences from three months to one year. The decree had thus repealed, for the Walloon Region, Section 28 of the Law of 28 February 1982 on hunting.

Languages:

French, Dutch.

*Identification:* BEL-1988-S-001

a) Belgium / b) Court of Arbitration / c) / d) 25.02.1988 / e) 47 / f) / g) *Moniteur belge* (Official Gazette), 17.03.1988 / h) CODICES (French, Dutch).

Keywords of the systematic thesaurus:

1.3.4.3 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between central government and federal or regional entities.**

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

4.8.7.1 Institutions – Federalism, regionalism and local self-government – Budgetary and financial aspects – **Finance**.

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

Keywords of the alphabetical index:

Union, economic and monetary / Environment, tax / Customs duties / Region, economic union / Region, finance / Region, own fiscal powers, limits / Free movement of goods.

Headnotes:

In the exercise of their own fiscal powers, the federated entities (Communities and Regions) must respect economic and monetary union within the Belgian federal set-up and cannot introduce internal customs duties, such as a tax on the transfer of water from the Walloon Region to the Flemish Region and the Brussels Capital Region.

Summary:

[confined to the most important parts of the judgment].

In Federal Belgium, the Flemish Region, the Walloon Region and the Brussels Capital Region are competent respectively, each for its own territory, for environmental protection, including the protection of water and air against pollution. A series of finance mechanisms must allow the Regions to conduct their own policy.

By the decree of the Walloon Region of 7 October 1985, a duty of three francs (0.7 Euro) per cubic metre of water was levied on consignments of surface water and groundwater, whether drinking water or water capable of being transformed into drinking water, taken or removed from the Walloon Region and transferred outside that Region, by any means whatsoever, with the exception of consignments of bottled or canned water. The duty was applicable solely to consignments of water within the territory of the Kingdom of Belgium, consignments to other States being excluded.

The ministerial Cabinet (Council of Ministers) brought an action for annulment of that decree before the Court of Arbitration on the ground that it violated a number of rules which allocate powers among the federal entities, including the rules establishing the mechanisms for the financing of the Regions. The Cabinet claimed, in particular, that the Region had exceeded its powers by levying a tax other than as provided for by the (federal) law.

The Court observed that Article 170.2 of the Constitution (before 1994 Article 110.2) conferred own fiscal powers directly on the Regions, although these powers were subject to a number of restrictions. It is for that reason that the federal legislature may in certain cases – “which are shown to be necessary” – determine what taxes cannot be levied by the Communities or the Regions, or abolish or limit a tax introduced by those entities. It is also for that reason that the Communities and the Regions cannot levy taxes on matters which are subject to an existing federal tax. Moreover, the Communities and the Regions also benefit from the proceeds of certain national taxes and also from certain additional limited fiscal powers, which are conferred on them by a federal law (at the time of the present case, the Ordinary Law of 9 August 1980, which was largely repealed and replaced by the Special Law of 16 January 1989 on the financing of the Communities and the Regions).

The Court added that the exercise by a Community or a Region of its own fiscal powers could not disregard the limits inherent in the global concept of the State, which derived from the entire set of provisions which allocated powers to the State, the Communities and the Regions.

According to the Court, it follows from those texts, taken together, that the new structure of the Belgian State is based on economic and monetary union, that is to say the institutional framework of an economy built on components and characterised by an integrated market (what is known as economic union) and the unity of the currency (what is known as monetary union).

The existence of an economic union means primarily the free movement of goods and of the factors of production between the component parts of the State. As regards trade in assets, measures established autonomously by the component parts of the union – in this case the Regions – which impede free movement are not compatible with economic union; this necessarily applies to all internal customs duties and to all taxes having equivalent effect.

After examining the content of the provision which taxes the transfer of water, the Court concluded that the tax constituted an internal customs duty, contrary to the principle of free movement of goods within an integrated market; in the Court’s view, Article 32 of the decree of 7 October 1985 was therefore not compatible with economic union and could not be integrated into the global framework of the structure of the Belgian State.

Supplementary information:

The judgment reproduces the principles of the original mechanisms for the financing of Federal Belgium (it is true that the new mechanisms are to a large extent regulated in a Special Law of 16 January 1989 on the financing of the Communities and the Regions).

The judgment is particularly important for the role of the Court of Arbitration as “arbitrator” between the Federal State, the Communities and the Regions, and more specifically in that the Court inferred from all the provisions allocating powers that it was necessary to maintain within the limits of the Federal State an economic and monetary union which assumed the free movement of goods within the federated entities and precluded internal customs duties. See also, for example, *Bulletin* 1995/1 [BEL-1995-1-003].

Subsequently, the federal legislature expressly inserted the following provision into the Special Law of 8 August 1980 (Section 6.1.VI.3 – inserted by the Special Law of 8 August 1988): “In economic matters, the Regions shall exercise their powers consistently with the principles of free movement of persons, goods, services and capital and freedom of trade and industry, and also consistently with the general regulatory framework of economic union and monetary unity, as established by or under the law, and by or under international Treaties”.

Although the new Section 6.1.VI.3 of the Special Law on the reform of the institutions relates to the allocation of powers to the regions as regards the economy, that provision must be regarded as the explicit expression of the special legislature’s intention to maintain uniform basic regulation of the organisation of the economy in an integrated market (consistent case-law – *inter alia* in Judgment no. 32/91 of 14 November 1991 and in Judgment no. 128/2001 of 18 October 2001 – available in French, Dutch and German at <http://www.const-court.be>). The latter judgment concerned a duty on waste collection levied by the Flemish Region and recites the same principles as Judgment no. 47 of 25 February 1988, *Special Bulletin – Leading Cases 2* [BEL-1988-S-001].

It should be observed, moreover, that the Communities’ and the Regions’ own fiscal powers are not necessarily linked to the particular spheres for which powers have been conferred on them. The Court has accepted that, for its part, the federal legislature may introduce ecotaxes on products placed on the market because of the harmful ecological effects which they are supposed to have, whereas it is the Regions that have powers for environmental matters and for waste disposal (see *Bulletin* 1995/1 [BEL-1995-1-001]).

Languages:

French, Dutch.

*Identification:* BEL-1989-S-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 13.07.1989 / **e)** 20/89 / **f)** / **g)** *Moniteur belge* (Official Gazette), 02.09.1989 / **h)** CODICES (French, Dutch).

Keywords of the systematic thesaurus:

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**

4.8.8.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods.**

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

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

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

Keywords of the alphabetical index:

Federal State, community, powers / Abortion, regulation, competence / Pregnancy, voluntary termination, grounds for justification / State of necessity / Criminal law powers.

Headnotes:

The powers allocated to the Communities to regulate health policy, health education and family policy do not in any way cover the possibility of regulating the exercise of the art of healing or abortion. The Community has no power to regulate abortion and also lacks the power to introduce in that regard a ground comparable to a state of necessity.

Summary:

The Brussels criminal court imposed suspended prison sentences on two people for having performed an abortion. The individuals in question appealed and

claimed before the Court of Appeal that, although the criminal law prohibited abortion, a decree of the French Community required doctors to provide women in difficulty with the necessary medical assistance where they had experienced problems in using contraceptive methods. That assistance might take the form of an abortion where the use of contraceptive methods had proved unsuccessful.

The Court of Appeal considered that if that interpretation were to be accepted, it was necessary to ascertain whether the French Community was empowered to regulate matters relating to abortion. It therefore referred a preliminary question to the Court of Arbitration.

The Court of Arbitration first of all recalled the powers of the Communities in relation to health policy and family policy. The former power allowed them to regulate the policy for the provision of care in and outside health establishments and also health education and the activities and services of preventive medicine. The latter power allowed them to regulate all forms of aid and assistance to families and children, which permitted them to take a set of initiatives and measures designed to provide assistance and material, social, psychological and educational aid to families, including support during pregnancy and aid with contraception and responsible parenthood. The Court observed, however, that the attribution of those powers did not in any way allow the Communities to regulate the exercise of the art of healing and abortion and that the national legislature alone had the power to amend the provisions of the Criminal Code (which at the time prohibited abortion).

Section 11 of the Special Law of 8 August 1980 on the reform of the institutions allows a Community to provide that any breach of those provisions constitutes a criminal offence and to establish penalties for such breaches, within certain limits. The Court of Arbitration considered that since the Community did not have the power to regulate abortion matters, it also lacked the power to prescribe a new ground for abortion where a woman was in difficulty and had experienced problems with contraception. Only the national legislature, which had power in respect of abortion matters, could establish a specific ground for abortion.

The Court next discussed the interpretation that should be given to the decree of the French Community. It observed that, according to the parties before the Court of Appeal, the decree regarded abortion as a case of technical and medical aid and that that argument might find support in the declarations of certain participants in the procedure

leading to the adoption of the decree and in the relative ambiguity of the text. As thus interpreted, the decree violated the rules on the allocation of powers.

The Court added that the decree might also be interpreted as not containing any obligation or authorisation to perform an abortion and as merely promoting an active policy of providing information, education and aid concerning contraception, with a view to responsible parenthood. As thus interpreted, the decree did not violate the rules on the allocation of powers.

In the operative part, the Court held that the decree did not violate the rules on the allocation of powers in so far as it did not envisage the hypothesis of an abortion or of any participation in an abortion.

Supplementary information:

The provisions of the Criminal Code on abortion were amended by a subsequent act, the Law of 3 April 1990 on the termination of pregnancy, which formed the subject-matter of an action for annulment before the Court of Arbitration. The Court ruled on that action in Judgment no. 39/91 of 19 December 1991, *Special Bulletin – Leading Cases 2* [BEL-1991-S-004].

Languages:

French, Dutch.



Identification: BEL-1989-S-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 13.10.1989 / **e)** 23/89 / **f)** / **g)** *Moniteur belge* (Official Gazette), 08.11.1989 / **h)** CODICES (French, Dutch).

Keywords of the systematic thesaurus:

1.2.2.1 Constitutional Justice – Types of claim – Claim by a private body or individual – **Natural person.**

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

1.5.4.5 Constitutional Justice – Decisions – Types – **Suspension.**

2.3.9 Sources – Techniques of review – **Teleological interpretation.**

- 3.16 General Principles – **Proportionality**.
 3.19 General Principles – **Margin of appreciation**.
 5.2 Fundamental Rights – **Equality**.
 5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.
 5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.

Keywords of the alphabetical index:

Social security, sickness insurance, clinical biology, combating overconsumption / Civil-law partnership of persons, legal form, obligation.

Headnotes:

Article 11 of the Constitution (before 1994 Article 6bis) is of general application and prohibits all discrimination, of whatever origin: the constitutional rule of non-discrimination is applicable to all the rights and all the freedoms afforded to Belgians.

The constitutional rules of equality of Belgians and of non-discrimination do not preclude a difference in treatment from being established in respect of certain categories of persons, provided that there are objective and reasonable grounds for the criterion for differentiation. The existence of such grounds must be assessed by reference to the aim and the effects of the rule under consideration; the principle of equality is violated where it is shown that there is no reasonable relationship of proportionality between the means employed and the aim pursued.

It is not for the Court to determine whether such a measure established by law is appropriate or desirable. It is for the legislature to determine the measures to be taken in order to achieve the aim which it has set itself. When reviewing the conformity of laws to Articles 10 and 11 of the Constitution (before 1994 Article 6 and 6bis) the Court considers whether the distinction is objective, whether the measures are appropriate to the aim in view and whether there is a reasonable relationship between the means employed and the objective pursued. The Court is not required to consider in addition whether or not the objective pursued by the legislature might be achieved by different legal measures.

Summary:

Following the grant to the Communities of wide powers in respect of educational matters, the body empowered to amend the Constitution decided in 1988 to redraft the constitutional guarantees on education set out in Article 24 of the Constitution (before 1994 Article 17). It also sought to empower the Court of Arbitration to

review compliance with those guarantees by the Communities and therefore conferred on it, in addition to its task of ensuring that the allocation of powers within the Federal State was consistent with the Constitution, powers in relation to rights and freedoms. Article 142 of the Constitution (before 1994 Article 107ter), revised in 1988, empowers the Court to adjudicate on the violation by a law, a decree or an ordinance of Articles 10, 11 and 24 of the Constitution (before 1994 Articles 6, 6bis and 17). With a view to ensuring equality in educational matters, the competent body added to Article 24 of the Constitution Articles 10 and 11, which enshrine the principles of equality and non-discrimination.

On the occasion of that constitutional revision, it was also provided that an application to the Court might be made not only by authorities designated by law but also by any person with a legitimate interest.

Judgment no. 23/89 of 13 October 1989 was the first judgment delivered by the Court in proceedings concerning equality and non-discrimination and the first judgment to annul a law upon application by individuals.

The applicants were certain clinical biology laboratories and certain persons working in those laboratories. They requested the Court of Arbitration to suspend and annul certain provisions of the Framework Law of 30 December 1988, which amended the conditions which laboratories must satisfy in order to be eligible for payment under the sickness insurance scheme for providing clinical biology services. The legislature wished to take certain measures in that regard and it relied on the consideration that the overconsumption of clinical biology services was due in particular to the connections established between the laboratories and third parties, mainly commercial companies.

The applicants claimed that they suffered discrimination as a result of those provisions, which constituted excessive interference, notably with their freedom of association.

By Judgments no. 21/89 of 13 July 1989 and no. 22/89 of 28 September 1989, the Court suspended, at the applicants' request, a number of provisions of the Framework Law. It considered that certain pleas were reasonable and that the immediate implementation of the law would bring about a de facto situation that would entail the risk of significant changes in the way in which the laboratories operated, that those changes might be the source of considerable harm and that it would be extremely difficult, if not impossible, to restore the status quo if the law should be annulled.

Where the Court suspends a law, it must give judgment on the action for annulment within three months. Failing that, the suspension becomes inoperative. By Judgment no. 23/89 of 13 October 1989, the Court also annulled a number of the contested provisions.

This first judgment in proceedings concerning equality and non-discrimination is important because the Court of Arbitration outlined the broad principles to which it would look for guidance when it was required to determine whether a law was consistent with the constitutional rules of equality and non-discrimination.

The Court stated, first of all, in response to an objection raised by the Cabinet, that Article 11 of the Constitution (before 1994 Article 6bis) was of general application and prohibited any discrimination, whatever its origin: the constitutional rule of non-discrimination was applicable with respect to all rights and all freedoms afforded to Belgians.

The Court then explained the content of the constitutional rules of equality and non-discrimination: the constitutional rules of equality of Belgians and non-discrimination do not preclude a difference in treatment from being established in respect of certain categories of persons, provided that there are objective and reasonable grounds for the criterion of differentiation. The existence of such grounds must be assessed by reference to the aim and effects of the rule under consideration; the principle of equality is violated where it is established that there is no reasonable relationship of proportionality between the means employed and the aim pursued.

In order to carry out its review, the Court must therefore first ascertain what objective the legislature is pursuing. It is in the light of that objective that the Court will be able to determine whether the measures taken are relevant and whether there is a violation of the principle of proportionality.

In this case, the Court stated first of all that it was for the legislature to set the conditions which laboratories must satisfy in order to be eligible for payment under the sickness insurance scheme for providing clinical biology services. Those conditions need not necessarily be the same for the different categories of laboratories, but could involve separate treatment provided that such treatment was based on objective and reasonable grounds.

The Court then explained that the distinctions may be based on objective criteria derived from the difference in the statutes governing the various categories of laboratories. The legislature may properly consider it essential to require that laboratories operated by a private-law company take the form of a civil-law partnership of persons, to the exclusion of any other form of company. The purpose of such a provision, from the viewpoint of combating overconsumption, is to ensure the transparency of the sector and check the identity of the partners and the internal structure of laboratories which seek payment under the sickness insurance scheme.

In response to the applicants' assertion that that this objective could be achieved in another way, the Court stated that it was not its place to ascertain whether a measure established by law was appropriate or desirable, since it was for the legislature to determine the measures that needed to be taken to achieve the aim which it had set itself. Where the measures taken satisfied the constitutional requirements, the Court was not required to examine whether the objective might be achieved by other measures.

However, a number of provisions of the Framework Law did not survive the review of constitutionality. The Court considered that they were indeed relevant by reference to the aim pursued but that they constituted excessive interference with the freedom of association of persons and thus with the rule of proportionality.

That was the case of the section requiring that every person providing clinical biology services in a laboratory must be a member of the company operating the laboratory and also of the provision placing a general and absolute ban on a company operating a laboratory being a member or partner of any other legal person or holding shares in any other company whatsoever or of representing members of an organ of any such other legal person or company. That was also the case with the provision imposing similar rules on the members of those companies.

Languages:

French, Dutch.



Identification: BEL-1990-S-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 23.05.1990 / **e)** 18/90 / **f)** / **g)** *Moniteur belge* (Official Gazette), 27.07.1990 / **h)** CODICES (French, Dutch).

Keywords of the systematic thesaurus:

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**

1.3.5.3 Constitutional Justice – Jurisdiction – The subject of review – **Constitution.**

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

1.4.9.4 Constitutional Justice – Procedure – Parties – **Persons or entities authorised to intervene in proceedings.**

2.1.1.4 Sources – Categories – Written rules – **International instruments.**

3.16 General Principles – **Proportionality.**

3.20 General Principles – **Reasonableness.**

4.3 Institutions – **Languages.**

4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities.**

4.9 Institutions – **Elections and instruments of direct democracy.**

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

5.2.2.10 Fundamental Rights – Equality – Criteria of distinction – **Language.**

5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights.**

Keywords of the alphabetical index:

Election, municipal / Municipal, councillor / Mayor, language used / Mayor, deputy, language used / Language used by the administrative authorities / Election, conditions, eligibility, linguistic knowledge, presumption / Language, use of languages in the public authorities / International law, direct applicability.

Headnotes:

The Court will limit the scope of an action for annulment to the provisions against which complaints are raised in the application.

An individual applicant wishing to bring an action for annulment must establish an interest in doing so. Every voter has the necessary interest in seeking annulment of provisions that might adversely affect his or her vote.

Any person establishing an interest may intervene by setting out his or her observations in a memorial to the Court within thirty days of publication of the notice of the action in the Official Gazette.

The principle of equality is violated where it is established that there is no reasonable relationship of proportionality between the means employed and the aim pursued.

By establishing equal treatment for a municipality on the linguistic border of the French language region (Comines-Warneton) and a municipality on the linguistic border in the Dutch language region (Fourons) in order to strike a balance between the Communities, the provisions of the Community Pacification Law are justified by the aim of protecting a higher public interest, provided that the measures taken can be reasonably considered not to be disproportionate to the general objective pursued by the legislature. They may be considered disproportionate if the price of such a safeguard was a violation of fundamental principles of the Belgian legal order.

Among the rights and freedoms guaranteed to Belgians are the rights and freedoms arising from provisions of an international convention which are binding on Belgium and are rendered applicable in the domestic legal order by a law assenting to the convention.

The Court has no jurisdiction to adjudicate on an option which the framers of the Constitution have themselves established.

Summary:

[A proper understanding of the case requires a knowledge of the rules on the use of languages in administrative matters in Belgium – to that end, see Supplementary information.]

A number of individuals in the municipality of Comines-Warneton, acting in various capacities (respectively mayor, deputy mayors (*échevins/schepenen*), municipal councillor and inhabitant of that municipality) brought an action before the Court of Arbitration for annulment of the “Pacification Law” of 9 August 1988 (and also of a Law of 8 August 1988, of secondary interest).

[It is unnecessary to provide an account of all the measures of the Pacification Law. What follows is confined to the Court’s response to the complaints in respect of certain measures. It is sufficient to observe, provisionally, that most of the measures

concern, in particular, the six municipalities termed “peripheral” municipalities adjoining the Brussels-Capital Region (in which the broadest linguistic facilities apply) and also two of the ordinary “municipalities with linguistic facilities”, namely Fourons (in the Dutch linguistic region, in the east of Belgium) and Comines-Warneton (in the French linguistic region, in the west of Belgium)].

The applicants sought annulment of the Law in its entirety, but the Court limited the scope of the action to the provisions against which complaints were actually formulated and solely insofar as those provisions were applicable to the municipality of Comines-Warneton.

The (Federal) Council of Ministers and the Executives of the Flemish Community, the French Community and the Walloon Region (federated entities) challenged the applicants’ interest. The Constitution and the Special Law of 9 January 1989 on the Court of Arbitration required in effect that an individual applicant seeking to bring an action for annulment must show that he or she could be directly and adversely affected by the legislative provisions being challenged.

Following a detailed examination, the Court accepted that the applicants, in view of their capacity as elected municipal representatives or as voters, had sufficient interest in the action. The Court accepted that in a democratic system voters were directly concerned by the conditions that elected representatives must satisfy and that every voter had an interest in seeking annulment of provisions of the electoral law that were capable of adversely affecting his or her right to vote.

The Court also allowed the application by two other municipal councillors of the municipality of Comines-Warneton to intervene in support of the action for annulment. Such intervention was possible by lodging a memorial within thirty days of publication in the *Moniteur belge* (Official Gazette) of the notice setting out the identity of the applicants and the subject-matter of the action. The memorial was not subject to any other condition *ratione temporis* and could be lodged after expiry of the time-limit for bringing an action (six months).

In their first complaint, the applicants claimed that there had been a violation of the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution, before 1994 Articles 6 and 6bis), in that the contested law entailed, without justification, a special arrangement for the municipality of Comines-Warneton.

The Court referred, first of all, to the scope of the constitutional articles cited: “The constitutional rules of the equality of Belgians and of non-discrimination do not preclude a difference in treatment being established in respect of certain categories of persons, provided that the criterion for differentiation is capable of objective and reasonable justification. Whether such justification exists must be assessed by reference to the aim and effects of the measure under consideration; the principle of equality is violated where there is no reasonable relationship of proportionality between the means employed and the aim pursued”.

The Court then stated that the general objective of the Law was to ensure pacification within the community. That aim was pursued by adopting, in connection with the administration of the municipality and in election matters, provisions capable of facilitating the administration of municipalities with a special linguistic status, avoiding confrontation within communities, ensuring harmonious participation by the linguistic majorities and minorities in the administration of the municipality and satisfying certain wishes of the linguistic minorities. This amounted to a complex set of rules designed to ensure “pacification” in relations between the Flemish and French Communities taken as a whole.

The Court found that by providing Comines-Warneton with the same rules as Fourons, the legislature had intended, in an attempt to strike a balance between the Communities, to establish symmetry by introducing equal treatment between a municipality on the linguistic border of the French linguistic region and a municipality on the linguistic border of the Dutch linguistic region. The Court accepted, generally, that the distinctions made by the contested provisions were justified by the intention to protect a higher public interest, provided that the measures adopted might be reasonably considered not to be disproportionate to the general objective pursued by the legislature. According to the Court, the measures adopted would be disproportionate, in particular, if the price of such protection were a breach of fundamental principles of the Belgian legal order.

That review of proportionality was then carried out by the Court with respect to the various contested measures. The present summary is confined to certain parts of that control (points 1 to 4 below).

1. Accordingly, the Court considered, *inter alia*, that the fundamental principles in relation to municipal organisation (Article 162 of the Constitution, before 1994 Article 108) had not been breached, first, by the fact that, for the municipalities in question, the deputy mayors (the members of the executive college,

normally elected by and from within the municipal council) were no longer elected at second degree by the majority of municipal councillors, but directly on a proportional basis by all the voters and, second, by the fact that in the absence of consensus within the college, the decision fell to the municipal council.

2. The Court also considered that the procedures for the functioning of a collegiate body governed by public law did not adversely affect the freedom of association guaranteed by the European Convention on Human Rights solely to natural or legal persons governed by private law.

The Court's review of respect for the constitutional prohibition of discrimination (Article 11 of the Constitution, before 1994 Article 6bis of the Constitution) led it to combine that constitutional provision with the rights and freedoms guaranteed in international treaties. The Court expressly declared (for the first time) that it had jurisdiction in that regard: "Among the rights and freedoms guaranteed to Belgians by Article 11 of the Constitution are indeed the rights and freedoms resulting from provisions of an international convention which are binding on Belgium and made applicable in the domestic legal order by a law assenting to the convention. That applies at least to the rights and freedoms resulting from provisions having direct effect, which is the case of Article 11 of the Convention" (since Judgment no. 103/2003 of 22 July 2003, the Court has no longer required that the Convention provisions in question must have direct effect – see *Bulletin* 2003/2 [BEL-2003-2-009]).

3. Nor, in the Court's view, was it disproportionate to provide expressly that (only) the municipal elected representatives (mayors, deputy mayors, municipal councillors and presidents and members of municipal social assistance councils) of the municipalities with linguistic facilities and of the six peripheral municipalities must, in order to exercise their function, know the language of the linguistic region in which the municipality was situated.

The Court observed that it was mainly in that group of municipalities that disputes had arisen concerning the linguistic knowledge of local elected representatives and that greater legal certainty had been necessary. It was therefore not contrary to the principle of equality that linguistic knowledge obligations were imposed solely for the municipalities with linguistic facilities and the peripheral municipalities.

The contested law provided, moreover, that there was an irrebuttable presumption of linguistic knowledge for representatives elected directly by the population, but a rebuttable presumption in the case of those

appointed (for example, the mayor) or elected at the second degree (for example, the deputy mayors).

That, according to the Court, did not give rise to an unwarranted limitation of the possibility of mounting a judicial challenge against the election and appointment of the representatives in question. The regime of presumptions satisfied the general objective of the contested law and could not be held to be disproportionate by reference to that objective. Furthermore, the fact that an irrebuttable presumption applied to all representatives elected directly by the population proved that it was the legislature's intention not to place any limit on the voters' choice or on access by candidates to a directly elected post.

4. Last, the question arose as to whether there had been a discriminatory breach of the principle of the secret ballot by the measures which allowed voters in the municipalities of Fourons et Comines-Warneton to vote in a constituency of the other linguistic region.

The Court responded that in amending Articles 61 and 62 of the Constitution in 1988 (before 1994 Articles 47 and 48), the body empowered to amend the Constitution had anticipated that possibility and that the Court did not have jurisdiction to adjudicate on a choice made by that body itself.

[The present summary does not deal with the remainder of the content of the judgment, which concludes in any event that the action must be dismissed].

Supplementary information:

There are different Communities in Belgium, their territory being defined according to the four linguistic regions (see Article 4 of the Constitution).

The rules on the use of languages in administrative matters between the public institutions and between individuals and those institutions are governed by law (Co-ordinated Laws on the use of languages in administrative matters, co-ordinated by the Royal Decree of 18 July 1966). In principle, in administrative matters the municipal authority must always use the language of the linguistic region in which the municipality is situated and municipal officials must also know that language (see the judgment itself as regards elected municipal representatives, and see also *Bulletin* 1998/1 [BEL-1998-1-002]).

In certain municipalities on the "linguistic border", linguistic facilities are granted to the inhabitants. Since the division into linguistic regions, there has been tension in certain municipalities because

elected municipal representatives use a different language from that of the linguistic region in which those municipalities are located. This local tension leads to confrontation between the Flemish and French Communities.

In order to reduce that tension, the Federal Parliament on 9 August 1988 enacted a law, called the "Pacification Law". Judgment no. 18/90 rules on the action for annulment of that law.

Cross-references:

- With regard to the voter's interest, see also Judgment no. 76/1994 of 18.10.1994, *Bulletin* 1994/3 [BEL-1994-3-020].
- With regard to the scope of the principle of equality, see also (among many others) Judgement no. 23/89 of 13.10.1989, *Special Bulletin – Leading Cases 2* [BEL-1989-S-002], Judgment no. 16/91 of 13.06.1991, *Special Bulletin – Leading Cases 2* [BEL-1991-S-001], Judgment no. 3/93 of 21.01.1993, *Bulletin* 1993/1 [BEL-1993-1-002], Judgment no. 137/2000 of 21.12.2000, *Bulletin* 2000/3 [BEL-2000-3-013] and Judgment no. 11/2003 of 22.01.2003, *Bulletin* 2003/1 [BEL-2003-1-002].
- With regard to the requirements of linguistic knowledge by municipal authorities, see also Judgment no. 26/1998 of 10.04.1998, *Bulletin* 1998/1 [BEL-1998-1-002].
- With regard to the control of the respect for Human Rights contained in international conventions, see also Judgment no. 39/91 of 19.12.1991, *Special Bulletin – Leading Cases 2* [BEL-1991-S-004], Judgment no. 103/2003 of 22.07.2003, *Bulletin* 2003/2 [BEL-2003-2-009] and Judgment no. 136/2004 of 22.07.2004, *Bulletin* 2004/2 [BEL-2004-2-003].

Languages:

French, Dutch.



Identification: BEL-1990-S-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 05.07.1990 / **e)** 25/90 / **f)** / **g)** *Moniteur belge* (Official Gazette), 06.10.1990 / **h)** CODICES (French, Dutch).

Keywords of the systematic thesaurus:

1.2.2.3 Constitutional Justice – Types of claim – Claim by a private body or individual – **Profit-making corporate body**.
 1.4.9.1 Constitutional Justice – Procedure – Parties – **Locus standi**.
 3.10 General Principles – **Certainty of the law**.
 5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.
 5.3.13.16 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Prohibition of reformatio in peius**.
 5.3.38.2 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Civil law**.
 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.

Keywords of the alphabetical index:

Legitimate expectation / Liability for negligence.

Headnotes:

When neither the Constitution nor legislation imposes with respect to aliens any derogations or limitations as regards the enjoyment of rights and freedoms, Article 191 of the Constitution (before 1994 Article 128) does not preclude those aliens from relying on Articles 10 and 11 of the Constitution (before 1994 Article 6 and 6bis).

It may be accepted that the legislature takes the view that the categories to which the contested Law of 30 August 1988 amending the Law of 3 November 1967 on the pilotage of sea-going vessels is addressed are, principally on account of their involvement in maritime activities, sufficiently specific to justify a special regime of liability.

By amending a statutory compensation scheme without re-opening claims based on a judicial decision, the legislature does not draw any unjustified distinction, as the protection ensured by Article 11 of the Constitution and Article 1 Protocol 1 ECHR applies only to property that has already been acquired.

Summary:

The Law of 30 August 1988 amending the Law of 3 November 1967 on the pilotage of sea-going vessels introduced a special regime of civil liability for damages for harm caused by negligence in the functioning of the pilotage service. Its aim was to exclude liability by the organisers of pilotage services for damage resulting from negligence on the part of the organiser itself or, on certain conditions, on the part of a member of its staff acting in the exercise of his or her duties. The legislature made that amendment retroactive for a period of thirty years.

Actions for annulment of the Law of 30 August 1988 were brought by twenty-five maritime companies governed by foreign law, in their capacity as users of a pilotage service. They complained that by exempting the State from liability with retroactive effect the contested law eliminated their claims against the State for compensation.

The Court of Arbitration considered that the actions were admissible. The contested law applied to both foreign persons and Belgian persons, all of whom were required by the Law of 3 November 1967 to employ a pilotage service, who had sustained or might sustain damage following the intervention of that service and who, in order to obtain compensation, might thus have to bring proceedings before a Belgian court. Since, in that regard, neither the Constitution nor legislation applied to those aliens any derogations or limitations with respect to the enjoyment of rights and freedoms, Article 191 of the Constitution of the did not prevent those aliens from relying on Articles 10 and 11 of the Constitution.

In their first plea, the applicants claimed that the contested law violated the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), because, first, the victims of damage caused by a pilotage service were treated differently from the victims of damage caused by the negligence of another public service and because, second, the members of the staff of a pilotage service were treated differently from other members of staff, both in the public sector and in the private sector.

According to the Court of Arbitration, it could be accepted that the legislature had taken the view that the categories to which the contested law was addressed were, principally on account of their involvement in maritime activities, sufficiently specific to justify a special regime of liability.

As regards the retroactive scope of the law, the Court considered that although the retroactive element constituting the special regime of liability introduced

for pilotage breached the fundamental principle of legal certainty, according to which the content of the right must in principle be foreseeable and accessible, that violation was not in this case disproportionate by reference to the objective pursued by the contested law. The Court pointed out, in that regard, that the legislature's intention in passing the contested law had been, first, to counter a new direction taken in the case-law of the Court of Cassation, the effect of which was that State liability might be incurred, and, second, to take into account the significant budgetary consequences arising in an unforeseen manner for the public authorities from that modification of the case-law.

The applicants also criticised the fact that by fixing the time when it produced its effects, the contested law created an unwarranted distinction between pending disputes (*causae pendentes*), to which the law was applicable, and disputes which had already been dealt with (*causae finitae*), to which it did not apply.

The Court observed in that regard that the fact that a rule of law was given retroactive effect meant in principle that that rule was to apply to legal relationships which had come into existence and been definitively completed before the rule entered into force. The Court added, however, that that rule could apply only to pending and future disputes and had no effect on disputes which had already been dealt with. According to a fundamental principle of the Belgian legal order, a judicial decision could be amended only by means of an appeal.

The applicants complained, finally, that there had been a discriminatory breach of their enjoyment of the right of property, granted by Article 16 of the Constitution (before 1994 Article 11) and Article 1 Protocol 1 ECHR.

The Court considered that by altering a statutory scheme for compensation for damage without re-opening claims based on a judicial decision, the legislature had not introduced any unjustified distinction, as the protection ensured by those provisions applied only to property which had already been acquired.

Supplementary information:

The applicants before the Court of Arbitration lodged an application with the European Commission for Human Rights. They claimed, in particular, that the liability regime introduced by the Law of 30 August 1988 violated Article 1 Protocol 1 ECHR. The case was referred to the European Court of Human Rights, which gave a broader interpretation of the concept of

possessions, the subject-matter of the protection afforded by Article 1 Protocol 1 ECHR, and concluded that there had been a violation of that provision. Belgium was therefore found to have violated the Convention (European Court of Human Rights, the *Pressos Compania Naviera SA and others v. Belgium*, Judgment of 20 November 1995, *Bulletin* 1995/3 [ECH-1995-3-019]).

Languages:

French, Dutch.



Identification: BEL-1991-S-001

a) Belgium / b) Court of Arbitration / c) / d) 13.06.1991 / e) 16/91 / f) Housewives / g) *Moniteur belge* (Official Gazette), 18.07.1991 / h) CODICES (French, Dutch).

Keywords of the systematic thesaurus:

1.2.2.2 Constitutional Justice – Types of claim – Claim by a private body or individual – **Non-profit-making corporate body**.
 1.4.9.1 Constitutional Justice – Procedure – Parties – **Locus standi**.
 1.4.9.2 Constitutional Justice – Procedure – Parties – **Interest**.
 1.4.9.4 Constitutional Justice – Procedure – Parties – **Persons or entities authorised to intervene in proceedings**.
 3.4 General Principles – **Separation of powers**.
 4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies**.
 5.2 Fundamental Rights – **Equality**.
 5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens**.
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

Keywords of the alphabetical index:

Interest, collective / Association, non-profit-making / Legislative validation / Judicial guarantee, breach.

Headnotes:

Non-profit-making associations which bring an action against a law affecting their social purpose and which rely on a collective moral interest establish the necessary interest to ask the Court to annul that law.

The constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution, before 1994 Article 6 and 6bis) are applicable with respect to all the rights and all the freedoms recognised to Belgians.

A legislative provision whose purpose is, first, to render lawful a royal decree after it has been held to be unlawful by a decision of the Council of State and, second, to prevent the Council of State from ruling on the possible unlawfulness of another royal decree the implementation of which it had suspended violates the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) in that it deprives the applicants and the category of citizens to which those decrees apply of a judicial guarantee essential for all citizens, without there being any justification for that difference in treatment.

Summary:

[A proper understanding of the case requires an account of the following background:

A non-profit-making association, the “*Association des femmes au foyer*” (“Association of housewives”), had successfully brought an action before the Council of State (the highest administrative court) for annulment of a Royal Decree fixing the scale of advance income tax payments. On the basis of those scales, each employer must determine what proportion of the income of his or her staff must be sent directly to the tax authorities. This advance payment would be taken into account when the total tax payable was finally determined. The Council of State had annulled that Royal Decree in part, insofar as the scale had had the effect that, solely in the case of households with only a single occupational income, the advance income tax deducted was higher than the total income tax payable from which the advance payment was to be deducted. A second, similar, Royal Decree had also been the subject of an action for annulment and the Council of State had already suspended that decree pending investigation of the merits of the case.]

A Law of 20 July 1990 had confirmed the Royal Decrees which had been annulled or suspended by the Council of State. It was apparent from the drafting history of the law that the legislature had intended to

remove the partial nullity from the decree which had been annulled (see Supplementary information).

The “*Association des femmes au foyer*” and another association whose purpose was to protect the tax interests of housewives then brought an action before the Court of Arbitration for annulment of that law. Since the contested law concerned the calculation of the advance income tax applicable to households where the woman had no occupational income of her own, the Court acknowledged that the two associations, acting on behalf of their members, had a collective moral interest in bringing their action.

The Court also granted a couple to whom the contested provisions were applicable leave to intervene.

The Court was required to review the law by reference to the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution). It observed, first of all, that those articles were of general application. They prohibited any discrimination, of whatever origin: the constitutional rules of equality and non-discrimination were applicable with respect to all rights and all freedoms recognised to Belgians. [The Court of Arbitration thus brought within its jurisdiction all discrimination, whatever its origin – see Judgment no. 18/1990 of 23 May 1990, *Special Bulletin – Leading Cases 2* [BEL-1990-S-001] for the rights and freedoms deriving from international treaties].

The Court then reiterated its working method when carrying out its review by reference to the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) and cited the following ground, which may be found (with slight amendments over time) in a large number of judgments and is very similar to the form of words used by the European Court of Human Rights as regards Article 14 ECHR):

“The constitutional rules of the equality of Belgians and of non-discrimination do not preclude the possibility that there may be objective and reasonable justification for the criterion for differentiation.

Whether or not such justification exists must be assessed in the light of the aim and effects of the contested measure and also of the nature of the principles in question; the principle of equality is violated where it is shown that there is no reasonable relationship of proportionality between the means employed and the aim pursued.”

The Court noted that the Council of State had annulled the Royal Decree that the legislature sought to validate. It also referred to the proceedings

pending against a second Royal Decree having the same content (which had already been provisionally suspended by the Council of State) which was also validated by the law.

The Court observed that the possibility of bringing an action before the Council of State afforded all citizens an essential judicial guarantee against the acts of the Executive.

The Court stated that the legislature had deprived certain persons of that judicial guarantee since the law was intended, first, to render the Royal Decree lawful after a decision of the Council of State had declared that it was unlawful and, second, to prevent the Council of State from ruling on the possible unlawfulness of a Royal Decree the implementation of which it had suspended.

The Court concluded that in this case there was no ground for that unequal treatment and it annulled the contested legislative provision.

The applicants had also sought annulment of another article of the same law, which authorised the Crown to set new scales for the payment of advance income tax, on condition that those scales were confirmed by the legislature.

The applicants contended that that arrangement was equally unconstitutional because it prevented individuals from challenging those scales before the Council of State.

The Court responded to that argument by stating that the confirmation procedure provided for by the law was not incompatible with the constitutional principle of equality and non-discrimination: on the contrary, it reinforced the legislature’s control of the exercise of powers which it conferred on the Crown and did not unjustifiably remove certain acts of the Executive from the scope of judicial review of legality. Such “legislative confirmation” was not therefore to be confused with the “legislative validation” complained of. By Judgment no. 34/93 of 6 May 1993, the Court dismissed the action brought against the confirmatory provision of the Law of 20 January 1991.

Last, the Court declared that it had no jurisdiction to deal with a final plea alleging violation of the principle of legality in fiscal matters and of the principle of equality in taxation (Articles 170 and 172 of the Constitution – before 1994 Articles 110 and 112) (see Supplementary information, final point).

Supplementary information:

In Belgium all courts may review acts of the administrative authorities by reference to higher legal norms and, where appropriate, refuse to apply those acts on the ground that they are inconsistent with the higher legal norms (up to and including the Constitution). The Council of State may also declare such acts void (*ex tunc – erga omnes*).

Review of the conformity to the Constitution of legislation (Laws of the Federal Parliament and decrees and ordinances of the Parliaments of the Communities and the Regions), however, can only be carried out by the Court of Arbitration.

Originally (1984-1988), the Court of Arbitration could review those laws, decrees and ordinances only in the light of the rules on the allocation of legislative powers between the Federal State, the Communities and the Regions.

In the past, the legislature had already on occasion validated by means of legislation decrees which had been declared void by the Council of State. In the absence of a constitutional court, such legislation was not amenable to a legal sanction.

At the time of the constitutional amendment of 1988, the Court of Arbitration was declared to have jurisdiction to review all legislation by reference to the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) as well as by reference to the rules on the allocation of powers.

Making use of this new jurisdiction, the Court, by Judgment no. 16/91, resumed here (see the references for other cases), annulled for the first time a legislative validation in so far as a category of citizens was thus deprived, without valid grounds, of a judicial guarantee.

In 1991 the Court had no jurisdiction to carry out (directly) a review by reference to the constitutional guarantees in tax matters (Articles 170 and 172 of the Constitution). Article 172, which prohibits any privilege in tax matters, is, however, a special application of the principle of equality, *in fiscalibus*. The Court could nonetheless indirectly ensure compliance with the abovementioned constitutional fiscal guarantees by carrying out a review in the light of Articles 10 and 11 of the Constitution, in conjunction with Articles 170 and 172.

Since the amendment of the Special Law of 6 January 1989 on the Court of Arbitration by the Special Law of 9 March 2003, the Court has also had

jurisdiction to carry out a direct review by reference to Articles 170 and 172 of the Constitution.

Cross-references:

- For the collective interest required of the applicant associations, see also (for example) Judgment no. 39/91 of 19.12.1991, *Special Bulletin – Leading Cases 2* [BEL-1991-S-004] and Judgment no. 61/94 of 14.07.1994, *Bulletin 1994/2* [BEL-1994-2-015].
- For the general application of the constitutional principle of equality and non-discrimination, see (among many others): Judgment no. 18/90 of 23.05.1990, *Special Bulletin – Leading Cases 2* [BEL-1990-S-001], Judgment no. 3/1993 of 21.01.1993, *Bulletin 1993/1* [BEL-1993-1-002], Judgment no. 137/2000 of 21.12.2000, *Bulletin 2000/3* [BEL-2000-3-013] and Judgment no. 11/2003 of 22.01.2003, *Bulletin 2003/1* [BEL-2003-1-002].
- For a case of comparable legislative validation, see Judgment no. 33/93 of 22.04.1993, *Bulletin 1993/2* [BEL-1993-2-018]. In that judgment, the Court states that exceptional circumstances may, where appropriate, justify the intervention of the legislature (see also Judgments no. 64/97 of 06.11.1997, *Bulletin 1997/3* [BEL-1997-3-011] and no. 72/2002 of 23.04.2002, *Bulletin 2002/1* [BEL-2002-1-004] although it is never possible to re-open definitive judicial decisions (Judgment no. 136/2004 of 22.07.2004, *Bulletin 2004/2* [BEL-2004-2-007].
- Also to be compared with Judgments no. 46/93 of 15.06.1993, *Bulletin 1993/2* [BEL-1993-2-021] and no. 5/94 of 20.01.1994, *Bulletin 1994/1* [BEL-1994-1-001] (justified intervention by the legislature). For other cases of “legislative validations” which did not have the aim or the effect of interfering with proceedings before a court or of preventing a court from adjudicating: see Judgments no. 128/2000 of 06.12.2000, *Bulletin 2000/3* [BEL-2000-3-012] and no. 72/2002 of 23.04.2002, *Bulletin 2002/1* [BEL-2002-1-004].

Languages:

French, Dutch.



Identification: BEL-1991-S-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 04.07.1991 / **e)** 18/91 / **f)** “Marckx-bis” / **g)** *Moniteur belge* (Official Gazette), 22.08.1991 / **h)** CODICES (French, Dutch).

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

1.6.2 Constitutional Justice – Effects – **Determination of effects by the court.**

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

1.6.5.3 Constitutional Justice – Effects – Temporal effect – **Limitation on retrospective effect.**

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

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

5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status.**

5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent.**

5.3.33.2 Fundamental Rights – Civil and political rights – Right to family life – **Succession.**

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

Keywords of the alphabetical index:

Child, born out of wedlock / Relationship to parents out of wedlock, inheritance right, child born out of wedlock / Inheritance, child born out of wedlock / Law, evolution / Law, transitional.

Headnotes:

The former Article 756 of the Civil Code, maintained in force as a transitional measure, violates the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution – before 1994 Article 6 and 6bis) in that it grants illegitimate children rights over the assets of their deceased father or mother only where they are lawfully recognised, and in that it deprives them of any right over the assets of the relatives of their father or mother.

In the light of the “Marckx” Judgment of the European Court of Human Rights of 13 June 1979, which condemned the distinction between legitimate and illegitimate children with respect, *inter alia*, to inheritance rights, the Court concludes that successions opened before delivery of the Marckx Judgment should not be affected and that the non-

discriminatory rule in the new Law of 31 March 1987 should be applied with effect from that date.

Summary:

Before 1987, a distinction was drawn in Belgium, with respect to inheritance and the right of succession, between “legitimate” and “illegitimate” children, on the basis of the provisions of the original Civil Code (*Code Napoléon* of 21 March 1804).

According to the “Marckx” Judgment of the European Court of Human Rights of 13 June 1979, *Special Bulletin – Leading cases ECHR* [ECH-1979-S-002], restrictions imposed on an illegitimate child in respect of his capacity to inherit from his unmarried mother (who had expressly recognised her child) were contrary to Article 14 ECHR in conjunction with Article 8 ECHR and Article 14 ECHR in conjunction with Article 1 Protocol 1 ECHR.

Before the Marckx Judgment, a number of Bills designed to adapt the legislation were already in existence, but it was only when the Law of 31 March 1987 was enacted that the differences in treatment in inheritance matters between children conceived within and those conceived out of wedlock were brought to an end.

In the meantime, an illegitimate child (who had not been recognised by his mother) claimed to be entitled to inherit from his mother, who had died in 1956, and also to inherit from his aunt, who had died in 1983 and had inherited from the mother and had herself remained without issue. The district court considered in 1986 that the child could inherit in the same way as a legitimate child, but the Court of Appeal held in 1988 that Article 8 ECHR was not directly applicable and that the child was not entitled to inherit.

Upon appeal against that judgment, the Court of Cassation decided to refer a preliminary question to the Court of Arbitration on the compatibility with the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) set out in Article 756 of the Civil Code, taking into account the fact that that this old provision continued to apply to successions opened in 1956 and 1983, on the basis of a transitional provision (Article 107 of the Law of 31 March 1987).

The Court of Arbitration noted that Article 756 established a difference in treatment in inheritance matters between illegitimate children and legitimate children, for the purpose of protecting the family as based on the institution of marriage but by denying the inheritance rights of the illegitimate child.

The Court then observed that the Law of 31 March 1987 is based, *inter alia*, on the opinion that attitudes have changed, as have views on unmarried mothers and children born out of wedlock. The legislature thus wished to put an end to discrimination against those children. The Court referred expressly to the “Marckx” Judgment of the European Court of Human Rights and concluded that Article 756 of the Civil Code, which was still in force, violated the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution).

The Court did not confine itself in this case to a mere finding of a violation of the Constitution. Notwithstanding the fact that the answer given by the Court was binding solely on the parties to the case (see Supplementary Information), it was necessary, according to the Court, to have regard to the repercussions that its decision might have on situations other than that forming the subject-matter of the preliminary question.

The Court observed in that regard that in the Marckx Judgment the European Court of Human Rights stated that “the principle of legal certainty, which [was] necessarily inherent in the law of the Convention ..., [dispensed] the Belgian State from re-opening legal acts or situations that [antedated] the delivery of the [Marckx] Judgment” (§ 58). On account of that legal certainty, the Court of Arbitration concluded that, in spite of its unconstitutionality, the old provision should still be applied to successions opened before 13 June 1979 (that is to say, the date of the Marckx Judgment).

The Court further observed that the new, non-discriminatory rules in the Law of 31 March 1987 must apply from that date, as otherwise the Court’s review would be deprived of all practical effect.

Supplementary information:

Proceedings before the Court may be initiated, on the one hand, by actions for annulment brought by individuals and by a certain number of authorities and, on the other hand, by preliminary questions referred by the courts. The authority of the Court’s judgments in preliminary proceedings is different from the authority of judgments whereby it determines actions for annulment.

Where an action for annulment is well founded, the provision found to be contrary to the Constitution is annulled. The annulment applies *erga omnes*, with retroactive effect, that is to say, the provision which has been annulled is deemed never to have existed. However, the Special Law of 6 January 1989 on the Court of Arbitration allows the Court, where necessary, to modify the retroactive effect of the

annulment by maintaining the effects of the provision which is annulled.

Where the preliminary question leads to a finding of a violation of the Constitution, the court which referred the question will not apply the unconstitutional provision. However, that provision continues to exist in the legal order and the Court’s judgment is in principle binding only on the referring court and the courts required to adjudicate in the same case (for example on appeal) between the same parties. Unlike the position in actions for annulment, the Law of 6 January 1989 makes no provision for any modification of the effects in time of a preliminary judgment. However, the courts dealing with similar cases can no longer apply the unconstitutional provision (see Article 26 of the Special Law of 6 January 1989).

In the present case, the Court none the less took account of the possible impact of its judgment on situations other than those of the case before the referring court and, in the interest of legal certainty, it proposed a solution to the possible effects in time of the finding of unconstitutionality. In that regard, the Court took as a criterion the date of delivery of the Marckx Judgment of the European Court of Human Rights, after the European Court had itself considered (§ 58) that legal certainty justified that legal acts or situations antedating that judgment should not be re-opened.

Cross-references:

- See also Judgement “Marckx” of the European Court of Human Rights of 13.06.1979, *Special Bulletin – Leading cases ECHR* [ECH-1979-S-002].

Languages:

French, Dutch.



Identification: BEL-1991-S-003

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 16.10.1991 / **e)** 26/91 / **f)** Lanaken / **g)** *Moniteur belge* (Official Gazette), 23.11.1991 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

2.2.1.1 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and constitutions.**

4.7.16.1 Institutions – Judicial bodies – Liability – **Liability of the State.**

4.16 Institutions – **International relations.**

Keywords of the alphabetical index:

Law assenting to an international treaty, review / Treaty, approval / Constitutional Court, jurisdiction, international treaty, review / Liability, international relations.

Headnotes:

The Court of Arbitration has jurisdiction to review laws assenting to international treaties or conventions, whether in the context of an action for annulment or in response to preliminary questions referred by the courts (see Supplementary Information for the amendment, by the Special Law of 9 March 2003, of the Court's jurisdiction in such matters).

Review of the constitutionality of the law assenting to an international convention (which merely proclaims that the provisions of the convention “shall produce their full and entire effect”) also implies an examination of the content of the relevant provisions of the international instrument concerned. In carrying out its review, the Court must take into account that in this case the measure under review is not a unilateral sovereign act but a convention that also produces legal effects outside the domestic order.

Summary:

A court had requested the Court of Arbitration to adjudicate, by way of preliminary decision, on the constitutionality of a Law of 16 August 1971 approving an international convention between Belgium and the Netherlands designed to avoid double taxation.

Before carrying out its review of constitutionality, the Court of Arbitration raised of its own motion the question of its jurisdiction to answer a preliminary question relating to a law assenting to a treaty.

The Court observed that the Law of 6 January 1989, which regulates, *inter alia*, the jurisdiction of the Court of Arbitration, does not exclude the laws, decrees or

ordinances whereby a treaty receives assent (see Supplementary information).

It is true that Article 3.2 of that law prescribes a shorter period for bringing an action for annulment of such a law assenting to a treaty (sixty days instead of six months), in order to ensure the security and stability of international relations.

The Court considered that that objective would not be achieved if the Court could, without any time limit, by a judgment having authority *erga omnes*, annul a law giving effect in the Belgian legal order to a provision of international convention law. Unlike a judgment delivered in an action for annulment, however, a preliminary decision whereby the Court makes a finding of violation is not applicable *erga omnes*, nor does it cause the legal rule in question to disappear from the Belgian legal order.

The Court concluded that it could not be inferred from Article 3.2 that the special legislature intended to exclude the Court's judgment to respond to a preliminary question relating to a law assenting to a treaty.

The Court then proceeded to review the constitutionality of the Law of 16 August 1971 assenting to the convention in question. That law stated solely that the Convention and the Protocol of 19 October 1970 should “produce their full and entire effects”. In the Court's view, a review of constitutionality also entailed an examination of the content of the provisions of the Convention and of the Protocol, even though when carrying out its review the court must take into account that it was dealing not with a unilateral sovereign act but with a convention that also produced legal effects outside the domestic legal order.

Under the Convention of 19 October 1970, income from a salaried post is in principle taxable in the State in which the person concerned works. However, frontier workers are liable for tax only in the State in which they have a home to which they return every day or at least once a week.

The question concerned a violation of the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) resulting from the exception laid down for Netherlands frontier workers who transferred their residence from the Netherlands to Belgium after 1 January 1970 and who remained liable for tax in the Netherlands. That exception existed solely for Netherlands nationals, and not therefore for Belgian nationals, or for French or German nationals.

The Court took account of the fact that that exception was dictated by the desire to prevent a risk of tax evasion specific to an objectively determined category.

According to the Court, the principle of equality does not require that in all conventions of that type Belgium must concern itself with always ensuring that frontier workers enjoy the most favourable arrangement. The Court concluded that the legislature had not violated the constitutional principle of equality by giving its assent to that exception in the convention.

Supplementary information:

In Belgium, treaties have no effect until the competent parliamentary assembly has marked its assent by means of a legislative norm.

The Court of Arbitration reviews the constitutionality of laws either in the context of an action for annulment or in response to preliminary questions referred by the courts. The Court has held that it has jurisdiction to review laws assenting to international treaties both in the context of preliminary questions and in the context of actions for annulment.

In this leading case, the Court establishes its jurisdiction to review such laws and states that its review also entails an examination of the content of the relevant provisions of the international instruments in question. The Court therefore ascertains whether, by giving its assent to a treaty, the legislature has indirectly introduced unconstitutional provisions into the legal order.

Judgment no. 26/91 may be consulted in Dutch, French and German at <http://www.const-court.be>.

The principle established in this judgment was confirmed, *inter alia*, by Judgment no. 12/94 of 3 February 1994 (see *Bulletin* 1994/1 [BEL-1994-1-004]).

Preliminary questions concerning laws assenting to international treaties might therefore raise indirectly, without limit in time, problems concerning the constitutionality of convention provisions, and the confidence of States which concluded a treaty with Belgium might be undermined.

In order to preclude such an outcome in certain cases, the legislature amended the Special Law of 6 January 1989 on the Court of Arbitration on 9 March 2003 and expressly provided that preliminary questions could not be referred where they concerned legally binding rules whereby "a treaty

establishing the European Union or the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms or an additional Protocol to that Convention [received] assent".

Cross-references:

- See *Bulletin* 1994/1 [BEL-1994-1-004] and *Bulletin* 2004/1 [BEL-2004-1-001].

Languages:

French, Dutch, German.



Identification: BEL-1991-S-004

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 19.12.1991 / **e)** 39/91 / **f)** / **g)** *Moniteur belge* (Official Gazette), 24.01.1992 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

- 1.4.9.2 Constitutional Justice – Procedure – Parties – **Interest.**
- 3.19 General Principles – **Margin of appreciation.**
- 5.2.1 Fundamental Rights – Equality – **Scope of application.**
- 5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender.**
- 5.3.2 Fundamental Rights – Civil and political rights – **Right to life.**
- 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**
- 5.3.33 Fundamental Rights – Civil and political rights – **Right to family life.**
- 5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

Keywords of the alphabetical index:

Equality and non-discrimination, scope, born child, unborn child / Abortion, difference in treatment, father, mother / Foetus, legal status / Pregnancy, voluntary termination, state of distress.

Headnotes:

Applicants who rely on their capacity as married men or fathers, and an association which protects human life, have a legitimate interest in seeking annulment of the law decriminalising the termination of pregnancy under certain conditions.

Articles 10 and 11 of the Constitution (before 1994 Article 6 and 6bis) do not in themselves establish that a human being benefits from the time of conception from the protection against discrimination which they guarantee.

It cannot be inferred from the provisions of international conventions on which the parties rely that the Belgian State's accession to those conventions gives rise to a constitutional guarantee that the same rights will be granted to living persons and to unborn children. Although the obligation to respect life requires the legislature also to adopt measures to protect the unborn life, it cannot be inferred that the legislature is under an obligation, on pain of violating Articles 10 and 11 of the Constitution, to treat the born child and the unborn child in the same way.

The right of the husband or the father to equal treatment as regards respect for his private and family life and the right to marry and found a family cannot be interpreted as being sufficiently broad as to include the procedural rights on which the applicants rely, namely the right for a man to be consulted and also the right to bring court proceedings where his wife demonstrates the intention to terminate her pregnancy.

Summary:

By a Law of 3 April 1990, the legislature amended a number of articles of the Criminal Code which made any abortion a criminal offence. Abortion continued to be punishable, but the new law provided that no offence would be committed where a pregnant woman who owing to her condition was in a state of distress requested a doctor to terminate her pregnancy and where termination took place under the conditions defined by the law.

A number of individuals and the non-profit-making association Pro Vita requested the Court of Arbitration to suspend and annul those provisions.

By Judgments nos. 32/90 and 33/90 of 24 October 1990, the Court dismissed the applications for suspension. Judgment no. 39/91 of 19 December

1991 concerned the actions for annulment, which were also dismissed.

The Court first of all examined the applicants' interest in bringing proceedings. Most of the applicants relied on their capacity as married men or fathers and on the fact that the law in question was capable of directly affecting their family life. The Court recognised that interest. The considerations put forward by other applicants, referring essentially to their ethical evaluation of the law, were not accepted by the Court. The fact that individuals disapproved of a law that was likely to elicit an ethical debate could not be accepted as grounds for a sufficient interest. The Court further acknowledged the collective interest of the association Pro Vita, whose stated aim was to protect human life at any stage of development whatsoever.

In support of their action, the applicants relied on the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution). They claimed, first of all, that those constitutional rules prohibited different treatment being given to a born child and an unborn child or to the different categories of unborn children.

The Court responded that those articles did not in themselves establish that a human being benefited, from the time of conception, from the protection which they guaranteed. It could not be inferred from the provisions of international conventions on which the parties relied that the Belgian State's accession to those conventions gave rise to a constitutional guarantee that the same rights would be granted to living persons and to unborn children. Under certain provisions found in a number of conventions the State signatories were no doubt bound to take appropriate measures to permit a pregnancy to run its normal term under the best possible conditions. There also existed, notably in Belgian civil law and social law, statutory provisions which protected the interests and health of the unborn child from the time of conception. Although the obligation to respect life required the legislature also to adopt measures to protect unborn life, it could not be inferred that the legislature was under an obligation, on pain of violating Articles 10 and 11 of the Constitution, to treat the born child and the unborn child in the same way.

On the basis of that reasoning, the Court rejected all the pleas alleging discrimination between persons who were born and living.

The Court then examined the differences in treatment between the father and the mother of the unborn child.

In accordance with its case-law, the Court observed that the constitutional rules of equality and non-discrimination were of general application. They prohibited any discrimination, whatever its origin: the constitutional rules of equality and non-discrimination were applicable with respect to all the rights and all the freedoms afforded to Belgians, including those resulting from the international conventions by which Belgium was bound, made applicable in the domestic legal order by a law of assent and having direct effect.

The Court then drew attention to the content of the constitutional rules of equality and non-discrimination. It explained, as is its custom, that it did not have a power of assessment and of decision comparable to that of the democratically-elected legislative assemblies but that it was required solely to ascertain whether the measures which those legislative assemblies had adopted respected the principle of equality and of non-discrimination.

The applicants complained that under the contested law the father was not involved in the decision to terminate the pregnancy and was not permitted to bring proceedings before an independent and impartial tribunal. According to the Court, the complaints based on the circumstance that the father's point of view was not expressly taken into consideration by the law were relevant only in situations where the law did not prohibit abortion. In those situations, to require the father's consent would be tantamount to granting him a right of veto, and by exercising that right he could require a woman to continue a pregnancy. The legislature's refusal to grant the man such a power, backed up by criminal sanctions, over the woman was justified by the objective difference between the man and the woman consisting in the fact that the woman's actual person was involved in the pregnancy and in the confinement. The Court then observed that during the procedure leading to the adoption of the law the legislature had expressed the view that no decision on an abortion could be taken without the man whose paternity was uncontested being consulted, but that the legislature had not considered that failure to consult him should give rise to legal sanctions, because it had taken certain sociological realities into account.

In support of their action, the applicants relied on Articles 6, 8 and 12 ECHR and Articles 14, 17 and 23 of the International Covenant on Civil and Political Rights, taken in conjunction with Articles 10 and 11 of the Constitution. The Court considered that the right of the husband or the father to equal treatment with respect to his private and family life and the right to marry and to found a family could not be interpreted as being sufficiently broad as to include procedural rights, namely the right for a man to be consulted and

also his right to bring proceedings before a court where his spouse showed that it was her intention to terminate her pregnancy.

Further pleas alleging discrimination between the parents of an underage mother and the mother in question, between doctors and between women who decide to terminate their pregnancy and those who decide not to do so, were also rejected by the Court.

Supplementary information:

With regard to control of rights and freedoms in international conventions see also no.18/90 of 23.05.1990, *Special Bulletin – Leading Cases 2* [BEL-1990-S-001], no.103/2003 of 22.07.2003, *Bulletin 2003/2* [BEL-2003-2-003] and no.136/2004 of 22.07.2004, *Bulletin 2004/2* [BEL-2004-2-007].

Languages:

French, Dutch, German.



Identification: BEL-1991-S-005

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 19.12.1991 / **e)** 41/91 / **f)** / **g)** *Moniteur belge* (Official Gazette), 25.01.1992 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

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

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

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

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

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

Keywords of the alphabetical index:

Legal aid, equality / Adultery, report establishing, legal aid / Equality, distinction, financial resources.

Headnotes:

Although the public service provided by the courts must be accessible equally to everyone, the Judicial Code establishes differentiated treatment, based solely on income.

While it is reasonable and permissible that the grant of legal aid should be conditional on the verification of income and a brief verification of whether the applicant has made out a *prima facie* case for the procedure for which he seeks legal aid, on the other hand the requirement for an *inter partes* hearing and an attempt at conciliation, and therefore the presence of the opposing party in the procedure for obtaining legal aid, do not present a reasonable relationship of proportionality with the aim pursued.

That disproportion is even more fundamental where, as in this case, legal aid is sought with a view to initiating proceedings by means of an *ex parte* application.

Summary:

An individual requested the legal aid office at Mons district court to grant him legal aid (that is to say, exemption from procedural fees and the free assistance of public officers, in this case the intervention of a bailiff for the purpose of obtaining a report establishing adultery) in divorce proceedings. The legal aid office considered that the request was well founded but observed that, with regard to the report establishing adultery, Article 675 of the Judicial Code required that the opposing party be invited to appear, and provided for a conciliation procedure. The district court therefore asked the Court of Arbitration whether that provision was compatible with the constitutional rules of equality and non-discrimination (Articles 10 and 11 of the Constitution, before 1994 Article 6 and 6bis).

The Court observed at the outset that there was a difference in treatment between individuals wishing to bring divorce proceedings, since a person with sufficient resources could immediately initiate the action without the opposing party receiving prior

notice, while a person who needed to seek legal aid, because he or she lacked sufficient resources, must follow a procedure in which the opposing party was called upon to appear.

The Court drew attention to the content of the constitutional rules of equality and non-discrimination. It then stated that although the public service provided by the courts must be accessible equally to all individuals, the provision in question provided for differentiated treatment, based solely on income.

Although it was reasonable and permissible that the grant of legal aid should be conditional on the verification of income and a brief verification of whether the applicant had made out a *prima facie* case for the proceedings for which he sought legal aid, the requirement for an *inter partes* hearing and an attempt at conciliation, and therefore the presence of the opposing party in the procedure for obtaining legal aid, did not present a reasonable relationship of proportionality with the aim pursued.

That disproportion was all the more fundamental where, as in this case, legal aid was sought with a view to initiating proceedings by means of an *ex parte* application.

The Court concluded that the provision violated the constitutional rules in so far as they applied to an application by an individual for legal aid for the purpose of obtaining a report establishing adultery.

Supplementary information:

Adultery is no longer punishable in Belgium but it may form the basis of a divorce on the ground of misconduct. One of the spouses may request the President of the district court to appoint a bailiff (in principle at the applicant's expense) and allow him or her, accompanied by an official or by a police constable, to enter one or more specified places for the purpose of drawing up the requisite report establishing adultery (Article 1016bis of the Judicial Code).

Languages:

French, Dutch, German.



France

Constitutional Council

Important decisions

Identification: FRA-1958-S-001

a) France / **b)** Constitutional Council / **c)** / **d)** 12.12.1958 / **e)** 58-34 / **f)** A.N., Gard (1st constituency.) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 16.12.1958, 11329 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.4.5 Constitutional Justice – Jurisdiction – Types of litigation – **Electoral disputes.**

4.9.13 Institutions – Elections and instruments of direct democracy – **Post-electoral procedures.**

Keywords of the alphabetical index:

Election, costs, reimbursement / Election, result, appeal, scope.

Headnotes:

In disputes relating to legislative elections, the constitutional judge cannot “validly deal with objections other than those directed against the election of a Member of Parliament”. In other words, it has jurisdiction only to adjudicate on the lawfulness of the election and not on the details of the results.

Summary:

Mr Rebeuf was a candidate in the general elections held on 23 November 1958 in the first constituency of Le Gard. He had obtained one vote fewer than the number corresponding to 5% of the votes cast which would have entitled him to recover his deposit and his propaganda costs (cost of paper, printing of ballot papers, posters and circulars, billposting costs). The applicant maintained that a number of ballot papers bearing his name had been unlawfully declared void and brought an action before the constitutional judge for a declaration that at least one of those ballot papers was valid. He did not challenge the result of

the election, i.e. the declaration of the successful candidate, but he challenged the results, in particular those relating to the number of votes attributed to him. The Provisional Constitutional Commission set up pending the appointment of the authorities responsible for nominating the members of the Constitutional Council declared that it had no jurisdiction to entertain the application; it relied on Articles 32, 33, 35 and 39 of the order of 7 November 1958 incorporating the Organic Law on the Constitutional Council, which appeared to assimilate the election to the declaration of the successful candidate.

This restrictive interpretation of the legislation subsequently led the Commission to refuse to consider numerous complaints ancillary to the election in the strict sense. The Constitutional Council then adopted the same interpretation. The Council of State, on an application by Mr Rebeuf, held in 1963 that the action was outside its jurisdiction.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 70-570 of 13.11.1970, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 54;
- Decision no. 73-605 of 01.06.1973, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 80;
- Decision no. 88-1035 of 16 and 20.04.1982, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 109;
- Decision nos. 88-1027, 88-1028 and 88-1029 of 04.06.1988, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 77;
- Decision no. 88-1035 of 13.07.1988, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 92.

Languages:

French.



Identification: FRA-1959-S-001

a) France / **b)** Constitutional Council / **c)** / **d)** 05.01.1959 / **e)** 58-68/126 / **f)** A.N., Drôme (3rd constituency) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 09.01.1959, 675 / **h)**.

Keywords of the systematic thesaurus:

4.9.8 Institutions – Elections and instruments of direct democracy – **Electoral campaign and campaign material.**

Keywords of the alphabetical index:

Election, application for annulment, admissibility / Election, irregularity, threshold taken into account.

Headnotes:

An application which does not specify the status of the applicant and merely requests that an investigation be ordered into the election, without expressly claiming that the election of the successful candidate should be annulled, is inadmissible.

When the improper use of propaganda has had sufficient influence to distort the result of the ballot, the constitutional judge will annul the election.

Summary:

Before the second round of the election, the substitute of the successful candidate had sent the members of a group of craftsmen and tradesmen a duplicated letter inviting them to vote and encourage others to vote for Mr Durand. This procedure constituted a breach of the provisions of the Election Code which restricted propaganda. The legislation defines the authorised forms of propaganda with a view to ensuring equality for candidates and to limiting the power of money. In this case, the improper use of propaganda essentially benefited the successful candidate, since his opponent was unable to reply. Having regard to the degree of this irregular propaganda, to the political tendencies of the two candidates and to the narrow margin of votes separating them, the judge declared the election void.

This decision contains most of the principles which the Council applies when reviewing the course of the election campaign; in particular, it shows the approach taken by the judge. The judge will annul the election only in so far as the irregularities were decisive, when they influenced the voters sufficiently to change the outcome of the election.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 97-2169 of 23.10.1997, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 199.

Languages:

French.



Identification: FRA-1959-S-002

a) France / **b)** Constitutional Council / **c)** / **d)** 17.06.1959 / **e)** 59-2 DC / **f)** Rules of Procedure of the National Assembly / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 06.07.1959, 6642 / **h)**.

Keywords of the systematic thesaurus:

- 1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**
- 1.3.5.9 Constitutional Justice – Jurisdiction – The subject of review – **Parliamentary rules.**
- 2.1.1.1.2 Sources – Categories – Written rules – National rules – **Quasi-constitutional enactments.**
- 2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**

Keywords of the alphabetical index:

Constitution, sources / Parliamentary, system, rationalisation.

Headnotes:

The Constitutional Council reviews the compatibility with the Constitution of the provisions of the Rules of Procedure when they implement rules of constitutional value.

On the other hand, it only ascertains that the relevant provisions are not contrary to the Constitution in the opposite case, i.e. when the provisions of the Rules of Procedure do not implement rules of constitutional value (the number of members necessary to form a group, the procedure for the resignation of a deputy, the powers of the Presidents' Conference, etc.).

Extension of the *bloc de constitutionnalité* to organic laws or orders.

The technique of compatibility with the Constitution subject to a reservation makes it possible to "make direct application of a declaration of incompatibility when a related provision is regarded as not being contrary to the Constitution only" subject to the reservation of the impact "of that declaration of non-conformity".

Summary:

This is the first time that the Constitutional Council was called upon to pronounce on the Rules of Procedure of the National Assembly. Although this decision was not well received in parliamentary and political circles because it appeared to demonstrate that the Constitutional Council was prepared to reinforce the supremacy of the Government over Parliament, the principles laid down here were found in the majority of subsequent decisions.

Thus, in the present decision, the Constitutional Council condemns the provisions of the Rules of Procedure of the Assembly which seek to limit the time during which the Government can speak, whereas Article 31.2 of the Constitution states that the members of the Government are to be "heard when they so request", or those which provide that the Assembly is to sit in secret committee at the request of the Prime Minister, whereas Article 33.2 gives it the "option" of acceding to such a request or not. Likewise, the Constitutional Council rejected all the provisions which failed to take account of the requirements of the Constitution, for example those which allowed oral questions with discussion to be

closed by a vote which could easily have been transformed into a kind of interpellation not provided for by the Constitution.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Languages:

French.

*Identification: FRA-1959-S-003*

a) France / **b)** Constitutional Council / **c)** / **d)** 09.07.1959 / **e)** 59-213 / **f)** Senate, Dordogne / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 26.07.1959, 7437 / **h)**.

Keywords of the systematic thesaurus:

1.3.1.1 Constitutional Justice – Jurisdiction – Scope of review – **Extension**.

1.3.4.5 Constitutional Justice – Jurisdiction – Types of litigation – **Electoral disputes**.

4.9.8 Institutions – Elections and instruments of direct democracy – **Electoral campaign and campaign material**.

Keywords of the alphabetical index:

Election, vote, sincerity / Election, propaganda, discriminatory / Election, propaganda, corporative.

Headnotes:

The means employed for the purposes of election propaganda must not amount to pressure or manoeuvres capable of adversely affecting the freedom or the sincerity of the vote.

The Constitutional Council considers that it must confine itself to examining only the election of a member of parliament who has been criticised. It cannot declare invalid a Member of Parliament when it has not been requested to annul the election, even if the election is irregular. The Constitutional Council cannot go beyond the limits of the application.

Summary:

In the elections held in the spring of 1959, two agricultural bodies in the district of Dordogne, one of them a public establishment, had sent a circular to those entitled to vote in the senatorial elections in which they invited them to vote only for candidates who stated that they were in agricultural occupations. Numerous anonymous leaflets with the same objective had also been distributed. The Constitutional Council found that the means in question had in fact been employed, established the extent to which they had been used and held that they were irregular; it then annulled the election, emphasising the clearly discriminatory and corporative nature of the propaganda.

Supplementary information:

This decision has been criticised, since the Constitutional Council annulled not the electoral operation in the district of the Dordogne but only “the declaration that Mr Sinsout had been returned as Senator for the Dordogne”: the successful candidates had benefited in the same way from the unlawful propaganda used by the agricultural organisations but their election had not been challenged.

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Languages:

French.



Identification: FRA-1959-S-004

a) France / **b)** Constitutional Council / **c)** / **d)** 27.11.1959 / **e)** 59-1 L / **f)** Article 2.3 of Order no. 59-151 of 7 January 1959 on the organisation of passenger transport in the Paris region / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 14.01.1960, 442 / **h)**.

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
4.5.2 Institutions – Legislative bodies – **Powers**.
4.6.2 Institutions – Executive bodies – **Powers**.
4.10.8 Institutions – Public finances – **State assets**.

Keywords of the alphabetical index:

Company, public, creation of a category / Legislation, regulations, scope.

Headnotes:

There are categories of public corporations which consist of only one establishment.

The rules on creating a category of public establishment include those providing, if not for the composition of the management board, at least for the principle of participation by the representatives of a particular sector.

Save in exceptional circumstances, the number of members of the management board does not fall to be determined by the rules which must appear in the legislative definition of a new category.

Where rules can only be determined by legislation, the authority empowered to adopt regulations remains competent to implement those rules in detail; thus, in addition to the power to adopt the “autonomous” regulations provided for in Article 37.1, it always maintains the power to apply legislation.

Summary:

Dealing for the first time with the definition of the competence of the legislature to determine “the rules concerning the creation of public establishments”, the Constitutional Council sets the pattern for its decisions on the distribution of power to enact legislation and to adopt regulations.

The Government sought authorisation to amend by order a provision of the ordinance of 7 January 1959 on the organisation of passenger transport in the Paris region: this order had maintained, as the management body, the RATP, a public establishment administered by “a board composed of a president and 15 members, including three representatives of the local authorities”. The Government wished to alter the number of local authority representatives on the management board.

The Constitutional Council notes that, according to Article 34, the Constitution provides that only legislation can “determine the rules concerning the creation of categories of public establishments” and states that “the RATP constitutes a particular category of public establishment with no equivalent at national level” and logically infers that the rules creating it must be determined by legislation. Those rules, according to the Constitutional Council, include “those providing for the presence of representatives of the local authorities on the management board”. It considers, on the other hand, that the provision specifying the total number of members of the management board and the number of local authority representatives does not need to be determined by legislation, because it is not, “in the circumstances of the case, a decisive element” of the category.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Languages:

French.



Identification: FRA-1959-S-005

a) France / **b)** Constitutional Council / **c)** / **d)** 27.11.1959 / **e)** 59-1 FNR / **f)** Private members' bill submitted by Mr Bajoux and Mr Boulanger, Senators, aimed at stabilising agricultural leases / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 14.01.1960, 441 / **h)**.

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
4.5.2 Institutions – Legislative bodies – **Powers**.
4.6.2 Institutions – Executive bodies – **Powers**.
4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers**.

Keywords of the alphabetical index:

“State of previous legislation”, criterion / Legislation, regulations, scope / Lease, agricultural, amount, determination.

Headnotes:

Any new provision which merely amends previous statutory prescriptions is in the nature of a regulation. Conversely, any provision aimed at amending fundamental principles falls within the competence of the legislature.

Summary:

At the beginning of 1959, the Government decided to amend by order the procedure for establishing the rents payable in respect of agricultural tenancies, on the basis of Article 37 of the Constitution. Two Senators submitted a private members' bill seeking to “stabilise agricultural leases” and seeking revocation of the order of 7 January 1959. However, the Prime Minister claimed that the bill was inadmissible under Article 41 of the Constitution. The President of the Senate took the view that the question was within the competence of Parliament, since there had been an interference with the fundamental principles of the rules on ownership and on civil obligations; he refused to grant the Prime Minister's request and referred the matter to the Constitutional Council.

This decision, relating to the scope of legislation and regulation, was the first occasion on which Article 41 of the Constitution had been applied.

The Constitutional Council confirmed that certain provisions in the Bill seeking the revocation of the order which had just amended the rents payable in

respect of agricultural tenancies was in the nature of a regulation and concluded that the Prime Minister was correct to claim that the Bill was inadmissible.

Supplementary information:

The Constitutional Council has only been seised 11 times on the basis of Article 41 of the Constitution. The procedure has fallen into disuse since 1979, for two reasons: first, because the Prime Minister is no longer required to claim that a Bill or an amendment is inadmissible and, second, because the Presidents of the Parliamentary Assemblies have on most occasions supported the objection raised by the Government and have not therefore sought the arbitration of the Constitutional Council.

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Languages:

French.



Identification: FRA-1960-S-001

a) France / **b)** Constitutional Council / **c)** / **d)** 11.08.1960 / **e)** 60-8 DC / **f)** Amended finance act for 1960 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 13.08.1960, 7599 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

2.1.1.1.2 Sources – Categories – Written rules – National rules – **Quasi-constitutional enactments.**

4.5.2 Institutions – Legislative bodies – **Powers.**

4.6.2 Institutions – Executive bodies – **Powers.**

4.10.7 Institutions – Public finances – **Taxation.**

Keywords of the alphabetical index:

Constitution, sources / Media, radio, licence, fee, determination / Tax, special.

Headnotes:

The radio licence fee is a special tax, since it is neither a tax nor remuneration for services provided.

Pursuant to the order of 2 January 1959 incorporating an organic law on the finance acts and to Article 34 of the Constitution, which provides that “Finance acts shall determine the financial resources and obligations of the State, subject to the conditions and reservations laid down in an organic act”, Parliament is not competent to amend a special tax.

The decision accepts that the review carried out following an action for a declaration that ordinary legislation is unconstitutional differs from the review of organic laws and regulations of the parliamentary assemblies, in that it may be exercised in respect of only one or some provisions of the impugned measure.

Summary:

In the course of the examination of the Finance Act for 1960, a legal controversy arose between Parliament and the Government concerning the determination of powers to enact a measure increasing the rate of the radio licence fee. A compromise was eventually reached, by the terms of which the tax at issue could be amended by regulation, provided that Parliament authorised the collection of the new rate. The Government supported this compromise solution, which the National Assembly adopted after a fourth reading, in spite of the opposition of the Senate. However, the Prime Minister changed his mind shortly afterwards and decided to refer the provisions in question (Articles 17 and 18 of the impugned bill) on the ground that they did not comply with the rules laid down in Articles 34 and 37 of the Constitution.

The Constitutional Council declared invalid two articles of the Amended Finance Act for 1960 after defining the legal nature of the radio licence fee and the scheme of powers to determine the taxable base, the rate applicable and the procedures for collecting taxation of that type.

This decision also brings the Organic Ordinance of 2 January 1959 within the *bloc de constitutionnalité*.

Supplementary information:

In this decision, the Constitutional Council accepts by implication that the Prime Minister can use the procedure laid down in Article 61.2 of the Constitution to ensure that the provisions on competence are observed. However, in 1982 (cf. 82-143 DC, 30 July 1982, (Official Digest) p. 57), the Constitutional Council reversed this decision and refused to declare an encroachment by the legislation on the domain of regulations unconstitutional.

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Languages:

French.

*Identification:* FRA-1960-S-002

a) France / **b)** Constitutional Council / **c)** / **d)** 23.12.1960 / **e)** / **f)** Decision relating to a request by the President of the “*Regroupement National*” / **g)** Decision non published in *Journal officiel de la République française – Lois et Décrets* (Official Gazette), but published in *Recueil de décisions du Conseil constitutionnel* (Official Digest), 1960, 67 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.3 Constitutional Justice – Jurisdiction – **Advisory powers.**

1.3.4.5 Constitutional Justice – Jurisdiction – Types of litigation – **Electoral disputes.**

Keywords of the alphabetical index:

Referendum, preparatory act, power to review.

Headnotes:

The powers of the Constitutional Council, as defined in the ordinance of 7 November 1958 incorporating the Organic Law on the Constitutional Council, are purely advisory as regards the operations preceding a referendum.

Although the Constitutional Council examines and definitively resolves all complaints, the latter term must be understood in the sense conferred on it by the legislation applicable to election matters and not as referring exclusively to post-election protests against the operations carried out.

Summary:

On 20 December 1960, Mr Jacques Soustelle applied to the Constitutional Council to have his party, the “*Regroupement National*” entered on the list of organisations entitled to use official propaganda methods, which the Government had refused to do. The Constitutional Council declared that such an action was inadmissible. It developed two arguments: the attributions which it derives from Article 47 of the Organic Law on the list of organisations entitled to use official propaganda methods are purely advisory, it is only authorised to present observations on the list drawn up by the Government. The Constitutional Council considers that, despite the very general terms of Article 60 of the Constitution, which entrusts it with ensuring the regularity of referendums, under Article 50 of the Organic Law it has judicial powers in that sphere only in respect of the results of the ballot.

Other actions, in particular those directed against government decisions, must be brought before the administrative courts. There can be no derogation from that principle except pursuant to an express measure conferring on the Constitutional Council jurisdiction for acts carried out preparatory to the referendum.

Supplementary information:

The principle that the Constitutional Council has no jurisdiction in actions directed against acts carried out preparatory to a referendum was confirmed on a number of occasions, but on the occasion of the referendum of September 2000 on the reduction of the duration of the presidential mandate to five years, the case-law was overturned when the Constitutional Council held that, in certain conditions, disputes concerning preparatory acts may be heard by the judge with jurisdiction in election matters (Decision of 25 July 2000 on an application by Mr Hauchemaille (*Bulletin* 2000/2 [FRA-2000-2-010])).

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision of 03.04.1962, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 63;
- Decision of 25.10.1988, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 191;
- Decisions of 15.09.1992, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 85 and p. 87.

Languages:

French.



Identification: FRA-1961-S-001

a) France / **b)** Constitutional Council / **c)** / **d)** 20.01.1961 / **e)** 60-11 DC / **f)** Law on sickness, invalidity and maternity insurance for farmers and members of their families not in paid employment / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 24.01.1961, 982 / **h)**.

Keywords of the systematic thesaurus:

1.3 Constitutional Justice – **Jurisdiction**.
4.10.1 Institutions – Public finances – **Principles**.

Keywords of the alphabetical index:

Public expenditure, concept / Social security, special scheme / Bill, financial impact.

Headnotes:

The Constitutional Council is competent to review compliance with Article 40 of the Constitution, which provides that “Private members’ bills and amendments shall be inadmissible if their adoption

would have the effect of reducing public revenue or of creating or increasing an item of public expenditure”.

The expression “public expenditure” must be understood very broadly: it encompasses not only all State expenditure in the finance acts, but also expenditure by other public bodies (communities and public establishments) and even “... expenditure by the various assistance and social security schemes”.

Summary:

The Constitutional Council had been requested by the Prime Minister to examine the bill on sickness, invalidity and maternity insurance for farmers and members of their families not in paid employment, to which Parliament had made various amendments the financial impact of which had been debated.

The Constitutional Council declared that Article 1 of the bill, resulting from a parliamentary amendment, was incompatible with the Constitution. It found that certain provisions of the measure in question, which had the effect of creating a new category of beneficiaries of a special social security scheme, “clearly entailed an increase in the expenditure to be borne by that scheme”.

In order to infer from that finding that the provision in question was unconstitutional, the Constitutional Council first had to assert that the expression “public expenditure” in Article 40 of the Constitution refers not only to State expenditure but also to all expenditure formerly referred to in the order of 19 June 1956 on the procedure for presenting the State budget and, in particular, the expenditure of the various assistance and social security schemes.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Languages:

French.



Identification: FRA-1961-S-002

a) France / **b)** Constitutional Council / **c)** / **d)** 23.04.1961 / **e)** / **f)** Opinion requested by the President of the Republic prior to the implementation of Article 16 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 24.04.1961, 3876 / **h)**.

Keywords of the systematic thesaurus:

1.3.3 Constitutional Justice – Jurisdiction – **Advisory powers.**

1.6.1 Constitutional Justice – Effects – **Scope.**

1.6.7 Constitutional Justice – Effects – **Influence on State organs.**

4.18 Institutions – **State of emergency and emergency powers.**

Keywords of the alphabetical index:

State of emergency, review / State of emergency, condition.

Headnotes:

(Extracts from the Opinion of the Constitutional Council of 23 April 1961)

“The Constitutional Council (...)

- whereas in Algeria, certain unsupervised junior officers and, subsequently, certain military units have openly rebelled against the constitutional public powers, whose authority they have usurped; in defiance of national sovereignty and republican legality, they have enacted measures for which the Parliament and the Government have sole competence; they have prevented the highest civil and military authorities in Algeria, to whom the Government of the Republic has delegated the power to protect the national interests, and also a member of the Government itself, from carrying out their duties and deprived them of their freedom; whereas it is their avowed aim to seize power throughout the country;
- whereas owing to these acts of subversion, the institutions of the Republic are under grave and immediate threat and the constitutional public authorities are unable to function properly, is of the opinion that the conditions required by the Constitution for the application of Article 16 are satisfied. (...)”

Summary:

The matter was brought before the Constitutional Council on 22 April 1961 by a letter from the President of the Republic concerning the possible implementation of Article 16 of the Constitution.

The Constitutional Council's decision is based on a list of all the circumstances and states that the two conditions required by Article 16 of the Constitution (grave and immediate threat – interruption of the proper functioning of the public authorities) are satisfied.

The scope of the opinion is principally moral: the President of the Republic is required to consult the Constitutional Council, but is not bound by the Council's opinion. Nonetheless, unlike the opinions which the Council gives on each of the decisions taken by President of the Republic in connection with the application of Article 16 of the Constitution, this initial opinion, duly reasoned and published, cannot fail to be influential.

Supplementary information:

Article 16 of the Constitution has only been used once; General de Gaulle implemented it between 23 April and 30 September 1961.

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Languages:

French.

*Identification: FRA-1961-S-003*

a) France / **b)** Constitutional Council / **c)** / **d)** 18.07.1961 / **e)** 61-14 L / **f)** Article 5 of Order no. 58-1273 of 22 December 1958 on the judicial organisation / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 13.10.1961, 9358 / **h)**.

Keywords of the systematic thesaurus:

4.5.2 Institutions – Legislative bodies – **Powers.**

4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

4.7.8.2 Institutions – Judicial bodies – Ordinary courts – **Criminal courts.**

Keywords of the alphabetical index:

Legislation, regulation, scope / Court, class, creation.

Headnotes:

As district courts with exclusively criminal jurisdiction constitute a class of courts, the provision establishing them is legislative in nature; however, the authority empowered to make regulations is competent to determine the number, seat and jurisdiction of such courts.

Summary:

The order of 22 December 1958 on the judicial organisation set up the district courts (*tribunaux d'instance*), which, as successors to the judges of the peace (*juges de paix*), have, like them, the twofold capacity of civil judge and criminal judge. However, in Paris, Lyon and Marseille – according to Article 5 of the order – district courts with exclusively criminal jurisdiction were set up, while the other district courts in those towns had jurisdiction in civil matters. The Prime Minister requested the Constitutional Council to declare that Article 5 was in the nature of a regulation, but the Constitutional Council recognised that these three courts constituted a new class of court and are therefore a matter for the legislature, although their number, rank and jurisdiction are matters that fall within the domain of regulations.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 64-31 L of 21.12.1964, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 43;

- Decision no. 65-33 L of 09.02.1965, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 73;
- Decision no. 77-99 L of 20.07.1977, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 63.

Languages:

French.

*Identification: FRA-1961-S-004*

a) France / **b)** Constitutional Council / **c)** / **d)** 18.07.1961 / **e)** 61-15 L / **f)** Articles 2 and 4 of ordinance no. 59-42 of 5 January 1959 establishing the Overseas Institute of Higher Education / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 13.10.1961, 9359 / **h)**.

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality.**

4.5.2 Institutions – Legislative bodies – **Powers.**

4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

4.10.8 Institutions – Public finances – **State assets.**

Keywords of the alphabetical index:

Public establishment, creation of a category / Legislation, regulation, scope.

Headnotes:

The concept of “category of public establishments” is defined on the basis of three criteria: the nature of the activity concerned, the arrangements for supervision and the speciality of the establishment.

The power to make regulations is exercised only “within the framework of the rules fixed by the legislature for the creation of a category”; these common rules concern “organisation and functioning”.

Summary:

In reserving to the legislature the power to create categories of public establishments, the framers of the Constitution clearly demonstrated the intention to put an end to the previous system, under which the legislature was competent to create any national public establishment. The Council's approach is to ascertain whether the public establishment to be created is connected by the three abovementioned criteria to a pre-existing category: if there is no identity on even one of those points, a new category is created.

Supplementary information:

A number of subsequent decisions of the Constitutional Council have significantly amended that presentation (Decision no. 79-105 DC of 25 July 1979, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 33, and Decision no. 79-107 L of 30 May 1979, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 44).

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 64-27 L of 17 and 19.03.1964, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 33;
- Decision no. 59-1 L of 27.11.1959, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 67;
- Decision no. 68-50 L of 30.01.1968, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 23;
- Decision no. 79-107 L of 30.05.1979, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 44;
- Decision no. 79-108 L of 25.07.1979, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 45;
- Decision no. 79-109 L of 13.09.1979, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 47.

Languages:

French.

*Identification:* FRA-1961-S-005

a) France / **b)** Constitutional Council / **c)** / **d)** 14.09.1961 / **e)** / **f)** Decision on a request for an opinion submitted by the President of the National Assembly (admissibility of a motion of censure) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 19.09.1961, 8631 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**
4.5.7.3 Institutions – Legislative bodies – Relations with the executive bodies – **Motion of censure.**

Keywords of the alphabetical index:

Constitutional Court, special jurisdiction.

Headnotes:

The Constitution has strictly defined the jurisdiction of the Constitutional Council; it can be called upon to adjudicate or to deliver an opinion only in the circumstances and according to the procedures defined in the Constitution.

Summary:

The Constitutional Council was consulted by the President of the National Assembly on whether a motion of censure was admissible during the period when Article 16 of the Constitution was being applied. A motion of censure had been filed by the Left during the sitting of 12 September 1961 and the admissibility of that motion had been challenged on the ground that, as the Government could not dissolve the Assembly while Article 16 was in operation, then, equally, the Government could not be censured by the Assembly; the Presidents' Conference was unable to agree on the question of admissibility of the motion of censure and the President of the Assembly decided on 14 September to request the opinion of the Constitutional Council. The Constitutional Council replied that it "did not have jurisdiction to reply to the abovementioned request of the President of the National Assembly".

In the present decision, the Constitutional Council confirms that it has no general jurisdiction in constitutional matters.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

On the recognition of a simple special jurisdiction, see [FRA-1960-S-002] and the decision relating to a request of the President of the “*Centre Républicain*” (Official Digest), p. 68, concerning entry on the list of organisations entitled to use propaganda prior to a referendum.

Languages:

French.



Identification: FRA-1962-S-001

a) France / **b)** Constitutional Council / **c)** / **d)** 16.01.1962 / **e)** 62-18 L / **f)** Article 31.2 of law no. 60-808 of 5 August 1960 on agricultural matters / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 25.02.1962, 1915 / **h)**.

Keywords of the systematic thesaurus:

1.6.1 Constitutional Justice – Effects – **Scope**.
 1.6.3 Constitutional Justice – Effects – **Effect erga omnes**.
 1.6.7 Constitutional Justice – Effects – **Influence on State organs**.

Keywords of the alphabetical index:

Constitutional Court, decision, binding force / Constitutional Court, decision, grounds / Constitutional Court, *obiter dictum*, binding force.

Headnotes:

The binding authority of decisions of the Constitutional Council refers not only to the operative part, but also to the grounds which provide the necessary support to and constitute the very basis of the operative part.

Summary:

Where an article of a law had twice been declared to be in the nature of a regulation, the Constitutional Council states that that classification, although not included in the operative part of the decisions, also has binding authority and is binding on the public authorities.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission.

Cross-references:

- Decision no. 88-244 DC of 20.07.1988, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 119;
- Decision no. 89-258 DC of 08.07.1989, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 48.

Languages:

French.



Identification: FRA-1962-S-002

a) France / **b)** Constitutional Council / **c)** / **d)** 06.11.1962 / **e)** 62-20 DC / **f)** Law on the election of the President of the Republic by direct universal suffrage, adopted by the referendum of 28 October 1962 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 07.11.1962, 10778 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.4.5 Constitutional Justice – Jurisdiction – Types of litigation – **Electoral disputes.**

1.3.5 Constitutional Justice – Jurisdiction – **The subject of review.**

Keywords of the alphabetical index:

Referendum, law, constitutionality / Constitutional Court, special jurisdiction.

Headnotes:

The jurisdiction of the Constitutional Council “is strictly defined by the Constitution and by the provisions of the organic Law of 7 November 1958”; “it cannot therefore be called upon to determine cases other than those exhaustively set out in those texts”. The Constitutional Council therefore declares that it has no jurisdiction to examine the compatibility with the Constitution of a law adopted by referendum.

Summary:

Following the attempt on his life at Petit-Clamart, General de Gaulle decided that the arrangements for appointing the President of the Republic should be changed. He chose to make use of the procedure provided for in Article 11 of the Constitution. Since it was necessary to amend certain articles of the Constitution, the opposition claimed that the procedure was unconstitutional and argued that the Constitution could be amended only pursuant to Article 89 of the Constitution. By order of 2 October 1962, the President of the Republic decided to submit a bill (on the election of the Head of State by universal suffrage) to a referendum, on 28 October 1962.

The reform was approved by 62% of the votes cast. The President of the Senate then referred the matter to the Constitutional Council, on the basis of Article 61.2 of the Constitution. Following the declaration by the Constitutional Council in the

present decision that it lacked jurisdiction, the constitutional law was promulgated and Articles 6 and 7 of the Constitution were amended.

Supplementary information:

Controversial at the time, the decision of the Constitutional Council has since been confirmed (Decision no. 92-313 of 23 September 1992, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 94.

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 92-313 of 23.09.1992, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 94.

Languages:

French.

*Identification:* FRA-1967-S-001

a) France / **b)** Constitutional Council / **c)** / **d)** 26.01.1967 / **e)** 67-31 DC / **f)** Organic Law amending and supplementing ordinance no. 58-1270 of 22 December 1958 incorporating the organic Law on the regulations applicable to the judiciary / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 19.02.1967, 1793 / **h)**.

Keywords of the systematic thesaurus:

4.7.4.1.2 Institutions – Judicial bodies – Organisation – Members – **Appointment.**

4.7.4.1.6 Institutions – Judicial bodies – Organisation – Members – **Status.**

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

Keywords of the alphabetical index:

Judge, auxiliary, appointment / Court of Cassation / Judge, post, assignment, temporary.

Headnotes:

Article 64 of the Constitution provides the basis for the rule that a judge cannot be assigned to another court without his or her consent. Consequently, a regulation adopted by the public administration cannot determine the conditions for the posting of those judges unless the organic Law has determined the guarantees capable of reconciling the consequences of the temporary nature of the post of auxiliary judge (*conseiller référendaire*) at the Court of Cassation with the principle of the irremovability of judges.

Summary:

In connection with a reform of the Court of Cassation, the Government secured the passage of provisions for the appointment to that court of “auxiliary judges”, who were to be appointed for only 10 years and were therefore to be given a new post on expiry of that period. The Government, supported by the legislature, had then decided that they should be compulsorily assigned to a judicial post, after 10 years, in derogation from the principle of irremovability expressly set out in Article 4 of the ordinance of 22 September 1958.

The contested law therefore provided that: “... by derogation from Article 4.2 of this law, auxiliary judges, on expiry of their term of office, may be compulsorily assigned to a post as judge, on the conditions to be determined by the regulation adopted by the public administration as provided for in Article 80-I below”.

The Constitutional Council annulled that provision as contrary to the principle of irremovability laid down in Article 64 of the Constitution.

It thus established a strict concept of the principle of irremovability, according to that concept, the principle not only prevents a judge from being removed from office, suspended or dismissed other than in accordance with the guarantees provided for in the regulations applicable to judges, but also precludes his being moved from one court to another without his consent and, in particular, his being compulsorily assigned to a judicial position.

Supplementary information:

This strict interpretation has been confirmed by a second decision (Decision no. 70-40 DC of 9 July 1970) concerning a law which provided that trainee judges (*auditeurs de justice*) could be called upon to make up the number at a regional court should one of the judges be prevented from sitting. The Constitutional Council declared that provision invalid on the ground that it was contrary to the principle of independence laid down in Article 64 of the Constitution, since the status of trainee judges did not guarantee their independence (Decision no. 70-40 DC of 9 July 1970, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 25).

On the other hand, the Constitutional Council did not regard the rules organising the mobility of judges by limiting the period during which they could exercise certain judicial functions as contrary to the principle of irremovability (Decision no. 2001-445 DC of 19 June 2001, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 63).

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 70-40 DC of 09.07.1970, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 25;
- Decision no. 92-305 DC of 21.02.1992, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 27;
- Decision no. 98-396 DC of 19.02.1998, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 153; *Bulletin* 1998/1 [FRA-1998-1-001];
- Decision no. 2001-445 DC of 19.06.2001, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 63; *Bulletin* 2001/2 [FRA-2001-2-005].

Languages:

French.



Identification: FRA-1968-S-001

a) France / **b)** Constitutional Council / **c)** / **d)** 24.01.1968 / **e)** 67-435 / **f)** A.N., Corsica (2nd constituency) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 28.01.1968, 1029 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

4.9.7.3 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Ballot papers.**

4.9.9.1 Institutions – Elections and instruments of direct democracy – Voting procedures – **Polling stations.**

4.9.9.3 Institutions – Elections and instruments of direct democracy – Voting procedures – **Voting.**

4.9.9.6 Institutions – Elections and instruments of direct democracy – Voting procedures – **Casting of votes.**

Keywords of the alphabetical index:

Election, invalidity / Election, postal vote.

Headnotes:

In principle, the Constitutional Council will only declare irregular ballot papers void. However, where the infringements hinder the verification, it will declare all the votes at the polling station concerned void.

Summary:

The Constitutional Council declared the election in the second constituency in Corsica void owing to numerous irregularities: at one polling station the record and attendance lists had disappeared; at another the ballot box had been removed and thrown into the sea and supporters of Bastia football team who were away in Nice had been allowed a postal vote.

Languages:

French.

*Identification: FRA-1969-S-001*

a) France / **b)** Constitutional Council / **c)** / **d)** 17.05.1969 / **e)** / **f)** Complaint submitted by Mr Ducatel against the establishment of the list of candidates for the Presidency of the Republic / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 18.05.1969, 4975 / **h)**.

Keywords of the systematic thesaurus:

1.3.4.5 Constitutional Justice – Jurisdiction – Types of litigation – **Electoral disputes.**

4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility.**

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

5.1.1.4.4 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Military personnel.**

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

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

Keywords of the alphabetical index:

Election, candidate, military obligation.

Headnotes:

In regard to the presidential election, the Constitutional Council exercises powers which are both advisory and judicial; it also adjudicates immediately on certain claims concerning acts preliminary to the election.

Any restriction on the exercise of a civic right must be interpreted restrictively.

Summary:

In this case, Mr Ducatel claimed that Mr Krivine should not be allowed to stand as a candidate in the presidential election. He maintained that, as Mr Krivine was doing his military service, he could not be included on an election list: that, consequently, he was ineligible; and that his candidature should not have been accepted. Under the ordinance of 24 October 1958 on parliamentary elections, candidates were required to have definitively satisfied the statutory requirements relating to active military service, and Article L.45 of the Electoral Code provided that: "No one shall be elected unless he shows that he has satisfied his obligations under the

law on recruitment to the army". However, the Constitutional Council gave a liberal interpretation to those provisions: since his situation was in order, Mr Krivine must be regarded as having satisfied the obligations of the law.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Languages:

French.



Identification: FRA-1969-S-002

a) France / **b)** Constitutional Council / **c)** / **d)** 26.06.1969 / **e)** 69-55 L / **f)** Legal nature of certain provisions of the Law of 2 May 1930 on the protection of natural monuments and sites / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 13.07.1969, 7161 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**
 2.1.2.2 Sources – Categories – Unwritten rules – **General principles of law.**
 2.2.2 Sources – Hierarchy – **Hierarchy as between national sources.**

Keywords of the alphabetical index:

Principle, legislative value / Legislation, scope, enlargement.

Headnotes:

Finding of the existence of a new general principle of law: "silence on the part of the administration is to be treated as a refusal", a principle not thus far recognised by the administrative courts.

Any amendment of or interference with a general principle of law requires legislation, including in matters, which in principle are reserved for the authority empowered to make regulations.

Summary:

On an application by the Prime Minister pursuant to Article 37.2 of the Constitution, the Constitutional Council asserts its power to discover general principles of law concurrently with the administrative courts and defines their place in the hierarchy of norms by conferring legislative value on them.

The Constitutional Council found the existence of a general principle of law not thus far recognised by the administrative courts. The Council of State reacted by impliedly rejecting this general principle of law in a decision of 27 February 1970, *Commune de Bozas*. However, the Constitutional Council, by Decision no. 94-352 DC of 18 January 1995, Law on direction and programming on security, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 170, confirmed the position it adopted in 1969, as regards both the substance and the legislative value of the general principle of law in question.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

Decision no. 94-352 DC of 18.01.1995, *Bulletin* 1995/1 [FRA-1995-1-004].

Languages:

French.



Identification: FRA-1971-S-001

a) France / **b)** Constitutional Council / **c)** / **d)** 16.07.1971 / **e)** 71-44 DC / **f)** Law supplementing the provisions of Articles 5 and 7 of the Law of 1 July 1901 on association agreements / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 18.07.1971, 7114 / **h)**.

Keywords of the systematic thesaurus:

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**

2.1.1.1.2 Sources – Categories – Written rules – National rules – **Quasi-constitutional enactments.**

5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association.**

Keywords of the alphabetical index:

Principle, constitutional value / Constitution, preamble, legal value / Constitution, sources / Association, registration.

Headnotes:

The principle of freedom of association, which forms the basis of the general provisions of the Law of 1 July 1901 on association agreements, must be included among the fundamental principles recognised by the laws of the Republic and solemnly reaffirmed in the Preamble to the Constitution. According to that principle, associations are formed freely and may be made public, subject only to the requirement that a preliminary declaration be lodged. Thus, with the exception of measures which could be taken vis-à-vis special categories of associations, even where an association appears to be void or to have an illegal object, the validity of its formation cannot be made subject to the prior intervention of the administrative authorities or even the judicial authorities.

Summary:

The Commissioner of Police for Paris, acting on the instructions of the Minister of the Interior, had refused to issue to the founders of the Association of “Friends of the Cause of the People” an acknowledgement of the declaration of their association which they had

made. The founders of the association brought the matter before the administrative court, which found in their favour. The law referred to the Constitutional Council by the President of the Senate, which was passed by the National Assembly alone, in order to overcome the annulment by the Paris Administrative Court of the refusal by the Commissioner of Police to issue an acknowledgement of the declaration of the association, restrictively amended freedom of association as established by the Law of 1 July 1901.

The Constitutional Council declared that Article 3 of the bill and the provisions of Article 1 of the law referring to that article were incompatible with the Constitution. Article 3 provided for a mechanism of prior control of associations, contrary to the purely penal mechanism of the 1901 law, which was elevated to the rank of a measure of constitutional value.

This decision had and continues to have considerable political and legal repercussions: the decision of 16 July 1971 definitively establishes the legal value of the Preamble; it extends the *bloc de constitutionnalité*; it applies “the fundamental principles recognised by the laws of the Republic”, forcefully confirms the independence of the Constitutional Council vis-à-vis the political power, makes freedom of association a constitutionally protected freedom and, in particular, transforms the nature of the Constitutional Council: previously the regulator of institutions, it is now also the guardian of freedoms.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Languages:

French.



Identification: FRA-1973-S-001

a) France / **b)** Constitutional Council / **c)** / **d)** 05.07.1973 / **e)** 73-686/687 / **f)** A.N., Landes (1st constituency) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 17.07.1973, 7739 / **h)**.

Keywords of the systematic thesaurus:

1.1.1.1.3 Constitutional Justice – Constitutional jurisdiction – Statute and organisation – Sources – **Other legislation.**

1.3.4.5 Constitutional Justice – Jurisdiction – Types of litigation – **Electoral disputes.**

1.4.3 Constitutional Justice – Procedure – **Time-limits for instituting proceedings.**

3.18 General Principles – **General interest.**

4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility.**

5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights.**

Keywords of the alphabetical index:

Election, candidate, substitute, eligibility.

Headnotes:

The extension of the jurisdiction of the Constitutional Council to the problem of the eligibility of members of Parliament and to control of the lawfulness of the election of the substitute derives not from the Constitution itself but from the provisions of the Election Code.

The eligibility of the substitute can be challenged only during the 10 days following the election; and the Constitutional Council will intervene only after the election.

However, the Constitutional Council states that as the question of the eligibility of the successful candidate, like that of his substitute, is a matter of public policy, this complaint may be raised at any stage of the procedure, even after expiry of the period prescribed for taking action.

Summary:

The substitute of the successful candidate was the director of a social security body subject to the supervision of the Court of Audit and therefore occupied a post expressly referred to by ordinance no. 58-998 of 24 October 1958 on the conditions of

eligibility for Parliament. He was therefore clearly ineligible.

However, a candidate who, while retaining the title of a post rendering him ineligible, has not carried out his duties during the relevant period before the election could "... be regarded as having ceased to occupy his post".

However, the Council found in this case that Mr M. had remained in the same department and that he had continued to receive his director's salary in full during the six months preceding the election. The Council therefore considered that he had occupied a post which rendered him ineligible.

The election of Mr M. was therefore annulled.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Languages:

French.

*Identification: FRA-1973-S-002*

a) France / **b)** Constitutional Council / **c)** / **d)** 27.12.1973 / **e)** 73-51 DC / **f)** Finance Act for 1974 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 28.12.1973, 14004 / **h)**.

Keywords of the systematic thesaurus:

1.3.4.1 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of fundamental rights and freedoms.**

2.1.1.1.2 Sources – Categories – Written rules – National rules – **Quasi-constitutional enactments.**

5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens.**

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

Keywords of the alphabetical index:

Inseparable provision, concept / Taxation system, automatic / Constitution, sources.

Headnotes:

A legislative provision which discriminates between citizens as regards the possibility of adducing evidence against a decision of automatic taxation of the administration concerning them infringes the principle of equality in the eyes of the law.

Summary:

Article 62 of the Finance Act for 1974 was intended to amend the automatic taxation system provided for in the former Article 180 of the General Tax code used by the administration to combat incomplete declarations of income tax. The administration was able to impose an automatic tax on a taxpayer whose “personal expenditure was either ostensibly or commonly known to be in excess of his declared income” and the taxpayer was not allowed to show that his expenditure was accounted for the realisation of capital or by gifts. The application of the principle had led to abuse. Consequently, while the Finance Act for 1974 was being examined, it appeared necessary to make the system more flexible, although the benefit of that improvement was confined to taxpayers whose taxable income did not exceed a certain figure. Taking the view that this restriction was contrary to the principle of equality for the purposes of taxation, the President of the Senate referred it to the Constitutional Council.

This was the first time that the Constitutional Council was called upon to adjudicate on a claim based on the principle of equality.

This decision also marks the first application of the Declaration of the Rights of Man and the Citizen as a reference text intended to determine the constitutionality of a law.

The Constitutional Council held that the final provision of Article 62 of the Finance Act for 1974 was incompatible with the Constitution and further stated that it could not be severed from the other provisions, so that the whole article must be declared unconstitutional.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

This decision confirms the well-known Decision no. 71-44 DC of 16.07.1971, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 7114; [FRA-1971-S-001] concerning the constitutional value of the Preamble to the Constitution of 1958 and of the texts referred to therein (in this case the Declaration of the Rights of Man and the Citizen of 1789).

Languages:

French.



Identification: FRA-1974-S-001

a) France / **b)** Constitutional Council / **c)** / **d)** 03.04.1974 / **e)** / **f)** Declaration concerning the powers of the Constitutional Council in the event of a vacancy in the Presidency or where the President of the Republic is under an impediment / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 04.04.1974, 3779 / **h)**.

Keywords of the systematic thesaurus:

1.3 Constitutional Justice – **Jurisdiction.**
4.4.2 Institutions – Head of State – **Appointment.**
4.4.3 Institutions – Head of State – **Term of office.**

Keywords of the alphabetical index:

President, death / President, vacancy.

Headnotes:

According to Article 7 of the Constitution, "In the event of the Presidency of the Republic falling vacant for any cause whatsoever, or of an impediment being formally recorded by the Constitutional Council upon referral to it by the Government ... the functions of the President of the Republic ... shall be temporarily exercised by the President of the Senate ...".

That provision does not confer any power on the Constitutional Council in the event of the Presidency becoming vacant; it provides for it to intervene only in the event of an impediment. However, in this decision the Council finds that the conditions provided for in Article 7 of the Constitution are satisfied.

Summary:

Following the death of President Pompidou, the Constitutional Council held that the taking up of his functions of the President of the Republic by the President of the Senate was lawful. The starting-point of the period within which the ballot to elect the new President must be held is officially fixed on that date.

The Constitutional Council had previously intervened pursuant to Article 7 of the Constitution on only two occasions. In each case the Presidency had fallen vacant.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Languages:

French.

*Identification:* FRA-1977-S-001

a) France / **b)** Constitutional Council / **c)** / **d)** 12.01.1977 / **e)** 76-75 DC / **f)** Law authorising the search of vehicles for the purpose of the investigation and prevention of crime / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 13.01.1977, 344 / **h)**.

Keywords of the systematic thesaurus:

4.11.2 Institutions – Armed forces, police forces and secret services – **Police forces.**

5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty.**

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

Keywords of the alphabetical index:

Freedom, liberty, broad interpretation / Principle, constitutionally protected.

Headnotes:

A law which conferred on senior police officers and their agents powers of search which were too general and not sufficiently circumscribed and did not specify the scope of controls infringed the essential principles underpinning the protection of individual freedom.

Summary:

The law referred to the Constitutional Council was intended to "empower senior police officers or, on their orders, police officers to search any vehicle or its contents provided only that the vehicle is on a public highway and that the search takes place in the presence of the owner and the driver".

The Constitutional Council did not censure the principle of vehicle searches, but the absence of precautions and guarantees provided by the legislature.

This decision makes individual freedom a constitutionally-protected fundamental right, confirms the constitutional value of judicial powers in relation to individual freedom and establishes a broad concept of individual freedom, which includes the protection of private life.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 88-244 DC of 20.07.1988, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 119;
- Decision no. 89-257 DC of 25.07.1989, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 59, where the principle of “personal” liberty forms the basis of the protection of private life.

Languages:

French.

*Identification: FRA-1978-S-001*

a) France / **b)** Constitutional Council / **c)** / **d)** 12.07.1978 / **e)** 78-874 / **f)** A.N., Paris (16th constituency) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 16.07.1978, 2843 / **h)**.

Keywords of the systematic thesaurus:

1.3.1.1 Constitutional Justice – Jurisdiction – Scope of review – **Extension.**

1.3.4.5 Constitutional Justice – Jurisdiction – Types of litigation – **Electoral disputes.**

4.9.7.1 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Electoral rolls.**

4.9.9.6 Institutions – Elections and instruments of direct democracy – Voting procedures – **Casting of votes.**

Keywords of the alphabetical index:

Election, vote, by proxy / Election, vote abroad, constituency, choice.

Headnotes:

The law does not prevent persons or groups from encouraging French citizens living abroad to enrol in the sixteenth constituency of Paris in order to increase the prospects of success of the candidate of such a political group. However, the choice of constituency must be based on the personal choice of each voter. It follows that this choice must be exercised by the voter himself. Applications for entry on a list drawn up before the consular authorities can validly be sent by diplomatic bag to the central services of the Ministry and forwarded by them to the mayors concerned.

The law does not require that the voter personally knows the proxy whom he appoints. Any authorisation on which the signature of the voter does not correspond to the signature on the application to be entered on the electoral register is declared void. Accordingly, 32 of the votes received by the candidate who came first in the first polling station in the constituency are declared void.

Summary:

Until 1975, the normal procedure whereby voters absent from their constituency on the date of the election were able to take part in the ballot was the postal vote. As this procedure gave rise to much fraud, it was abolished by the Law of 31 December 1975. Only the proxy vote remained.

The Law of 19 July 1977 was intended to encourage French citizens abroad to participate in the various ballots. It allowed voters residing abroad a free choice of constituency. In addition, the administrative formalities were simplified. Voters who were abroad did not need to be personally acquainted with the persons whom they appointed as their proxies.

The applicants considered that certain voters abroad had been entered on electoral lists or had given their proxy in unlawful conditions.

The Constitutional Council extended its powers in election matters since instead of confining itself to examining the results of the contested polling stations it checked all the votes.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Languages:

French.

*Identification:* FRA-1979-S-001

a) France / **b)** Constitutional Council / **c)** / **d)** 25.07.1979 / **e)** 79-105 DC / **f)** Law amending the provisions of Law no. 74-696 of 7 August 1974 on the continuity of the public radio and television service in the event of a concerted work stoppage / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 27.07.1979, 1953 / **h)**.

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 3.18 General Principles – **General interest.**
 4.5.2 Institutions – Legislative bodies – **Powers.**
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**
 5.4.10 Fundamental Rights – Economic, social and cultural rights – **Right to strike.**

Keywords of the alphabetical index:

Strike, restriction in public services / Principle, constitutional value / Strike, minimum service / Strike, advance notice / Media, television, national, strike.

Headnotes:

The right to strike is exercised within the framework of the laws which regulate it. In adopting that provision, the framers of the Constitution intended to show that the right to strike is a principle of constitutional value but that there are limits to it and they empowered the

legislature to define those limits by bringing about the necessary reconciliation between the protection of occupational interests, which the strike is a means of achieving, and the protection of the general interest which may be harmed by the strike. Particularly in the case of public services, recognition of the right to strike cannot have the effect of preventing the legislature from placing the necessary limits on that right in order to ensure the continuity of the public service which, like the right to strike, is by its nature a principle of constitutional value. These limits may go so far as to prohibit the right to strike in the case of personnel whose presence is essential to the functioning of the parts of the service whose interruption would harm the essential needs of the country.

The provisions set out of Article 26.1 of the law merely regulate the conditions in which advance notice of the strike must be given; that article is not contrary to any provision of the Constitution or to any principle of constitutional value.

However, in providing that “where the numbers of the staff of the national television programme companies are insufficient to provide normal service, the president of each company may, where the situation so requires, require the attendance of the categories of staff or servants who must remain on duty to ensure the continuity of the parts of the service necessary to the performance of its tasks”, the legislature provides that where a concerted stoppage of work prevents normal service the presidents of the companies may, in order to ensure that range of tasks for which the legislature makes those companies responsible, prevent the exercise of the right to strike in cases where such prohibition does not appear to be justified according to the principles of constitutional value.

It is for the legislature to define the limits of the right to strike “by bringing about the necessary reconciliation between the protection of occupational interests, which the strike is a means of achieving, and the protection of the general interest which may be harmed by the strike”.

Summary:

The Government bill of 1979 was designed to specify the obligations relating to the lodging of the advance notice of a strike in order to avoid “devious notices”, to define, or have defined by an order adopted in the Council of State, the “services or categories of staff strictly indispensable to the performance of the task” who could be required to work. Last, in the event of a strike, if the staff numbers are insufficient “to provide normal service”, the measure empowers the presidents

of the companies concerned to “require the attendance of the categories of staff or servants who must remain on duty to ensure the continuity of the parts of the public service necessary for the performance of the tasks defined in Articles 1 and 10”. It was this last provision that was criticised on the ground that it interfered with the exercise of the right to strike.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 80-117 DC of 22.07.1980, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 42;
- Decision no. 86-217 DC of 18.09.1986, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 141;
- Decision no. 87-230 DC of 28.07.1987, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 50.

Languages:

French.



Identification: FRA-1979-S-002

a) France / **b)** Constitutional Council / **c)** / **d)** 24.12.1979 / **e)** 79-110 DC / **f)** Finance Act for 1980 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 26.12.1979, 3259 / **h)**.

Keywords of the systematic thesaurus:

- 4.5.6 Institutions – Legislative bodies – **Law-making procedure.**
 4.10.1 Institutions – Public finances – **Principles.**
 4.10.2 Institutions – Public finances – **Budget.**

Keywords of the alphabetical index:

Finance Act, proper examination.

Headnotes:

The budget was declared incompatible with the Constitution, first because, on the first reading, the Assembly had proceeded to debate the second part without first adopting the balancing article closing the first part, the provisions of which “constitute its *raison d’être* and are indispensable if it is to achieve its purpose”; second, because it had not taken separate successive votes on each of the two parts at the second reading, but made a pronouncement on both parts together and on the entire bill after the Government had employed the procedure provided for in Article 49.3 of the Constitution.

Summary:

In its decision of 24 December, the Constitutional Council adopted a strict interpretation of Article 40 of the order of 2 January 1959, the purpose of which is to prevent Members of Parliament, when examining the second part of the Finance Act, to call in question the provisions relating to the balancing of resources and expenditure set out in the first part (the balancing article).

Supplementary information:

As a consequence of the annulment pronounced on 24 December (the first and only occasion on which a Finance Act has been annulled), Parliament met in an extraordinary sitting in order to authorise the Government to continue to receive existing taxes and duties. On a further referral dated 28 December 1979, the Constitutional Council declared the law compatible with the Constitution on the ground that “neither the Constitution, nor the order of 2 January 1959 expressly laid down the procedure to be followed” in such a circumstance and that “in that situation, and in the absence of any directly applicable constitutional or organic provisions, it is clearly for the Parliament and the Government, within their respective competences, to take all the financial measures necessary to ensure the continuity of the life of the nation” (cf. 79-111 DC, 30 December 1979, (Official Digest); p. 39).

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 78-95 DC of 27.07.1978, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 26;
- Decision no. 82-154 DC of 29.12.1982, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 80;
- Decision no. 90-285 DC of 28.12.1990, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 95;
- Decision no. 92-309 DC of 09.06.1992, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 66.

Languages:

French.

*Identification: FRA-1980-S-001*

a) France / **b)** Constitutional Council / **c)** / **d)** 22.07.1980 / **e)** 80-119 DC / **f)** Law validating administrative acts / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 24.07.1980, 1868 / **h)**.

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
 3.18 General Principles – **General interest.**
 4.5.2 Institutions – Legislative bodies – **Powers.**
 4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**
 4.6.6 Institutions – Executive bodies – **Relations with judicial bodies.**
 5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence.**
 5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law.**

Keywords of the alphabetical index:

Order, validation / Law, validity, retroactive effect.

Headnotes:

Generally, the legislature, in non-criminal matters and for reasons in the general interest, has “the option of using its power to adopt retroactive provisions in order to regulate, as it alone is able to do, situations resulting from the annulment of an order and, in order to do so, to validate the orders and measures” adopted on the basis of that order. Furthermore, pursuant to Article 34 of the Constitution, the legislature is competent to establish the rules concerning the fundamental guarantees conferred on civil and military personnel employed by the State. The power of validation therefore does not constitute an interference in the domain of regulations.

It follows from constitutional provisions that “the independence of the courts and the specific nature of their functions are guaranteed”. Their independence prevents the legislature from criticising decisions of the courts, from issuing instructions to them, from substituting itself for them in determining disputes falling within their jurisdiction and, last, from making the grant of assistance to the police in executing a court decision subject to completion of an administrative formality.

Summary:

This was the first case in which the Constitutional Council was requested directly to examine a law validating administrative acts.

In 1977, a central joint technical committee of teaching staff subject to the regulations governing university teachers was established by order adopted in the Council of State. However, the Council of State annulled the order. Therefore, all the orders reforming the regulations, and all the individual or collective decisions adopted on the basis of those orders, were threatened. A validating bill consisting of a single article was then lodged: “Orders adopted following consultation of the joint technical committee established by order no. 77-679 of 29 June 1977 and all measures, whether in the form of regulations or not, adopted on the basis of those orders are validated”. The law was referred to the Constitutional Council. The applicants claimed a breach of the principle of separation of powers and failure to observe the distribution of legislative and regulatory powers. The application was dismissed and the law validating administrative acts was declared compatible with the Constitution.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

For a more restrictive interpretation of the criteria used in determining the compatibility of validating laws with the Constitution, see:

- Decision 95-369 DC of 28.12.1995, *Bulletin* 1995/3 [FRA-1995-3-011];
- Decision 99-422 DC of 21.12.1999, *Bulletin* 1999/3 [FRA-1999-3-010];
- Judgment of the European Court of Human Rights of 28.10.1999 (*Zielinski, Pradal, Gonzalez and others v. France*), *Reports of Judgments and Decisions* 1999-VII.

Languages:

French.

*Identification:* FRA-1981-S-001

a) France / **b)** Constitutional Council / **c)** / **d)** 19.01.1981 / **e)** 80-127 DC / **f)** Law increasing individual security and individual freedom / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 22.01.1981, 308 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

2.3.1 Sources – Techniques of review – **Concept of manifest error in assessing evidence or exercising discretion.**

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**

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

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

3.22 General Principles – **Prohibition of arbitrariness.**

5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty.**

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

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

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

5.3.16 Fundamental Rights – Civil and political rights – **Principle of the application of the more lenient law.**

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

Keywords of the alphabetical index:

Penalty, certainty / Lawyer, removal / Criminal law, fundamental principles.

Headnotes:

No one can be punished except pursuant to a law enacted and promulgated before the offence was committed and applied in accordance with the law; accordingly, the legislature must define offences in sufficiently clear and precise terms to preclude unfairness.

The Constitutional Council does not have a power of assessment and decision identical to that enjoyed by Parliament. It is only competent to rule on the conformity with the Constitution of laws referred to it for examination. Except where there has been a manifest error of assessment, the Council cannot undertake an assessment of the need for penalties.

The principle of the necessity of penalties set out in Article 8 of the Declaration of the Rights of Man and Citizen of 1789 gives rise to the obligation for the legislature to apply the new, less harsh criminal law to old offences (the retroactivity of more severe criminal laws is prohibited).

A provision which allows the President of the Court to remove a lawyer on the ground that his attitude compromised the security of the proceedings, although the lawyer has not failed to fulfil any of the obligations imposed on him by his oath and although he fulfilled his role as defending counsel, is contrary to the rights of the defence.

Summary:

Law no. 81-82 of 2 February 1981 “reinforcing and protecting the freedom of individuals” was designed to combat increasing violence and to provide improved protection for freedoms. Its purpose was to restore the certainty of penalties and to speed up criminal proceedings by introducing direct trial for minor offences where it did not appear essential that the case be dealt with by the investigating judge. New provisions increased the punishment by imposing more severe penalties on assailants. Last, the simplification of the procedure for claiming civil damages in criminal cases was designed to make it possible to provide better protection for the rights of victims. However, the reform was badly received by the judges, since the certainty of the penalty necessarily reduced the discretion of the judges and the new provisions infringed a number of fundamental principles. It was for those reasons that the law was referred to the Constitutional Council.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Languages:

French.

*Identification:* FRA-1982-S-001

a) France / **b)** Constitutional Council / **c)** / **d)** 16.01.1982 / **e)** 81-132 DC / **f)** Nationalisation act / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 17.01.1982, 299 / **h)**.

Keywords of the systematic thesaurus:

2.1.1.1.2 Sources – Categories – Written rules – National rules – **Quasi-constitutional enactments.**
3.18 General Principles – **General interest.**

3.22 General Principles – **Prohibition of arbitrariness.**

4.5.2 Institutions – Legislative bodies – **Powers.**

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

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

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

Keywords of the alphabetical index:

Constitution, sources / Nationalisation, compensation, just and fair nature / Freedom of enterprise, restriction.

Headnotes:

The fact that the Constitution leaves it to legislation to fix rules or to determine principles “does not mean that the legislature, in exercising its power, is not required to observe the principles and rules of constitutional value which are binding on all organs of the State”.

The right of property has constitutional value but none the less is not absolute, “[its] purpose and the conditions governing [its] exercise ... have been developed in such a way that its scope has been significantly extended to new individual spheres and limits required in the general interest have been introduced”.

Any “arbitrary or abusive restrictions ... placed on the freedom of enterprise” would be contrary to the provisions of the Declaration of Rights.

The legislature may determine the scope of nationalisation, in particular in the event of economic crisis, in order to promote growth or to combat unemployment. In that regard, it is for the legislature to assess “public necessity within the meaning of Article 17 of the Declaration of the Rights of Man and Citizen of 1789”.

Summary:

The impugned provisions gave rise to heated debate in Parliament lasting for several months. The Constitutional Council was called upon to adjudicate on two occasions. The law was first referred to it on 18 December 1981 by opposition deputies and a number of senators and by decision of 16 January 1982 it accepted that the principle of nationalisation

was a constitutional principle but rejected certain detailed rules, in particular those relating to compensation. After the Government had a revised bill passed by Parliament, a number of deputies referred the new law to the Constitutional Council. This new action was dismissed by the decision of 11 February 1982, delivered in accordance with the emergency procedure (cf. Decision no. 82-139 DC of 11 February 1982, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 18).

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Languages:

French.



Identification: FRA-1982-S-002

a) France / **b)** Constitutional Council / **c)** / **d)** 18.02.1982 / **e)** 82-137 DC / **f)** Law on the rights and freedoms of municipalities, districts and regions / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 03.03.1982, 759 / **h)**.

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality**.
 4.5.2 Institutions – Legislative bodies – **Powers**.
 4.8.4 Institutions – Federalism, regionalism and local self-government – **Basic principles**.
 4.8.8 Institutions – Federalism, regionalism and local self-government – **Distribution of powers**.
 4.8.8.3 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Supervision**.

Keywords of the alphabetical index:

Act, enforceability / Local authority, act, administrative supervision / Decentralisation, limits / Local authority, free administration.

Headnotes:

The legislature, which is subject to the principle of legality, is competent to implement, but not to call in question, the principle of the free administration of local communities, which has constitutional value.

The “administrative supervision” of acts of local authorities by the Government Delegate pursuant to Article 72.3 of the Constitution may be confined to the power to initiate a judicial review.

Conversely, an act cannot become enforceable as soon as it is published or notified. That procedure would prevent the Prefects from being “in a position to be aware of the content of acts at the time when they become enforceable and if necessary to refer them without delay to the administrative court” and therefore to perform the task assigned to them by Article 72.3 of the Constitution.

Summary:

Entry into force of the measures governing the reform of local administration, known as “decentralisation”.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Languages:

French.



Identification: FRA-1982-S-003

a) France / **b)** Constitutional Council / **c)** / **d)** 30.07.1982 / **e)** 82-143 DC / **f)** Law on prices and incomes / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 31.07.1982, 2470 / **h)**.

Keywords of the systematic thesaurus:

4.5.2 Institutions – Legislative bodies – **Powers.**

4.5.7 Institutions – Legislative bodies – **Relations with the executive bodies.**

Keywords of the alphabetical index:

Law, definition / Legislation, scope / Regulation, scope.

Headnotes:

Article 61.2 of the Constitution cannot be used to censure an encroachment by legislation into the domain of regulations, because “the Constitution is not intended to render unconstitutional a provision in the nature of a regulation which is contained in a law”, but solely to allow the Government, where it so desires, to protect the domain of regulations.

In other words, an encroachment by the legislature into the domain of regulations, with the consent of the Government, is not contrary to the Constitution.

Summary:

This decision marks an important stage in the case-law of the Constitutional Council. In asserting for the first time that legislation may enter into the domain of regulations without being unconstitutional, the Constitutional Council departs from an exclusively material definition of legislation (since a law can include provisions in the nature of regulations without being unconstitutional, the law is defined as the act passed by Parliament).

Supplementary information:

This judicial principle is now well established (cf. Decision no. 83-162 DC of 19 July 1983, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 49; Decision no. 83-167 DC of 19 January 1984, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 23).

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection

of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 83-162 DC of 19.07.1983, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 49;
- Decision no. 83-167 DC of 19.01.1984, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 23.

Languages:

French.

*Identification: FRA-1982-S-004*

a) France / **b)** Constitutional Council / **c)** / **d)** 18.11.1982 / **e)** 82-146 DC / **f)** Law amending the Electoral Code and the Municipalities Code and relating to the election of municipal councillors and to the conditions governing the inclusion of French nationals established outside France on the electoral registers / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 19.11.1982, 3475 / **h)**.

Keywords of the systematic thesaurus:

4.9.5 Institutions – Elections and instruments of direct democracy – **Eligibility.**

4.9.7.1 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Electoral rolls.**

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.**

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

Keywords of the alphabetical index:

Election, electorate, indivisibility / Election, electoral list, quota, sex.

Headnotes:

Being a citizen entitles a person to vote and to stand for election under the same conditions as all those not excluded on grounds of age, incapacity or nationality. These principles of constitutional value preclude any division by categories of voters or those eligible to stand for election. Consequently, a provision to the effect that "lists of candidates shall not include more than 75% of persons of the same sex" is contrary to the principle of equality of citizens.

Summary:

When the Constitutional Council was requested by more than 60 members of Parliament to examine the law on electoral provisions introducing, for municipalities of more than 3,500 inhabitants, a voting system which was both majority and proportional, it raised of its own motion the question of the constitutionality of the provision prohibiting more than 75% of persons of the same sex, in bands of 12, from being placed on the municipal lists, i.e. in practice establishing a compulsory quota of at least 25% women, and on this point delivered a decision declaring it unconstitutional and providing useful guidance on the concept of citizenship in France.

Supplementary information:

The decision of the Constitutional Council led to the amendment of the Constitution in July 1999, following which it now states "The law promotes equal access by men and women to electoral mandates and to elective functions". Following that constitutional amendment, the legislature adopted a law aimed at promoting equal access by men and women to electoral mandates and to elective functions. This law was also referred to the Constitutional Council (Decision no. 2000-429 DC of 30 May 2000).

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 98-407 DC of 14.01.1999, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 21, *Bulletin* 1999/1 [FRA-1999-1-001];
- Decision no. 2000-429 DC of 30.05.2000, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 84; *Bulletin* 2000/2 [FRA-2000-2-006];
- Decision of the Italian Constitutional Court, no. 422, 12.09.1995.

Languages:

French.

*Identification: FRA-1983-S-001*

a) France / **b)** Constitutional Council / **c)** / **d)** 29.12.1983 / **e)** 83-164 DC / **f)** Finance Act for 1984 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 30.12.1983, 3871 / **h)**.

Keywords of the systematic thesaurus:

- 4.10.1 Institutions – Public finances – **Principles**.
- 5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty**.
- 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.
- 5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home**.

Keywords of the alphabetical index:

Search and seizure, judicial guarantee / Tax, evasion / Tax, authority, powers.

Headnotes:

Although the requirements of taxation may demand that the tax authorities be authorised to carry out investigations on private premises, such investigations can be carried out only in compliance with Article 66 of the Constitution, which entrusts the judiciary with protecting individual liberty, including the inviolability of the home. Provision must be made for intervention by the judiciary in order to ensure that

the latter retains the responsibility and the power of review conferred on it.

Summary:

The applicants challenged the article of the Finance Act which authorised certain agents of the tax authorities to carry out investigations consisting of searches and seizures. They relied on Decision no. 76-75 DC of 12 January 1977 [FRA-1977-S-001] and claimed that those provisions interfered with the individual liberty of which Article 66 of the Constitution makes the judiciary the guardian since the conditions under which these operations could be carried out were too general and imprecise. The Council confirms, first, that Article 66 of the Constitution entrusts the judiciary with protecting all aspects of individual liberty and, in particular, the aspect of the inviolability of the home, the constitutional value of which is thus expressly recognised. Second, the Council refers to Article 13 of the Declaration of the Rights of Man and Citizen of 1789 on the need for the public contribution and asserts that it has constitutional value. Investigations by agents of the tax authorities are therefore constitutional only in so far as they are carried out under the responsibility and under the effective supervision of the judiciary.

Supplementary information:

The Finance Act for the following year repeated the article declared unconstitutional and amended it to take account of the requirements laid down by the Constitutional Council in its decision of 1983. However, the new version did not satisfy the members of the opposition, who again referred the law to the Constitutional Council on the same ground. This time, the Council found that the contested article “does not fail to take account of any of the constitutional requirements which guarantee the reconciliation of the principle of individual liberty and the need to combat tax evasion as set out in the decision of the Constitutional Council of 29 December 1984” (Decision no. 84-184 DC of 29 December 1984).

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- See Decision no. 84-184 DC of 29.12.1984, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 94.

Languages:

French.



Identification: FRA-1984-S-001

a) France / **b)** Constitutional Council / **c)** / **d)** 20.01.1984 / **e)** 83-165 DC / **f)** Law on higher education / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 21.01.1984, 365 / **h)**.

Keywords of the systematic thesaurus:

- 2.1.2.2 Sources – Categories – Unwritten rules – **General principles of law.**
- 4.5.2 Institutions – Legislative bodies – **Powers.**
- 5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion.**
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
- 5.4.1 Fundamental Rights – Economic, social and cultural rights – **Freedom to teach.**

Keywords of the alphabetical index:

University, teacher, independence / University, teacher-researcher, freedom of education, concept / Constitution, sources.

Headnotes:

The regulations governing teachers “cannot limit the right to the free communication of ideas and opinions guaranteed by Article 11 of the Declaration of the Rights [of Man] ...”.

The independence of university professors derives from a fundamental principle recognised by the laws of the Republic.

Summary:

After the independence of the administrative and judicial courts had been established with reference to the concept of fundamental principle recognised by the laws of the Republic, the Constitutional Council asserts the constitutional nature of the independence university teaching and research. However, it established a narrow concept of freedom of education which applies to university teachers but not to teacher-researchers.

Supplementary information:

The Constitutional Council may have been inspired by the judgment of the German Constitutional Court of 24 May 1973, which derived the principle of the independence of university teachers from Article 5 of the Basic Law.

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 80-119 DC of 22.07.1980, [FRA-1980-S-001].

Languages:

French.

*Identification: FRA-1985-S-001*

a) France / **b)** Constitutional Council / **c)** / **d)** 25.01.1985 / **e)** 85-187 DC / **f)** Law on the state of emergency in New Caledonia and its dependencies / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 26.01.1985, 1139 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.2.1 Constitutional Justice – Jurisdiction – Type of review – **Preliminary / ex post facto review.**

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**

4.5.2 Institutions – Legislative bodies – **Powers.**

4.18 Institutions – **State of emergency and emergency powers.**

Keywords of the alphabetical index:

Emergency, state, declaration / Law, promulgated, examination, conditions / Law, implementing.

Headnotes:

Although the compatibility with the Constitution of the terms of a law which has been promulgated may be challenged when legislative provisions which amend or complete it or affect its scope are examined, no such challenge is available where the law is merely being implemented.

Summary:

A state of emergency was declared in New Caledonia by the High Commissioner of the Republic, in accordance with Law no. 84-821 of 6 September 1984 extending the state of emergency procedures to that territory; the Government passed a law extending the state of emergency on 13 and 24 January 1985. The parties referring the law to the Constitutional Council claimed that the legislature was not competent to declare a state of emergency in the absence of an express provision in the Constitution providing a basis for that competence.

On 25 January the Constitutional Council rejected all the arguments put forward and declared the law on the state of emergency in New Caledonia and its dependencies compatible with the Constitution.

However, the Constitutional Council accepted for the first time that legislative provisions which have already been promulgated may be challenged when the law referred to it affects their sphere of application.

Supplementary information:

In this case the Constitutional Council merely states the principle. It was not until 1999 that a declaration of unconstitutionality was made in application of that principle.

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 89-256 DC of 25.07.1989, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 53;
- Decision no. 99-410 DC of 15.03.1999 [FRA-1999-1-004] (first concrete application of the principle), *Bulletin* 1999/1 [FRA-1999-1-004].

Languages:

French.

*Identification:* FRA-1985-S-002

a) France / **b)** Constitutional Council / **c)** / **d)** 08.08.1985 / **e)** 85-196 DC / **f)** Law on the development of New Caledonia / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 09.08.1985, 9127 / **h)**.

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy**.
 4.4.1.1 Institutions – Head of State – Powers – **Relations with legislative bodies**.
 4.5.6 Institutions – Legislative bodies – **Law-making procedure**.
 4.8.4 Institutions – Federalism, regionalism and local self-government – **Basic principles**.
 4.9.4 Institutions – Elections and instruments of direct democracy – **Constituencies**.

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

Keywords of the alphabetical index:

Law, new deliberation / Law, new reading / Local authority, free administration.

Headnotes:

In order to be representative of a territory and its inhabitants in accordance with Article 3 of the Constitution, a political assembly must be elected on essentially demographic bases.

The law does not express the general will unless it complies with the Constitution.

Summary:

Instead of promulgating the law on the development of New Caledonia without the provisions declared incompatible with the Constitution and then submitting a new bill relating only to those provisions, the President of the Republic used the procedure available under Article 10 of the Constitution and Article 23 of the Organic Law of 7 November 1958 and requested a new deliberation. The opposition denounced this abuse of procedure on the ground that the procedure followed had confused the “new reading” following a declaration of partial invalidity by the Constitutional Council with the “new deliberation” of the law.

In its subsequent Decision no. 85-197 DC of 23 August 1985, the Council held that the binding authority of its decision of 8 August had not been disregarded and that, where a law is annulled in part, the Head of State has two possibilities, one of which is to submit the law to a new deliberation, because, all things considered, “this does not entail voting on a new law, but proceeding, in the course of the existing legislative procedure, to an additional stage resulting from the review of constitutionality”.

Supplementary information:

This is also the first time that the Constitutional Council became involved in the supervision of the distribution of constituencies.

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 85-197 DC of 23.08.1985, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 70;
- Decision no. 86-208 DC of 01 and 02.07.1986, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 78;
- Decision no. 86-218 DC of 18.11.1986, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 167;
- Decision no. 87-227 DC of 07.07.1987, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 41.

Languages:

French.

*Identification: FRA-1986-S-001*

a) France / **b)** Constitutional Council / **c)** / **d)** 25.06.1986 / **e)** 86-207 DC / **f)** Law authorising the Government to take various economic and social measures / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 27.06.1986, 7978 / **h)**.

Keywords of the systematic thesaurus:

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**

3.18 General Principles – **General interest.**

4.5.2 Institutions – Legislative bodies – **Powers.**

4.10.8.1 Institutions – Public finances – State assets – **Privatisation.**

5.2.1 Fundamental Rights – Equality – **Scope of application.**

Keywords of the alphabetical index:

Public service, privatisation / Constitutional public service, concept.

Headnotes:

Although, under Article 34.9 of the Constitution, the legislature has sole competence in matters relating to privatisation, its competence is limited by the need to comply with the principles and rules of constitutional value.

Activities or undertakings which constitute neither a “national public service” nor a “*de facto* monopoly” within the meaning of point 9 in the preamble to the Constitution are capable of being transferred. Thus national public services “the need [for which] flows from principles or rules of constitutional value”, in other words constitutional public services, cannot be privatised. On the other hand, “the fact that an activity has been set up as a public service by the legislature although the Constitution contained no requirement to that effect does not prevent the activity in question, and the undertaking responsible for carrying it out, from being transferred to the private sector”.

Summary:

The Law authorising the Government to take various economic and social measures is finally declared compatible with the Constitution, but “subject to the strict reservations on interpretation” set out in the grounds thereof. The draft ordinance on privatisation was adopted in the Council of Ministers but the President of the Republic refused to sign the ordinance. The Government then returned to the parliamentary route and secured the passage of a bill in place of the ordinance which became the Law of 6 August 1986, with no further reference to the Constitutional Council by the parliamentary opposition. The law set out the procedures for the privatisation of 65 public undertakings.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 76-72 DC of 12.01.1977, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 31;

- Decision no. 81-132 DC of 16.01.1982, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 18 [FRA-1982-S-001];
- Decision no. 86-208 DC of 01 and 02.07.1986, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 78;
- Decision no. 86-217 DC of 18.09.1986, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 141.

Languages:

French.



Identification: FRA-1986-S-002

a) France / **b)** Constitutional Council / **c)** / **d)** 01.07.1986 / **e)** 86-208 DC / **f)** Law on the election of deputies and authorising the Government to adopt ordinances defining the constituencies / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 03.07.1986, 8282 / **h)**

Keywords of the systematic thesaurus:

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**

3.18 General Principles – **General interest.**

3.22 General Principles – **Prohibition of arbitrariness.**

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

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

Keywords of the alphabetical index:

Election, constituency, delimitation / Election, equal representation.

Headnotes:

Under the principle of equality of suffrage, in conjunction with the principle of equality before the law, “the National Assembly designated by direct universal suffrage must be elected on essentially demographic bases”. Although the legislature may

take account of certain requirements in the general interest which are apt to limit the scope of that fundamental rule, the extent to which it may do so is limited.

Although in extreme cases it may have the effect of increasing the disparities in representation from one district to another, the traditional practice of having at least two deputies elected in each district in order to ensure a direct link between the person elected and the voters is not contrary to the Constitution.

The delimitation of constituencies which is the purpose of the ordinance must not “be based on any arbitrariness”.

Summary:

At the end of May 1986, following quite a lively battle waged by the opposition on the left and on the extreme right, Parliament passed a law restoring the uninominal majority ballot in two rounds and authorising the Government to establish, by means of ordinances (adopted pursuant to Article 38 of the Constitution), a new distribution of the constituencies, subject to compliance with a number of directives. The law was referred to the Constitutional Council, which on 1 and 2 July 1986 delivered a decision, set out here, in which it declared that the law was not contrary to the Constitution, subject to the strict reservations on interpretation set out in the grounds. These strict reservations are numerous and precise, since in reality they are directed against the Government, which is authorised to determine the distribution of the constituencies.

Following the promulgation of the law on 11 July 1986, the Government prepared a draft ordinance delimiting the constituencies. However, the President of the Republic refused to sign the ordinance and the draft ordinance was transformed into a bill and passed by Parliament on 24 October. The socialist deputies then referred the law to the Constitutional Council, which on 18 November delivered a decision declaring that the law on the distribution of constituencies was “not contrary to the Constitution”.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 85-196 DC of 08.08.1985 [FRA-1985-S-002];
- Decision no. 86-218 DC of 18.11.1986, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 167;
- *Contra*: Decision no. 2000-431 DC of 06.07.2000, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 98, *Bulletin* 2000/2 [FRA-2000-2-007].

Languages:

French.

*Identification:* FRA-1989-S-001

a) France / **b)** Constitutional Council / **c)** / **d)** 17.01.1989 / **e)** 88-248 DC / **f)** Law amending law no. 86-1067 of 30 September 1986 on freedom of communication / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 18.01.1989, 754 / **h)**.

Keywords of the systematic thesaurus:

3.4 General Principles – **Separation of powers.**
 4.13 Institutions – **Independent administrative authorities.**
 5.2.1 Fundamental Rights – Equality – **Scope of application.**
 5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication.**

Keywords of the alphabetical index:

Authority, administrative, independent, power, scope /
 Authorisation, administrative, regime / Penalty,
 administrative.

Headnotes:

No one can be exempted by a general statutory provision from all liability irrespective of the nature or the gravity of the act which he is alleged to have committed. Consequently, provisions which exempt

the presidents of public radio and television corporations from all personal liability when adopting measures resulting from decisions of the Supreme Council for Radio and Television Broadcasting (*Conseil supérieur de l'audiovisuel*) are contrary to the Constitution, as they infringe the principle of equality before the law.

The delegation of a power to adopt regulations to the independent radio and television regulatory authority is constitutional, provided however this authorisation covers only measures of limited scope in terms of both their application and their content.

The attribution to an administrative authority of a power to impose penalties does not infringe the principle of separation of powers enshrined in Article 16 of the Declaration of the Rights of Man and of the Citizen.

Summary:

The new law sought, essentially, to alter the composition of and certain powers enjoyed by the regulatory authority. As regards the attribution to that body of a power to make regulations, the Constitutional Council took a restrictive approach. In 1986 (cf. DC no. 86-217 of 18 September 1986), the Council had accepted, in regard to the National Commission of Communication Freedoms (Commission nationale de la communication et des libertés), the delegation to an independent administrative authority of the power to make regulations. Although that ground is reiterated in the reported decision, the permissible level of the delegation of the power to make regulations is restricted. The Constitutional Council held that the legislative provisions which conferred on the Supreme Council for Radio and Television Broadcasting the power to impose penalties were subject to important reservations of interpretation. The law enacted by the legislature was designed to respond to a desire to increase the range of penalties available to the regulatory authority where licence-holders fail to fulfil their obligations. The exercise of this power is strictly circumscribed by a series of limitations which protect the rights of citizens.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 86-217 DC of 18.09.1986, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 141;
- Decision no. 82-155 DC of 30.12.1982, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 88;
- Decision no. 87-237 DC of 30.12.1987, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 63;
- Decision no. 89-260 DC of 28.07.1989, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 71.

Languages:

French.

*Identification: FRA-1990-S-001*

a) France / **b)** Constitutional Council / **c)** / **d)** 07.11.1990 / **e)** 90-278 DC / **f)** Rules of Procedure of the Senate / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 09.11.1990, 13714 / **h)**.

Keywords of the systematic thesaurus:

- 4.5.4.1 Institutions – Legislative bodies – Organisation – **Rules of procedure.**
 4.5.4.4 Institutions – Legislative bodies – Organisation – **Committees.**
 4.5.6.4 Institutions – Legislative bodies – Law-making procedure – **Right of amendment.**

Keywords of the alphabetical index:

Parliament, committee, competences / Parliament, vote, without debate.

Headnotes:

A provision which prohibits any Senator from resubmitting in a plenary sitting an amendment which has been rejected by the competent committee infringes the right of amendment. The Senate's

attempt to introduce a new voting procedure was thus held to be incompatible with the Constitution.

Summary:

In order to put an end to parliamentary obstruction and to simplify the agenda of public sittings, the Senate on 4 October 1990 introduced a number of amendments to its rules of procedure, in particular fast-track procedures.

Only certain amendments of limited scope were held to be compatible with the Constitution:

- the measures providing for the work of the legislative committees to be made public;
- the provisions on the examination of additional articles in public.

The Constitutional Council also declared that an amendment of the Rules of Procedure of the Senate which provided that only amendments which were “not wholly unconnected with the subject-matter of the measure being debated” were admissible, whereas the previous version referred to the fact of being “proposed in the context of the government bill or private member's bill”, was compatible with the Constitution. The Constitutional Council thus incorporated into the Rules of Procedure one of the elements of the concept of amendment as defined in its case-law.

The amendments which introduced the vote without a debate were held to be incompatible with the Constitution, on the ground that they did not respect the right of amendment which must be exercised in full in a public sitting and as a matter of discretion at the committee stage. The danger represented by this amendment was that it would have conferred on the Senate committees a role involving more than just the preparation of debates: they would have been able to act as a filter. The Council thus gave full effect to the provision of the Constitution which makes a distinction between the fact that legislation is passed by Parliament and drafted by committees.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 85-199 DC of 28.12.1985, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 83;
- Decision no. 86-225 DC of 23.01.1987, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 13;
- Decision no. 89-269 DC of 22.01.1990, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 33;
- Decision no. 90-274 DC of 29.05.1990, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 61;
- Decision no. 90-277 DC of 25.07.1990, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 70.

Languages:

French.

*Identification:* FRA-1991-S-001

a) France / **b)** Constitutional Council / **c)** / **d)** 07.05.1991 / **e)** 91-290 DC / **f)** Law on the status of the territorial authority of Corsica / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 14.05.1991, 6350 / **h)**.

Keywords of the systematic thesaurus:

3.8.1 General Principles – Territorial principles – **Indivisibility of the territory.**

4.8.2 Institutions – Federalism, regionalism and local self-government – **Regions and provinces.**

5.2.1 Fundamental Rights – Equality – **Scope of application.**

5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin.**

Keywords of the alphabetical index:

People, concept / People, unicity / Region, special status.

Headnotes:

A reference to the “Corsican people, a component of the French people” is contrary to the Constitution, which recognises only the French people, composed of all citizens without distinction as to origin, race or religion.

Summary:

Nine years after Decisions no. 82-137 DC [FRA-1982-S-002] and no. 82-138 DC of 25 February 1982 on decentralisation and the special status of Corsica, the Constitutional Council confirmed the principles identified during the decentralisation reform.

The Government had chosen to include in Article 1 of the law on the status of the territorial authority of Corsica a reference to the “Corsican people”, a component of the “French people”. Referring to Article 2 of the Constitution of 1958, which states that the French Republic is “an indivisible, secular, democratic and social Republic” which ensures the equality of all citizens before the law “without distinction as to origin, race or religion”, the Constitutional Council condemned the reference to the “Corsican people”.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 82-137 DC [FRA-1982-S-002] and no. 82-138 DC of 25.02.1982, *Recueil de décisions du Conseil constitutionnel* (Official Digest), pp. 38 and 41;
- Decision no. 2000-428 DC of 04.05.2000, *Recueil de décisions du Conseil constitutionnel* (Official Digest), p. 70, *Bulletin* 2000/2 [FRA-2000-2-005].

Languages:

French.



Identification: FRA-1992-S-001

a) France / **b)** Constitutional Council / **c)** / **d)** 07.04.1992 / **e)** 92-308 DC / **f)** Treaty on European Union (Maastricht I) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 11.04.1992, 5354 / **h)**.

Keywords of the systematic thesaurus:

3.1 General Principles – **Sovereignty**.
 4.17.2 Institutions – European Union – **Distribution of powers between Community and member states**.
 5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.
 5.3.41 Fundamental Rights – Civil and political rights – **Electoral rights**.
 5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.

Keywords of the alphabetical index:

Sovereign power, transfer / Visas, common policy / Election, voter, foreigner, resident.

Headnotes:

Article B of the Treaty on European Union, in so far as it provides for the establishment of economic and monetary union, ultimately including a single currency, and Article 100.c.3 inserted into the Treaty of Rome and eventually conferring on Community authorities the power to adopt decisions “determin[ing] the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States” are contrary to the Constitution on the ground that they deprive France of “its own powers in an area involving the essential conditions of its sovereignty”.

Article 8.b.1, inserted into the Treaty of Rome by Article G of the Treaty of Maastricht, conferring on citizens of the Union residing on the territory the right to vote and to stand as a candidate at municipal elections is contrary to Articles 3 and 24 of the Constitution of 1958, since pursuant to those articles the Senate participates in the exercise of national sovereignty, senators are elected by municipal councillors and only French nationals are entitled to vote and to stand for election.

Summary:

On a request by the President of the Republic pursuant to Article 54 of the Constitution, the Constitutional Council clearly asserted that a constitutional amendment was required before the Treaty of Maastricht could be ratified.

In its earlier Decision no.76-71 DC of 29 and 30 December 1976 concerning the European Assembly, the Council had drawn a line between the limitations of sovereignty and transfers of sovereignty: only the former were authorised by the Constitution. It subsequently dropped that distinction in a decision of 22 May 1985 in which it referred to the “essential conditions of the exercise of sovereignty”. In the present decision, the Constitutional Council identifies a number of criteria to be used in assessing an interference with sovereignty: the sphere in which competence is transferred, the extent to which it is transferred and the rules governing the exercise of the competence transferred.

Supplementary information:

By the constitutional amendment of 25 June 1992, France consented to the “transfers of powers” necessary for the construction of European economic and monetary union, and for the definition of the rules on crossing the external borders of the Community. In addition, the principle of the right to vote and to stand for election of citizens of the States of the Union residing in France was established (Article 88-2 and 88-3). A new Title XIV, consisting of Articles 88-1 to 88-4, is now devoted to the “European Communities and the European Union”.

This is the first decision whereby the Constitutional Council declares a treaty contrary to the Constitution from the aspect of the principle of national sovereignty.

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Cross-references:

- Decision no. 97-394 DC of 31.12.1997 on the compatibility with the Constitution of the Treaty of Amsterdam, *Bulletin* 1997/3 [FRA-1997-3-007];

- Decision no. 98-400 DC of 20.05.1998, *Bulletin* 1998/2 [FRA-1998-2-003] concerning the organic Law determining the conditions for the application of Article 88-3 of the Constitution in relation to a Community directive and to Article 8b of the Treaty establishing the European Community.

Languages:

French.



Identification: FRA-1992-S-002

a) France / **b)** Constitutional Council / **c)** / **d)** 02.09.1992 / **e)** 92-312 DC / **f)** Treaty on European Union (Maastricht II) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 03.09.1992, 12095 / **h)**.

Keywords of the systematic thesaurus:

1.3.5.1 Constitutional Justice – Jurisdiction – The subject of review – **International treaties**.
 3.1 General Principles – **Sovereignty**.
 4.1.2 Institutions – Constituent assembly or equivalent body – **Limitations on powers**.

Keywords of the alphabetical index:

European Union, Treaty.

Headnotes:

The compatibility of a Treaty with the Constitution, where the latter has been amended following an initial decision of the Constitutional Council, cannot be examined unless it appears that the Constitution, as amended, remains contrary to one or more provisions of the Treaty, or if a new provision has been inserted into the Constitution which renders one or more provisions of the Treaty incompatible with it.

“The constituent power is sovereign and can repeal, amend or supplement provisions of the Constitution in the form which it deems appropriate (...)”.

Summary:

The Constitutional Council was again requested by 70 senators to examine the compatibility of the Treaty of Maastricht with the amended Constitution.

This was the first occasion on which the new procedure, introduced by the constitutional amendment of 25 June 1992 which allowed 60 deputies or 60 senators to request the Constitutional Council to examine the compatibility with the Constitution of an international commitment.

In the present case, the Constitutional Council rejected all the complaints raised by the senators, on the ground that “the Treaty on European Union contains no clause contrary to the Constitution” and that, consequently, “authorisation to ratify it may be given on the basis of a law”.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Languages:

French.



Identification: FRA-1992-S-003

a) France / **b)** Constitutional Council / **c)** / **d)** 23.09.1992 / **e)** 92-313 DC / **f)** Law authorising the ratification of the Treaty on European Union (Maastricht III) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 25.09.1992, 13337 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**

3.1 General Principles – **Sovereignty.**

Languages:

French.

*Keywords of the alphabetical index:*

Law, adopted by referendum, constitutional review.

Headnotes:

Laws adopted by referendum cannot be examined as to their constitutionality.

Summary:

A number of RPR, UDF and independent deputies signed an application challenging the regularity of the law which, adopted by referendum on 20 September, authorised the ratification of the Treaty of Maastricht. The action was lodged on the day of the referendum, where the “yes” vote barely won (51.9%).

The Council dismissed the action on the ground that it had no jurisdiction to examine laws adopted by referendum. It had already had occasion to state that it lacked competence to examine the constitutionality of a law adopted by referendum (Decision no. 62-20 DC of 6 November 1962 [FRA-1962-S-002]).

In its decision, the Constitutional Council confirmed the position it adopted in 1962: the laws which the Constitution intended to be subject to a review of constitutionality “are only the laws voted by Parliament and not those which, adopted by the French people following a referendum, constitute the direct expression of national sovereignty”. However, in 1992 it no longer based its lack of competence on the spirit of the Constitution, but on the balance of powers established by the Constitution.

Supplementary information:

This decision of the Constitutional Council was indexed in the context of the retrospective work requested by the Venice Commission. The selection of the decisions and the account of the facts in the summary owe much to the work which Professor Louis Favoreu and Professor Loïc Philip have provided since 1975 in the Dalloz collection dedicated to leading judicial decisions.

Hungary

Constitutional Court

Important decisions

Identification: HUN-1990-S-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 23.04.1990 / **e)** 8/1990 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 35/1990 / **h)**.

Keywords of the systematic thesaurus:

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

5.4.11 Fundamental Rights – Economic, social and cultural rights – **Freedom of trade unions.**

Keywords of the alphabetical index:

Trade union, representation / Employee, right to human dignity / Umbrella, right.

Headnotes:

Article 15.2 of the Labour Code was unconstitutional as it could potentially infringe an employee's right to self-determination which formed an integral part of the right to human dignity in Article 54.1 of the Constitution. It was not inconceivable that the trade union might choose to exercise its right of representation in spite of an employee's explicit request to the contrary. Such potential infringement of the employee's right to self-determination could not be alleviated by taking into account the employee's interest which could only be assumed by the union. Indeed the risk of infringing the employee's interests was at its greatest where the personal matters of non-member employees were concerned. Once the disputed provision had been annulled, the Labour Code would then retain consent as the sole basis for representation.

The right to human dignity ensured by Article 54.1 of the Constitution was a natural right of which no one could be deprived. Such a right included, *inter alia*, the right to free personal development, to self-determination, to privacy or general freedom of action. It was an "umbrella right", a subsidiary fundamental right which might be relied upon to

protect an individual's autonomy when no particular, specified fundamental right was applicable.

Summary:

The petitioner sought a ruling on the constitutionality of a 1967 Labour Code provision giving trades unions the right to represent employees without their authorisation.

The petitioner submitted that representation of employees had previously fallen within the exclusive competence of the trade union in the particular sector of the economy. Under Article 15.2 of the Labour Code, the trade union in employment-related issues had the right to act in the interests, in the name and on behalf of the employees in the absence of any special authorisation to do so. Following the process of political transformation, the representation of employees' interests had been placed on a more pluralist basis, reflected in Articles 4 and 70/C of the Constitution. As a result, he contended, representation by trade unions was permissible only in respect of their members with special authorisation and not in respect of non-union member employees unless so authorised.

The Constitutional Court did not find the disputed provision unconstitutional either under Article 4 or Article 70/C.1 of the Constitution: Article 4 of the Constitution extends the trade unions' right to engage in the protection of interest and representation, which appears also in the former Constitution, to other organisations formed for the protection of interests. Neither this rule nor the provision of Article 70/C.1 of the Constitution pertaining to the freedom of forming trade unions and other organisations for the representation of interests prescribe what interest protection and representation activities include.

On the other hand, the trade unions' right under the disputed provision of the Labour Code to undertake the representation without authorisation may infringe upon the employees' right to self-determination, which is an integral part of the right to human dignity declared by Article 54.1 of the Constitution as a natural right of which no one may be deprived. On the basis of the disputed provision, it may not be ruled out that a trade union may choose to exercise its right of representation in spite of an employee's explicit request to the contrary. This potential infringement upon the right to self-determination may not be eliminated even by the fact that a representation without authorisation must take into account the employee's interest, since the interests of the individual employees are only presumed by the trade union.

The risk of infringing the employee's interest is at its greatest when the non-trade-unionist employee's personal matters are concerned. That was the primary reason why the provision in question had to be annulled. As a result of this annulment, however, the Act has retained only consent as a way of trade union representation. If the right of trade unions to represent their members either without authorisation or in capacities to which employees may effectively give tacit consent by acquiescence seems justifiable, such a gap should be overcome by creating new legal regulations.

Languages:

Hungarian.



Identification: HUN-1990-S-002

a) Hungary / b) Constitutional Court / c) / d) 04.10.1990 / e) 21/1990 / f) / g) *Magyar Közlöny* (Official Gazette), 98/1990 / h).

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State**.
 3.17 General Principles – **Weighing of interests**.
 4.14 Institutions – **Activities and duties assigned to the State by the Constitution**.
 5.2.2 Fundamental Rights – Equality – **Criteria of distinction**.
 5.3.39.4 Fundamental Rights – Civil and political rights – Right to property – **Privatisation**.

Keywords of the alphabetical index:

Reprivatisation, compensation / Privatisation, definition / Reprivatisation, definition / Co-operative, property.

Headnotes:

According to Article 70/A.1 of the Constitution and in the absence of constitutional reasons, if the property of certain people were to be reprivatised while that of others was not – depending on the type of property – this would amount to discrimination in relation to the acquisition of property. In examining the Government's

privatisation programme, it was necessary to clarify the conceptual uncertainty concerning the relationship between privatisation, reprivatisation and compensation. Privatisation involved the assignment of state property into private ownership while reprivatisation was the return of assets formerly owned by private persons but currently in the possession of the State. The term “compensation” was, however, used in a special sense by the Government: the sole legal basis for the partial compensation was fairness, the State was not obliged to pay such compensation and no former owner had the right to receive it since it depended solely on a sovereign state decision.

It was then necessary to consider two types of discrimination, first between the former owners and non-owners and then between the former owners according to the type of property. The constitutionality of the discrimination between former and non-owners depended on whether the interests of these two groups had been weighed with the same degree of prudence and impartiality. If it were the case that, with the preferential treatment of former owners, the distribution of state property would produce a more favourable overall social result as regards the constitutionally-mandated “market economy” than equal treatment would, then this would be permissible. In this type of situation, it was necessary to ascertain whether the right of former owners of land had had their interests considered as thoroughly and impartially as those of all other former owners in order to reveal the objective basis of the discrimination between former owners. Further, it had to be proved that former non-landowners had to be put into a disadvantageous position in order to achieve equality of persons as completely as possible in the future market economy. On its interpretation of Article 70/A of the Constitution, the discrimination in the Act under consideration would accordingly be unconstitutional.

The taking of property from co-operatives, even by virtue of law, without immediate, unconditional and full compensation violated Articles 12.1 and 13 of the Constitution. The recognition by the State under Article 12.1 of the Constitution that co-operatives were autonomous included the recognition that they had the right to property although the Constitution did not expressly provide for co-operative property. Article 9.1 of the Constitution provided a prohibition of discrimination (“the equal protection clause”) against any forms of ownership and further, under Article 13 of the Constitution, constitutional protection was also extended, *inter alia*, to the unnamed property of business associations. As co-operatives and agricultural co-operatives were a form of business association, irrespective of the fact that they were not regulated by the Act on Business Associations, the

property of agricultural co-operatives (including arable land) enjoyed constitutional protection similar to that of the property of business associations. Consequently Articles 12.1 and 13.1 of the Constitution read together guaranteed the right to property including the right of agricultural co-operatives to the arable land they owned. Since property could be taken by a single official decree or by virtue of law only with immediate, unconditional and full compensation, the Government's proposal was therefore unconstitutional.

Summary:

The Prime Minister petitioned for an advisory opinion on the interpretation of certain legal provisions concerning the government's privatisation programme.

He requested:

- a. whether compensation procedures to provide for certain people's former property to be reprivatised while other people's property would not be returned to them amounted to discrimination contrary to Article 70/A of the Constitution. According to the Government, the general principle of privatisation was that state property was sold to new owners in exchange for payment while former owners received partial compensation. The settlement of land ownership would be an exception to these principles because in such questions either the original land would be returned in kind or other land offered in exchange; and
- b. whether, in the context of Articles 12 and 13 of the Constitution it was constitutional to take land from co-operatives without expropriation proceedings and compensation. Within the government's framework of reprivatisation, arable land in the possession of the co-operatives which had not been acquired in the manner prescribed by the Civil Code would serve as the source for reprivatisation without any compensation.

The Constitutional Court interpreted Article 70/A of the Constitution – with regard to Articles 9 and 13.1 of the Constitution – to mean that according to Article 70/A.1 of the Constitution there was discrimination against persons if, in the absence of constitutional reasons, the property of certain persons was reprivatised while the property of others was not, depending on the type of property. Such discrimination was unconstitutional.

The Constitutional Court interpreted Article 12.1 of the Constitution in conjunction with Article 13.1 of the Constitution to mean that the Republic of Hungary guarantees agricultural co-operatives the right to the

arable land they own. Article 13.2 of the Constitution on expropriation is a guarantee provision that is applicable to the taking of property not only by a single official decree but also by virtue of law. Property may be taken either by a single official decree or by virtue of law only with immediate, unconditional and full compensation. Taking property without immediate, unconditional and full compensation is, therefore, unconstitutional.

The first part of the Government petition asks whether it constitutes discrimination between the former owners if, depending on the kind of property, some of them are given back their former properties, while others are not, during the process of reprivatising state property.

The permissibility of any limitations upon constitutional rights may be judged only on the basis of arguments which address the unavoidability of the limitations in a particular case. Arguments in support of the discrimination between the former owners are not included in the petition.

However, the Constitutional Court has taken into consideration that the question itself implies that it should be examined in relation to the Government's privatisation programme and it notes that the privatisation of state property through sale, to anyone theoretically, is a principal rule in this programme. The former owners of assets that are now in the property of the State will receive partial compensation. Land ownership is an exception to these principles because the original ownership would be restored in kind. From the wording of the petition it may be inferred that in the case of former owners of assets other than land, the return of assets in kind would be substituted by partial compensation: "their property will not be returned to them due to the different privatisation and compensation principles."

These explanations do not contain an assessable cause for the discrimination.

The question to be answered is whether the reprivatisation of land ownership, with regard to the reprivatisation of other state-owned assets, involves discrimination that conflicts with Article 70/A of the Constitution.

The position of the Constitutional Court was that, in this particular case, differentiating on the basis of the type of property became discrimination against persons since it related to the acquisition of property.

The question included two partially overlapping kinds of discrimination: discrimination between the former owners and non-owners, on the one hand; and

discrimination between the former owners according to the type of the property.

Article 70/A of the Constitution prohibits discrimination in connection with human rights and the rights of citizens. In the Constitutional Court's opinion, the State's guarantee of the right to property (Article 13.1 of the Constitution) also embraces the right to acquire property. In the given context, the right to engage in business activities must also be taken into consideration because privatisation, including the privatisation of land, primarily serves the formation of an entrepreneurial economy.

The question whether discrimination remained within constitutional limits may only be examined in the objective and subjective context of the current rules because the same criterion – e.g., “landowner” – may constitute discrimination, depending on the context. Equality shall exist with reference to the essential element of a given state of facts. If, however, a different rule applies to a group within a given regulatory scheme, this will be in conflict with the prohibition of discrimination, unless there is sufficient constitutional justification for the difference. By assigning state property into private ownership, the State fulfils the duty to create a socially-aware market economy, set forth as an aim in the Preamble to the Constitution. However, as an owner, the State acts freely in deciding how to support private property, even when it comes to assigning its own property.

If, however, during the assignment of state property into private ownership, the State differentiates between former owners by establishing different conditions for the acquisition of property and, what is more, it further differentiates within the group of former owners, then it will only violate Article 70/A of the Constitution if its arguments fail to meet the conditions of permissible positive discrimination.

The constitutionality of the discrimination depends on whether the discrimination between owners and non-owners is realised in a procedure where the interests of former owners and non-owners have been weighed with the same degree of prudence and impartiality. In the review of such a possibility, former owners just like non-owners have the right to equal treatment and to have their interests judged with the same degree of attention and equity, but none of them has a right to a share in the state property. Without this, the discrimination violates the Constitution.

Even if the above considerations are flawless, the discrimination is constitutional only if the gratuitous property acquisition, granted to former owners, and property acquisition by others in exchange for payment, establishes equality between the private

owner participants in the market economy to be developed. If it can be proved that with the preferential treatment of former owners, the distribution of state property will yield a more favourable overall social result than equal treatment would, and if it follows inexorably from the facts that another non-discriminatory procedure against the non-owners would be far from this result, then non-owners could not claim that their rights ensured by Article 70/A of the Constitution had been violated. The criterion of discrimination – i.e., the former ownership situation – would not be unconstitutional if it logically followed from the above arguments.

The same examination must be made in order to decide whether discrimination between former owners by the type of property at issue – i.e., if only real property is reprivatised – is in conflict with Article 70/A of the Constitution. First, it must be ascertained whether the right of the other former owners to have their interests considered as thoroughly and impartially as those of the former landowners has been satisfied in the enactment of the discriminatory regulation. The objective basis of the discrimination between the former owners must be shown. In addition, it must be proved that it was necessary to put non-land owners into a disadvantageous position in order to achieve the equality of persons as completely as possible in the future market economy and that the initial conditions of the market economy would be much more unfavourable if the other former owners were not put into a disadvantageous position.

While proving whether discrimination against certain persons or groups is a condition for achieving a more complete social equality, the Constitutional Court may not accept arguments concerning a preferred group which are valid in relation to another group as well (e.g. the establishment of entrepreneurial economy, the remedying of injustice). On the other hand, to prove equal treatment, it is necessary to give a complete account of the interests of both the preferred and discriminated groups together with the method of evaluation.

The Constitutional Court interpreted Article 70/A of the Constitution to mean that it amounts to discrimination against persons if certain persons' former property is reprivatised, while other persons' property is not returned to their possession; the Constitutional Court therefore proclaimed this discrimination unconstitutional.

The Government tried to interpret Article 13 of the Constitution in relation to Article 12 of the Constitution: whether it is possible to take land from co-operatives by virtue of the law but without

expropriation and compensation procedures. The Constitutional Court interpreted these provisions with regard to the property belonging to agricultural co-operatives, irrespective of the fact that there are several other kinds of co-operatives.

According to Article 13 of the Constitution the Republic of Hungary guarantees the right to property, and it adds that property may be expropriated only exceptionally when this is a matter of the public interest, and only in the manner prescribed by law, with full, unconditional and immediate compensation.

Under Article 12.1 of the Constitution, the State supports co-operatives based on voluntary association and recognises their autonomy. That provision of the Constitution, therefore, concerns those co-operatives which exist on the basis of voluntary association – irrespective of the circumstances of their foundation. The only organ competent to decide whether a co-operative exists on the basis of voluntary or involuntary association is the general meeting of the co-operative. Accordingly, the Constitutional Court has not found any constitutional justification for depriving, with universal validity of law, the agricultural co-operatives of the protection guaranteed under Article 12.1 of the Constitution.

The recognition by the State that co-operatives are independent includes the recognition that they have the right to property although the Constitution does not provide explicitly for co-operative property. The Constitutional Court, therefore, found it necessary to interpret Article 12 of the Constitution with reference to Article 9.1 of the Constitution, under which in the Republic of Hungary public and private property shall receive equal protection under the law. The clause, however, may not be viewed as constituting an exhaustive list of kinds of property protected by the Constitution and, accordingly, to be classified in one of these would be a precondition for constitutional protection. It is not certain kinds of ownership that the Constitution distinguishes between but, on the contrary, it provides a prohibition of discrimination against any form of ownership. Accordingly, Article 9.1 of the Constitution is an explanation for the proposition of equality before the law, referred to in Article 70/A.1 of the Constitution, as well as the general proposition of the right to enterprise and freedom of competition contained in Article 9.2 of the Constitution, with regard to the right to property. Article 9.1 of the Constitution is, therefore, not related to Article 13 of the Constitution which guarantees the right to property without the distinction (between private and public property) set forth in Article 9.1 of the Constitution. On the basis of Article 13 of the Constitution, constitutional protection is extended, among others, to the unnamed property of business

associations as well. The Constitutional Court, therefore, took the position that the property of agricultural co-operatives, including arable land, enjoys constitutional protection similar to that of the property of business associations.

In accordance with the petition for the interpretation of the Constitution, the Constitutional Court examined the possibility of taking land from co-operatives by virtue of law but without an expropriation procedure and compensation. Article 13.1 of the Constitution, which deals with expropriation, is a guarantee provision that applies to the taking of property not only by a single official decree but also by virtue of law. Property may only be taken either by a single official decree or by virtue of law – with regard to Article 13.1 of the Constitution – with immediate, unconditional and full compensation.

Accordingly, the Constitutional Court took the position that the taking of property from co-operatives – even by virtue of law – without immediate, unconditional and full compensation, violates Articles 12.1 and 13 of the Constitution, and is, therefore, unconstitutional.

Languages:

Hungarian.



Identification: HUN-1990-S-003

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 31.10.1990 / **e)** 23/1990 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 107/1990 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

3.22 General Principles – **Prohibition of arbitrariness.**

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

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

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

5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**

Keywords of the alphabetical index:

Death penalty, abolition, tendency / Death penalty, criminological and statistical finding / Basic right, essence.

Headnotes:

Capital punishment is unconstitutional when assessed against a comparative reading of Articles 8.2 and 54.1 of the Constitution. The relevant provisions of the Criminal Code and other related legal rules which permitted capital punishment as a criminal sanction conflicted with the prohibition against any limitation on the essential content of the right to life and to human dignity. From an examination of the Constitution, human life and human dignity form an inseparable unit, having a greater value than other rights; and thus being an indivisible, absolute fundamental right limiting the punitive powers of the State. It is the inherent, inviolable and inalienable fundamental right of every person in Hungary irrespective of citizenship, which the State had a primary responsibility to respect and protect.

Article 8.2 of the Constitution does not permit any limitation upon the essential content of fundamental rights even by way of legislative enactment. Since the right to life and human dignity are itself the “essential content”, the State cannot derogate from it. Consequently any deprivation of it is conceptually arbitrary. The State would come into conflict with the whole concept of fundamental constitutional rights if it were to authorise deprivation of the right by permitting and regulating capital punishment. Therefore Article 54.1 of the Constitution cannot be construed as allowing capital punishment even if imposed on the basis of legal proceedings, i.e. non-arbitrarily, since the possibility of any kind of limitation on any basis of the right to life and human dignity is theoretically excluded. Since capital punishment results not merely in a limitation upon that right but in fact the complete and irreversible elimination of life and dignity together with the guarantee thereof, all relevant provisions providing for capital punishment were therefore declared null and void.

Moreover, it follows from the fact that as the sanctions provided for in the Criminal Code constituted a coherent system, the abolition of capital punishment – which previously formed a component of that system – would necessarily result in a complete revision of the entire system. Such a revision, however, is beyond the jurisdiction of the Court.

Summary:

The petitioner submitted that the above mentioned provisions were unconstitutional on the grounds, *inter alia*, that they violated Article 54 of the Constitution which guarantees that no-one should be arbitrarily deprived of the right to life, and that such punishment:

- a. could not be justified ethically;
- b. was generally incompatible with fundamental rights as specified in Article 8 of the Constitution; and
- c. amounted to an irreparable and irreversible means of punishment unsuitable for preventing or deterring the commission of serious crimes.

When petitioning the Constitutional Court to establish the unconstitutionality of legal rules providing for capital punishment, the petitioner pointed out that these rules violate the provisions of Article 54 of the Constitution, according to which: “In the Republic of Hungary, every human being has the inherent right to life and to human dignity of which no one shall be arbitrarily deprived” [paragraph 1]; and “no one shall be subjected to torture, to cruel, inhuman or degrading treatment or punishment” [paragraph 2].

The Chapter on “Penalties and Measures” in Article 38.1 of the Criminal Code, mentions capital punishment as the first item on the list of primary penalties. In Article 39, the legislature stipulated the subjective criteria for the imposition of capital punishment, the applicable secondary punishments and certain legal consequences.

The Chapter on “Imposition of Punishments” in Article 84 states that “capital punishment may only be imposed in exceptional cases and – with respect to the extreme danger presented by the perpetrator and the crime as well as to the especially high degree of culpability – the protection of society can only be secured with the application of this punishment.”

The Constitutional Court based its decision to declare the rules on capital punishment unconstitutional and therefore null and void on the following considerations:

Chapter I of the Constitution, entitled “General Provisions”, states that “The Republic of Hungary recognises inviolable and inalienable fundamental human rights. Ensuring the respect and protection of these shall be a primary obligation of the State” [Article 8.1]. The Constitution states in the first place in Chapter XII, “Fundamental Rights and Duties”, that “In the Republic of Hungary, every human being has the inherent right to life and to human dignity, of which no one shall be arbitrarily deprived” [Article 54.1]. According to Article 8.4 of the Constitution, the right to life and human dignity are considered fundamental rights, whose exercise may not be suspended or limited even in a state of emergency, exigency or peril.

It can be concluded from the comparison of the quoted provisions of the Constitution that, irrespective of citizenship, the right to life and human dignity is an inherent, inviolable and inalienable fundamental right of every human being in Hungary. It is a primary responsibility of the Hungarian State to respect and protect these rights. Article 54.1 of the Constitution stipulates that “no one shall be arbitrarily deprived of” life and human dignity. The wording of this prohibition, however, does not exclude the possibility that someone shall be deprived of life and human dignity in a non-arbitrary way.

Nevertheless, when judging the constitutionality of the legal permissibility of capital punishment, the relevant provision is Article 8.2 of the Constitution under which in the Republic of Hungary, rules pertaining to fundamental rights and obligations shall be determined by law which, however, shall not impose any limitations on the essential content of fundamental rights.

The Constitutional Court found that the provisions in the Criminal Code and the quoted related regulations concerning capital punishment breached the prohibition against the limitation of the essential content of the right to life and human dignity. The provisions relating to the deprivation of life and human dignity by capital punishment not only impose a limitation upon the essential content of the fundamental right to life and human dignity, but also allow for the entire and irreparable elimination of life and human dignity or of the right ensuring these. Therefore, the Constitutional Court established the unconstitutionality of these provisions and declared them null and void.

After the reasons for the Constitutional Court's decision to declare the quoted provisions of the Criminal Code and other regulations unconstitutional and therefore null and void, the Constitutional Court considered it necessary to refer to the following:

1. Article 8.2 of the Constitution conflicts with the text of Article 54.1 of the Constitution. It is the responsibility of Parliament to harmonise the two.
2. Human life and human dignity form an inseparable unity and have a greater value than anything else. Accordingly the rights to human life and human dignity form an indivisible and unrestrainable fundamental right which is the source of and the precondition for several other fundamental rights. A state under the rule of law shall regulate fundamental rights stemming from the unity of human life and dignity with respect to the relevant international treaties and fundamental legal principles, and in the service of public and private interests defined by the Constitution. The right to human life and dignity as an absolute value leads to a limitation upon the power of the State in the criminal field.
3. The Constitutional Court found that consideration should be given to criminological and statistical findings, based on the experience of several countries: the application or abolition of capital punishment has not been confirmed to influence either the total number of crimes or the incidence of the commission of crimes that were formerly penalised by capital punishment.
4. Article 6.1 of the International Covenant on Civil and Political Rights – which was signed by Hungary and promulgated by Law Decree 8/1976 – declares that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his/her life.” Paragraph 6 of the same article states that “[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.”

The Covenant, therefore, recognises a development towards the abolition of capital punishment. While Article 2.1 ECHR, signed in Rome on 4 November 1950, recognised the legitimacy of capital punishment, Article 1 Protocol 6 ECHR adopted on 28 April 1983 provides that “[t]he death penalty shall be abolished. No one shall be condemned to such penalty or executed.” Also, Article 22 of the Declaration “On Fundamental Rights and Fundamental Freedoms”, adopted by the

European Parliament on 12 April 1989, declares the abolition of capital punishment. Hungarian constitutional development moves in the same direction since, after the formulation of Article 54.1 of the Constitution which did not clearly exclude capital punishment, a subsequent modification of Article 8.2 of the Constitution proscribed limitations by law upon the essential content of fundamental rights.

5. Since the punishments included in the Criminal Code form a coherent system, the abolition of capital punishment which is a part of this system requires the revision of the entire penal system; this does not, however, fall within the competence of the Constitutional Court.

Supplementary information:

The reasoning of the Court was in the form of a summary and the Justices enlarged upon their own theories in concurring opinions.

Languages:

Hungarian.



Identification: HUN-1991-S-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 13.04.1991 / **e)** 15/1991 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 39/1991 / **h)**.

Keywords of the systematic thesaurus:

5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data.**

Keywords of the alphabetical index:

Data-gathering / Data-processing / Personal identification number (PIN), use.

Headnotes:

In the absence of a definite purpose and for arbitrary future use, the collection and processing of personal

data is unconstitutional. The right to the protection of personal data, known as the right to informational self-determination, as guaranteed under Article 59 of the Constitution, permits everyone the freedom to decide about the disclosure and use of their personal data to the extent that the approval of the person concerned is generally required to register and use it. In addition Article 59 of the Constitution ensures that such person can monitor the entire route of data processing thereby guaranteeing the right to know who used the data and when, where and for what purpose it was used. A statute could exceptionally require the compulsory supply of personal data and prescribe the manner of its use provided it complied with Article 8 of the Constitution.

Summary:

The petitioner sought the constitutional review of several legal rules on the grounds that they violated the right to the protection of personal data under Article 59 of the Constitution.

Law Decree 10/1986 on the State Population Register provided, *inter alia*, that:

- a. the objective of the Register was to promote the enforcement of the citizens' rights and the fulfilment of their duties, and to provide assistance for the activity of state and private organisations (Article 1.1);
- b. the function of the Register was the collection of data necessary for unified personal data records and the keeping and supply thereof (Article 1.2);
- c. there was an obligation to supply data on education and professional training (Article 3);
- d. the Register was to contain the citizen's personal identification number ("PIN"), and basic identification and residence data, the scope of which was delegated to the Council of Ministers (Article 4);
- e. the compulsory introduction of the PIN into the Register and into the procedures for the administration of the State and of the judiciary was allowed (Article 6.2);
- f. the Register could use data from other records if the organisation concerned approved (Article 7.1);
- g. a private person could request another person's data to which he or she was entitled or had a lawful interest, such application being certified by his/her own statement or by an official document. The Register was to supply data to state and private organisations to facilitate the performance of their duties (Article 7.2);
- h. mandatory regular data to be supplied to certain organisations for the performance of their basic tasks, such organisations to be determined by decree of the Council of Ministers (Article 7.3);

- i. provision of data could be refused if it violated a citizen's personal rights (Article 8);
- j. each citizen had the right to correct the data on him or herself (Article 10.2); and
- k. personal data could only be made public in cases specified by a statute or by decrees of the Council of Ministers (Article 10.3).

The petitioner submitted that:

- a. the Law Decree was unconstitutional because it did not comply with the Constitution or the regulatory level necessary for the regulation of fundamental rights as required by Act XI of 1987 on Legislation;
- b. the provision of mandatory data was prescribed in such a way that the scope of data to be provided was to be determined by the Council of Ministers which also conflicted with Act XI of 1987. The authorisation did not specify the subject or the limit of its scope. Consequently the Council regulated fundamental rights and duties, which it was not authorised to do; and
- c. it was unconstitutional that a Decree of the Council of Ministers could determine who received the mandatory data and who, based on such data, established rights and duties; moreover the protection of personal data in the hands of such recipients could not be guaranteed.

According to Article 59 of the Constitution everyone is entitled to the protection of his/her reputation, and to privacy, including privacy of the home and to the protection of personal secrets and data. The Constitutional Court did not interpret the right to the protection of personal data as a traditional protective right, but as an informational right to self-determination. Thus, the right to the protection of personal data, as guaranteed by Article 59 of the Constitution, means that everyone has the right to decide about the disclosure and use of his/her personal data. Hence, approval by the person concerned is generally required to register and use personal data; the entire route of data processing and handling shall be made accessible to everyone, i.e. everyone has the right to know who uses his/her data, and when, where and for what purpose it is used. In exceptional cases, a statute exceptionally requires the compulsory supply of personal data and prescribes the manner in which this data may be used. Such a statute restricts the fundamental right to informational self-determination, and it is constitutional only if it is in accordance with the requirements specified in Article 8 of the Constitution.

Adherence to the purpose to be achieved is a condition of and at the same time the most important guarantee for exercising the right to informational

self-determination. It follows from the principle of adherence to the purpose to be achieved that collecting and storing data without a specific goal, "for the purpose of storage", for an unspecified future use, is unconstitutional.

The other basic guarantee is the restriction on the forwarding and publication of data. Personal data may be made accessible to a third party, other than the concerned party and the original data user, and thereby data processing systems may be linked together, only if all the conditions required for data forwarding are fulfilled in relation to each item of data.

The contested Law Decree was unconstitutional because it failed to meet the basic requirement of the adherence to the purpose to be achieved.

The principle of adherence to the purpose to be achieved was a condition of and the guarantee for exercise of the right to informational self-determination. Personal data might therefore only be processed for a definite and legally-justified purpose to which every stage of the process had to conform. The person concerned was to be informed of the purpose for the data processing in a manner which allowed him to assess its effect on his/her rights, to make a well-founded decision on its provision and to enforce his/her rights were the use of such data to deviate from the original purpose. If there were any possible alteration in the purpose, the person was to be notified unless a statute permitted otherwise.

The definition by the Law Decree of the purpose and scope of data collection violated a person's right to human dignity. The protection of the right to informational self-determination in the process of data forwarding was to be ensured through guarantee-based regulations and the adherence to the purpose to be achieved which had to be present at every stage from the supply to the elimination of such data from a record. Since the Register, whose data processing was "for the purpose of storage" lacked any tangible objective, this resulted in a lack of continuity of purpose from the data-forwarding stage onwards as well as a lack of legitimacy of an alteration in the purpose thereof. Moreover it was clear that a data user with an undefined scope for data collecting would become familiar with personal data in its entirety and in its context. Taken out of its original context, the data used to create a "personality profile" violated the personality rights of the person concerned.

The main legal provisions on the population register, with respect to the collection of data and its processing, were unconstitutional. Article 1 of the Law Decree provided a definition of the objective of the

Register and its duties which was inadequate and vague, incapable of guiding data processing in a definite direction or restricting it in any way. In addition under Article 4, data collection for storage purposes had no definite purpose or scope: there was no detailed list of the data to be included in the Register and instead the Law Decree gave a broad authorisation to the Council of Ministers to draw up such a list. However it had gone beyond its authorisation under Articles 3-4 when it included for compulsory registration the PIN of the person's father, mother, children and spouse, thereby violating the personality rights of the person since it used relationships without his/her knowledge.

Further, Article 7 was unconstitutional since it gave unlimited freedom to the data processing of the Register. The person concerned was not required to give his/her approval to the processing, nor was there a duty that once the specific service had been completed the data was to be deleted or that a record of such amendments was to be kept with the data. Moreover, when combined with data from other sources, the data in the Register could provide different information on a person who would be ignorant of its provision. Consequently, in order to render constitutional the acquisition of data from other records or its forwarding, the data would have to be used solely for the purpose of original record-keeping and made available only to the audience with whom the person would have to deal in connection with the original record-keeping. Data outside the collection remit of the Register would have to be deleted after forwarding while the request and forwarding of data would need to be documented.

In addition, different stipulations under Article 7 provided for data supply or forwarding to private persons, i.e. having a "lawful interest" in another person's data, or to organisations "to facilitate the performance of their duties" which did not sufficiently take into account a person's right to data protection. These objective conditions were of themselves incapable of providing the requisite basis for protection under Article 8, according to which supply could be refused if it violated personality rights. The supply of personal data for the performance of a specifically-defined task and the performance of which possibly justified the risk involved in the supply alone complied with personality rights protection. Only organs of state administration and the judiciary were given such tasks so that identical restrictive conditions were to be imposed on providing data to these "organisations" other than the aforementioned organs and to private persons – the right to informational self-determination could be enforced if based on a right documented and certified in writing on the same footing as private persons. Finally the

requirement of mandatory regular data supply in Article 7.3 to local authorities and to ministries for the performance of their basic tasks was insufficient to permit constitutional data-forwarding and those entitled could only be determined by statute, not merely by executive decree.

The express guarantees of personality rights in the Law Decree failed to meet all the criteria of constitutionality. For instance, Article 10.2 only provided the right to make corrections for the person concerned. Since the essence of the right to informational self-determination was that the party concerned might know and follow the route and circumstances of the use of his/her personal data, the preconditions necessary for the exercise of this right were to be ensured: applications for data on certain subjects were to be officially documented in the Register, i.e. records on whose data was supplied to whom, when and for what purpose, as well as the use of other data systems. Certification would also facilitate possible corrections which would need to be made in all registers receiving the wrong item of data. Further, the right to correction should also be extended to deletions. By Article 10.3, personal data could only be made public in cases specified by statute or government decree where general authorisation, in view of the current Decision, was also unconstitutional. The right to informational self-determination might be limited only in unavoidable situations, the justified exceptions to the rule being determined by statute. Therefore only where the person concerned could forbid the provision of his/her data recorded in the Register would the protection of personality rights satisfy the Constitution.

Finally the concept of a universal and unified PIN available for unlimited use was unconstitutional. Article 6.2 permitted the use of PINs in any official document and record or computerised register system and was thus broader in scope than the Register: indeed, it failed to limit or impose conditions on the use of PINs. The PIN threatened personality rights particularly where data was acquired from various databases without informing the person concerned: he or she was therefore limited in or deprived of the possibility of monitoring the dataflow. Further this mass of interconnected data, of which the person generally had no knowledge, rendered him defenceless and created unequal communication conditions so that one party possessed information giving a particular (possibly distorted) image of which the other party concerned was unaware. The power of the state administration in using PINs was also markedly extended. Where they were used outside the ambit of the administration, this increased the power not only of the data user over the parties concerned but also of the State since it further

broadened the possibility of control through use of such data. Taken together, they seriously jeopardised the right to self-determination and human dignity. Accordingly PINs remained contrary to the right to data protection, to the principle of divided information systems with adherence to the purpose to be achieved and to the main rule that data was to be acquired from persons with their knowledge and consent.

Languages:

Hungarian.



Identification: HUN-1991-S-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 26.09.1991 / **e)** 48/1991 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 103/1991 / **h)**.

Keywords of the systematic thesaurus:

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

4.4.1.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**

4.4.1.2 Institutions – Head of State – Powers – **Relations with the executive powers.**

4.4.1.6 Institutions – Head of State – Powers – **Powers with respect to the armed forces.**

4.4.4.1 Institutions – Head of State – Status – **Liability.**

4.4.4.1.1 Institutions – Head of State – Status – Liability – **Legal liability.**

4.5.2 Institutions – Legislative bodies – **Powers.**

4.6.2 Institutions – Executive bodies – **Powers.**

4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces.**

Keywords of the alphabetical index:

Army, governing function / Army, commanding function.

Headnotes:

The current separation of powers over the armed forces under the Constitution was the natural result of every parliamentary system. Both governing and

commanding functions over the armed forces were activities directed at their successful operation: the governing authority stood outside the forces while the commander was situated inside being not only the head but also part of the organisation. The relative independence of the armed forces within the executive branch and the establishment of governing authorities which fell outside the executive power's jurisdiction were political rather than constitutional questions for which the Constitution set the framework.

Summary:

The petitioners sought an advisory opinion on the interpretation of the Constitution in relation to the position of the President of the Republic *vis-à-vis* the armed forces.

The first petitioner, the Minister of Defence, requested the interpretation of those constitutional provisions on the governance of the activities of the armed forces and sought to establish the interrelation between the institutions of the President, Parliament and Government as laid down in Article 40/B.3 of the Constitution with regard to their authority on governance of the armed forces. He submitted that the governance, in peacetime, of the armed forces was for the exclusive authority of the Government; the President or Parliament could not determine directly the forces' activities outside the area specifically assigned to them by law.

The second petitioner, the Parliamentary Committee on Cultural, Educational, Scientific, Sport, Television and Press Affairs requested the interpretation of the question of the President's power of appointment pursuant to the various statutes governing appointments adopted in accordance with Article 30/A.1.m of the Constitution. They further requested the interpretation of the question of ministerial countersignature pursuant to Article 30/A.2 of the Constitution, with particular reference as to whether the President:

- a. could refuse the appointment of a duly-submitted nominee;
- b. could challenge the grounds of the position to be filled;
- c. had to take into account the view expressed by the parliamentary committee which interviewed the nominee; and further
- d. whether the President's consideration had to include practical and political purposes besides considering the existence of the necessary legal conditions; and
- e. at what stage did Government responsibility commence when countersigning the President's action.

The third petitioner, the Minister of Justice, submitted for interpretation Article 31/A.1 of the Constitution and sought particularly guidance on the President's personal inviolability (i.e. to be protected from criminal prosecution) including, narrowly speaking, the strengthened criminal protection of his life and personal safety or, broadly speaking, the protection of his reputation and dignity.

Under Article 40/B of the Constitution, the Parliament, the President and the Government had the sole right to participate in governing the armed forces according to their respective constitutionally-established powers and without infringing those of the other two institutions. Therefore, according to the Court, no command role could be established under the Constitution independent of the governing powers stipulated for the three institutions. The commander-in-chief of the Hungarian Army might exercise his commanding powers exclusively in accordance with the governing actions of the said institutions and within the limits of the established rules.

Parliament could establish new, unspecified powers for governing the armed forces without amending the Constitution only where such a constitutional Act of "power creation" did not infringe the governing powers vested in the other institutions in Article 40/B of the Constitution. However, were Parliament to seek to redistribute the various powers provided for in the Constitution, it would then be necessary to amend it.

Under Article 29.2 of the Constitution, the President was vested with the authority of a traditional commander-in-chief of the armed forces. This supreme command function was a constitutional one and did not thereby give him a rank or post in the Hungarian armed forces. Since the commander-in-chief was outside the structure of the forces, being its leader but not chief commanding officer, he therefore did not act as superior officer in respect of the armed forces since the commands (which had to be issued in accordance with his governing authority/action) were issued by the commander of the Hungarian Army and of the Border Guard. The President's governing authority over the armed forces, being exclusively determined by the Constitution and legislation enacted there under, was similar to those which he possessed in respect of other institutions in the exercise of the powers of appointment, approval and confirmation.

The government was the sole executive branch which possessed all governing authority over the armed forces accorded to it under the Constitution and which did not fall within the competence of the President or Parliament. Thus, under Article 35.1.h of the Constitution, it had the power to regulate and

supervise the operation of the armed forces. Although no law could deprive the Government of its supervisory authority in the field of the armed forces, it was still theoretically possible to widen the authority of the President or Parliament.

The President's governing actions in respect of the armed forces during peacetime were all subject to countersignature. In fact all appointments and approvals effected by the President according to the Constitution or other laws (except appointing judges) were subject to the countersignature of the Prime Minister or the relevant competent minister. Such countersignature validated the President's action, on the one hand ensuring that this action would not conflict with government policy while on the other hand making the government assume political responsibility for such action before Parliament.

The President was required to reject the appointment or approval if he were of the opinion that the necessary legal preconditions for such appointments were absent. Such prerequisites included Hungarian citizenship; professional qualification; age; or procedural conditions which included, *inter alia*, the interviewing of the nominee by a competent organ, e.g. the relevant parliamentary committee. Both the interview and opinion of such an organ/committee amounted to procedural validating instruments. Indeed the President, if legislation expressly so determined, was required to take the opinion into consideration in his deliberations but it did not bind him in his decision.

In other situations, the President might reject the appointment of a candidate on the grounds of merit only if he came to a well-founded conclusion that his compliance with the proposal could seriously endanger the democratic functioning of the State according to Article 29.1 of the Constitution. By rejecting a formally correct nomination, the President directly intervened in the merits of the case, thereby preventing the politically responsible organ from fulfilling its duty without his assuming that responsibility. His refusal served as a final guarantee, an extraordinary measure the exercise of which was to be based on grounds similar to those which lead to the extraordinary convening or dissolving of Parliament.

As part of his constitutional status, the inviolability of the President expressed the principles that he bore no political responsibility before Parliament and that his legal responsibility was limited; moreover his protection from criminal prosecution, according to Article 31.1 of the Constitution, was to be provided for in separate legislation. According to Articles 31, 31/A and 32 of the Constitution, the President was legally

responsible for his actions while in office which amounted to a premeditated breach of the Constitution or other legislation. For acts committed outside his official activities, he might be held criminally responsible after the end of his term in office. Consequently his complete non-responsibility existed only *vis-à-vis* acts committed while in office but being of a non-official type. As regards his immunity from criminal prosecution, it was for Parliament to decide on the scope of such protection with regard to his life, good health, honour and dignity and to the extent thereof including severity or leniency of the punishment.

Supplementary information:

Three of the Justices attached separate opinions to the decision and six Justices wrote concurring opinions to the current decision.

Languages:

Hungarian.



Identification: HUN-1991-S-003

a) Hungary / b) Constitutional Court / c) / d) 17.12.1991 / e) 64/1991 / f) / g) *Magyar Közlöny* (Official Gazette), 139/1991 / h).

Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**
 3.19 General Principles – **Margin of appreciation.**
 4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy.**
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**
 5.1.1.4 Fundamental Rights – General questions – Entitlement to rights – **Natural persons.**
 5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**
 5.3.2 Fundamental Rights – Civil and political rights – **Right to life.**
 5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**
 5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

Keywords of the alphabetical index:

Abortion / Foetus, legal status / Child, unborn, protection of life / Woman, right to self-determination / Foetus, dignity, right.

Headnotes:

The non-statutory regulation of abortion was unconstitutional. Statutory regulation was required for any direct and significant restriction of fundamental rights and, in certain instances, the determination of the content of such rights and the manner of their protection. However where the relationship with fundamental rights was indirect and remote, administrative/executive (i.e. non-statutory) regulation was sufficient as otherwise everything would have to be regulated by statute.

The decision on whether the foetus is or is not a person is within the competence of the Parliament.

Summary:

Two groups of petitioners sought to challenge the constitutionality of various statutory and non-statutory provisions regulating abortion.

The basis of both petitions was that the governmental and ministerial decrees on abortion were contrary to Article 8.2 of the Constitution and to various provisions of Act XI of 1987 on Legislation since such decrees constituted non-statutory regulation of issues involving fundamental rights and duties which could only be regulated by statute. The decrees were also contrary to Articles 35.2 and 37.3 of the Constitution which prohibited the government and ministers from issuing unlawful decrees.

The first group of petitioners contended that the decrees were unconstitutional since they permitted or insufficiently restricted the availability of abortions. They submitted, *inter alia*, that:

- a. since human life began at conception and any restriction on the substantial content of fundamental rights and duties, being contrary to Article 8.2 of the Constitution, was equally applicable to a foetus as to a fully-grown human being, the decrees violated Article 54.1 of the Constitution under which no one may be arbitrarily deprived of their right to life and human dignity;
- b. failure to protect the life of the foetus to the same extent as that conferred on other lives was discriminatory and therefore breached Article 70/A.1 of the Constitution;

- c. consequently permitting abortion also violated Article 56 of the Constitution which guaranteed the right to legal capacity; and
- d. the decrees did not guarantee doctors and other health-care workers the right to refuse termination of a pregnancy thereby violating their right to freedom of conscience in Article 60 of the Constitution.

The second group contended that since abortion was a matter of conscience to be resolved by the woman concerned, any external regulatory interference was unconstitutional. They submitted, *inter alia*, that:

- a. the right to terminate pregnancy sprang from the woman's fundamental right to human dignity under Article 54.1 of the Constitution and consequently any restriction on this right by decree was contrary to Article 8.2 of the Constitution; and
- b. were the decrees to be annulled, the Constitutional Court should therefore declare an unconstitutional omission to legislate since the provisions remaining in force would prohibit abortion in all circumstances thereby violating those rights of women which, according to Article 8.2 of the Constitution, could not be restricted.

According to the Court, the need for statutory regulation depended on the particular measure and on the intensity of its relationship to fundamental rights. In the present case, the regulation of abortion concerned the foetus' right to life and since this raised the question of its legal status, such regulation undoubtedly pertained to the foetus' right to legal capacity. This right was the prerequisite for the foetus' right to life and human dignity as a legal person. Therefore a decision as to whether the foetus was a legal person would determine whether it was a human being in the legal sense. The connection between abortion regulation and the rights to life and to legal recognition was necessarily predicated by the prior determination of the existence of these rights: since these rights could not be limited, for they either did or did not exist, the regulation of abortion was fundamentally related to them.

In order to determine whether these rights were affected by abortion regulation to an extent which rendered statutory intervention necessary, a balancing test therefore had to be employed. It was necessary to weigh the woman's right to self-determination (dignity) against the question of whether the State's duty to protect life extended to the foetus the right to life. Only if the foetus had no right to legal recognition and was therefore not a legal person could it be maintained that abortion complied with the right to life under Article 54 of the

Constitution. In contrast, if the foetus had a right to life and human dignity then this right could not differ from those accorded to others and the rights of the unborn, when conflicting with those of the mother, had to be weighed no differently than would be the case with children already born. The right to dignity of the foetus in such circumstances would prohibit the termination of a pregnancy. Consequently abortion always required statutory regulation because any ruling on the matter implied the resolution of the question of the foetus' legal status. Based on this reasoning the executive decrees in question were unconstitutional since by regulating abortion they also determined that question, a decision which according to Articles 8.2, 54 and 56 of the Constitution could only be made by statute.

Article 8.2 of the Constitution was also violated by Articles 29.4 and 87.2 of the Health Act 1972. These subsections authorised the regulation of abortion by measures which did not have the full force of law. No decree could be elevated to the status of a law by another law, i.e. the mere possibility of regulation was superfluous, since the decrees in question could not be construed to mean that the Health Act exclusively authorised statutory regulation of abortion in a manner consistent with the Constitution and the Act on Legislation. Both subsections were necessarily unconstitutional since they permitted regulation of a fundamental right by decree and not by statute.

Although the question of whether the foetus was a legal subject could not be resolved by constitutional interpretation, nevertheless it was possible to evaluate both the constitutionality of the restriction and the extension of its scope. According to the Constitution and international human rights' agreements, every human being was unconditionally entitled to be recognised as a legal subject, i.e. a person in the legal sense of the word. The substantive rights to life and to human dignity which supplemented a human being's basic legal status fulfilled formal requirements of the right to legal capacity while giving content to a person's human quality. The right to human dignity meant that the individual possessed an untouchable core of autonomy and self-determination beyond the reach of all others, whereby the human being remained a subject not amenable to transformation into an instrument or object whereas entities having legal capacity remained susceptible to total regulation, lacking an inviolable substance. Human dignity was a quality coterminous with human existence, indivisible and unlimitable thus belonging equally to every human being. Consequently the right to equal dignity coupled with the right to life, ensured that the value of human life could not be legally differentiated. A person's dignity and life was inviolable irrespective of

development or conditions, or fulfilment of human potential. Based on these most important fundamental rights which formed the foundation of a person's legal status, the Constitution did not permit the revocation or restriction of any part of the legal position already attained by a human being. Conversely only a constitutionally-mandated change in the scope of entitlement to legal status and, correspondingly, in the legal concept of personhood, could permit its extension to the pre-natal stage.

Further it was also possible for the Court to consider whether such an extension modified the basic characteristics of the legal concept of man and assess whether its interpretation of the right to life complied with such a modification. The realisation of this extension would be permissible provided it did not contradict the existing constitutionally-validated legal concept of man. The most important substantive component of such a concept was equality in the abstract which, being the legal equivalent of the ethical concept of man guaranteed by substantive law, was not affected by the extension of legal capacity to the unborn. Consequently neither the foetus' legal status had to be recognised nor was it impossible to accord it legal capacity since such an extension did not substantially affect the important elements of the legal concept of man. Within such a framework, it was for Parliament to legislate on the matter.

The abortion regulations in force guaranteed doctors and other health-care professionals the possibility, on grounds of conscientious objection, of refusal to perform or to assist in abortions. The State's duty to uphold the doctor's right to freedom of conscience was met by the Constitution and by existing rules in the Labour Code which permitted exemption from work-related obligations or of the doctor to create a work environment where he/she was not forced to undertake an abortion contrary to their convictions.

Subject to Parliament's determination on whether the foetus was a legal person, there were constitutional boundaries limiting the opportunities for abortion. Were the legislature to decide that the foetus was not legally a person, a legal subject entitled to the right to life and dignity, then abortion was permissible only in those situations where the law tolerated a choice being made between two lives and therefore did not punish the extinction of human life. Were the legislature to decide otherwise, the State would be compelled to balance its duty to protect life against the woman's right to self-determination. An outright ban would be unconstitutional since this would completely negate the mother's right to self-determination as would rules which exclusively favoured that right. The State's duty was to protect

human life from its inception and so the right to self-determination could not be dispositive even at the earliest stages of pregnancy. This duty meant that the State could not lawfully permit unjustified abortions. Justifications deemed adequate by Parliament had to be incorporated into a new abortion law as conditions with which to be complied. In the ultimate analysis, it was for Parliament to decide where to draw the line between the two unconstitutional extremes of total prohibition and unrestricted availability of abortions.

Supplementary information:

Five of the Justices attached concurring opinions to the decision.

Languages:

Hungarian.



Identification: HUN-1992-S-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 05.03.1992 / **e)** 11/1992 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 23/1992 / **h)**.

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law.**
 3.10 General Principles – **Certainty of the law.**
 3.14 General Principles – ***Nullum crimen, nulla poena sine lege.***
 3.22 General Principles – **Prohibition of arbitrariness.**
 5.3.38.1 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Criminal law.**

Keywords of the alphabetical index:

Transition, justice / Sanction, criminal, reimposition / Statute of limitations, extension / Pardon, restriction / Punishment, mitigation, restriction.

Headnotes:

Concerning the question of the constitutionality of the specific provisions of Act IV of 1991 on the

Prosecution of Serious Criminal Offences not previously prosecuted for Political Reasons, the Constitutional Court's opinion is the following:

1. Reimposition of criminal punishability for offences whose statutes of limitation had expired is unconstitutional.
2. Extension of the statute of limitation defined by law for criminal offences whose statute of limitation has not yet expired is unconstitutional.
3. Enactment of a law to interrupt the running of the statutes of limitation for criminal offences whose statute of limitation has not yet expired is unconstitutional.
4. The determination of causes for the suspension and interruption of the statute of limitation by a retroactive law is unconstitutional.
5. With respect to the running of the statute of limitation, there is no constitutional basis for differentiating between the State's failure to prosecute for political or for other reasons.
6. The vagueness of the statutory definition stating that the "State's failure to prosecute for criminal offences was based on political reasons" is repugnant to the principle of legal certainty, and as a result, the suspension of the statute of limitation on such a basis is unconstitutional.
7. It is unconstitutional for the Act to incorporate the crime of treason within its scope without consideration of the fact that the legally-protected subject matter has undergone numerous changes under different political systems.
8. Restrictions upon the right of pardon for a partial or total mitigation of punishments, imposed on the basis of the Act, are unconstitutional.

Summary:

The President of the Republic, having declined to promulgate Act IV of 1991 on the Prosecution of Serious Criminal Offences not previously prosecuted for Political Reasons (henceforth: "the Act"), petitioned for a preliminary review of its constitutionality.

He sought to know whether Article 1 of the Act violated the principle of the rule of law under Article 2.1 of the Constitution and, further, Article 57.4 of the Constitution. In particular, he petitioned, *inter alia*, as to whether:

- a. the recommencement of the statute of limitation conflicted with the principle of the rule of law, an essential component of which was legal certainty;
- b. Article 1 of the Act amounted to an unconstitutional retroactive criminal law which violated the doctrine of *nullum crimen sine lege* especially since the statute of limitation for acts criminalised by the section might have already expired according to the

Criminal Code in force at the time the acts were committed;

- c. the recommencement of the statute of limitation, which had already expired, violated the rule of law, especially the principle of legal certainty;
- d. moreover, overly general provisions and vague concepts violated the principle of legal certainty, e.g. "the State's failure to prosecute its claim was based on political reasons"; and
- e. it was a violation of the prohibition of arbitrariness under Article 54.1 and equal protection of citizens under Article 70/A of the Constitution that a distinction was drawn by the law as regards different instances of the same offence being committed, with the state giving different reasons for prosecuting or excusing such offences.

The ambiguity and vagueness of the Act offended the principle of legal certainty and was accordingly unconstitutional. Since the change of system had proceeded on the principle of legality as imposed by the rule of law, the old law had thereby retained its validity and thus, irrespective of the date of enactment, every law had to comply with the present Constitution. It was possible, however, to give special treatment to the previous law where legal relationships created by the old (now unconstitutional) law could be harmonised with the new Constitution; or where, in judging the constitutionality of new laws intended to remedy unconstitutional measures of the previous systems, whether the unique historical circumstances of the transition should be taken into consideration. Such matters were to be resolved in conformity with the fundamental principle of the rule of law, of which legal certainty formed a part, that required, *inter alia*, the protection of vested rights, the non-interference with legal relations already executed or concluded, and the limitation of the possibility of modifying existing long-term legal relations. As a consequence of legal certainty, already concluded legal relations – as a rule – could not be altered constitutionally either by enactment or by invalidation of existing law. Retroactive modification of the law and legal relations were permitted within very narrow limits. Exceptions to legal certainty were permissible only if the constitutional principle competing against it rendered this outcome unavoidable, provided that in fulfilling its objectives it did not cause disproportionate harm. Accordingly, reference to historical situations and the rule of law's requirement of justice could not be used to set aside legal certainty as a basic guarantee of the rule of law.

As a result, the Act regarding the recommencement of the statute of limitation overstepped the limits of the State's criminal power. These were guaranteed rights, the restriction of which Article 8.4 of the Constitution did not permit, even if other fundamental

rights could constitutionally be suspended or restricted. The constitutional guarantees of criminal law could be neither relativised nor balanced against some other constitutional right or duty since they already contained the result of a balancing act, i.e. the risk of unsuccessful prosecution was borne by the State. The presumption of innocence could not therefore be restricted or denied full effect because of another constitutional right: as a result of the State's inaction, once the time limit for prosecution expired the non-indictability thereby acquired was complete. Considerations of historical circumstances and justice could not therefore be used to gain exemption from the guarantees of criminal law since any such exemption would completely disregard those guarantees, a result precluded by the rule of law.

The Act was also contrary to the principle of the legality of criminal law. Article 8.1 and 8.2 of the Constitution required offences, their punishment and the declaration of the criminality of an act to be regulated only by statute, and stated that the imposition of punishment had to be necessary, proportional and used only as a last resort. It followed from Article 57.2 of the Constitution, on the presumption of innocence, that only a court of law establishing the defendant's guilt could convict him and from Article 57.4 of the Constitution, that such conviction and punishment could only proceed according to the law in force at the time of commission of the crime. The court was therefore required to judge the offence and punishment in accordance with the law in force when the crime was committed unless a new law was passed subsequent to the offence which prescribed a more lenient punishment or decriminalised the act. This was the necessary result of the prohibition on retroactivity embodied in the principle of legal certainty (foreseeability and predictability) which, in turn, stemmed from the rule of law.

The reimposition of the possibility of criminal sanctions for a crime the statute of limitation for the prosecution of which had already expired was contrary to Articles 2.1 and 57.4 of the Constitution. With the expiry, the criminal responsibility of the offender was irrevocably extinguished and he acquired the right not to be punished since the State was unable to punish him during the period prescribed for the exercise of its punitive powers. It did not matter which method was used to reimpose the possibility of punishment (whether the statute of limitation recommenced or *ex post facto* legislation was imposed to suspend the statute) since their constitutionality had to be viewed in the same light as a law retroactively imposing punishment on conduct which, at the time of its commission, did not constitute a criminal offence.

The statutory extension of a statute of limitation which had not yet expired was also unconstitutional. According to law, the prosecuting authorities could suspend and recommence its running with regard to the offender without informing him with the result that the duration of the suspension extended the statute of limitation: this extended statute of limitation would then represent the minimum rather than the actual time required for termination of the offender's responsibility. Although the statute of limitation did not guarantee that punishability would be extinguished within the initially prescribed time frame, it did ensure the methods of calculating the time expired did not change in a manner detrimental to the offender: the State's punitive powers therefore had to be the same at the time of punishment as at the time of the offence. Consequently the extension of the as yet unexpired statute of limitation was unconstitutional since it would always impose a more onerous burden on the offender. Moreover, determination of whether or not the period had expired could not be decided retroactively by the legislature: no law could therefore retroactively declare that the period was suspended for reasons which the law in force at the time of the offence and during the running of the statute of limitation did not acknowledge as applicable to that criminal offence. The legal facts determining the commencement and duration of the statute of limitation had to exist throughout the duration of the period and what did not constitute a legal fact warranting the suspension of the period could not be declared so retroactively.

The incorporation of the condition that the statute of limitation recommenced "if the State's failure to prosecute was based on political reasons" into the Act was unconstitutional. Legal certainty required the predictability of the behaviour of other legal subjects as well as of the authorities themselves and the condition failed to satisfy this requirement since it did not allow for an interpretation which could be determined with sufficient certainty. Further the differentiation contained in the law allowed the re-enactment of the statute of limitation only for three of many non-prosecuted crimes and then only for non-prosecution of those three crimes based on political reasons: such differences could only be justified if Parliament sought to apply positive discrimination in favour of those offenders whose actions, while not covered, by it could have fallen within the scope of the Act. As the Act revealed no reason which could satisfy the constitutional requirement for positive discrimination, it was accordingly contrary to Article 70/A.1 of the Constitution.

Languages:

Hungarian.



Identification: HUN-1992-S-002

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 26.05.1992 / **e)** 30/1992 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 53/1992 / **h)**.

Keywords of the systematic thesaurus:

3.3 General Principles – **Democracy.**

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

3.16 General Principles – **Proportionality.**

3.22 General Principles – **Prohibition of arbitrariness.**

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

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

Keywords of the alphabetical index:

Hate speech / Hatred, incitement.

Headnotes:

The freedom of expression is the “umbrella right” of the fundamental rights of communication. Free expression of ideas and beliefs, free manifestation of even unpopular or unusual convictions, is fundamental to a pluralist, democratic society. The constitutional boundary of the freedom of expression has to be drawn in such a way that in addition to the individual's subjective right to free expression, it is necessary to consider the (free) formation of public opinion as an indispensable democratic principle.

Summary:

The petitioners sought the *ex post facto* review of the constitutionality of Article 269 of Act IV of 1978 on the Criminal Code.

Article 269.1 provides that anyone who, before a large public audience, incites hatred against the Hungarian nation, any other nationality, people, religion or race, or certain groups among the population commits an offence punishable by up to three years' imprisonment. Under paragraph 2 of the same article, anyone in the same circumstances who uses an offensive or denigrating expression or commits similar acts against the groups above

commits an offence punishable by up to one year's imprisonment, corrective training or a fine.

The petitioners submitted, *inter alia*, that Article 269 was unconstitutional because it punished behaviour which fell within the scope of the freedoms of expression and of the press under Article 61 of the Constitution, the freedom of thought under Article 60 of the Constitution and the right of asylum under Article 65 of the Constitution.

In approaching the question of the constitutionality of Article 269 of the Criminal Code, it was necessary to examine the dividing line between the freedoms of expression and of the press on the one hand, and behaviour prohibited as criminal and subject to criminal sanction on the other. It was important to determine whether and on what terms a constitutional fundamental right might be limited or restricted, and if two such rights conflict on what criteria one of them would take priority. The State could only restrict a fundamental right in order to protect or realise another if the restriction was proportional, and even then the legislature was required to use the least restrictive means available for the achievement of its objective. It was not permissible to impose restrictions that were arbitrary, unjustified or disproportionate to the objective to be achieved.

The restriction of the freedom of expression and the freedom of the press under Article 269.1 was justified by the historically proven harmful effect on certain groups of incitement to hatred, the protection of fundamental constitutional values and the fulfilment of international treaty obligations by Hungary. Further, the impact and consequences for an individual and society of the prohibited behaviour were so grave that other forms of accountability (e.g. civil liability) were inadequate to deal with persons who publicly incited racial hatred. Consequently, since only a criminal sanction was sufficient to respond effectively to the behaviour, it was important to scrutinise strictly which breaches of the law against inciting racial hatred were punishable by criminal sanctions: thus criminal sanctions could only be applied when absolutely necessary and only as justified in accordance with the principle of proportionality if, as in the present case, there were no other means of protecting the State under the rule of law and in line with its social and economic aims and values.

Moreover, Article 269.1 was sufficiently definite and did not define too broadly the scope of behaviour subject to criminal sanction. Constitutional criminal law required that the provision designating a type of behaviour against which criminal sanctions may be applied must be specific, clearly defined and demarcated. Thus a clear expression of the legislative intent concerning the

content of the unlawful act was also necessary. The definition of the crime had to contain an unequivocal message putting a person on notice as to when a crime would be committed, while simultaneously minimising the opportunity for arbitrary interpretation by those applying the law. Incitement to hatred included behaviour which was capable of whipping up such intense emotions in the majority of the people that they might, upon giving rise to hatred, might result in the disturbance of social order and peace; this also included the danger of the large scale violation of individual rights. Bearing in mind the danger to individual rights and through this the threat to public order, the restriction on the freedom of expression in Article 269.1 was to be regarded as necessary and proportionate, and accordingly constitutional.

Article 269.2 of the Criminal Code, however, was unconstitutional. The freedom of expression had only external boundaries: unless and until it clashed with such a constitutionally-drawn external limit, the opportunity and fact of the expression of opinion was protected irrespective of the value or veracity of its content. The Constitution guaranteed free communication – as a manifestation of individual behaviour and as a social process – and it was not the content to which the right of free expression related. Although everyone was entitled to support or oppose an opinion provided that some other right was not violated to such an extent that freedom of expression was pushed back, Article 269.2 did not establish an external boundary; rather, it classified opinion on the basis of content. The message conveyed by certain words was so clearly linked to a given situation and cultural context (which was subject to change) that the abstract, hypothetical definition of an offensive or denigrating expression – in the absence of an actual breach of the peace – was a mere assumption which did not sufficiently justify the restriction of the external boundary, i.e. the violation of another right, which was itself uncertain.

Moreover, a further distinction had to be made between incitement to hatred under Article 269.1 and the use of offensive or denigrating expressions under Article 269.2. Apart from public gatherings, the “public at large” effectively meant the press. The freedom of the press now meant that anyone speaking out publicly could not invoke external compulsion, and any journalist or writer risked his entire moral credibility through his writings. Anyone known for using scurrilous or derisive language would earn a reputation for this: such abusive language needed to be answered by sanctions for which the payment of a large sum of damages would be considered adequate. Criminal sanctions, as previously indicated, could be applied for the defence of other rights and only when unavoidably necessary; they were not to

be used as a means with which to shape public opinion or the manner of political debate. Consequently, Article 269.2 would be declared null and void.

Languages:

Hungarian.



Identification: HUN-1992-S-003

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 10.06.1992 / **e)** 37/1992 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 59/1992 / **h)**.

Keywords of the systematic thesaurus:

- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
- 5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press.**
- 5.3.23 Fundamental Rights – Civil and political rights – **Rights in respect of the audiovisual media and other means of mass communication.**
- 5.3.24 Fundamental Rights – Civil and political rights – **Right to information.**

Keywords of the alphabetical index:

Media, public broadcaster, state influence / Information, monopoly / Media, public radio and television, independence.

Headnotes:

The regulatory duty of the State – in the interest of enforcing “neutrality”, that is comprehensive, balanced and accurate reporting – regarding the public radio and television was based on their monopoly position and the limited number of frequencies.

Summary:

The petitioners sought an *ex post facto* review of the constitutionality of Paragraph 6 of Council of Ministers Decree 1047/1974 (IX.18) MT and a declaration that the said Paragraph 6 was unconstitutional, as well as

a declaration that there had been an unconstitutional omission to enact laws. Paragraph 6 of the said Decree provided that the Hungarian State Radio and the Hungarian State Television were under the supervision of the Council of Ministers, and subject to its approval of their corporate and operational regulation.

It was submitted that Paragraph 6 violated Articles 8.2 and 61.2 of the Constitution, as well as Article 61.4 of the Constitution, which permitted the regulation of the suspension of public radio and television and the appointment of their heads only by an Act passed by a two-thirds majority of the members of Parliament. In the absence of such an Act, passing such a regulation at the level of the Council of Ministers engendered an unconstitutional situation since it afforded the Government an exclusive opportunity to exercise a determining influence over news content, thus violating the right to the freedom of press.

The freedom of the press was a fundamental right derived from the umbrella right of all rights related to communication, the freedom of expression, guaranteed under Article 61 of the Constitution. The State was obliged to guarantee press freedom, recognising that the press was the pre-eminent tool for disseminating and moulding views and for the gathering of information necessary for individuals to form their own opinions. Since the freedom of the press was subject only to external limits, it was primarily guaranteed by the State's non-intervention with respect to content, ensured (for example) by the prohibition of censorship and the opportunity to establish newspapers freely. The protection afforded to the right to be informed, namely the substantive and procedural means provided for safeguarding the freedom of information, was developed by the State in connection with regulating access to data not just by the press but by everyone. Since the forming of public opinions in a democracy depended on the objective and comprehensive dissemination of information, the right to information indispensable to the formation of such opinions was constitutionally recognised as a restriction on the freedom of the press only to the extent that it was unavoidable: statutory regulation would therefore be required to prevent the emergence of information monopolies.

The freedom of expression in radio and television imposed requirements beyond those necessary to secure the freedom of the press. As a result, in the present case, Paragraph 6 of Council of Ministers Decree 1047/1974 (IX.18) MT was contrary to Article 61.1 and 61.2 of the Constitution because it did not contain any substantive, procedural or organisational regulation which would preclude the

possibility of the government using its licence to assert (even indirectly) a controlling influence on programme content. The protection of the freedom of expression of opinions in the radio and television context required extensive, legally-regulated, organisational solutions able to guarantee comprehensive, balanced and accurate reporting of the views prevailing in society and to promote unbiased reporting about facts and events in the public interest. Any future Act on radio and television would have to ensure that neither organs of the State (legislature or government) nor specific interest groups could, directly or indirectly, exert a formative or undue influence on the content of public radio and television broadcasting, thereby introducing bias in the subject-matter of programmes.

Languages:

Hungarian.



Luxembourg Constitutional Court

Languages:

French.



Important decisions

Identification: LUX-1998-S-001

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 13.11.1998 / **e)** 2/1998 / **f)** Article 367 of the Civil Code / **g)** *Mémorial, Recueil de législation* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

5.2.2.12 Fundamental Rights – Equality - Criteria of distinction – **Civil status**.

5.3.33.1 Fundamental Rights – Civil and political rights – Right to family life – **Descent**.

Keywords of the alphabetical index:

Child, adoption, by an unmarried person.

Headnotes:

Article 367 of the Civil Code, which authorises married couples only (and not single persons) to apply for full adoption is not contrary to Article 10bis of the Constitution (formerly 11.2) and Article 11.3 of the Constitution, which state respectively that “Luxembourgers are equal before the law” and that “the State guarantees the natural rights of the individual and of the family”.

Summary:

The Luxembourg District Court, having been asked to execute a judgment by a Peruvian court establishing the full adoption of a child by an unmarried Luxembourg, had asked the Constitutional Court whether Article 367 of the Civil Code, which allowed only married couples to adopt a child fully, was in keeping with Article 10bis of the Constitution (formerly 11.2) and Article 11.3 of the Constitution, which state respectively that “Luxembourgers are equal before the law” and that “the State guarantees the natural rights of the individual and of the family”.

Identification: LUX-1998-S-002

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 20.11.1998 / **e)** 3/1998 / **f)** Case of Azenha Sansana v. the Grand Duchy of Luxembourg – Law of 10 August 1912 on the organisation of primary education / **g)** *Mémorial, Recueil de législation* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience**.

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

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

Keywords of the alphabetical index:

Education, public, primary, compulsory / Religion, practice, on Saturdays.

Headnotes:

The scope of freedom of worship may not be such that its exercise disrupts the planning of primary school lessons, which, under Article 23.1 of the Constitution, are free of charge and compulsory.

Summary:

The Administrative Court of the Grand Duchy of Luxembourg, in the context of an appeal against a ministerial refusal to grant a schoolgirl who belonged to the Seventh-Day Adventist Church dispensation from attending school on Saturdays, Saturday being, according to that religion, the weekly day of absolute rest, had asked the Constitutional Court whether Section 1 of the Law of 10 June 1912 on the organisation of primary education, insofar as it extended compulsory schooling to part of secondary education, was in keeping with Article 19 of the Constitution, which guaranteed freedom of worship.

The answer received was that the above-mentioned statutory provision was not contrary to Article 19 of the Constitution, insofar as the scope of freedom of worship could not be such that its exercise caused problems likely to disrupt the planning of school lessons and hence the education system.

Languages:

French.



Identification: LUX-1999-S-001

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 26.03.1999 / **e)** 7/1999 / **f)** Constitutional case of Schleich v. Koerner – Article 380.1 of the Civil Code / **g)** *Mémorial, Recueil de législation* (Official Gazette) / **h)**.

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 private life– **Protection of personal data**.

Keywords of the alphabetical index:

Child, born out of wedlock, parental authority / Child, mother, preferential assignment.

Headnotes:

Article 380.1 of the Civil Code, insofar as it attributes parental authority in respect of a child born out of wedlock and acknowledged by both parents exclusively to the mother is not in keeping with Article 10bis of the Constitution (formerly Article 11.2).

Summary:

The guardianship judge attached to the Luxembourg District Court, in the context of a dispute between the biological father and mother of a common, acknowledged child over the assignment of parental authority, had raised with the Constitutional Court the

preliminary issue of whether the preferential assignment of parental authority to the mother, which established a distinction between legitimate biological families on the one hand and an unmarried mother and father on the other, was compatible with the principle of the equality of Luxembourgers (citizens in general) before the law, as enshrined in Article 10bis of the Constitution (formerly Article 11.2).

Languages:

French.



Identification: LUX-1999-S-002

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 09.07.1999 / **e)** 8/99 / **f)** Constitutional case of la Civette v. the State of the Grand Duchy of Luxembourg – Section 14.5 of the Law of 30 June 1976 setting up an employment fund and governing the award of full unemployment benefit / **g)** *Mémorial, Recueil de législation* (Official Gazette), 106, 03.08.1999 / **h)**.

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality**.

5.2.1.2.1 Fundamental Rights – Equality – Scope of application – Employment – **In private law**.

5.4.15 Fundamental Rights – Economic, social and cultural rights – **Right to unemployment benefits**.

Keywords of the alphabetical index:

Employment, employee, dismissal, unfair / Unemployment, benefit.

Headnotes:

The law under which an employer may be ordered to reimburse the employment fund for unemployment benefit in the event of unfair dismissal, although it does not provide for a similar measure in respect of an employee dismissed justifiably on the ground of his or her conduct, is not contrary to the Constitution. The distinction is warranted by the employer's position of authority and the employee's position of subordination and the fact that the employer's decision is responsible for the unemployment

situation; the measure in question is appropriate and proportionate in view of the purpose of the law, which is to ensure the subsistence of the dismissed employee.

Summary:

The Appeal Court, in the context of a labour dispute, had asked the Constitutional Court whether "Section 14 of the Law of 30 June 1976 setting up an employment fund and governing the award of full unemployment benefit, as amended – insofar as it provided, in paragraph 5, that 'a judgment or decision declaring a worker's dismissal unfair required the employer to reimburse the employment fund for the unemployment benefit paid to the worker during the period(s) corresponding to wages, a salary or allowances that the employer was required to pay pursuant to the judgment or decision', without requiring the employer to make a similar refund in respect of an employee whose dismissal with notice was declared justified because of the worker's conduct, within the meaning of Section 22.2 of the Law of 24 May 1989 on employment contracts – was in keeping with Article 11.2 of the Constitution, which provides that 'Luxembourgers are equal before the law'".

Languages:

French.



Identification: LUX-2000-S-001

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 05.05.2000 / **e)** 9/2000 / **f)** Constitutional case of Kinsch v. CNPF – Law of 10 August 1912 on the organisation of primary education / **g)** *Mémorial, Recueil de législation* (Official Gazette), 40, 30.05.2000 / **h)**.

Keywords of the systematic thesaurus:

5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens.**

Keywords of the alphabetical index:

Social contributions, profession, independent / Family allowance, compulsory contribution.

Headnotes:

Section 16 of the Law of 19 June 1985, as amended, concerning family allowances and setting up the National Family Benefit Fund (NFBF), insofar as it requires members of the independent professions to pay contributions while exempting other socio-occupational categories, is not contrary to Article 10bis.1 of the Constitution.

Summary:

The Social Insurance Arbitration Board, in the context of an appeal by a lawyer against a decision by the National Family Benefit Fund requiring him to pay contributions, had submitted the following preliminary question to the Constitutional Court:

“Insofar as it requires persons covered by subparagraph d. – including members of the independent professions – to pay contributions, while dispensing employees and farmers and deciding that the contributions relating to the work of the latter are not their responsibility (nor even, in the case of employees, that of their employers), but the responsibility of the State, is Section 16.3 of the Law of 19 June 1985 concerning family allowances and setting up the National Family Benefit Fund, as amended by the Law of 17 June 1994 setting out measures to preserve employment, price stability and business competitiveness, in keeping with Article 10bis.1 of the Constitution (formerly Article 11.2), which provides that Luxembourgers are equal before the law?”

The answer was that it was in keeping with this provision, on the grounds that, given that Parliament's intention was gradually to make the State responsible for all contributions in this area by removing this burden, in stages, from those with whom it initially lay, in the light of their economic and social situation, temporary inequities were not tantamount to differences in treatment that were irrational, inappropriate or disproportionate to the aim, and the law in question did not therefore infringe Article 10bis.1 of the Constitution.

Languages:

French.



Identification: LUX-2000-S-002

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 08.12.2000 / **e)** 10/2000 / **f)** Constitutional case of Niedner v. the State of the Grand Duchy of Luxembourg – Sections 18, 23, 92, 93 and 118 of the Law of 4 December 1967, as amended, concerning income tax / **g)** *Mémorial, Recueil de législation* (Official Gazette), A 134, 22.12.2000 / **h)**.

Keywords of the systematic thesaurus:

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

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

Keywords of the alphabetical index:

Tax, income, calculation / Asset, revenue.

Headnotes:

The rules governing the setting and collection of income tax do not constitute deprivation of property within the meaning of Article 16 of the Constitution, which concerns only deprivation of a particular piece of property in consideration of prior and just compensation.

Summary:

The Administrative Court of the Grand Duchy of Luxembourg, in the context of a tax appeal, had submitted the following question to the Constitutional Court:

“Are Sections 18, 23, 92, 93 and 118 of the Income Tax Act (ITA), taken together, insofar as they apply to the 1990 tax year, or some of those sections – insofar as they include a building used for the practice of an independent profession in a series of assets subject to a historical cost evaluation, and, when the building is sold, require that income tax be paid, without any revaluation, on capital gains equal to the difference between the historical cost, less depreciation, and the sale price, with the result that the income tax levied uses up the entire capital gains, in view of inflation, and substantially affects the taxpayer’s assets – in keeping with the Constitution, and in particular Articles 16, 99, 100 and 101 thereof?”

The answer was that the above-mentioned legislation is not contrary to Article 16 of the Constitution, on the grounds that this article concerns only deprivation of a particular piece of property in consideration of prior and just compensation and not the effect on assets of a tax debt, which is merely an individual contribution to the collective expenses of the community.

Languages:

French.



Identification: LUX-2001-S-001

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 28.09.2001 / **e)** 11/2001 / **f)** Jos Meyers v. National Land Consolidation Office – Articles 1, 6, 7, 20, 24 and 33 of the Law of 25 May 1964 on rural land consolidation / **g)** *Mémorial, Recueil de législation* (Official Gazette), A 126, 17.10.2001 / **h)**.

Keywords of the systematic thesaurus:

3.18 General Principles – **General interest.**

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

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

Keywords of the alphabetical index:

Property, agricultural, consolidation / Expropriation, compensation, value.

Headnotes:

The statutory procedures for rural land consolidation are not contrary to the Constitution on the ground that the deprivations of property are in the public interest owing to the collective increase in the profitability of the holdings; that the compensation is fair in the light of the development of the lands transferred; that any differences in value are subsidiary and marginal; and that the compensation is paid in advance in the light of the apportionment procedure provided for by the law.

Summary:

On appeal against a decision of the National Land Consolidation Office, the Diekirch Justice of the Peace Court referred the following questions to the Constitutional Court:

“1. Is the amended Law of 25 May 1964 on rural land consolidation consistent with Article 16 of the Constitution?

2. More particularly, are Articles 6, 7, 24 and 33 of that law, in so far as they provide for an exchange of land on the basis of vague criteria relating to productivity and, only as a subsidiary matter, for compensation of only 5% of the value in question, and in so far as they require, in order for a court action to be declared well founded, that the new situation be considerably less advantageous than the former situation, compatible with Article 16 of the Constitution, which requires that compensation be fair and paid in advance?

3. Is Article 6 of the Law on consolidation not, for the same reason, contrary to Article 16 of the Constitution in so far as it requires the automatic surrender, free of charge, on the part of individuals of the land necessary for the development of highways, drainage services and other related works?

4. More particularly, are Articles 1 and 20 of the Law on consolidation consistent with the Constitution in that they provide for an exchange of land in favour of individuals and with the agreement of a majority of the owners, whereas Article 16 of the Constitution makes deprivation of property expressly and exclusively dependent on its being in the public interest and being so declared by a law?”

For the reasons set out in the headnotes, the answer received was that Articles 1, 6, 7, 20, 24 and 33 of the Law of 25 May 1964 on the consolidation of rural assets are not contrary to Article 16 of the Constitution.

Languages:

French.

*Identification:* LUX-2002-S-001

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 22.03.2002 / **e)** 12/2002 / **f)** Dr Pierre Stein v. Union des Caisses de Maladie – Article 73 of the Social Insurance Code / **g)** *Mémorial, Recueil de législation* (Official Gazette), A 40, 12.04.2002 / **h)**.

Keywords of the systematic thesaurus:

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

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

3.19 General Principles – **Margin of appreciation.**

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

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

Keywords of the alphabetical index:

Penalty, disciplinary / Offence, precise definition / Professional activity, malpractice / Offence, public health / *Lex mitior*, principle.

Headnotes:

1. The principle that penalties must be in accordance with the law implies the principle that any retroactive effect applies to the lightest penalty.

2. The principle that penalties must be in accordance with the law implies the principle that the offence must be precisely defined.

3. A certain lack of precision in the formulation of unlawful conduct in the context of malpractice does not affect the principle that the offence must be precisely defined if logical and technical criteria and those based on professional experience make it possible to foresee with sufficient certainty the essential characteristics constituting the offence concerned.

Summary:

The Supreme Council for Social Insurance, on appeal against a judgment of the Social Insurance Arbitration Committee imposing various penalties on a medical practitioner for malpractice, referred to the Constitutional Court, in substance, the following questions:

- a. "Does Article 14 of the Constitution, which enshrines the principle that penalties must be in accordance with the law, also imply the principle of retroactivity *in mitius*?"
- b. "Does Article 14 of the Constitution, which enshrines the principle that penalties must be in accordance with the law, also embrace the principle that the offence must be precisely defined?"; and, if so,
- c. "Does Article 14 of the Constitution, which enshrines the principle that penalties must be in accordance with the law, also lay down the principle that the offence of malpractice by a care provider' referred to in Article 73 of the Social Insurance Code must be precisely defined"?

The Constitutional Court's answer was that Article 14 of the Constitution implies both the principle that any retroactive effect applies to the most advantageous law and the principle that the offence must be precisely defined; that the precise-definition condition applying to "malpractice by a care provider" is satisfied to the requisite legal standard in the present case by the detailed provisions of Article 73 of the Social Insurance Code.

Languages:

French.



Identification: LUX-2002-S-002

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 17.05.2002 / **e)** 13/2002 / **f)** Hammes v. Gonner – Articles 227.4, 276 and 300.5 of the Civil Code / **g)** *Mémorial, Recueil de législation* (Official Gazette), A 60, 13.05.2002 / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Divorce, maintenance / Maintenance, action for review, conditions / Divorce, by consent, maintenance, increase.

Headnotes:

The statutory provisions which limit an action for a review of the maintenance fixed in a divorce by mutual consent solely to cases where the situation of the person paying maintenance or the person in receipt thereof has deteriorated, whereas when maintenance has been settled in the context of a divorce on a specific ground an action for a review of the maintenance is also available both where the situation of both parties has deteriorated and where it has improved, are not contrary to Article 10bis.1 of the Constitution.

Summary:

The Luxembourg Justice of the Peace Court, on an application to reduce the maintenance fixed in the Agreement reached in a divorce by mutual consent, had referred to the Constitutional Court two questions which sought, in substance, to ascertain whether the difference between the possibilities to initiate an action for a review of the maintenance in the case of a divorce by mutual consent and that of a divorce on a specific ground were consistent with Article 10bis of the Constitution, in that in the former case the action is admissible only where the situation of one of the parties has deteriorated while in the latter case that possibility is available both where the situations have deteriorated and where they have improved.

The answer received was that the relevant statutory provisions are not contrary to that provision of the Constitution.

Languages:

French.



Identification: LUX-2002-S-003

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 06.12.2002 / **e)** 14/2002 / **f)** Chandoul v. Ministry of Labour and Employment – Articles 1, 26, 27 and 28 of the amended law on: a. entry and residence by foreign nationals; b. the medical examination of foreign nationals; and c. the employment of foreign labour / **g)** *Mémorial, Recueil de législation* (Official Gazette), A 133, 13.12.2002 / **h)**.

Keywords of the systematic thesaurus:

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

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

5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment.**

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

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

Keywords of the alphabetical index:

Foreigner, work permit, difference in treatment / Discrimination, nationals, by comparison with citizens of the European Union.

Headnotes:

The restrictions on the right to work of foreign nationals set out in the Law of 28 March 1972 on:

1. entry and residence by foreign nationals;
2. the medical examination of foreign nationals; and
3. the employment of foreign labour

are not contrary to Articles 10bis, 11.3 and 11.4 of the Constitution, which guarantee the fundamental rights relating to equality, the natural rights of individuals and the family and the right to work, since Article 111 of the Constitution provides that “every foreign national on the territory of the Grand Duchy shall enjoy the protection afforded to persons and to possessions, except where otherwise provided by the law”.

Summary:

The Administrative Court of the Grand Duchy of Luxembourg, in proceedings between a foreign national, the husband of a Luxembourg national, and the Ministry of Labour and Employment, had referred the following question to the Constitutional Court:

“Are Articles 1 and 26 to 28 of the amended Law of 28 March 1972 on:

1. entry and residence by foreign nationals;
2. the medical examination of foreign nationals; and
3. the employment of foreign labour

taken together or, alternatively, taken individually, consistent with Articles 10bis and 111 of the Constitution, read with Article 11.3 and 11.4 of the Constitution, in that they maintain the requirement that a resident non-Community national, the spouse of a resident Luxembourg national, hold a work permit, whereas they do not impose that requirement on a non-Community resident who is the spouse of a migrant Community national, who is also a Luxembourg resident?”

For the reasons set out in the headnotes of the decision, the answer received was that the statutory texts concerned are not contrary to the relevant provisions of the Constitution.

Languages:

French.

*Identification: LUX-2003-S-001*

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 07.02.2003 / **e)** 16/2003 / **f)** Dea v. Zenners – Articles 28 and 32 of the Law of 15 March 1979 on expropriation on grounds of public interest / **g)** *Mémorial, Recueil de législation* (Official Gazette), A 31, 28.02.2003 / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Expropriation, compensation, advance payment / Expropriation, authority to take possession, procedure.

Headnotes:

Authority to take possession on the sole basis of the deposit of provisional compensation based on a summary assessment is not consistent with Article 16 of the Constitution, which provides for fair compensation paid in advance, conditions which the statutory procedures for authorising the taking of possession do not satisfy.

Summary:

The District Court of and at Diekirch, upon an application by the *Syndicat de la Distribution d'Eau des Ardennes* ("the D.E.A."), in connection with an application for expropriation on grounds of public interest against Jean-Pierre Zenners, for a declaration that the procedures prescribed by the Law of 15 March 1979 on expropriation on grounds of public interest had been observed, for settlement of compensation and for authority to take possession, requested the Constitutional Court to rule on the following preliminary question:

"Are Article 28 of the Law of 15 March 1979 on expropriation on grounds of public interest, which provides that the court, by making a summary assessment, is to fix the amount of the provisional compensation which the expropriating authority is to pay to the expropriated person, and Article 32, which provides that the expropriating authority, after depositing the provisional compensation at the Bank for Official Deposits, may be authorised to take possession of the expropriated possessions by order of the President of the Court, consistent with Article 16 of the Constitution, which provides that no one may be deprived of his possessions except on grounds of public interest, in the cases and in the manner established by law and in consideration of just compensation paid in advance?"

The answer received was that Articles 28 and 32 of the Law of 15 March 1979 on expropriation on grounds of public interest, in so far as they provided that the expropriating authority may be authorised to take possession upon depositing provisional compensation based on a summary assessment, are not consistent with Article 16 of the Constitution.

Languages:

French.

*Identification:* LUX-2003-S-002

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 07.03.2003 / **e)** 17/2003 / **f)** Gaston Vogel, Anne-Marie Vogel, Ferdinand Burg, Paul Trierweiler, Joëlle Christen, Roy Reding, Bernard Felten, Isabelle Girault, Daniel Schwarz, Miguel Andreu, Réguia Amiali, Yamina Noura, Emmanuelle Adam, Lydie Lorang, Jean-Paul Rippinger, Laurent Niedner, Véronique Achenne, Jos Stoffel, Nicky Stoffel, Claude Wassenich and Marie-Pierre Bezzina v. Luxembourg Bar Association – Article 19 of the amended Law of 10 August 1991 on the profession of lawyer / **g)** *Mémorial, Recueil de législation* (Official Gazette), A 41, 02.04.2003 / **h)**.

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
 4.5.2 Institutions – Legislative bodies – **Powers.**
 4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**
 4.7.15.1.2 Institutions – Judicial bodies – Legal assistance and representation of parties – The Bar – **Powers of ruling bodies.**

Keywords of the alphabetical index:

Regulation, implementation of the law / Law, reserved matter, delegation.

Headnotes:

Although for the implementation of the details, the law may delegate to the executive the regulation of a matter reserved by the Constitution to the legislature, Article 36 of the Constitution allows such delegation only to the person of the Grand Duke, any other delegation being contrary to the Constitution.

Summary:

In an action for annulment of the regulation of the Luxembourg Bar Association of 19 December 2001 entitled "Regulation on continuing professional training", the Administrative Court requested the Constitutional Court to rule on the following preliminary question:

"Is Article 19 of the amended Law (of 10 August 1991) on the profession of lawyer consistent with Article 36 of the Constitution?"

That statutory provision, which confers on the Luxembourg Bar Association a rule-making power in relation to the professional rules that must be observed, was held to be inconsistent with Article 36 of the Constitution, in that implementation of the law in the context of reserved legislative matters was entrusted to an authority other than the Grand Duke.

Languages:

French.



Identification: LUX-2003-S-003

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 21.11.2003 / **e)** 18/2003 / **f)** Gelhausen v. State of the Grand Duchy of Luxembourg – Articles 1 and 7 of the amended Law of 26 March 1992 on the practice and upgrading of certain health professions / **g)** *Mémorial, Recueil de législation* (Official Gazette), A 174, 09.12.2003 / **h)**.

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
 4.5.2 Institutions – Legislative bodies – **Powers.**
 4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

Keywords of the alphabetical index:

Law, reserved matter, delegation, limit / Regulation, law, conformity.

Headnotes:

The system of matters reserved for legislation set out in the Constitution precludes the legislature from relinquishing its powers to an unreasonable extent by conferring authorisation. Only the legislature may therefore validly dispose of reserved matters.

The Law of 26 March 1992 on the practice and upgrading of certain health professions, after setting out, in Article 2, the general criteria governing authorisation of access to those professions and determining, in Articles 5, 6 and 8 to 15, the common conditions for the practice of those professions,

validly authorised in Article 7, the executive to define the status, functions and the rules governing the practice of each of those professions, without infringing the constitutional principle of reserved matters.

Summary:

The Administrative Court of the Grand Duchy, on an application for annulment of a Grand-Ducal Regulation on the practice of the profession of nursing auxiliary, referred the following preliminary question to the Constitutional Court:

“Are the combined provisions of Articles 1 and 7 of the amended Law of 26 March 1992 on the practice and upgrading of certain health professions consistent with Articles 11.5, 11.6 and 36 of the Constitution, taken together or, alternatively, taken individually?”

After analysing the conditions in which the executive may be authorised to regulate in detail a matter reserved for legislation, the Constitutional Court recognised that Articles 1 and 7 of the Law of 26 March 1992 on the practice and upgrading of certain health professions are not contrary to Articles 11.5, 11.6 and 36 of the Constitution.

Languages:

French.



Romania

Constitutional Court

Important decisions

Identification: ROM-1994-S-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 08.02.1994 / **e)** 1/1994 / **f)** Decision on free access to the courts by individuals in order to protect their legitimate rights, freedoms and interests / **g)** *Monitorul Oficial al României* (Official Gazette), 69/16.03.1994 / **h)**.

Keywords of the systematic thesaurus:

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

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

5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**

Keywords of the alphabetical index:

Procedure, administrative, judicial / Decision, administrative, judicial review / Remedy, right.

Headnotes:

Access to the courts and to the appropriate procedures, including remedies, respects the rules on jurisdiction and procedure laid down by law and also the principle that all citizens are equal before the law and public authorities.

The introduction of a judicial administrative procedure is not contrary to the principle laid down in Article 21 of the Constitution on free access to justice, provided that the decision of the judicial administrative body is subject to review by a court.

Summary:

Following applications or objections alleging unconstitutionality formulated, as appropriate, in accordance with Article 144.a and 144.c of the Constitution, the Constitutional Court was called upon

to rule on the constitutionality of certain legislative provisions alleged to limit free access to justice, provided for in Article 21 of the Constitution.

The Court's solutions differ according to the specific nature of each case.

Therefore, in order to remove any possibility of an equivocal interpretation of the decisions of the Constitutional Court on free access to justice, provided for in Article 21 of the Constitution, including on access to the use of remedies, the Constitutional Court held as follows:

Article 21 of the Constitution provides:

“Everyone is entitled to bring proceedings before the courts in order to protect his legitimate rights, freedoms and interests. The exercise of this right may not be restricted by any law”.

In interpreting this constitutional principle, the Constitutional Court is required to decide:

1. whether the introduction of a judicial administrative procedure constitutes a violation of the principle of free access to justice or may have the consequence of limiting such access;
2. whether the introduction of certain special procedures for specific situations is compatible with the principle of free access to justice or whether, on the other hand, it implies the existence of a single procedure, in spite of the existence of such situations, which also applies to the exercise of remedies; and
3. in what circumstances the existence of certain special procedures, in particular as regards the exercise of remedies, is consistent with the principle, laid down in Article 16.1 of the Constitution, that citizens are equal before the law and public authorities.

The Constitutional Court observes that free access to justice is a reality only when the principle that citizens are equal before the law and public authorities is observed, so that any exclusion entailing a violation of the principle of equality of legal treatment is unconstitutional.

Languages:

Romanian.



Identification: ROM-1994-S-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 08.03.1994 / **e)** 10/1994 / **f)** Decision on an objection of unconstitutionality in respect of the provisions of Section 7 of Law no. 85/1992 on the sale of housing and areas intended for other purposes built with the funds of the economic and budgetary agents of the State / **g)** *Monitorul Oficial al României* (Official Gazette), 114/05.05.1994 / **h)**.

Keywords of the systematic thesaurus:

4.10.8 Institutions – Public finances – **State assets.**

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

Keywords of the alphabetical index:

Housing, right to buy / Housing, obligation to sell / Lease, lessee.

Headnotes:

Every subjective right has a corresponding obligation; in this case, a tenant's right to buy entails an obligation on the owner to sell. Once the lessee has expressed his option to buy the apartment, the entity which owns it cannot refuse to sell.

This statutory provision is not contrary to Article 41 of the Constitution, which guarantees the right of property and states expressly that the limits and the content of those rights are to be determined by law.

Summary:

On the matter of the resolution of the objection of unconstitutionality of the provisions of Section 7 of Law no. 85/1992 on the sale of housing and areas intended for other purposes built with the funds of the economic or budgetary agents of the State, raised by the defendant in a case before Brasov Civil Court of First Instance, no. 1262/1993.

By the action brought on 27 January 1993, the plaintiff requested the Brasov Court to order the defendant to conclude the contract for the sale of the apartment in the town of Codlea, in the District of Brasov, in accordance with the provisions of Law no. 85/1992; it is that action that forms the subject-matter of the case before this Court.

The Brasov Court supplements the interlocutory decision given in the sitting of 16 March 1993, when it

held that Section 7 of Law no. 85/1992 did not infringe the provisions of the Constitution, since the words alleged to be unconstitutional state that “housing built with the funds of the economic or budgetary agents of the State shall be sold to the lessees, upon application by the latter”, the price being paid in full or in instalments, on the conditions laid down in Legislative Decree no. 61/1990 and the present law.

In the case before the Constitutional Court, the defendant raises an objection of unconstitutionality in respect of Section 7 and shows that that section violates the provisions of Articles 41 and 135 of the Constitution, which guarantee the right to property.

In support of that objection, it is submitted that Section 7 establishes for the owner, the defendant, the obligation to sell the service apartments as soon as the lessee has merely manifested his intention, thus cancelling “the right of disposal as an attribute of the right to property guaranteed by the Constitution”.

In the light of the grounds stated under Article 144.c of the Constitution and Section 13.1.A.c of Law no. 47/1992, the Constitutional Court, taking the above considerations into account, finds that the provisions of Section 7 of Law no. 85 of 22 July 1992 on the sale of apartments and areas intended for other purposes built with State funds and funds of economic or budgetary entities of the State are constitutional.

Tenants who are not employees of the proprietor entities will also benefit from the provisions of the first paragraph.

The Court rejects the objection of unconstitutionality raised by the defendant before the Brasov Court and referred by that court to the Constitutional Court by the interlocutory decision of 16 March 1993.

Languages:

Romanian.



Identification: ROM-1994-S-003

a) Romania / b) Constitutional Court / c) / d) 17.05.1994 / e) 46/1994 / f) Decision on the constitutionality of the Regulation of the Senate / g) *Monitorul Oficial al României* (Official Gazette), 131/27.05.1994 / h).

Keywords of the systematic thesaurus:

1.2.1.2 Constitutional Justice – Types of claim – Claim by a public body – **Legislative bodies**.
 1.3.5.9 Constitutional Justice – Jurisdiction – The subject of review – **Parliamentary rules**.
 3.3.3 General Principles – Democracy – **Pluralist democracy**.
 4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies**.

Keywords of the alphabetical index:

Parliament, Senate, regulation / Parliament, senator, oath, obligation.

Headnotes:

Having regard to the Regulation of the Senate and the provisions of Articles 61.1, 66-71 and 74.1 of the Constitution,

1. the provisions of the Regulation of the Senate are constitutional in so far as they relate solely to its internal organisation and functioning;
2. these provisions are constitutional so long as they do not regulate matters which, under the Constitution, may be regulated only by other legal acts;
3. the status of members of parliament is regulated by the Constitution separately from the internal organisation of the Chambers of the Parliament, which means that parliamentary regulations cannot go beyond the limits of the organisation of each individual Chamber;
4. as the Regulation of the Senate was approved by a resolution and as it governs the internal organisation of the Senate itself, its provisions can establish only rights and obligations for senators and for authorities, dignitaries and public officials, in accordance with their constitutional relations with the Senate;
5. as the Regulation of the Senate is a legal measure of lower rank than the Constitution and legislation, it cannot contain substantive rules, which are the province of the Constitution and legislation, but it may contain procedural rules for the implementation of the regulations laid down by the Constitution or by law; those procedural rules

may allow only the validation of the constitutional and legal provisions and cannot affect their regulatory field or their content; and

6. certain articles of the Regulation of the Senate faithfully reproduce the provisions of the Constitution, a procedure common in Romanian legislation. In such situations, the provisions concerned are clearly constitutional.

Summary:

The President of the Senate requested the Constitutional Court to examine the Regulation of the Senate, adopted by Resolution no. 16 of 30 June 1993, published in the *Monitorul Oficial al României*, Part I, no. 178 of 28 July 1993, from the aspect of its constitutional legitimacy. The legal basis of the request lies in the provisions of Article 144.b of the Constitution, whereby the Constitutional Court rules on the constitutionality of the regulations of the Parliament, upon application by one of the Presidents of the two Chambers, and in the provisions of Section 21 of Law no. 47/1992.

At the same time, the Constitutional Court received an application from the UDMR parliamentary group in the Senate, which claimed that Article 160.2 of the Regulation of the Senate, concerning the obligation for senators to take the oath provided for in Article 82.2 of the Constitution, was unconstitutional. Essentially, they maintained that that provision was unconstitutional because it was not provided for in the Constitution; as members of parliament are required to comply with the law not in their capacity as members of parliament but as citizens, the duty to take an oath amounted to an imperative mandate, prohibited by Article 66 of the Constitution, and contrary to political pluralism.

According to the Constitution, the Parliament of Romania may adopt the following categories of legal measures: constitutional laws, organic laws and ordinary laws (Article 72.1 of the Constitution); the regulation of joint sessions (Article 62.1 of the Constitution); a motion of censure (Article 112 of the Constitution). Each Chamber of the parliament may adopt the following legal acts: its own regulation of organisation and functioning (Article 61.1 of the Constitution); resolutions (Articles 64 and 74.2 of the Constitution), and motions (Articles 64 and 111.2 of the Constitution).

Languages:

Romanian.



Identification: ROM-1994-S-004

a) Romania / **b)** Constitutional Court / **c)** / **d)** 17.05.1994 / **e)** 47/1994 / **f)** Decision on the constitutionality of certain provisions of the Law on war veterans and on certain rights of war invalids and war widows / **g)** *Monitorul Oficial al României* (Official Gazette), 139/02.06.1994 / **h)**.

Keywords of the systematic thesaurus:

4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces.**

5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin.**

5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security.**

Keywords of the alphabetical index:

War, veteran / War, invalid / War, widow / War, enforced mobilisation / War, veteran, social benefit.

Headnotes:

The exclusion from the benefit of the law of persons forcibly enlisted or mobilised in the Romanian provinces temporarily occupied in the period 1940-1945 (under the Diktat of Vienna of 1940, considered null and void), if they fought against the Romanian army, is discriminatory if account is taken of the fact that that condition is not laid down for “ethnic Germans” who were enlisted in the German army during the Second World War.

Nor can anyone be censured for failure to fulfil an obligation which is impossible to fulfil, particularly since, by Section 1.b of Law no. 772/1946, the persons concerned were considered to have “discharged their military obligations to the Romanian State”. Any exclusion in respect of persons who, according to the law, are considered to have fulfilled their military obligations constitutes discrimination.

Summary:

In accordance with Section 2.b of the Law on war veterans and on certain rights of war invalids and war widows, persons forcibly enlisted or mobilised in the Romanian provinces temporarily occupied during the period 1940-1945 are excluded from the benefit of the

law if they fought against the Romanian army. A group of deputies submitted an application to the Constitutional Court on 7 April 1994, claiming that the stipulation “if they did not fight against the Romanian army” in Section 2.b of the Law on war veterans and on certain rights of war invalids and war widows was unconstitutional.

In their application, the group of deputies contended, essentially, that the exclusion from the benefit of the law of persons forcibly enlisted or mobilised in the Romanian provinces temporarily occupied during the period 1940-1945 if they fought against the Romanian army was discriminatory, if account were taken of the fact that that condition was not laid down for Germans, in the ethnic sense, enlisted in the German army during the Second World War. It was likewise asserted that thus far there had been no equivalent discrimination in Romanian legislation and that, in French legislation, only those who had voluntarily enlisted in the foreign army were denied the status of war veteran.

By a separate application, registered on 12 April 1994 and submitted by a group of senators, the applicants disputed the constitutionality of the stipulation “if they have not fought against the Romanian army” in Sections 2.a and 2.b of the abovementioned law.

A group of war veterans lodged a “reply” in which they opposed the objections of unconstitutionality and also sought amendment of the law with new provisions. Also in support of amendment of the law there are the “open letter” from the Association “the military virtue of war” of Sibiu and the views of the National Association of War Veterans, communicated to the Constitutional Court by the President of Romania.

The Constitutional Court noted that the persons to which the first application referred were forcibly enlisted or mobilised in the Hungarian army because they lived in a territory temporarily occupied under the Diktat of Vienna of 1940, which is null and void. In those circumstances, the Romanian State was unable at the material time to decide on their enlistment or mobilisation, and if, from that historical circumstance, one were now to infer an incapacity, that would mean recognising, within the limits referred to, the legal effects of an act which is null and void. It is for that very reason that the fact of excepting the persons concerned constitutes discrimination.

In the second application, the applicants challenge not only Section 2.b of the law but also the constitutionality of the reference in Section 2.a to the condition of not having fought against the Romanian army. However, the argument underlying those provisions is different from that underlying Section 2.b of the law. It concerns Romanian citizens who enlisted voluntarily.

The Constitutional Court decided that Section 2.b of the Law on war veterans and on certain rights of war invalids and war widows, referring to those who were forcibly enlisted or mobilised, is unconstitutional as regards the condition "if they have not fought against the Romanian army".

Sections 2.a and 2.c, and the first sentence of Section 7.b of the Law are unconstitutional as regards the definition of the status of war veteran. In the context of the re-examination procedure, their correlation is necessary in order that observance of the principle of equal rights of citizens may be ensured.

Languages:

Romanian.



Identification: ROM-1994-S-005

a) Romania / **b)** Constitutional Court / **c)** / **d)** 18.05.1994 / **e)** 59/1994 / **f)** Decision on the objection of unconstitutionality of the provisions of Article 175.1.b of the Labour Code / **g)** *Monitorul Oficial al României* (Official Gazette), 259/15.09.1994 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.5.5.1 Constitutional Justice – Jurisdiction – The subject of review – Laws and other rules having the force of law – **Laws and other rules in force before the entry into force of the Constitution.**

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

5.2.1.2 Fundamental Rights – Equality – Scope of application – **Employment.**

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

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

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

Keywords of the alphabetical index:

Employment, labour, code / Employment, dismissal / Employment, dispute / Authority, administrative, competence.

Headnotes:

As regards disputes concerning dismissal, there is not sufficient reason to justify a difference in treatment between the various categories of employees (senior staff having a management role) as far as the competent court is concerned.

Everyone may bring court proceedings in order to protect his legitimate rights, freedoms and interests, and the exercise of that right cannot be limited by any law.

The administrative authorities referred to in Article 175.1.b of the Labour Code cannot have the status of judicial organs, since it was they themselves that adopted the measure terminating the contract of employment.

Summary:

In accordance with Article 175.1.b of the Labour Code, the hierarchically superior administrative organ or the collective management organ is statutorily responsible for challenges to dismissal and for disputes concerning the reinstatement in post of persons having a management role who were appointed by the hierarchically superior organs, and also of managers, general managers or those treated as such in the central organs.

On the matter of the resolution of the objection concerning the unconstitutionality of the provisions of Article 175.1.b. of the Labour Code, raised by an applicant, in a case before the Focsani Court.

The Constitutional Court notes that, by the interlocutory decision of 17 December 1993 pronounced in this case, the Constitutional Court was requested to consider the objection that the provisions of Article 175.1.b of the Labour Code were unconstitutional. In support of the objection, the applicant shows that although Article 175.1.b of the Labour Code has not been expressly repealed, it is unconstitutional because the only decision-making bodies capable of resolving labour disputes are the courts and not administrative organs carrying out judicial activities, which have become superfluous in a State governed by the rule of law.

The Focsani Court expresses the opinion that the objection is well founded, first on the basis of the principle of the separation of powers in the State and second because the provisions of Article 175 of the Labour Code are contrary to Article 125 of the Constitution, which provides that justice is administered by the Supreme Court of Justice and by the other courts established by law. According to the decision bringing the matter before the Constitutional Court, the administration of justice entails the application of the rules of judicial procedure, an obligation to state the reasons on which decisions are based, the availability of remedies and the impartiality and independence of the judges, who are subject only to the law.

The Constitutional Court held that, although the objection of unconstitutionality is raised in respect of a legislative provision which predates the Constitution, the Court is entitled to resolve it, since the Focsani Court did not reach a definitive decision, in the operative part of the decision, on the conflict between Article 175.1 of the Labour Code and the Constitution and requested the Court to determine the matter. From that aspect, therefore, the Constitutional Court is required to rule on the objection by virtue of the parties' constitutional right, enshrined in Article 144.c of the Constitution, to plead that a legislative provision applicable to the dispute is unconstitutional.

It follows from an examination of the provisions of Article 175.1.b of the Labour Code that as those provisions are applicable only to a category of employees – namely senior staff having a management role – there is a violation of the principle laid down in Article 16.1 of the Constitution that all citizens are equal before the law and public authorities. That conclusion is imperative, having regard to the fact that the legal grounds for declaring a contract of employment void set out in Article 130 of the Labour Code do not distinguish between employees having a management role and other employees. It is for that reason that the jurisdiction established by Article 175.1.b of the Labour Code is discriminatory and therefore unconstitutional, not only by reference to the provisions of Article 16.1 of the Constitution, which refer to citizens having equal rights, without discrimination, but also by reference to the provisions of Article 6.1 ECHR, as amended by Protocols nos. 3, 5 and 8 and supplemented by Protocol no. 2, to which Romania acceded by Law no. 30/1994. In accordance with the latter provisions, everyone is entitled to a fair trial of his case, in public, and within a reasonable time, by an independent and impartial tribunal established by law.

Having further regard to Article 125 of the Constitution, which provides that justice is to be

administered by the Supreme Court of Justice and other courts established by law, it follows from the latter provisions taken together that no law may limit a person's right to defend his rights, freedoms and legitimate interests before the courts.

In the present case, if it were held that the organs envisaged by Article 175.1.b of the Labour Code had the status of judicial organ, the procedure laid down in that provision could be characterised as a prior administrative court procedure, which would allow the parties to make use of the remedy provided for in Section 4 of Law no. 29/1990 on administrative litigation procedure, and access to justice would therefore be ensured. That would mean that the same authority would be both judge and party to the proceedings, which is contrary to Article 6.1 ECHR referred to above. In the circumstances of Article 175.1.b of the Labour Code, the principle established by that provision concerning a person's right to have his case determined fairly by an independent and impartial tribunal is violated.

Having regard to Article 20 of the Constitution, concerning the obligation to interpret and apply citizens' rights and freedoms in accordance with the covenants and treaties on human rights to which Romania is a party in the event of inconsistencies with domestic laws, the Court observes that as Article 175.1.b of the Labour Code is inconsistent with the provisions of the abovementioned Convention, it is unconstitutional in its entirety and not only from the aspect that citizens are denied the right of access to justice. Thus observance of the principle that all citizens are equal before the law is ensured at the same time.

In the course of the proceedings, and also from the Government's point of view, reference was made to the problem of the unconstitutionality of the provisions of Article 175 of the Labour Code other than those in subparagraph b. Nonetheless, if the limits of the application to the Constitutional Court, as defined in the interlocutory decision of the Focsani Court of 17 December 1993 and of the provisions of Article 144.c of the Constitution and Section 23.2 of Law no. 7/1992, are taken into consideration, it follows that in the present case the Constitutional Court lacks jurisdiction to rule on the aspects which are outside the scope of the application submitted to it.

As the Labour Code was expressly amended by Law no. 104/1992, and therefore after the Constitution had entered into force, it follows that in the present case it is not the problem of the application of Article 150.1 of the Constitution that arises, but the problem of the unconstitutionality of the provisions in question of the Labour Code, as amended.

The Constitutional Court accepts the objection of unconstitutionality raised by the applicant in the case before the Focsani Court and finds that the provisions of Article 175.1.b of the Labour Code are unconstitutional.

An appeal may be brought against this judgment within 10 days of its notification.

Languages:

Romanian.



Identification: ROM-1994-S-009

a) Romania / **b)** Constitutional Court / **c)** / **d)** 25.05.1994 / **e)** 60/1994 / **f)** Decision on a preliminary objection of unconstitutionality concerning the provisions of the last paragraph of Article 149 of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), no. 57 of 28.03.1995 / **h)**

Keywords of the systematic thesaurus:

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**

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

5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial.**

Keywords of the alphabetical index:

Arrest and detention, safeguard / Pre-trial detention, extension.

Headnotes:

The provisions of the last paragraph of Article 149 of the Code of Criminal Procedure are unconstitutional if they are interpreted to mean that the length of pre-trial detention ordered by the court in the course of criminal proceedings may exceed 30 days without the need for an extension decision as required by Article 23 of the Constitution.

Summary:

On the list: ruling on a preliminary objection of unconstitutionality concerning the provisions of the last paragraph of Article 149 of the Code of Criminal Procedure, raised by the accused in a case before the Bucharest Court of Appeal and by another accused in a case before the Pitești Court of Appeal.

The Constitutional Court decided to join the cases and gave its ruling in the present decision.

Article 23 of the Constitution guarantees individual liberty and security of person. The rules on arrest and detention are as follows: detention is permitted only in cases and in accordance with the procedure prescribed by the law; detention must be ordered by a judge; the length of detention may not exceed thirty days; a person placed in detention may contest the legality of the detention order by appealing to a judge, who must give a ruling on the appeal containing reasons; decisions to extend detention may be taken only by the trial court; persons taken into custody must be released if the reasons for their detention no longer apply; persons detained pending trial have the right to apply for provisional release under judicial supervision or on bail.

Article 23 of the Constitution treats preventive custody as a separate legal institution, distinct from all other factual or legal procedural steps. The constitutional rules on detention form part of the general rules safeguarding individual liberty and enabling justice to be done. It is for this reason that the text focuses on detention per se, making no distinction between the prosecution and trial stages.

The last paragraph of Article 149 of the Code of Criminal Procedure is constitutional in so far as it allows detention to be ordered during a trial but it becomes unconstitutional if it is interpreted in such a manner that the length of detention no longer complies with Article 23 of the Constitution.

The provisions of the last paragraph of Article 149 of the Code of Criminal Procedure must be interpreted in accordance with the provisions of Article 23 of the Constitution, under which the length of pre-trial detention must not exceed thirty days. According to this interpretation, if the thirty-day period comes to an end during the trial, the court has a constitutional duty to check, of its own motion, whether it is necessary for the preventive custody to continue and, if this is so, order an extension.

On the above grounds and pursuant to Sections 13.1.A and 25.1 of Law no. 47/1992, the Constitutional Court partly allows the preliminary

objection of unconstitutionality raised by the accused in a case before the Bucharest Court of Appeal and another accused in the Pitești Court of Appeal.

An appeal may be brought against this judgment within 10 days of its notification.

Languages:

Romanian.



Identification: ROM-1994-S-010

a) Romania / **b)** Constitutional Court / **c)** / **d)** 13.06.1994 / **e)** 66/1994 / **f)** Decision on the constitutionality of Law no. 35/1991 on foreign investment / **g)** *Monitorul Oficial al României* (Official Gazette), no. 362 of 27.12.1994 / **h)**.

Keywords of the systematic thesaurus:

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

5.1.1.5 Fundamental Rights – General questions – Entitlement to rights – **Legal persons.**

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

Keywords of the alphabetical index:

Property, acquisition, conditions / Investment, foreign.

Headnotes:

Under the Constitution and Law no. 35/1991 on foreign investment, foreigners and stateless persons are prohibited from acquiring immovable property in Romania. The relevant constitutional provision refers specifically to foreign citizens and stateless persons, and Section 1.d of Law no. 35/1991, taken together with Section 3 of the same law, relates to individuals ordinarily resident or legal persons officially registered or domiciled abroad.

The reference to foreign legal persons is not unconstitutional because it has foreign investors in mind and implicitly applies to legal persons in which foreign citizens have interests.

Summary:

On the list: ruling on a preliminary objection of unconstitutionality concerning Section 1.d of Law no. 35/1991 on foreign investment, reproduced in the *Monitorul Oficial al României*, Part I, no. 185 of 2 August 1993, and raised by the defendant, ..., in the Zalău Court of First Instance.

The Salaj County Prefecture brought legal proceedings against a commercial company for the registration of 17,834 m² of land in the company's name to be removed from the land register.

The company raised a preliminary objection that Section 1.d of Law no. 35/1991 on foreign investment was unconstitutional.

In support of its preliminary objection of unconstitutionality, the company alleged that the prohibition on acquiring land (Section 1.d of Law no. 35/1991) could only be constitutional if it was considered to apply solely where a foreign investor wished to purchase land following the withdrawal or liquidation of a Romanian company. Consequently it asked the Zalău Court of First Instance to rule that the prohibition in Section 1.d was unconstitutional, as provided for in Article 150.1 of the Constitution; otherwise the company would raise a preliminary objection of unconstitutionality under Article 144.c of the Constitution and Section 23 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court.

By an interlocutory decision of 28 October 1993, the Zalău Court of First Instance stayed proceedings and referred the case to the Constitutional Court for it to rule on the preliminary objection of unconstitutionality in accordance with Section 23.2 of Law no. 47/1992 on the organisation and functioning of the Constitutional Court. Referring to Section 23.5 of Law no. 47/1992 and Article 41.2 of the Constitution, under which private property was also protected, the Court of First Instance argued that where the prohibition on the right to own land applying only to foreigners and stateless persons applied to Romanian legal persons, even when they were established using foreign capital, it appeared to be unconstitutional.

Section 1.d of Law no. 35/1991, under which the acquisition by foreign investors of property rights in land was prohibited, was based on the second sentence of Article 41.2 of the Constitution ("Foreigners and stateless persons may not acquire property rights in land").

However, the constitutional provision referred expressly to foreigners and stateless persons,

whereas the provision of Section 1.d of Law no. 35/1991 related to individuals or legal persons domiciled or legal persons officially registered abroad.

The preliminary objection sought a Constitutional Court interpretation of the prohibition contained in Section 1.d of Law no. 35/1991 as meaning that a Romanian business firm with foreign capital could possess property rights in land. The interpretation of laws, although relevant to compliance with the Constitution, was a prerogative of the ordinary courts, and their interpretation was reviewed by means of the appeal system. The Constitutional Court had consistently found to that effect, as in Decision no. 42 of 8 July 1993 and Decision no. 51 of 5 October 1993, and so the defendant's request for it to give a binding interpretation of the law in question could not be allowed.

The Constitutional Court rejected the preliminary objection of unconstitutionality concerning Section 1.d of Law no. 35/1991.

Languages:

Romanian.



Identification: ROM-1994-S-011

a) Romania / **b)** Constitutional Court / **c)** / **d)** 05.07.1994 / **e)** Opinion 1/1994 / **f)** Advisory opinion on a proposal for the President of Romania to be suspended from office / **g)** *Monitorul Oficial al României* (Official Gazette), no. 166 of 16.07.1994 / **h)**.

Keywords of the systematic thesaurus:

3.9 General Principles – **Rule of law.**
 3.18 General Principles – **General interest.**
 4.4.1.2 Institutions – Head of State – Powers – **Relations with the executive powers.**
 4.4.1.3 Institutions – Head of State – Powers – **Relations with judicial bodies.**
 4.4.4.1.2 Institutions – Head of State – Status – Liability – **Political responsibility.**
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**
 5.3.39.4 Fundamental Rights – Civil and political rights – Right to property – **Privatisation.**

Keywords of the alphabetical index:

Property, restitution, procedure / Denationalisation, regulation / Head of State, Constitution, guarantor.

Headnotes:

Article 1.3 of the Constitution, according to which Romania is a state governed by the rule of law, requires all public authorities, including judicial authorities, to abide by the law. Legality is a cardinal principle of the rule of law and is out of the question if the law is applied haphazardly for the convenience of this person or that. The law reflects the will of the nation and so it must apply to everyone. If this principle is violated, serious social conflicts will inevitably arise, which the President of Romania must take action to prevent in accordance with Article 80 of the Constitution. His position reflects a political choice as to whether the question of nationalised housing should be settled by legislative measures rather than by judicial decisions and so it is covered by Article 84.2 of the Constitution, taken together with Article 70 of the Constitution, concerning freedom of opinion.

Summary:

When still in office, the former President of Romania made the following public statement concerning nationalised housing:

“The courts should not have ruled on the merits until a legal framework had been established. For the time being, until a new law is adopted, the existing legislation applies. And so I agree with you. You are right to say that you are the victims of an abuse. The local authorities and their specialised services must perform the function that they have been assigned, which is to protect the public interest. The focus therefore should be on the local authorities and their specialised services, i.e. the housing management companies. I have heard that legal proceedings have begun in Bucharest and that these companies which represent the public interest have not appeared in court. No doubt there are abuses and mercenaries involved in these cases as well. They are paid employees of these institutions and yet they do not even appear in court to defend the interests of tenants and the public. As a result, the courts are faced with only one party, who argues in favour of the measure, and they find themselves forced to give way. They should not do so.”

The Romanian Parliament, pursuant to Articles 95 and 144.f of the Constitution, asked the Constitutional

Court for an opinion on a proposal by 167 deputies and senators for the President of Romania, Mr Ion Iliescu, to be suspended from office.

The proposal had been presented to both houses of parliament meeting in an extraordinary joint session and was prompted by the public statement made by the President of Romania, Mr Ion Iliescu, at Satu Mare on 20 May 1994.

The proposal to suspend the President from his office alleged that the President had seriously infringed a number of provisions of the Constitution through his public statement.

The point that President Iliescu had been making in his statement was that although the issue of nationalised housing was being debated in Parliament and was a matter to be determined exclusively by the law under Section 26.3 of Law no. 47/1992 and Section 77 of Law no. 58/1991, some judicial authorities had decided the matter by returning nationalised housing to its former owners and evicting the tenants before the new legislation had been introduced and in the absence of any regulations. His argument was that the former owners had been dispossessed by the law on nationalisation, not by an improper administrative decision lacking in any legal basis. Consequently, the Romanian President's criticism, which was confined exclusively to the violation of the law currently in force, could not be interpreted as an infringement of the provisions of the Constitution.

As to the accusation of incitement to disobey court decisions, President Iliescu's statement related solely to the local authorities. However, enforcing a judicial decision was the responsibility of the judicial authorities, not of the local authority to which the President had been referring, forcible execution being the last stage in civil proceedings. A final or irrevocable judgment was binding and could not be reversed or contested by anyone save through legal proceedings as prescribed by the law.

The President's statement therefore amounted to a political choice without any legal relevance. Consequently it fell within the scope of Article 84.2 of the Constitution, taken together with Article 70 of the Constitution, concerning freedom of opinion, which applied as much to the President as it did to parliamentarians.

In view of the foregoing, acting under Article 144.f of the Constitution and Articles 32 and 33 of Law no. 47/1992, the Constitutional Court gave an advisory opinion to the effect that the proposal, presented to the Romanian Parliament by 167 deputies and senators on 4 July 1994, that Mr Ion Iliescu, the President of

Romania, should be suspended from office was not founded on arguments which constitute a serious violation of provisions of the Constitution within the meaning of Article 95 of the Constitution.

Languages:

Romanian.



Identification: ROM-1994-S-012

a) Romania / **b)** Constitutional Court / **c)** / **d)** 27.07.1994 / **e)** 85/1994 / **f)** Decision on the constitutionality of the law on associations of employees and managers of commercial companies undergoing privatisation / **g)** *Monitorul Oficial al României* (Official Gazette), no. 209 of 11.08.1994 / **h)**.

Keywords of the systematic thesaurus:

3.25 General Principles – **Market economy**.
4.10.8.1 Institutions – Public finances – State assets – **Privatisation**.
5.2 Fundamental Rights – **Equality**.
5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.
5.3.39.4 Fundamental Rights – Civil and political rights – Right to property – **Privatisation**.

Keywords of the alphabetical index:

Privatisation, procedure, methods / Privatisation, company, employee, participation in privatisation, advantage / Company, employees' association, formation.

Headnotes:

In principle, setting preferential terms for employees in privatisation procedures is not contrary to Article 16 of the Constitution, as equality of rights does not imply that equal measures should be applied in differing situations. Clearly, the situation of a company's employees cannot be the same as that of other citizens, from the viewpoint both of motivation and interest in the privatisation of the company. Not making preferential arrangements would imply that a privatisation was exclusively for the benefit of those

who had the necessary capital to buy shares and, in practice, would exclude those whose work helped the capital invested in the company to grow; that would be unfair and discriminatory.

Summary:

The Supreme Court of Justice applied to the Constitutional Court for a ruling that some parts of the law on associations of employees and managers of commercial companies undergoing privatisation were unconstitutional.

The application related to the law as a whole, with two specific objections in respect of Sections 2.2 and 5.2 taken together, and Section 26. The main complaints were as follows.

The new legislation allegedly distorted the aims of Law no. 58/1991 and restricted the right of certain types of citizens to take part in the privatisation process owing to a violation of the provisions of Articles 41, 135 and 47.1 of the Constitution with regard to property rights and freedom of association.

The law, it was argued, was based on the willingness of certain persons to privatise commercial companies of which they were employees, with the result that the state ownership fund and the private ownership fund – as the owners of the shares which formed the companies' state capital – could no longer influence “the method and the pace of privatisation”, a situation which could “slow the process or even divert it from its purpose”.

The new legislation, further, “ran counter to the spirit of the Constitution regarding freedom of association and the protection of private property” because it contained provisions which restricted freedom of trade and competition or “were contrary to the fundamental principles of association”. There was a particular problem in this connection with Section 26 of the law, relating to the powers of an association's governing body which it was argued “should be assigned to the associations' general meeting dropping of “staff”.

The *de facto* consequence of its becoming standard practice to set up employees' associations in all commercial companies would be to make it impossible for the state ownership fund to sell shares in such companies through public tender or public auction any more – a situation which contravened Article 134 of the Constitution, establishing the principles of the market economy, beginning with free trade and the protection of fair competition.

In addition, Sections 2.2 and 5.2 of the law, according to which only one such association could be set up within each company, infringed the right to freedom of association enshrined in Article 37.1 of the Constitution.

It was also submitted that general adoption of a method of privatisation which consisted in simply exchanging ownership certificates “without taking account of the varying attractiveness of each company” could give rise to social and economic inequities, as it enabled company employees to take part in the privatisation of their companies under preferential conditions, unlike other public sector employees and farmers, who were unable to benefit from the process. Consequently, there was allegedly an infringement of Article 16 of the Constitution on the equality of citizens before the law and the public authorities, especially as “the new law allowed only one method of privatisation (manager-employee buyout), thus restricting the scope of such activity”.

The Constitutional Court held as follows.

With regard to the alleged violation of the state ownership and private ownership funds' property rights over the shares which formed the state capital of commercial companies undergoing privatisation, the application had maintained that the right of employees' associations to purchase the shares which constituted the assets of those funds on behalf of their members restricted the funds' ability to influence “the method and pace of privatisation” and sell shares through public tender or public auction.

The two funds' right to ownership of shares was subordinate to the ultimate aim, which was to privatise the state capital of commercial companies. This followed from Section 1 of Law no. 58/1991 (“The law on the privatisation of commercial companies shall establish the appropriate legal framework for the transfer of state property into the private ownership of private individuals and corporate bodies”). In principle, a method which did not reject the current privatisation procedures provided for by Law no. 58/1991 and served the same aim, could not be contrary to the social purpose of the funds' rights to ownership of the share capital of companies undergoing privatisation.

Under Sections 26.b and 48 of the law, employees' associations negotiated share issues with the two funds, which also had to sign the sale contract.

Under Section 29, the association must acquire shares on the conditions laid down by Section 48.2 of Law no. 58/1991. Under Section 46, privatisation must be carried out through public tender, public

auction, sale by direct negotiation or a combination of these procedures. However, under Section 48.2, employees had preferential rights only when sale was by direct negotiation and their bid was competitive with bids of other potential buyers, so it followed that the new legislation applied only in such an event. That meant that employees' associations were not entitled to take part in public tenders or auctions and, when negotiating direct, they could purchase shares only if, as provided in Section 48.2 of Law no. 58/1991, they made an offer similar to offers from other potential buyers.

Consequently, the objection that privatisation procedures involving public tenders and auctions were restricted and hence that there had been a violation of the property rights of funds over the shares to be privatised was unfounded. Since employees' associations could not participate in these forms of privatisation, the rules could not be said to have been infringed, especially as the new legislation did not give any priority or preference to direct negotiation, which was the only method of privatisation in which employees' associations were allowed to take part.

In conclusion, and having regard also to Article 41 of the Constitution, under which the content and limits of property rights must be established by law, it followed that, since the provisions of the impugned law intended to guarantee the property rights of the state ownership and private ownership funds were in keeping with the purpose of the law, they were not unconstitutional. They could not be considered unconstitutional, either in respect of the rights of employees, provided that their work for the association was unpaid, or with regard to other citizens, whose participation in the privatisation process, as governed by Law no. 58/1991, was unaffected.

The application also alleged a violation of Article 16 of the Constitution (the principle that citizens were equal before the law) in that employees who were members benefited from the advantages of the association whereas any other member of the public who bought shares in the privatisation process did not. It argued that the preferential terms for employees outranked the terms available to others. The fact was, however, that deferred purchases of shares and shares purchased on credit were also covered by Law no. 58/1991, which provides in Section 49 that employees, managers and retired staff could, on conditions set by the state ownership fund, be allowed credit, time to pay, instalment plans and other special terms, depending on the type of shares and the conditions of sale. Thus the arrangements under the new legislation corresponded to those established

by Law no. 58/1991. Besides those that it mentioned specifically, Law no. 58/1991 allowed the state ownership fund to grant still other types of special terms. Clearly, therefore, it could not be unconstitutional for Parliament to set special terms, such as a ceiling on interest charges or a minimum length of monthly payments, as long as the arrangements were such as to facilitate the privatisation process.

Precisely for that reason Law no. 58/1991 on the privatisation of commercial companies, like similar laws in other countries, had set certain preferential terms, to which the new law also referred. Under Law no. 58/1991, these could be granted by the state ownership fund, so it was all the more legitimate for the legislature to allow them.

The argument in the application that the new legislation excluded certain categories of citizens from the privatisation process was unfounded since – as had already been shown – it had not eliminated privatisation by public tender, public auction or direct negotiation, involving all competitors of an employees' association.

Associations were formed by the free consent of their members. The principle enshrined in Sections 2.2 and 5.2 of the law, that only one association could be set up per company, was a restriction on freedom of association, but was justified under Article 49.1 of the Constitution as an association clearly could not protect its members' rights properly if there were several separate, competing associations. During the negotiation of sales, competition was mainly, as followed from Section 48.2 of Law no. 58/1991, between employees and other potential buyers.

With regard to assigning the Section 26 powers of the governing body to the general meeting so long as none of the fundamental rights of the association's members, as enshrined in the Constitution, were not infringed, that was not a constitutional issue.

Neither was any constitutional question raised by the use of ownership certificates for share-buying "regardless of the particular company's attractiveness" since, under Section 7 of the law, the privatisation process was triggered by a feasibility study.

As to the complaint of a violation of Article 134 of the Constitution (the article introducing the principles of the market economy), employees' associations stimulated the process of privatisation, so they clearly made it easier to establish that form of economy and therefore could not be at odds with it. Only if the market economy was considered to cause increased

polarisation of society could it be argued that the new legislation was unconstitutional, whereas in fact Article 1.3 of the Constitution established human dignity and unrestricted development of human personality as supreme values which must be guaranteed.

The Constitutional Court ruled that the law on associations of employees and managers of commercial companies undergoing privatisation was constitutional.

Languages:

Romanian.



Identification: ROM-1994-S-013

a) Romania / **b)** Constitutional Court / **c)** / **d)** 30.09.1994 / **e)** 87/1994 / **f)** Decision on constitutionality of Article 7 of the Rules of Procedure for Joint Sitzings of the Chamber of Deputies and the Senate / **g)** *Monitorul Oficial al României* (Official Gazette), no. 292/14.10.1994 / **h)**.

Keywords of the systematic thesaurus:

4.4.1.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**

Keywords of the alphabetical index:

President, message to parliament, obligation to receive.

Headnotes:

Under the provisions of Article 88 of the Constitution, the Presidential message is the means whereby the President of Romania conveys to parliament his opinions on the nation's main political problems. Once the message has been received by the chambers, the points made in it could be the subject of a debate, but as a separate issue. There is nothing to prevent parliament, as the supreme body representing the Romanian people, in accordance with Article 58.1 of the Constitution, from debating a problem specified in the message it has received and even adopting a measure following those debates.

On grounds of his position and role, resulting from direct election by the people – bestowing on him a legitimacy equivalent to that of parliament, also directly elected –, the President of Romania may not be a participant in a parliamentary debate, as that would mean being committed in terms of his political responsibility, and therefore in a situation similar to that of the government which, under Article 108.1 of the Constitution, is answerable, politically speaking, to parliament. That would be contrary to the President's constitutional position.

Summary:

The Constitutional Court was requested by the speaker of the Chamber of deputies and the speaker of the Senate, pursuant to Article 144.b of the Constitution and Article 21 of Law no. 47/1994, to review the constitutionality of Article 7 of the Rules of Procedure for Joint Sitzings of the Chamber of Deputies and the Senate, in relation to the provisions of Article 88 of the Constitution.

No specific grounds were cited in the application but, following the parliamentary debates held during the combined sitting of the chambers for the reception of the Romanian President's message to parliament, on 13 September 1994, it emerged that the problem sparking controversy with regard to Article 7 of the Rules of Procedure stemmed from the proposal that the message be debated immediately after being presented. The proposal was based on the provisions of Article 7.1 of the Rules of Procedure, under which "the presentation and debate of messages addressed to parliament" by the President of Romania are placed on the order of business as a priority.

The Court was asked to rule on the constitutionality of Article 7 of the Rules of Procedure in the light of the provisions of Article 88 of the Constitution, under which "the President of Romania shall address parliament by messages on the main political issues of the Nation".

The Constitutional Court's findings were as follows.

Under the provisions of Article 88 of the Constitution, the Presidential message is the means whereby the President of Romania conveys to parliament his opinions on the nation's main political problems. Corresponding to the President's entitlement to address parliament by a message is the obligation, set out in Article 62.2.a of the Constitution, for the chambers, in a joint sitting, to receive the message.

There is no constitutional provision laying down an obligation to submit this message to parliament for debate.

Similarly, given that Article 99 of the Constitution states that only presidential decrees are countersigned by the Prime Minister, the message constitutes an exclusive and unilateral political act of the President of Romania, a message that the jointly sitting chambers are obliged only to “receive”, in accordance with Article 62.2.a of the Constitution. For that reason, organising debates on the message, with the participation of the President, is contrary to those provisions.

Reception of the message by the jointly sitting chambers is the means of collaboration between the two authorities elected by direct suffrage – the parliament and the President of Romania – providing the parliamentarians with information on the President's opinions on the main political problems facing the nation.

It ensues that the text of Article 7.1 of the Rules of Procedure, referring to “presentation and debate” of the message and so linking two aspects that may only be distinct, is unconstitutional where the obligation of debate is concerned. It is in conflict not with the entitlement to the message, enshrined in Article 88 of the Constitution, but with the provisions of Article 62.2.a of the Constitution, which institute the obligation of the chambers to “receive” the message.

The Constitutional Court held that the provisions of Article 7.1 of the Rules of Procedure for Joint Sitzings of the Chamber of Deputies and the Senate, concerning the compulsory nature of debate on messages presented by the President of Romania, was unconstitutional, except where situations referred to in Article 92.3 of the Constitution were concerned.

Languages:

Romanian.



Identification: ROM-1994-S-014

a) Romania / **b)** Constitutional Court / **c)** / **d)** 16.11.1994 / **e)** 127/1994 / **f)** Decision on the legal situation of religious buildings and parish houses previously belonging to the Romanian Uniate bishopric in the cities of Cluj-Napoca and Lugoj / **g)** *Monitorul Oficial al României* (Official Gazette), no. 66/11.04.1995 / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Church, property, restoration.

Headnotes:

Concerning religious buildings and parish houses, as accessory buildings to religious buildings, the right of ownership may be restored only in accordance with the principle of the freedom of religions.

Summary:

On the list: Decision on the appeal by the Romanian Uniate bishopric of Cluj-Napoca against Constitutional Court Decision no. 23 of 27 April 1993.

In Decision no. 23 of 27 April 1993, the Constitutional Court rejected as manifestly unfounded the preliminary objection of unconstitutionality regarding the provisions of Article 3 of legislative Decree no. 126/1990 raised by the Romanian Uniate bishopric of Cluj-Napoca in a case before the First-Instance Court of Cluj-Napoca and by the Romanian Uniate bishopric of Lugoj in a case before the Timiș Department Court.

The Romanian Uniate bishopric of Cluj-Napoca appealed against this decision, within the legal time-limit, asking that the appeal be allowed together with the preliminary objection of unconstitutionality regarding Article 3 of legislative Decree no. 126/1990.

The applicants claimed that the right of ownership, constituted in accordance with the previous law, could not be rescinded by the law of a later date, as this would mean retrospective application of the new law. If the new law was able to restore the previous right of ownership, it was solely with *ex nunc* effect, the restored right being a new right resulting from the act of restoration.

The restoration of the right of ownership was regulated differently, in relation to the nature of the property subject to rights of ownership.

For religious buildings and parish houses, as accessory buildings to religious buildings, there were other arrangements for restoring the right of

ownership. In particular, following the repeal of the 1948 regulations, provision was made for:

- a. the decision of a joint commission, made up of ecclesiastical representatives of the faith which owned the property concerned after 1948; and
- b. options available to members of religious communities concerning the intended use of the property concerned.

In this connection, Article 3 of legislative Decree no. 126/1990 sets out: "the legal situation of religious buildings and also parish houses having belonged to the Romanian Uniate Church and taken over by the Romanian Orthodox Church shall be established by a joint commission, made up of ecclesiastical representatives of the two religious faiths, with due respect for the wishes of the members of the communities in possession of that property". Legislative Decree no. 126/1990 governs the restoration of the right of ownership of property originally belonging to the Romanian Uniate Church under the aforementioned arrangements, with no retrospective effect, pursuant to Article 15.2 of the Constitution, setting out that the law makes provision solely for the future. Where religious buildings and parish houses are concerned, the right of ownership may be restored solely if the principle of freedom of religious faiths is respected.

According to official census statistics from 7 June 1992, in the department of Cluj, 70.1% of the population are Orthodox believers and 5.1% Uniate believers, and in the city of Cluj-Napoca, 65.91% of the population are Orthodox believers and 6.64% Uniate believers. The same census shows that in the department of Timiș 78.2% of the population are Orthodox believers and 1.2% Uniate believers, while in the city of Lugoj, 75.91% are Orthodox believers and 1.79% Uniate believers.

The Constitutional Court rejected the appeal lodged by the Romanian Uniate bishopric, with its seat in Cluj-Napoca, rue Moșilor no. 26, against Constitutional Court Decision no. 23 of 27 April 1993.

Judge Fazakas delivered a dissenting opinion in which he regretted that these two worthy churches have not found a fair solution in the course of 5 years, including where the subject of the present dispute is concerned.

He considered that the preliminary objection of unconstitutionality regarding Article 3 of legislative Decree no. 126/1990 is founded, as this text violates the constitutional principles indicated below.

The most serious violation of the Constitution is the failure to respect the right of ownership guaranteed

by Article 41 of the Constitution, which states: "The right of property and also debts to the State are guaranteed. The content and limitations of these rights shall be established by law".

"Private property shall be equally protected by law, irrespective of its owner".

The Romanian Uniate Church would lose its properties on the sole ground that it had fewer followers than the Orthodox Church.

On the basis of the arguments set out, Article 3 of legislative Decree no. 126/1990 is contrary to the current Constitution and inapplicable, and the Romanian Uniate Church must have its legitimate rights restored.

Supplementary information:

According to Article 25.1 of Law no. 47/1992 on the Constitutional Court, decisions of the Court in preliminary review procedures could be appealed within a deadline of 10 days after their pronouncement. An appeal decision taken by a panel of five judges was then however final. Law no. 47/1992 has been amended by Law no. 138/1997 according to which decisions on preliminary requests are taken by the Court's plenum and can no longer be appealed against.

Languages:

Romanian.



Identification: ROM-1994-S-015

a) Romania / **b)** Constitutional Court / **c)** / **d)** 23.11.1994 / **e)** 131/1994 / **f)** Decision on the preliminary objection of unconstitutionality of the provisions of Article V.6 of Law no. 59/1993 amending the Code of Civil Procedure, the Family Law Code, Law no. 29/1990 on administrative disputes and Law no. 94/1992 on the organisation and functioning of the Auditor's Court and the provisions of the sole article of Law no. 65/1993 supplementing Law no. 59/1993 / **g)** *Monitorul Oficial al României* (Official Gazette), no. 34/15.02.1995 / **h)**

Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**
 5.3.38.3 Fundamental Rights – Civil and political rights
 – Non-retrospective effect of law – **Social law.**

Keywords of the alphabetical index:

Appeal, extraordinary, time limit.

Headnotes:

In view of the principle of the law having no retrospective effect, set out in Article 15.2 of the Constitution, the provisions of Article V.6 of Law no. 59/1993, as supplemented by Law no. 65/1993, are unconstitutional, as they apply to final decisions pronounced prior to the date of the law's entry into force.

Summary:

The Constitutional Court had referred to it a preliminary objection of unconstitutionality of the provisions of Article V.6 of Law no. 59/1993 amending the Code of Civil Procedure, the Family Law Code, Law no. 29/1990 on administrative disputes and Law no. 94/1992 on the organisation and functioning of the Auditor's Court and the provisions of the sole article of Law no. 65/1993 supplementing Law no. 59/1993, raised by the ... Commercial Company in a case before the Commercial Section of the Appeal Court of Bucharest.

Law no. 59/1993 repealed the extraordinary appeal that could be exercised by the prosecutor general within one year of the law is entry into force. For that reason, as of 26 July 1993, date of entry into force of Law no. 59/1993, there were two categories of final decisions of judicial bodies: decisions prior to 26 July 1992, which could no longer be challenged by extraordinary appeal, and decisions after that date and up to the entry into force of Law no. 59/1993, against which an extraordinary appeal could be lodged.

Under Article V.6 of Law no. 59/1993, "decisions that become final in the period 30 June 1992 – 30 June 1993 may be challenged through the appeal procedure provided for in the present law by the parties concerned, within a time-limit of 60 days of the entry into force of that same law". The provisions of Article V.6 of Law no. 59/1993 "shall also apply to judicial decisions that become final in the period 1 July 1993 – 26 July 1993, date of the entry into force of Law no. 59/1993", as provided for in the sole article of Law no. 65/1993 as a supplement to Law no. 59/1993.

On the basis of Article 15.2 of the Constitution, under which "the law makes provision solely for the future, with the exception of more favourable penal law", the non-retrospective effect of the law has become a constitutional principle.

Consequently, Article V.6 of Law no. 59/1993 establishing that "decisions that become final in the period 30 June 1992 – 30 June 1993 may be challenged through the appeal procedure provided for in the present law" is partially unconstitutional.

Thus, with regard also to the provisions of Article 144.c of the Constitution and those of Articles 13.1.A.c, 24 and 25.1 of Law no. 47/1992, the Constitutional Court partially accepts the preliminary objection of unconstitutionality raised by the ... Commercial Company in a case before the Commercial section of the Appeal Court of Bucharest and notes that the provisions of Article V.6 of Law no. 59/1993, as supplemented by Law no. 65/1993, are unconstitutional, as they apply to final decisions pronounced prior to 26 July 1992.

Languages:

Romanian.

*Identification:* ROM-1994-S-016

a) Romania / **b)** Constitutional Court / **c)** / **d)** 14.12.1994 / **e)** 139/1994 / **f)** Decision on the constitutionality of the law approving Government Order no. 50 of 12 August 1994 introducing a border-crossing tax with a view to constituting funds earmarked for social protection / **g)** *Monitorul Oficial al României* (Official Gazette), no. 359/21.12.1994 / **h)**.

Keywords of the systematic thesaurus:

3.16 General Principles – **Proportionality.**
 3.17 General Principles – **Weighing of interests.**
 4.10.7.1 Institutions – Public finances – Taxation – **Principles.**
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**
 5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens.**

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

Keywords of the alphabetical index:

Tax, introduction / Border, tax / Border, crossing.

Headnotes:

Restricting a constitutional right in order to uphold another fundamental right is possible, under Article 49 of the Constitution, solely as a measure essential to prevent that other right from being gravely affected and, in accordance with the principle of proportionality, such restriction must remain within the limits necessary for that right not to be compromised, at least in part.

As no specific indication is given of the right benefiting from such a restriction, merely referring to the rights to social protection (Article 1 of the Order) or to social assistance (Article 7 of the Order) is not sufficient to demonstrate that this restriction is “essential” and proportionate to the situation giving rise to it.

Summary:

The Constitutional Court was asked to rule, on 30 November and 2 December 1994, by 28 senators and 66 deputies respectively, alleging the unconstitutionality of the law approving Government Order no. 50 of 12 August 1994.

Both applications recalled Decision no. 71/1993 of the Constitutional Court, ruling that, given the border-crossing tax was intended to pay subsidies for heating homes, the tax was constitutional until the deadline established for payment of those subsidies, beyond which it would constitute “solely a hindrance of a financial nature encumbering the right to free movement, which is not included among the hypotheses provided for in Article 49 of the Constitution”. In this connection, the applicants claimed that Government Order no. 50/1994, approved by the law complained of, “purely and simply disregarded the position of the Constitutional Court, reintroducing a permanent tax that is a condition for exercising a fundamental right of the citizen”, despite the aforementioned decision specifying that “such an arrangement may not have a character of principle”. It was also considered that introducing the tax was contrary to the provisions of Article 25 of the Constitution guaranteeing the right to free movement, as well as those of Article 49 of the Constitution, since it could not be equated with any of the hypotheses set out as limitations in paragraph 1 of that article. In the light of international rules on

human rights, it was claimed that the introduction of the border-crossing tax was contrary to Article 13.2 of the Universal Declaration of Human Rights and Article 2.2 Protocol 4 ECHR. Similarly, it was pointed out that instituting this tax was contrary to the Final Act of the Conference on Security and Cooperation in Europe, signed in Helsinki in 1975, the concluding document of the Madrid meeting on Security and Cooperation in Europe and the concluding document of the Vienna meeting of the representatives of the States participating in the Conference on Security and Cooperation in Europe. As regards the possibility of the tax being periodically adjusted by the government, it was claimed that this would make it even more difficult to exercise the right to free movement, which was contrary to the provisions of Article 49 of the Constitution.

In the application from the group of deputies, it was also claimed that the law contravened Article 53.2 of the Constitution, under which the system of taxation “must ensure a fair distribution of the tax burden”. It was also noted that, under Article 7 of the Order, the tax was intended to fund social protection measures already in existence, supplementing the resources provided by the state budget, and not at all for new measures that might justify contributions from the population through new taxes, as had been the case with the legal provision concerned by Constitutional Court Decision no. 71/1993, which ruled that such a tax may not have a “character of principle”, as it was earmarked solely “for the institution of a protection measure, pursuant to Article 43.1 of the Constitution”.

The Constitutional Court stressed that the constitutional legitimacy of this tax could only be based on the provisions of Article 49 of the Constitution.

Under the new regulations, the tax has the status of a principle and is no longer of an exceptional nature, linked to the application of a certain social protection measure.

Provision may be made to restrict a constitutional right in order to safeguard another right considered to be of paramount importance by the legislator. However, where there is no specific indication of the right benefiting from such a restriction, it may not be inferred from a mere reference to the rights to social protection (Article 1 of the Order) or to social assistance (Article 7 of the Order) that this restriction is “essential” – as provided for in Article 49.1 of the Constitution – or that it is proportionate to the situation giving rise to it – as provided for in Article 49.2. On the other hand, Article 1 of the Order bestows on the tax a character of principle and a definitive nature and indicates that it is intended to

constitute supplementary contributions to certain state social insurance budget funds. Through those funds, i.e. indirectly, the tax is intended to fund certain entitlements, although these are defined in general terms, with no possibility of deducing to what extent they would be compromised if this restriction did not exist.

The Constitutional Court concluded therefore that the law approving Government Order no. 50/1994 was unconstitutional because:

- it institutes a restriction on the right to free movement provided for in Article 25 of the Constitution, which is of a permanent nature and has a character of principle;
- it represents a financial hindrance to the exercise of the right of free movement which has no justification, within the meaning of Article 49 of the Constitution, as a measure essential to uphold another right that would, without such restriction, be seriously compromised;
- it constitutes a measure adopted without regard for the principle of proportionality provided for in Article 49.2 of the Constitution, as it may not be said that the social protection measures, if only in part, could not be implemented without introducing this tax, since they are supported by the state social insurance budget, approved by law; and
- it constitutes a measure contrary to the principle of a fair distribution of the tax burden provided for in Article 53.2 of the Constitution, representing a tax levied on the simple exercise of a constitutional right, without being justified by any service delivered by any public authority.

Languages:

Romanian.



Identification: ROM-1995-S-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 04.01.1995 / **e)** 1/95 / **f)** Decision concerning objections that the provisions of Article 45 of the Code of Civil Procedure were unconstitutional / **g)** *Monitorul Oficial al României* (Official Gazette), no. 66/11.04.1995 / **h)**.

Keywords of the systematic thesaurus:

3.18 General Principles – **General interest.**

4.7.2 Institutions – Judicial bodies – **Procedure.**

4.7.4.3.1 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Powers.**

4.7.4.3.4 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Term of office.**

4.7.4.3.6 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Status.**

Keywords of the alphabetical index:

Public Prosecutor's Office, discretion / Public Prosecutor's Office, participation in proceedings.

Headnotes:

Under Article 130.1 of the Constitution, the Public Prosecutor's Office represents the public interest – the interests of society – and ensures that the law is enforced and citizens' rights and freedoms are protected, with no distinction between criminal and civil proceedings. In particular, it may fulfil this function by taking part in court proceedings.

The participation of the Public Prosecutor's Office in any stage of the proceedings does not however imply that it is present at all stages of the proceedings, including the deliberations. The prosecutor's involvement in the proceedings implies his or her presence at the hearing, the possibility of raising objections on grounds of public policy, the submission of conclusions and the obligation to observe procedural rules, just like the other parties to the proceedings.

The general provision introduced by Article 130.1 of the Constitution may be enshrined in institutional or ordinary laws, provided the content of the constitutional provision is not thereby restricted.

Summary:

Objections that the provisions of Article 45 of the Code of Civil Procedure were unconstitutional, raised by the representative of the prosecutor's office attached to the Timiș court in case no. 1.764/C/1994 and by the Constanța Appeal Court in cases nos. 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 1.49, 1.153, 1.154, 1.155 and 1.167/1994, were referred to the Constitutional Court.

The Public Prosecutor's Office has existed under Romanian law since the times of the institutional regulations, except during the period between 1948 and 1992, when it was replaced by a somewhat

different system based on the organs of the prosecuting authorities. Under both systems, the bulk of the work concerned criminal law, and this is still the case today, but there were important civil law duties, which are mentioned in the law on civil proceedings, in the broad sense. These civil law duties, which concern the case in question, varied in breadth at different times, depending on the legislation in force (the 1865 Code of Civil Procedure, the law setting out the duties of the Public Prosecutor's Office of 25 October 1877, the 1900 Code of Civil Procedure, the 1984 Code of Civil Procedure, as amended by Decree no. 38/1959, Law no. 6/1952 setting up and organising the prosecuting authorities). Article 45.1 of the Code of Civil Procedure, which concerns this matter, currently reads as follows, pursuant to Law no. 59/1993:

“The Public Prosecutor's Office may take any action, except personal action, and take part in any proceedings, at any stage, where this is necessary in order to defend the rights and legitimate interests of minors and legally incapacitated persons, and in other cases provided for by law.

If it is the prosecutor who instituted the proceedings, the owner of the right concerned may take part in the proceedings and may if necessary avail himself or herself of the provisions in Articles 246 *et seq.* and 271 *et seq.* of this Code.

The prosecutor may, under the conditions set forth by law, appeal or call for the enforcement of the judgment.”

This statutory provision has already been interpreted in different ways in legal theory and court practice. It is not, however, for the Constitutional Court to establish which of these interpretations is correct: its role is to ascertain whether the contested provision of the Code is in keeping with the Constitution, which is the supreme basic law.

The Public Prosecutor's Office, as an institution, is governed by Title III (“Public authorities”), Chapter VI (“Judicial authority”), of the 1991 Constitution. Article 130.1 states: “In court proceedings, the Public Prosecutor's Office shall represent the general interests of society, uphold the law and defend citizens' rights and freedoms.” The constitutionality of the contested provision must also be considered in the light of Article 128 of the Constitution, which reads: “The parties concerned and the Public Prosecutor's Office may appeal against court decisions under the conditions laid down by law.”

In arguing that Article 45.1 of the Code of Civil Procedure was unconstitutional, the prosecutor's

office attached to the Timiș Court contended that the Code restricted the prosecutor's participation in proceedings to matters submitted for judgment, which was contrary to Article 130.1 of the Constitution, under which, in court proceedings, the Public Prosecutor's Office was responsible for upholding the law and defending citizens' rights and freedoms. On the other hand, the Constanța Appeal Court took the view that Article 45.1 was at variance with Article 130 because it added duties that were not included in the constitutional provision, namely participation in any proceedings, which meant “participation in all stages of the proceedings, including the deliberations”, in violation of Article 123.2 of the Constitution, under which “[j]udges [were] independent and subject only to the law”, and Article 126 of the Constitution, which established that only the hearings were public. Furthermore, what constituted “necessity”, within the meaning of Article 45.1, was left to the prosecutor's discretion, and this could lead to all kinds of arbitrary decisions.

The Constitutional Court noted that constitutional provisions were general provisions that could be enshrined, depending on the case, in institutional laws or ordinary laws. Thus Article 31.1.c, 31.1.d, 31.1.e, 31.1.f and 31.1.h of Law no. 92/1992 on the organisation of the courts provided that the main civil law duties of the Public Prosecutor's Office were as follows: instituting civil proceedings in cases provided for by law; participating, under the conditions set forth by law, in the hearing of cases by the judicial authorities; appealing against court decisions under the conditions laid down by law; ascertaining that the law was observed in the enforcement of court decisions and other enforceable decisions; and defending the rights and interests of minors and legally incapacitated persons. Furthermore, Article 45 of the Code of Civil Procedure elaborated on some aspects of these civil law duties.

The view was taken, firstly, that, although Article 45.1 of the Code of Civil Procedure enshrined two forms of intervention by the prosecutor in civil proceedings – the institution of proceedings and participation in any proceedings at any stage – the objections that the Code was unconstitutional concerned only the second form of intervention. The Constitutional Court was therefore allowed, under Article 23.2 of Law no. 47/1992, to rule on this aspect only.

The Court observed, firstly, that the purpose of Article 130.1 of the Constitution was to ensure that the Public Prosecutor's Office represented the public and general interest – the interests of society – and was responsible for upholding the law and defending citizens' rights and freedoms, with no distinction between criminal and civil proceedings. One of the

ways in which the Public Prosecutor's Office could fulfil this role in practice was precisely to take part in proceedings, at any stage, and to submit conclusions in accordance with the objectives set forth in the Constitution.

This practical form of intervention, enshrined in Article 31.1.d of Law no. 92/1992 and Article 45.1 of the Code of Civil Procedure, was not at variance with Article 130.1 of the Constitution or with other constitutional provisions, for it was clear that participation in any proceedings at any stage did not imply that the prosecutor was present at all stages of the proceedings, including the deliberations.

Nor could it be argued that the contested Code was unconstitutional on the grounds that it afforded the prosecutor discretion to assess whether or not it was necessary to take part in proceedings. Although, on occasion, the law overrode the prosecutor's discretion, expressly stating that he or she must submit conclusions, in other cases discretion rested with the Public Prosecutor's Office, which had the capacity, under Article 130.1 of the Constitution, and the competence to take action in pursuit of the objectives set out therein. It would be unconstitutional to abolish the prosecutor's discretion. The prosecutor's position and the conclusions he or she drew in the course of the proceedings were definitely not binding on the judges ruling on the case in question, for the latter were independent under Article 123.2 of the Constitution and subject only to the law.

As for "[defending] the rights and legitimate interests of minors and legally incapacitated persons, and [intervening] in other cases provided for by law", the Constitutional Court considered this reference unconstitutional, on the following grounds.

Article 130.1 of the Constitution could be enshrined in institutional or ordinary laws, provided the content of the constitutional provision was not thereby restricted. Yet, whereas the Constitution referred to upholding the law and defending citizens' rights and freedoms, Article 45.1 of the Code of Civil Procedure restricted the prosecutor's possibility of taking part to cases concerning minors and legally incapacitated persons and other cases provided for by law. Under the current Code, participation in administrative proceedings was not allowed, since it was not provided for in Law no. 29/1990, which predated the Constitution, and yet administrative proceedings could undoubtedly concern the public interest and the legal system.

The restriction provided for in Article 45.1 of the Code of Civil Procedure was therefore considered unconstitutional. It was also observed that, although

Article 130.2 provided: "The Public Prosecutor's Office shall perform its duties through prosecutors grouped to form prosecution departments under the conditions laid down by law", the reference to conditions laid down by law clearly concerned the organisation of the prosecution departments and not the performance of the duties set out in paragraph 1. Accordingly, Article 45.1, which had been inserted in the Code of Civil Procedure pursuant to Law no. 59/1993, should have been drafted in the light of the 1991 Constitution and not by incorporating earlier regulations issued at a time when Parliament was not bound by a constitutional provision similar to that mentioned in the current version of Article 130.1.

In referring to the defence of citizens' rights and freedoms, the constitutional provision was not designed to transform the prosecutor into an advocate for one or other party: it merely stated that the prosecutor was responsible for upholding the law in proceedings in which such rights or freedoms were at stake. Although the proceedings in question were private civil proceedings, there were certainly general interests that had also to be protected in this area and, where court proceedings were concerned, the Constitution had assigned this protective role to the prosecutor. Moreover, the principle whereby the court must take decisions on all the matters submitted to it and nothing else, which governed civil proceedings, continued to operate, since the prosecutor's involvement in the proceedings did not prevent the parties from exercising their rights, in accordance with the conditions laid down by law.

In the light of the foregoing, the Constitutional Court held that Article 45.1 of the Code of Civil Procedure was unconstitutional in so far as it restricted the prosecutor's right to take part in any civil proceedings, at any stage, and that, where this duty was concerned, the provisions of Article 130.1 of the Constitution were directly enforceable. Thus, except in cases where the prosecutor was obliged by law to take part in civil proceedings, he or she could take part in the settlement of any civil proceedings at any stage if he or she considered that this was necessary in order to uphold the law or defend citizens' rights and freedoms.

As for Article 45.3 of the Code of Civil Procedure, the Constanța Appeal Court had taken the view that it went beyond the bounds of the Constitution and of Article 45.1, on the grounds that it introduced a general provision whereby prosecutors could "appeal and call for the enforcement of a judgment", under the conditions laid down by law. The objection to the possibility of appealing, raised in the interlocutory judgment referring the case to the Constitutional Court, could not be accepted, for Article 128 of the

Constitution allowed the Public Prosecutor's Office to appeal against court decisions, under the conditions laid down by law, alongside the parties. The only restriction, therefore, was that appeals must take place under the conditions laid down by law, and if the law did not intend to place restrictions on the institution of proceedings, such a provision could not be considered unconstitutional. On the contrary, it was also in keeping with Article 130.1 of the Constitution, which made general reference to court proceedings, and hence to means of appeal. Even though Article 21 of the Constitution, which enshrined freedom of access to the courts, also presupposed observance of the principle whereby the courts must take decisions on all matters submitted to them and nothing else (court's duty to manage cases), Article 45.3 of the Code of Civil Procedure could not be considered unconstitutional, for the parties could also exercise their rights in the case of appeals brought by the prosecutor, given that, in accordance with the conditions laid down by law, they could forfeit the right conferred on them, accept the other party's claim or reach a friendly settlement. Moreover, in some cases, for example in the event of an appeal to have a judgment set aside, if the prosecutor withdrew his or her appeal, the parties to the proceedings could request that proceedings continue (Article 3304 of the Code of Civil Procedure).

The Constanța Appeal Court had also held that the fact that the text of Article 45 of the Code of Civil Procedure was included in Title I, entitled "The parties", was at variance with Article 130 of the Constitution because it made it seem as though the Public Prosecutor's Office were a party to civil proceedings, whereas the prosecutor's procedural status was merely that of a participant. This objection on grounds of unconstitutionality was not accepted because Article 130.1 of the Constitution was not designed to specify the status of the prosecutor in the proceedings. The prosecutor was indeed a participant in the proceedings, because all the bodies and individuals involved in civil proceedings – the Court, the parties, the enforcing body, the prosecutor, the lawyers, witnesses, experts and interpreters – were designated in legal theory by the concept of participant, even though their role and status were different. The fact that Parliament had included Article 45 in the Title concerning the parties reflected a situation which the law sometimes expressly mentioned. For instance, Article 309.2 of the Code of Civil Procedure provided: "The prosecutor shall speak last, except where he or she is taking part as plaintiff, defendant or appellant", while Article 45 of the Law on the Supreme Court of Justice, no. 56/1993 stated: "Prosecutors from the prosecution departments attached to the Supreme Court of Justice shall submit conclusions in connection with judgments concerning

appeals lodged in the interests of the law, appeals to have judgments set aside and all kinds of criminal cases and, in other cases, when they are taking part as plaintiff or defendant, where so provided for by law, and in such other cases as they see fit."

In including Article 45 in the Title concerning the parties, Parliament wished to stress that the position of the prosecutor was more similar to that of the parties, for even if the prosecutor was not party to the case, he or she had procedural rights and obligations similar to those of the parties. It was for precisely this reason that legal writers sometimes stressed that the prosecutor was a party only in the procedural sense. In any event, the prosecutor could not be put on the same footing as the other participants, for example witnesses, experts and interpreters, given that Article 130.1 of the Constitution provided that, in court proceedings, the Public Prosecutor's Office represented the general interests of society.

The Constitutional Court therefore allowed the objection raised, on grounds of unconstitutionality, by the prosecutor's office attached to the Timiș Court in case no. 1.764/C/1994 concerning the court's role, and held that Article 45.1 of the Code of Civil Procedure was unconstitutional in so far as it restricted the prosecutor's right to participate to proceedings concerning "[the defence of] the rights and legitimate interests of minors and legally incapacitated persons and to other cases provided for by law". With regard to this duty, it ruled that Article 130.1 of the Constitution was directly applicable.

On the other hand, it dismissed the objection to Article 45 of the Code of Civil Procedure which the Constanța Appeal Court had raised, on grounds of unconstitutionality, of its own motion in the following cases on its list: nos. 976/1994, 977/1994, 978/1994, 979/1994, 980/1994, 1.49/1994, 1.153/1994, 1.154/1994, 1.155/1994 and 1.167/1994.

Languages:

Romanian.



Identification: ROM-1995-S-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 14.02.1995 / **e)** 19/1995 / **f)** Decision concerning the constitutionality of the law interpreting Articles 21.1 and 21.2 of Law no. 53/1991 concerning the allowances and other entitlements of parliamentarians and the remuneration of staff of the Romanian Parliament, as republished / **g)** *Monitorul Oficial al României* (Official Gazette), no. 39/23.02.1995 / **h)**.

Keywords of the systematic thesaurus:

3.5 General Principles – **Social State.**

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

4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies.**

5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens.**

Keywords of the alphabetical index:

Parliament, member, allowance, exemption from tax / Law, interpreting a previous law.

Headnotes:

So long as there are no special regulations concerning the taxation of parliamentarians' income, the rules of ordinary law shall apply. Rules that waive the principles of the Constitution may not be introduced by the special law concerning the monthly parliamentary allowance and other entitlements of parliamentarians.

The fact of deducting from the tax paid by parliamentarians a proportion of the income they receive for exercising the authority conferred on them leads to discrimination and favours a category of people for taxation purposes, a situation that cannot be justified on the grounds of their parliamentary status.

Summary:

The Supreme Court of Justice applied to the Constitutional Court to have the law interpreting Article 21.1 and 21.2 of Law no. 53/1991 concerning the allowances and other entitlements of parliamentarians and the remuneration of staff of the Romanian Parliament, as republished, declared unconstitutional.

In the grounds for its application, the Supreme Court contended that the contested law was contrary to

Article 53 of the Constitution, under which all citizens – and hence senators and members of the lower house of parliament – were obliged to contribute, by means of equitably established taxes, to public expenditure, and that it was at variance with Article 16, which enshrined the equality of citizens before the law, without discrimination or privilege.

The Constitutional Court observed that the Romanian Constitution did not make express provision for, but nor did it rule out the idea of, a law interpreting a previous law. Indeed, the law interpreting the previous law was also in keeping with the Constitution in the light of Article 15.2 of the Constitution, which stated: “The law shall provide solely for the future, except in the case of more lenient criminal law.” It also observed that the constituent assembly had ruled out the very idea of a law interpreting the Constitution, given that Article 72.2 specified that “constitutional laws [were] those revising the Constitution”, i.e. those amending the Constitution. It was unanimously accepted that a law interpreting a previous law did not amend or add anything to the law it interpreted, but merely clarified its meaning when this was obscured by unclear drafting.

On the other hand, a law interpreting a previous law, as the contested law was designed to do, and any institutional or ordinary law, must be in keeping with the Constitution.

It was therefore irrelevant whether a law described by Parliament as being interpretative was actually a law interpreting a previous law, including in terms of its content, or whether, on the pretext of interpreting that law, it amended existing legislation.

Article 71 of the Constitution provided that members of the lower house of parliament and senators received a monthly allowance, and that the amount of that allowance and of other entitlements should be provided for by law.

The constituent assembly had sought, in this way, to highlight, by means of the very term used for the remuneration of parliamentarians, the fact that they were in a public-law relationship, a relationship of authority, and not in a legal employment relationship governed by the principles of the Labour Code. The fact, therefore, that the constituent assembly had made no mention of the concept of “salary” with reference to the remuneration of parliamentarians was not such as to remove all resemblance between parliamentarians' allowances and other pecuniary entitlements provided for by law, on the one hand, and salaries, on the other.

The principal law concerning the remuneration of parliamentarians, Law no. 53 of 31 July 1991, had been passed prior to the adoption of the Constitution. For this reason, the title of the law – “Law on the salaries of parliamentarians and staff of the Romanian Parliament” – used the term “salaries”. In this form, the law stipulated that senators and members of the lower house of parliament attending parliamentary proceedings in plenary sitting or in committee or meetings of the Standing Bureau would receive a daily allowance of 200 Lei, and provision was made in the case of parliamentarians from the provinces for an additional allowance of 120 Lei a day, the latter being tax free under Law no. 32/1991, unlike the former.

In 1993, pursuant to Law no. 41 (published in the *Monitorul Oficial al României*, Part I, no. 189 of 29 July 1993), the title of Law no. 53/1991 was amended to “Law concerning the allowances and other entitlements of parliamentarians and the remuneration of staff of the Romanian Parliament”, and the daily allowance was converted into an attendance allowance. It was specified in Article 21.1 and 21.2 that this allowance was granted to parliamentarians attending plenary sittings and meetings of parliamentary bodies and amounted to 2% of the parliamentarian’s monthly allowance. Once the law had come into force, the view was taken that as the allowance did not constitute remuneration, it was no longer taxable, for it qualified as one of the exceptions provided for in Law no. 32/1991.

In order to give legitimacy to this solution, Parliament passed the interpretative law that is the subject of the case in question, which provided as follows: “Sums of money received as attendance allowances, in accordance with Article 21.1 and 21.2 of Law no. 53/1991 concerning the allowances and other entitlements of parliamentarians and the remuneration of staff of the Romanian Parliament, as republished, shall not constitute salary entitlements and shall not be taxable under Law no. 32/1991 on the taxation of wages and salaries.”

On considering this interpretative law in the light of the provisions of the Constitution, the Constitutional Court took the view that the law instituted a privilege for certain categories of people in respect of the fulfilment of the fundamental duties provided for in Article 53 of the Constitution. Regardless of the term used, the sum of money that parliamentarians received for attending plenary sittings or meetings of parliamentary bodies, in addition to their monthly allowance, constituted, as specified in the government’s opinion, “remuneration of a permanent nature, designed to provide an incentive”; together, these sums undoubtedly constituted entitlements with the same legal status as salary entitlements.

Accordingly, the attendance allowance did not constitute compensation, as did the allowance for expenses incurred when parliamentarians living in the provinces travelled to Bucharest. It was clearly awarded to parliamentarians in return for their attending sittings, i.e. for fulfilling one of the specific duties deriving from a relationship under public law, and it was therefore granted for “work done”, and only members of parliament who attended sittings received it. It was therefore only logical that the attendance allowance should, for tax purposes, have the same legal status as the monthly allowance. In other words, a privilege had been introduced for the recipients of the allowance, and this was contrary to Article 16.1 of the Constitution, which enshrined the equality of citizens, without privilege or discrimination.

On a different tack, the Court considered that the solution of the interpretative law was also at variance with Article 53.2 of the Constitution, which stipulated that the statutory taxation system must ensure that taxes were equitably established.

As already stated in Decision no. 6/1993 of the Constitutional Court (published in the *Monitorul Oficial al României*, Part I, no. 61 of 26 March 1993), the introduction of certain exceptions to income tax on the basis of social criteria or on the basis of the job performed violated the equality of citizens before the law and represented an unfair distribution of the tax burden, which was contrary to Article 53.2 of the Constitution, since “[t]axation must not only be provided for by law, but also be proportional, reasonable and fair, and taxes must not differ according to the group or category of citizens concerned.”

The Court also held that the contested interpretative law was at variance with the principles enshrined in Article 1.3 of the Constitution: “Romania is a democratic, social state governed by the rule of law, where human dignity, the rights and freedoms of citizens, free development of the human personality, justice and pluralism are the supreme values and shall be guaranteed.” One dimension of the Romanian State was therefore social justice, which was inconceivable without social justice, and therefore fell within the judicial sphere.

In the circumstances, in the light of the hierarchical coefficient applicable to the parliamentarians’ monthly allowance and all the entitlements provided for in Article 21 of Law no. 53/1991, exempting the attendance allowance from tax appeared to be socially unjust, given that all the other categories of attendance allowances received by people in public office were taxable.

Under Article 58.1 of the Constitution, parliamentarians formed “the supreme organ representing the Romanian people and the country's sole legislative authority”, but this principle did not imply that parliamentarians could establish, by law, certain entitlements that were at variance with the Constitution, for this was incompatible with the requirements of a state governed by the rule of law, which were based on the supremacy of the Constitution.

Under Article 51 of the Constitution, “[o]bservance of the Constitution, its primacy and the law [was] compulsory” and, under Article 16.2, “[n]obody was above the law”. These principles also applied to parliamentarians. Parliament could amend any law, but only within the limits of the Constitution, and this applied equally to laws interpreting earlier laws.

The Constitutional Court therefore held that the parliamentary attendance allowance provided for in Article 21.1 and 21.2 of Law no. 53/1991 constituted taxable income in accordance with the law and that the law interpreting Article 21.1 and 21.2 of Law no. 53/1991 concerning the allowances and other entitlements of parliamentarians and the remuneration of staff of the Romanian Parliament, as republished, was therefore unconstitutional.

Languages:

Romanian.



Identification: ROM-1995-S-003

a) Romania / **b)** Constitutional Court / **c)** / **d)** 27.02.1995 / **e)** 22/1995 / **f)** Decision concerning the constitutionality of the method whereby the Standing Bureau of the Chamber of Deputies was formed / **g)** *Monitorul Oficial al României* (Official Gazette), Part I / **h)**.

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.5.9 Constitutional Justice – Jurisdiction – The subject of review – **Parliamentary rules.**

4.5.4.1 Institutions – Legislative bodies – Organisation – **Rules of procedure.**

4.5.4.4 Institutions – Legislative bodies – Organisation – **Committees.**

Keywords of the alphabetical index:

Parliament, rules of procedure, application / Parliament, standing bureau, membership.

Headnotes:

Under Article 144.b of the Constitution, the Constitutional Court has jurisdiction to rule only on “the constitutionality of parliamentary Rules of Procedure”.

If it were also to rule on the way in which the Rules of Procedure were applied, this would represent an extension of its jurisdiction and be contrary not only to Article 144.b of the Constitution but also to the independence of Parliament, in this case the Chamber of Deputies, in respect of its Rules of Procedure, organisation and workings, as provided for in Title III, Chapter I of the Constitution.

In the case of complaints or objections by members of parliament or parliamentary groups concerning practical measures implementing the Rules of Procedure, solely the use of parliamentary channels and procedures is constitutional.

Summary:

The Civic-Liberal Alliance parliamentary group of the Chamber of Deputies applied to the Constitutional Court on 7 February 1995, contesting the constitutionality of the way in which the Standing Bureau of the Chamber of Deputies, elected on 6 February 1995, had been formed.

It argued in its application that there had been a violation of Article 61.2 and 61.5 of the Constitution and Articles 23.2 and 24 of the Rules of Procedure of the Chamber of Deputies, which laid down that the political configuration of each House of Parliament must be reflected in internal working bodies. Because of the failure to comply with these constitutional provisions and with the Rules of Procedure, the Civic-Liberal Alliance parliamentary group had been deprived of the seat to which it was entitled on the Standing Bureau.

The Constitutional Court considered that the application was manifestly ill-founded, as the record of the sitting of the Chamber of Deputies on 6 February 1995 stated, firstly, that the leaders of the

parliamentary groups had attended the meeting of the Standing Bureau at which the above arrangements had been confirmed and, secondly, that the proposed solutions had been adopted unanimously. Furthermore, the Chamber had voted in favour of the agreement, with only one abstention.

Article 61.2 of the Constitution provided: "Each House of Parliament shall elect its Standing Bureau. The Speaker of the Chamber of Deputies and the Speaker of the Senate shall be elected for the term of office of the Houses of Parliament. The other members of the Standing Bureaux shall be elected at the beginning of each session. Members of the Standing Bureaux may be removed from office before the expiry of their term of office". Article 61.5 specified: "The Standing Bureaux and parliamentary committees shall be constituted in accordance with the political configuration of each House."

In the light of the content of the application, two rules were submitted for discussion: the rule concerning election at the beginning of each session and that concerning respect for the political configuration of the House.

Article 23.2 of the Rules of Procedure of the Chamber of Deputies provided: "In order to accede to proposals, the Chamber of Deputies shall establish the number of seats on the Standing Bureau to be allotted, according to function, to parliamentary groups in accordance with the political configuration of the House", and Article 24 of the Rules of Procedure stated: "The Vice-Chairs, secretaries and officers shall be elected at the beginning of each ordinary session."

It was clear from a comparison of the Constitution and the Rules of Procedure that there was no contradiction between them.

The provisions of the Rules of Procedure incorporated and elaborated on the constitutional provisions without violating them. This was normal and certainly constitutional.

In its application, the parliamentary group did not contest the constitutionality of the Rules of Procedure, but only the way in which they were applied.

Article 144.b of the Constitution authorised the Constitutional Court to rule on "the constitutionality of parliamentary Rules of Procedure".

The Constitutional Court was therefore not competent to rule on the way in which the Rules of Procedure were applied. In one of its decisions (Decision no. 44

of 8 July 1993, concerning the constitutionality of Article 2 of the Rules of Procedure of the parliamentary session of 27 June 1990), the Constitutional Court had ruled that only the Chamber of Deputies could decide on the arrangements, procedures and conditions to be applied when it took certain measures, in accordance with the principle of its independence in respect of its Rules of Procedure, by virtue of which it set up its internal bodies and decided how to carry out its activities, with due regard, naturally, for all the constitutional rules applicable. Furthermore, in another decision (Decision no. 68 of 23 November 1993, concerning the invalidation of a parliamentarian's mandate), the Constitutional Court had demonstrated that Article 144.b of the Constitution applied only to the Rules of Procedure of the Chamber and that it followed that "reviewing decisions implementing these Rules of Procedure did not fall within the jurisdiction of the Constitutional Court."

It was therefore in keeping with the Constitution and the practice of the Constitutional Court that the review of constitutionality should not be extended to decisions implementing the Rules of Procedure. Application of the Rules was the responsibility of the Chamber of Deputies. Any interference on the part of public authorities external to the Chamber of Deputies could be deemed to constitute a breach of the latter's independence. In the event of complaints or objections by members of parliament or parliamentary groups concerning practical measures implementing the Rules of Procedure, only the use of parliamentary channels and procedures was constitutional.

The Constitutional Court also observed that it was apparent from the record appended to the file that the issue had not been raised or discussed and that no objections had been voiced in this connection either at the meeting of the Standing Bureau with the leaders of the parliamentary groups or at the plenary sitting of the Chamber of Deputies. It emerged from the record of the sitting of the Chamber of Deputies that the proposals for the allocation of seats on the Standing Bureau, according to function, had been accepted, with no votes against and only one abstention.

The Constitutional Court therefore held that it was not incumbent on the Constitutional Court to deal with the application from the Civic-Liberal Alliance parliamentary group of the Chamber of Deputies.

Languages:

Romanian.



Identification: ROM-1995-S-004

a) Romania / **b)** Constitutional Court / **c)** / **d)** 05.04.1995 / **e)** 38/95 / **f)** Decision concerning the objection that the provisions of Articles 1 and 6 of Law no. 47/1993 were unconstitutional / **g)** *Monitorul Oficial al României* (Official Gazette), no. 274/24.11.1995 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

3.18 General Principles – **General interest.**

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

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

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

Keywords of the alphabetical index:

Adoption / Child, neglect / Child, protection and assistance / Convention on the Rights of the Child of 1989 / Parental right, restriction.

Headnotes:

Under Article 19 of the Convention on the Rights of the Child, which Romania ratified on 28 September 1990, States Parties must take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, and degrading treatment.

Although it places a restriction on the exercise of a fundamental right, Article 1 of Law no. 47/1993 – which stipulates that a minor in one of the situations provided for by the law may be declared to have been abandoned by his or her parents if they have shown indifference towards him or her for more than six months – is not unconstitutional. There are two reasons for this: the fact that the restriction in question is provided for by law and the fact that it is one of the measures designed to achieve certain objectives set out in the Constitution itself: the protection of health and public morals and of the rights of citizens, and in this case protection of the child.

Summary:

I. Civil Division III of the Bucharest Municipal Court applied to the Constitutional Court by means of the interlocutory Judgment of 5 July 1994 in Case no. 5391/1993, objecting that the provisions of Articles 1 and 6 of Law no. 47/1993, relied on by defendant P.C., were unconstitutional.

In his application, the defendant had contended that Article 1 of Law no. 47/1993, under which a minor in one of the situations provided for in the law could be declared to have been abandoned by his or her parents if they had shown indifference towards him or her for more than six months, was contrary to Article 49.1 of the Constitution, according to which the exercise of certain rights or freedoms could be restricted solely by law, and only where necessary for the achievement of certain major objectives specifically provided for.

II. The Constitutional Court observed that the law in question did of course restrict parents' rights, but considered that this restriction was covered by Article 49 of the Constitution, which concerned situations in which certain rights or freedoms could be restricted, including the need to protect citizens.

Indeed, neglect of a child by his or her parent was not only morally blameworthy, constituting a serious violation of public morals, but could also be detrimental to the health and even endanger the life of the child denied parental care.

The situation of *force majeure* argued by the defendant to justify his neglect were not such as to warrant another analysis, for Article 1 of Law no. 47/1993 introduced a rebuttable presumption concerning the cessation of the exercise of parental rights, which also followed from the provisions of Article 1.2, according to which a parent must be held responsible for his or her lack of interest. If he or she could not be blamed for the lack of interest, for example in cases of *force majeure*, the above-mentioned presumption no longer applied. The presumption could also be refuted if the parent resumed contact with the child within the statutory period, demonstrating his or her intention of fulfilling his or her parental obligations.

The Constitutional Court therefore concluded that the provisions of Article 1.1 of Law no. 47/1993 were in keeping with the Romanian Constitution. Moreover, these provisions were deemed to be fully in keeping with the Declaration of the Rights of the Child adopted by the United Nations General Assembly on 20 November 1959 and with the Convention on the Rights of the Child, ratified by Romania on

28 September 1990, under which the best interests of the child constituted a paramount criterion in States' legislative policy.

The provisions of the Convention were binding on Parliament, for, under Article 20 of the Constitution, its human rights provisions must be interpreted in accordance with the Universal Declaration of Human Rights, and with the pacts and other treaties to which Romania was party, the provisions of which took precedence over domestic laws.

In the spirit of these international treaties, children and young people enjoyed, under Article 45 of the Constitution, a special protection and assistance arrangements in respect of the exercise of their rights.

The Court also held that Article 1 of Law no. 47/1993 was not at variance, either, with the constitutional principles deriving from Article 49.2 of the Constitution, which stated that the restriction of rights or freedoms by law must not be such as to undermine the existence of those rights or freedoms.

It was the parent himself or herself who, in fact, had forfeited his or her right by neglecting the child.

Article 1.2 of Law no. 47/1993 stated in this connection that "lack of interest [meant] the cessation, at the parents' instigation, of all contact proving the existence of normal parental ties with the child."

In weighing up the rights of the child and those of the parent in the light of their interests, in accordance with Article 45 of the Constitution, the law gave precedence to the former.

As for the criticisms levelled at Article 6 of Law no. 47/1993, the Court held that they were likewise ill-founded.

The restriction of parental rights provided for by law was not irreversible, given that Article 6 stated that the competent body could, at any time, decide, at the request of one or both parents, to restore parental rights if the circumstances that had prompted the declaration of neglect no longer applied and if the restoration of these rights was in the child's interests.

The fact that these provisions could no longer be implemented if the child had been adopted in accordance with the conditions laid down by law was a consequence, firstly, of the fact that, by neglecting the child, the natural parent had deprived himself or herself of the possibility of consenting to the adoption and, secondly, of the fact that, in accordance with the

above-mentioned Convention and the Family Code, the adoption had taken place in the sole interests of the child. The adoption could be annulled, in accordance with Article 81 of the Family Code, only if this was in the interests of the adopted child.

The Court stressed in this connection that, to some extent, the provisions of Article 6 of Law no. 47/1993 duplicated those of Article 109 of the Family Code, according to which a parent could be deprived of his or her parental rights if the child's health or physical development was being affected by the abuse of those rights. If Article 6 of the law were repealed, Article 109 of the Family Code would continue to apply, without the benefit of the six-month period provided for in the law.

The applicants had also contended that, in providing for a six-month period during which no action could be taken, Article 1 of the law had breached the unity of Romanian law by departing from the general prescription period.

The Constitutional Court observed that whether the system for declaring that a child had been abandoned did or did not duplicate the provisions of the Family Code was not a question of constitutionality, but of the co-ordination of domestic law.

This ground of appeal was therefore dismissed, as the Constitutional Court had jurisdiction only to rule on the compatibility of laws and decrees with the Constitution: the co-ordination of the legislation in force was the responsibility of the legislative authority.

The view was taken that the contested articles of Law no. 47/1993 were fully in keeping with the Constitution, as they reflected the Romanian State's policy on the protection of children and young people, in accordance with the international conventions to which Romania was party.

The objection, raised by P.C. in Case no. 5.391/1993 of Civil Division III of the Bucharest Municipal Court, that the provisions of Articles 1 and 6 of Law no. 47/1993 were unconstitutional was therefore dismissed.

Languages:

Romanian.



Identification: ROM-1995-S-005

a) Romania / **b)** Constitutional Court / **c)** / **d)** 13.06.1995 / **e)** 62/1995 / **f)** Decision concerning the constitutionality of the law speeding up the privatisation process / **g)** *Monitorul Oficial al României* (Official Gazette), no. 131/29.06.1995 / **h)**.

Keywords of the systematic thesaurus:

4.5.6.5 Institutions – Legislative bodies – Law-making procedure – **Relations between houses.**

Keywords of the alphabetical index:

Bill, diverging versions.

Headnotes:

When the two Houses of Parliament do not succeed in reaching agreement on divergent versions of a law speeding up the privatisation process, Parliament must submit each divergent version for debate, in order to come up with a single version or a compromise version.

Summary:

On 25 May 1995, 25 senators referred the Law speeding up the privatisation process, as a whole, to the Constitutional Court on the grounds that it was unconstitutional, in that it violated Article 76.2 of the Constitution.

On the same date, 29 senators referred the Law speeding up the privatisation process as a whole, and certain provisions of it in particular, to the Constitutional Court on grounds of unconstitutionality.

A group of 52 members of the Lower House of Parliament likewise referred the Law to the Court on the same grounds as in the latter case.

Having regard to the preamble to, and Articles 1.3, 15.2, 16.1, 45.1 and 45.5, 76.2, 137.5 and 144.a of the Constitution and to Article 20 of Law no. 47/1992, the Constitutional Court observed that the provisions of the Law speeding up the privatisation process were unconstitutional, and specified that Article 14.1 was unconstitutional only in so far as it also applied to contracts validly entered into either with the State property fund or with the private property fund.

Languages:

Romanian.

Identification: ROM-1995-S-006

a) Romania / **b)** Constitutional Court / **c)** / **d)** 20.06.1995 / **e)** 64/1995 / **f)** Decision on the constitutionality of the Social Welfare Act / **g)** *Monitorul Oficial al României* (Official Gazette), 131/29.06.1995 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

3.5 General Principles – **Social State.**

3.16 General Principles – **Proportionality.**

4.5.6.4 Institutions – Legislative bodies – Law-making procedure – **Right of amendment.**

4.10.7 Institutions – Public finances – **Taxation.**

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

5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens.**

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

5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security.**

5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living.**

Keywords of the alphabetical index:

Tax, temporary, specified purpose, determination / Social welfare / Border, crossing, tax / Income, family, establishment.

Headnotes:

The introduction of a border-crossing tax designed to raise the resources needed to finance the right to social welfare provided for in the Social Welfare Act does not constitute a restriction on the right to freedom of movement guaranteed in Article 25 of the Constitution as long as it has been introduced for purely social purposes and, in particular, to help low-income families and individuals.

This measure is a purely temporary one designed to remedy an exceptional situation caused by the lack of budgetary resources. It is in no way intended as a financial impediment to the right to freedom of movement.

Determination of the exceptions to the income to be included in the total income of the families concerned by the border-crossing tax is the sole responsibility of parliament, given that it is responsible for determining the net income of each family. The Constitutional Court does not therefore have jurisdiction to rule on the matter.

Summary:

On 30 and 31 May 1995, respectively, 91 members of the Chamber of Deputies and 25 Senators referred the provisions of Section 23 of the Social Welfare Act to the Constitutional Court on the grounds that they were unconstitutional.

On 1 June 1995, 32 Senators referred Sections 6 and 23 of the Social Welfare Act to the Constitutional Court on the grounds that they were unconstitutional.

A. Section 6.1 specifies what constitutes each family's net monthly income, which is used to determine the amount of social welfare the family receives. This monthly income includes all the earnings of family members and regular allowances and aid granted in accordance with the law, with the exception of scholarships awarded to pupils and students on the basis of merit and aid to the wives of men doing compulsory military service.

In one of the applications, the applicants contended that State child benefit should be excluded as it was a separate personal right accruing to the child concerned and did not depend on the family's assets or income. They argued that including child benefit was contrary to Article 45 of the Constitution, which provided for special protection for children and young people.

The Constitutional Court held that the inclusion of State child benefit in the income of families with children was not at variance with the constitutional provisions of the aforementioned Article 45 affording special protection. This constitutional provision could not therefore be used as a basis for criticism. Admittedly, in accordance with the constitutional provisions in question, the State granted child benefit and afforded other forms of social protection, but the fact that child benefit was included in the income of families with children for the purposes of establishing the social welfare ceiling in no way affected either the existence or the purpose of that benefit, which remained unchanged. The provisions of Section 6 of the Act were therefore in no way contrary to Article 45.2 of the Constitution.

Failure to include this benefit among the types of income excluded from the total family income reflected a choice for which parliament was solely

responsible, as it was in charge for defining the regular income to be taken into account for the purposes of establishing each family's net monthly income. Exceptions were made in cases where income was a reward for special academic effort or was designed to make good a temporary shortfall faced by the wives of men doing compulsory military service, as the government had argued in its opinion.

In the light of the jurisdiction established by the Constitution and the Act laying down the principles governing the workings of the Court, the Constitutional Court was not competent to remedy any omissions on the part of the law for, if it did so it would be taking the place of the country's sole law-making body, which was the parliament, and would be making positive law, which was unacceptable under the Romanian constitutional system.

B. Section 23 of the Social Welfare Act provided as follows: "In order to raise the resources needed to finance the right to social welfare provided for herein, a border-crossing tax shall be introduced in 1995 for Romanian citizens travelling abroad for tourist or personal purposes.

The tax provided for in paragraph 1 shall be set at 15,000 Lei for each departure from the country and 5,000 Lei for short journeys across the border."

The main criticisms levelled at the law were based on the provisions of Articles 25, 49 and 53 of the Constitution, and took account of the Constitutional Court's case-law, as reflected in its Decisions nos. 71/1993, 75/1994 and 139/1994.

Article 25 of the Constitution guarantees the right to freedom of movement in Romania and abroad, and the conditions under which this right is to be exercised are laid down by law.

Under Article 49, the exercise of certain rights and freedoms could be restricted solely by law, and only if unavoidable for the purposes of protecting national security, public order, health or morals, citizens' rights and freedoms, for the conduct of criminal investigations, or for the prevention of the consequences of certain natural calamities or extremely grave disasters.

The restriction had to be proportional to the situation giving rise to it and could not undermine the existence of the right or freedom in question.

Article 53 provided that citizens were under an obligation to contribute to public expenditure by means of taxes and duties and that the statutory taxation system must ensure a fair distribution of the tax burden.

In interpreting the Constitution by means of the three above-mentioned decisions, which contained the references to the constitutionality of the border-crossing tax, the Constitutional Court held, primarily, that the tax was in keeping with the Constitution only if it was not designed to constitute a financial impediment to the right to freedom of movement, but served a purely social purpose, in particular that of helping low-income families and individuals, the measure being justified solely by the temporary existence of an exceptional situation caused by the lack of budgetary resources.

It also noted that the tax introduced could not be considered proportional to the situation giving rise to it unless its collection was connected with a concrete right to social protection in positive law, for otherwise the right to freedom of movement would be seriously infringed. In accordance with Constitutional Court Decision no. 139/1994, restriction of the exercise of a right (the right to freedom of movement) was therefore not proportional to the situation giving rise to it if the restriction had been introduced as a social protection measure that was to all intents and purposes permanent and was actually designed – by virtue of its permanence and the fact that it constituted a principle – to set up an additional source of funding for the State's social insurance budget. In such circumstances, the provisions of Article 53.2 of the Constitution would also be infringed, for it would no longer be possible to argue, in this particular case, that there was a fair distribution of the tax burden on members of the public required to contribute to public expenditure.

The Constitutional Court therefore concluded that the provisions of Section 23 of the Social Welfare Act were not at variance with either the above-mentioned constitutional provisions or the line consistently taken by the Constitutional Court.

Under Article 1.3 of the Constitution, Romania is a democratic and social State governed by the rule of law, in which the free development of the human personality and justice are guaranteed. To this end, Article 43 of the Constitution provided that the State was under an obligation to take steps to assure citizens of a decent standard of living, and Article 134.2.f of the Constitution required the State to secure the conditions needed to improve the quality of life.

This concern must be reflected in practical measures concerning the sections of the population with modest incomes, who bear the brunt of the social costs of the current transition period. The introduction of social welfare, which Section 1.2 rightly described, at the start of the Act, as being based on the principle of social solidarity, was one such measure.

C. As for the fact that the introduction of the tax would affect the rights of members of national minorities, who were, as a result, less able to establish and maintain free, peaceable contacts with people with whom they shared an ethnic, cultural, linguistic or religious identity, the Constitutional Court held that the tax had not been introduced as a means of discrimination, since it was levied equally on all citizens, regardless of nationality. The same obligations therefore applied to Romanian citizens belonging to national minorities as to citizens with Romanian nationality.

If this were not the case, members of a minority would be privileged, which would be contrary not only to Article 16, which concerned the equality of citizens before the law, but also to Article 6.2 of the Constitution, under which measures to preserve and promote the identity of members of national minorities must be in keeping with the principles of equality and non-discrimination in relation to other Romanian citizens. The Court pointed out, moreover, that the justifiable exemptions from this tax – listed in Section 24 – were applicable under the same conditions to citizens belonging to national minorities as to other Romanian citizens.

D. As for the argument that there was no link between the right affected and the restrictive measure, the Court held that not only was there such a link, by virtue of the provisions of Article 53.2 of the Constitution, but it constituted the very basis of the provisions of Section 23 of the Social Welfare Act. The link in question consisted of the fact that, in 1995, in response to a special financial situation, a contribution had been introduced to fund a form of social protection designed to secure citizens' right to a decent standard of living, as provided for in Article 43 of the Constitution.

The Court also took the view, in this connection, that the border-crossing tax could be used only for this purpose. Some of the opinions received argued that money from the tax was being spent on ensuring that international trade functioned properly (improvements to border-crossing points, customs clearance, measures to address consular problems, etc). This was unacceptable, for if it were used for this purpose this would not only unjustifiably undermine the right to freedom of movement but would be contrary to the very purposes and reasons for which the contribution had been introduced.

Lastly, the fact that this tax had not been included in the Bill submitted to the Senate, but had been added after the debate in the Chamber of Deputies, was constitutionally irrelevant. The Constitutional Court had jurisdiction to consider objections referred to it in

connection with constitutionality, in accordance with the laws passed by parliament. Accordingly, it was irrelevant who had drafted the legislative amendments, and when: all that mattered was whether the provisions, in their final form, were contrary to the Constitution. It could not be considered that there had been any violation of the Constitution on this count, since the border-crossing tax, as provided for in the Social Welfare Act, was constitutional.

The Constitutional Court therefore concluded that the provisions of Sections 6 and 23 of the Social Welfare Act were constitutional.

Languages:

Romanian.



Identification: ROM-1995-S-007

a) Romania / **b)** Constitutional Court / **c)** / **d)** 20.06.1995 / **e)** 65/1995 / **f)** Decision on the constitutionality of the Law approving Government emergency Decree no. 1/1995 on salary increases in 1995 in State-run companies and commercial undertakings in which the State has a majority holding / **g)** *Monitorul Oficial al României* (Official Gazette), 129/28.06.1995 / **h)**

Keywords of the systematic thesaurus:

2.2.2 Sources – Hierarchy – **Hierarchy as between national sources.**

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

3.18 General Principles – **General interest.**

4.5.2 Institutions – Legislative bodies – **Powers.**

4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

4.18 Institutions – **State of emergency and emergency powers.**

5.4.11 Fundamental Rights – Economic, social and cultural rights – **Freedom of trade unions.**

Keywords of the alphabetical index:

Enabling act, decree / Government, emergency decree, exceptional circumstances, interpretation / Salary, increase / Trade union, bargaining, compulsory / Collective agreement, legally binding.

Headnotes:

The concept of “exceptional circumstances”, within the meaning of Article 114.4 of the Constitution, in which the government may pass emergency decrees, must invariably be interpreted case by case in the light of the reasoning behind both the introduction of provision for the delegation of legislative powers, as enshrined in Article 114, and the Constitution as a whole.

Moreover, emergency decrees were not affected by the possibility of using all constitutional means, such as the delegation of legislative powers, or by the fact that the advent of the exceptional circumstance could have been prevented in time. Such a measure could be based solely on necessity and the urgent need to address a situation which, given the exceptional circumstances, required an immediate solution in order to prevent serious harm to the public interest.

With regard to the right to collective bargaining in the field of industrial relations, the Constitutional Court pointed out that collective agreements could be concluded only provided they were in keeping with the law. Although they were a source of law, they could not take precedence over the law. Collective agreements could therefore be negotiated only with due regard for existing statutory provisions, including the provisions introduced by means of the law approving Government emergency Decree no. 1/1995.

Summary:

26 senators referred the law approving government emergency Decree no. 1/1995, concerning salary increases in 1995 in State-run companies and commercial undertakings with a majority State holding, to the Constitutional Court on the grounds of unconstitutionality. They considered that the law was contrary to Articles 114.1, 114.2, 114.4, 74, 72 and 38.5 of the Constitution.

Article 114 of the Constitution, which concerns the “delegation of legislative powers”, states that “parliament may pass a special law enabling the government to issue decrees in fields outside the scope of organic laws.”

The first argument put forward was that government emergency Decree no. 1/1995 had been passed in violation of Article 114.4 of the Constitution, under which the government may pass such decrees only in exceptional circumstances. It was argued that such decrees were constitutional only in situations where “objectively speaking, it [had] not been possible to pass an Enabling Act ... or an Urgent Procedure Act

committing the government”, particularly as parliament was in ordinary session and that “[t]he problem the government intended to address by means of the decree [had] been known for a long time and [was] due to the failings of the economy, which [had] not in any event been remedied by this means.”

The Constitutional Court considered that the criticisms were ill-founded on the grounds that, as the Constitution did not specify the content of the concept of “exceptional circumstances”, it must invariably be interpreted in each case.

Exceptional circumstances, within the meaning of Article 114.4 of the Constitution, meant situations that were not expressly covered by law. Accordingly, if the law had not introduced a rule specific to an exceptional circumstance, it would be contrary to the intention of those who drafted it for the existing rules to be applied in the exceptional circumstances referred to in Article 114.4 of the Constitution. When the public interest was undermined on account of the abnormal and excessive nature of exceptional circumstances, the government was therefore justified in intervening by means of an emergency decree under Article 114.4 of the Constitution.

The Constitutional Court therefore concluded that the emergency decree was not affected by the fact that it was possible to use all constitutional means, such as the delegation of legislative powers, or by the fact that the exceptional circumstances could have been prevented in time, as argued in the application referred to the Court, or by the fulfilment of the requirements of the government’s programme, as claimed in the opinion of the Speaker of the Chamber of Deputies.

In the case of government emergency Decree no. 1/1995, the public interest referred to was the prevention of the resumption of inflation which, by virtue of its consequences, was damaging to the general development of society, particularly in financial terms and in terms of the standard of living of the members of the public most disadvantaged in the current transition process. These consequences showed that it was in the public interest that they should be avoided in the exceptional situations mentioned.

The Court likewise considered the second ground unjustified because government emergency Decree no. 1/1995 and, implicitly, the law approving it did not refer to the “general rules governing industrial relations” mentioned in Article 72.3.l of the Constitution, but to certain measures introduced solely for 1995. The decree referred to the introduction of certain economic criteria for increasing salaries, solely in connection with State-run

companies and commercial undertakings with a majority State holding, so that the law approving it, being an ordinary law, had been passed with due regard for Article 74 of the Constitution.

The criticism in the third allegation concerning the unconstitutionality of Article 38.5 of the Constitution, which guaranteed the right to collective bargaining in industrial relations and the binding force of collective agreements, was rejected. Collective agreements were a source of law, but they could not take precedence over the law: otherwise a fundamental principle of the rule of law, namely the primacy of the law in the regulation of industrial relations, would be infringed. Article 16.2 of the Constitution stated that nobody was above the law; Article 51 of the Constitution stated that observance of the law was a fundamental obligation and, pursuant to Article 58.1 of the Constitution, parliament was the sole legislative authority of the country. Collective agreements could therefore be negotiated only with due regard for existing statutory provisions, including the provisions introduced by means of the law approving government emergency Decree no. 1/1995.

In the light of the foregoing and pursuant to Articles 38.5, 74, 114 and 144.a of the Constitution and Sections 17-20 of Act no. 47/1992, the Constitutional Court held that the law approving government emergency Decree no. 1/1995 concerning salary increases in 1995 in State-run companies and commercial undertakings with a majority State holding was in keeping with the Constitution.

Languages:

Romanian.



Identification: ROM-1995-S-008

a) Romania / **b)** Constitutional Court / **c)** / **d)** 28.06.1995 / **e)** 66/1995 / **f)** Decision concerning the plea that Article 175.1.c of the Labour Code was unconstitutional / **g)** *Monitorul Oficial al României* (Official Gazette), 210/13.09.1995 / **h)**.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Employee, redeployment / Employee, right of appeal.

Headnotes:

The competence of the hierarchically superior administrative body or the Board to hear disputes concerning staff redeployment, as provided for in the provisions of Article 175.1.c of the Labour Code, created an unjustified difference in treatment between employees whose employment contracts were amended following downsizing, who could not apply to the courts, and other employees whose contracts were amended for other reasons, who had access to the courts.

Those provisions therefore amounted to a limitation on the principle of equal rights for citizens and the right of access to the courts, as guaranteed by the Constitution.

Summary:

The list of cases to be heard included an application from the Ialomița Court (Case no. 122/1995) to the effect that the provisions of Article 175.1.c of the Labour Code were unconstitutional.

Under Article 175.1.c of the Labour Code, disputes concerning staff redeployment on the occasion of administrative or production staff downsizing are dealt with by the hierarchically superior administrative body or the Board.

After examining the Code, the Court concluded that, because its provisions ruled out the jurisdiction of the courts to settle disputes concerning staff redeployment in the event of downsizing, these provisions were contrary to Articles 21 and 125 of the Constitution, which provided that everyone was entitled to bring a case before the courts in order to defend his or her rights, freedoms and legitimate interests, that the exercise of this right could not be restricted by any law, and that justice was administered by the Supreme Court of Justice and other courts established by law.

It also noted that the grounds for considering Article 175.1.c of the Labour Code unconstitutional were in keeping with the Constitutional Court's case-law, as it emerged from its Decision no. 59 of 18 May 1994, *Bulletin* 1994/2 [ROM-1994-2-003], in which it had held that the provisions of sub-paragraph b of the same article were unconstitutional.

Given that the Labour Code had been expressly amended by Act no. 104/1992, i.e. it had been amended after the Constitution had come into force, in the case in question the issue requiring review was not the implementation of Article 150.1 of the Constitution, but the constitutionality of the provisions in question.

Languages:

Romanian.

*Identification:* ROM-1995-S-009

a) Romania / **b)** Constitutional Court / **c)** / **d)** 18.07.1995 / **e)** 71/1995 / **f)** Decision on the constitutionality of the law on certain employee-protection measures / **g)** *Monitorul Oficial al României* (Official Gazette), 166/31.07.1995 / **h)**.

Keywords of the systematic thesaurus:

4.5.4.1 Institutions – Legislative bodies – Organisation – **Rules of procedure.**

4.5.4.4 Institutions – Legislative bodies – Organisation – **Committees.**

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

4.5.6.5 Institutions – Legislative bodies – Law-making procedure – **Relations between houses.**

Keywords of the alphabetical index:

Law, drafting conditions / Parliament, mediation committee, rules of procedure / Parliament, committee, membership / Parliament, committee, decision-taking, quorum.

Headnotes:

In accordance with the Constitution and the Rules of Procedure of the two houses of parliament, the Mediation Committee whose appointment is provided for if a Bill is passed in different versions by each house of parliament must comprise 7 members from each house.

The committee worked legitimately in the presence of 9 members, representing the majority required by both sets of Rules of Procedure, and adopted a decision by a majority of the votes of the members present. The fact that only 2 of the 7 Senators appointed as members attended the proceedings is not such as to make the decision of the Mediation Committee, which comprised equal numbers of members from each house and operated in accordance with the Rules of Procedure, null and void.

The fact is that it is a prerequisite for the appointment of the committee, but not for the adoption of a decision, that there be an equal number of members from each house.

Summary:

A group of Senators appealed to the Constitutional Court on the grounds that a Bill on certain employee-protection measures was unconstitutional.

They contended that each house had passed a differently-worded version of the Bill. During mediation, the provisions of Article 76.1 of the Constitution, under which mediation must be carried out by an equi-representational committee, were allegedly infringed because the committee comprised 7 members of the Chamber of Deputies and only 2 Senators.

The Constitutional Court held that the objection that the Bill was unconstitutional was ill-founded.

Under Article 76.1 of the Constitution, if one of the houses passed a Bill that was worded differently from that passed by the other house, the Speakers of the two houses set in motion the mediation procedure, which involved an equi-representational committee.

Article 58 of the Rules of Procedure of the Senate provided that the Mediation Committee should comprise 7 Senators, and the same figure was provided for in Article 72.2 of the Rules of Procedure of the Chamber of Deputies.

This committee, like any parliamentary committee, had operated, in accordance with Article 38 of the Rules of Procedure of the Senate and Article 50 of the Rules of Procedure of the Chamber of Deputies, with a majority of its members present. The adoption of decisions was subject to Article 60 of the Senate's Rules of Procedure and Article 74 of the Rules of Procedure of the Chamber of Deputies, according to which the committee's decisions were taken by a majority of its members.

The Constitutional Court therefore concluded, in the light of the provisions of Articles 76.1 and 144.a of the Constitution and of Sections 17-20 of Act no. 47/1992, that the Bill concerning certain employee-protection measures was in keeping with the Constitution.

Languages:

Romanian.

*Identification:* ROM-1995-S-010

a) Romania / **b)** Constitutional Court / **c)** / **d)** 18.07.1995 / **e)** 72/1995 / **f)** Decision concerning the constitutionality of certain provisions of the Education Act / **g)** *Monitorul Oficial al României* (Official Gazette), no. 167/31.07.1995 / **h)**.

Keywords of the systematic thesaurus:

3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature.**

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**

5.3.43 Fundamental Rights – Civil and political rights – **Right to self fulfilment.**

Keywords of the alphabetical index:

Religion, instruction, level, differentiation / Religion, instruction, compulsory.

Headnotes:

The compulsory teaching of religion in primary education, provided for in Article 9.1 of the Education Act, is in keeping with the freedom of conscience guaranteed by the Constitution, provided it is carried out in such a way as to respect the right of parents or guardians to bring up the under-age children for whom they are responsible in accordance with their own beliefs.

Summary:

Two groups of members of the lower House of Parliament and a group of senators referred certain provisions of the Education Act to the Constitutional Court. These provisions concerned the right to education of members of national minorities; the independence of the universities; the material basis of education and, in particular, the provisions of Article 9.1, which stipulated: "Primary education, lower and upper secondary education and vocational education curricula shall include religion as a school subject. In primary education, religion shall be a compulsory subject; in lower secondary education it shall be an option, and in upper secondary and vocational education it shall be voluntary. Pupils shall, with the consent of their parents or legal guardian, choose the religion and denomination studied."

The applicants contended, essentially, that the fact that religious instruction was compulsory in primary education under Article 9.1 of the Act was contrary to the provisions of Article 1.3 of the Constitution, concerning "the free development of the human personality", Article 26.2 guaranteeing "every individual the right to self-determination", Article 29.1, 29.2 and 29.6 concerning freedom of conscience and Article 45.5 concerning the obligation of the public authorities to help "ensure the conditions needed for young people to take part freely in the country's politics, society, economy and cultural and sporting life."

Languages:

Romanian.

*Identification:* ROM-1995-S-011

a) Romania / **b)** Constitutional Court / **c)** / **d)** 27.07.1995 / **e)** 1/1995 / **f)** Judgment concerning the fulfilment of the conditions for the exercise of citizens' right to initiate legislation (Article 144.b of the Constitution) / **g)** *Monitorul Oficial al României* (Official Gazette), no. 172/03.08.1995 / **h)**.

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.4.5 Constitutional Justice – Jurisdiction – Types of litigation – **Electoral disputes.**

1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation.**

3.3.2 General Principles – Democracy – **Direct democracy.**

3.20 General Principles – **Reasonableness.**

4.5.6.1 Institutions – Legislative bodies – Law-making procedure – **Right to initiate legislation.**

4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy.**

Keywords of the alphabetical index:

Constitution, direct applicability / Legislation, right to initiate, signatures, verification / Legislation, right to initiate, admissibility.

Headnotes:

In the absence of a law governing the means whereby the right of citizens to initiate legislation, as guaranteed by Article 73 of the Constitution, is to be exercised, it is not possible to ascertain whether the requirements laid down, in particular those concerning the authenticity of the signatures on the lists of signatories, the need for signatories to be citizens entitled to vote and their place of residence, have been fulfilled.

The fact that there is no special law does not, however, mean it is impossible for citizens to exercise their right to initiate legislation, given that Article 73.1 of the Constitution does not depend on the existence of a subsequent law but is, on the contrary, directly applicable.

Summary:

The Speaker of the Senate, in accordance with Articles 73.1 and 144.h of the Constitution and Articles 13.1.B.d and 36 of Law no. 47/1992, applied to the Constitutional Court in connection with a legislative initiative signed by 492,380 citizens from 11 counties, asking it to ascertain whether the conditions needed for the exercise of the right to initiate legislation had been met.

The Constitutional Court observed that the conditions applicable to the exercise of citizens' right to initiate legislation, as set out in Article 73 of the Constitution, were exhaustive and cumulative.

Article 73.1 of the Constitution read as follows: "The following shall have the right to initiate legislation: the government, members of the lower House of Parliament, senators and a group of at least 250,000 citizens entitled to vote. Citizens exercising their right to initiate legislation must come from at least a quarter of the counties in the country, and in each of these counties or in the municipality of Bucharest at least 10,000 signatures must have been recorded in support of the initiative."

In the absence of a special law governing the way in which citizens' right to initiate legislation is to be exercised, the Constitutional Court was unable to ascertain whether the legislative initiative that had been referred to it had been taken solely by citizens entitled to vote. In order to ascertain this, it would have been necessary to check the authenticity of the signatures on the lists and ascertain that the signatories were citizens entitled to vote.

In order to compensate for this loophole in the law, the Constitutional Court asked the government to have the necessary checks carried out by government departments, for which it had general responsibility under Article 101.1 of the Constitution.

The government fulfilled only its obligation to ascertain whether the citizens who had taken the initiative of proposing legislation were entitled to vote, and did not check the authenticity of signatures. Moreover, by July 1996, only 118,044 signatures out of a total of 492,380 had been checked by the Ministry of the Interior, which had been designated by the government to check them. A further period of at least nine months was requested.

Given the circumstances, the checks were expected to take over a year from the time when the initiative took place, which was considered excessive and likely to hinder the exercise of the constitutional right in question. The initial period of two to three months specified by the Court was reasonable for the purposes

of ensuring that the initiative was still topical and effective. Given that it was impossible for the administrative authorities to comply with this deadline, and that the Constitution did not make the exercise of citizens' right to initiate legislation conditional upon the existence of a law, the Court concluded that there was no justification for preventing citizens who had properly signed the lists from exercising their right to initiate legislation because of a factor for which they could not be held responsible. Accordingly, the Constitutional Court held that, given that, of the quarter of the signatures checked by the Ministry of the Interior, only 9% presented irregularities, the remaining 91% were valid. It pointed out that the same could not be said of the remaining three-quarters of the signatures, which had not yet been checked.

As for the second condition, concerning the need for the legislative initiative to have been signed by at least 250,000 citizens, the Constitutional Court noted that the list of signatories contained 492,380 signatures. The partial checks that had been carried out had revealed certain irregularities but, even of these were taken into consideration, there were no grounds for considering that the threshold of 250,000 would not be reached.

With regard to the condition concerning geographical spread, whereby the citizens who had exercised their right to initiate legislation must come from at least a quarter of the country's counties, it was noted that it could be deemed to be fulfilled only if, in a quarter of the counties, at least 10,000 signatures per county had been collected. An examination of the documents submitted showed that this condition had been met in 11 counties, namely: Arad, Bihor, Braşov, Cluj, Covasna, Harghita, Maramureş, Mureş, Satu Mare, Sălaj and Timiş. The condition concerning the geographical spread was therefore considered to have been met.

Nor was the Constitutional Court able – again for want of a law on citizens' right to initiate legislation – to ascertain whether all the signatories came from the counties on whose lists they appeared, and the government was not able to carry out the necessary checks within a reasonable time. Following the partial checks carried out, a few irregularities were discovered. Given that they accounted for about 9% of the quarter of the signatures investigated and that, in each of the counties concerned, the number of signatures on the lists exceeded the 10,000 threshold, the Court considered that these irregularities were not such as to affect its conclusion that the conditions concerning geographical spread, provided for in Article 73.1 of the Constitution, had been satisfied.

Lastly, the view was also taken that the final two conditions concerning the exercise of citizens' right to

initiate legislation, which specified that the subject of the initiative could not be tax matters or be international in nature, or be an amnesty or pardon, and set out the form in which the initiative was to be presented, had been met.

It was possible to ascertain that the other conditions attached to the exercise of citizens' right to initiate legislation, as provided for in Article 73.1, 73.2 and 73.4 of the Constitution, had been fulfilled.

The Constitutional Court held that, in the light of the documents submitted, the legislative initiative concerning teaching in the languages of national minorities fulfilled the formal conditions set out in Article 73.1 of the Constitution and those laid down in Article 73.2 and 73.4 of the Constitution.

It also noted that a further consequence of the lack of a law on citizens' rights to initiate legislation was that there was no group representing the citizens who had signed the initiative before the Constitutional Court and in parliamentary debates, with which these irregularities could have been discussed so as to prevent any further contestation in this respect.

Parliament and the government were called on to draft and pass a law on citizens' right to initiate legislation in order to ensure the effective exercise of this constitutional right and set out the conditions needed for its exercise.

Languages:

Romanian.



Identification: ROM-1995-S-012

a) Romania / **b)** Constitutional Court / **c)** / **d)** 10.10.1995 / **e)** 91/1995 / **f)** Decision concerning the objection that Government Order no. 55/1994 was unconstitutional / **g)** *Monitorul Oficial al României* (Official Gazette), no. 272/23.11.1995 / **h)**.

Keywords of the systematic thesaurus:

3.13 General Principles – **Legality.**

4.6.3.2 Institutions – Executive bodies – Application of laws – **Delegated rule-making powers.**

Keywords of the alphabetical index:

Prison sentence, extension by government order / Fine, increase / Fine, conversion into a prison sentence in the event of failure to pay.

Headnotes:

Government Order no. 55/1004 concerning the modification of the amount of fines is unconstitutional in so far as it does not merely increase the amount of the fines but also extends the length of imprisonment for an offence other than the offence in question, namely failure to pay the fine.

Summary:

In one of its cases, the Braşov Civil Court of First Instance, of its own motion, submitted an objection to the Constitutional Court to the effect that Government Order no. 55/1994 concerning the increase in the minimum and maximum levels of fines for petty offences provided for by the legislation in force on 1 June 1994 was unconstitutional.

Because the criterion for converting unpaid fines into prison sentences in accordance with the new limits applied to fines, further to Government Order no. 55/1994, had not been updated, the length of the prison sentence for failure to pay a fine had been increased. This increase was not deliberate, but it was nonetheless evident and inescapable, as long as the fine had been updated but not the conversion criterion. Consequently, from the legislative point of view, it followed that Government Order no. 55/1994 had not only increased the amount of the fine but also extended the length of the prison sentence for failure to pay the fine. Yet the law authorising the government to legislate by regulation allowed it only to increase the amount of fines and not to extend prison sentences handed down for unpaid fines.

Accordingly, the failure to bring the criterion for transforming unpaid fines for petty offences into prison sentences – a criterion which had not been modified – into line with the new level of the fines did not constitute a loophole in the regulations but, rather, reflected the determination of Parliament to extend the period of imprisonment, given that this was its inevitable consequence.

Establishment of the length of imprisonment for failure to pay fines for petty offences by virtue of Government Order no. 55/1994 was unconstitutional. The fact that the Order had been approved by Law no. 129/1994 did not affect the unconstitutionality of the provisions of Article 3.1.b, set out in Article 2.s of Law

no. 61/1991, as amended by the Order in question, for Parliament was not authorised to confirm an unconstitutional rule, which therefore remained unconstitutional until it was amended by Parliament.

The Constitutional Court allowed the objection and held that the provisions of Article 3.1.b, set out in Article 2.s of Law no. 61/1991, as amended by Government Order no. 55/1994, approved by Law no. 129/1994, were unconstitutional in so far as they had been used to convert unpaid fines for petty offences into prison sentences without account being taken of the coefficient used to increase the limits on fines for petty offences, in accordance with Government Order no. 55/1994.

It therefore appealed to Parliament and the government to bring the criterion for converting unpaid fines, referred to in Article 16.6 of Law no. 61/1991, into line with the updated amounts of the fines introduced by Government Order no. 55/1994.

Languages:

Romanian.



Identification: ROM-1995-S-013

a) Romania / **b)** Constitutional Court / **c)** / **d)** 31.10.1995 / **e)** III/1995 / **f)** Decision concerning the judgment of the constitutionality of a statutory provision amended in response to an objection / **g)** *Monitorul Oficial al României* (Official Gazette), no. 259/09.11.1995 / **h)**.

Keywords of the systematic thesaurus:

1.2.3 Constitutional Justice – Types of claim – **Referral by a court.**

1.3.1.1 Constitutional Justice – Jurisdiction – Scope of review – **Extension.**

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**

1.4.6 Constitutional Justice – Procedure – **Grounds.**

Keywords of the alphabetical index:

Constitutional Court, change in the wording of the contested provision, continuity of the referral.

Headnotes:

Under Article 144.c of the Constitution and Article 23 of Law no. 47/1992, the Constitutional Court rules on objections concerning unconstitutionality within the limits of the matter referred to it.

If, however, after an objection has been raised in the courts on grounds of unconstitutionality, the contested statutory provision has been amended in such a way that the new wording reflects the legislative solution in terms of principle that existed prior to the amendment, the grounds for unconstitutionality remaining the same, it is not necessary to submit a further objection to the Constitutional Court: the latter continues to examine the case on the basis of the objection on grounds of unconstitutionality raised in connection with the earlier provision.

If, however, the legislative solution differs from that of the statutory provision as it existed prior to the amendment, even if the interests of the party raising the objection are the same, the Court may not rule on the constitutionality of the new version of the statutory provision, as to do so would go beyond the scope of the matter referred to it.

Summary:

The interlocutory judgment of the 14 May 1993 of the Iași Civil Court of First Instance, handed down in case no. 13.987/1993, referred an objection to Article 19.1 of Law no. 85/1992 on grounds of unconstitutionality to the Constitutional Court (case no. 41C/1994).

The Constitutional Court also received five objections on the grounds of the unconstitutionality of the provisions of Article 19.1 of Law no. 85/1992, before they were amended by Law no. 76/1994, forming the subject of cases nos. 54C/1994, 55C/1994, 61C/1994, 58C/1995 and 70C/1995, which were joined at the Division's sitting on 11 April 1995.

Before it was amended, Article 19.1 of Law no. 85/1992 read as follows: “Contracts for the sale/purchase of housing that was not built with State funds but has been transferred to State ownership, contracts for the sale/purchase of company flats and flats for people in public-sector business jobs which are contrary to the provisions of this Act, and any other contract entered into in violation of the provisions of Legislative Decree no. 61/1990 shall be null and void.”

Following its modification by Law no. 76/1994, his provision read: “Sales contracts concluded in violation

of the provisions of the Legislative decree no. 61/1990 and the present law are null and void.”

In case no. 23C/1993, which concerned the unconstitutionality of Article 34 of Law no. 80/1992 on pensions and other social insurance entitlements of farmers, the Bucharest Civil Court of First Instance (Sector 1) had, by means of an interlocutory judgment of 25 January 1993, referred the matter to the Constitutional Court. Before the case was settled, the contested article had been amended by Article 17 of Law no. 1/1994, published in the *Monitorul Oficial al României*, Part I, no. 9 of 17 January 1994.

In case no. 102C/1993, in which an objection had been raised to Article 37 of Law no. 32/1968, which made provision for petty offences and the penalties for them, the Maramureş Court had referred the matter to the Constitutional Court by means of an interlocutory judgment of 19 November 1993.

In case no. 40C/1993, concerning an objection, on grounds of unconstitutionality, to the provisions of Article 3.2 of Law no. 58/1992 on the correlation between salaries provided for by Law no. 53/1991, Law no. 40/1991 and Law no. 52/1991 and the salaries paid by commercial companies and independent public-sector businesses, the Bucharest Civil Court of First Instance (Sector 5) had referred the matter to the Constitutional Court by means of an interlocutory judgment of 7 May 1993.

The contested law stated: “Salaries received as a result of doing more than one job at the same time, in accordance with paragraph 1, and income obtained from sources other than the basic job, regardless of where this income is obtained, shall be taxed separately, the tax levied being that provided for by law, increased by 100%.” It was contended that, in the final analysis, these provisions were contrary to Articles 16.1 and 53.2 of the Constitution.

The objection on grounds of unconstitutionality concerned a statutory provision, not so much from the technical angle as from the material angle, since, in this respect, the party submitting it contended that the statute was at variance with a constitutional provision. For this reason, as long as the legislative solution in terms of principle provided for in the amended text was taken from the text as it existed prior to amendment, the objection on grounds of unconstitutionality stood.

Languages:

Romanian.



United States of America Supreme Court

Important decisions

Identification: USA-1803-S-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 24.02.1803 / **e)** / **f)** Marbury v. Madison / **g)** 1 Cranch (5 U.S.) 137 (1803) / **h)**.

Keywords of the systematic thesaurus:

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.5.5 Constitutional Justice – Jurisdiction – The subject of review – **Laws and other rules having the force of law.**

2.2.2.2 Sources – Hierarchy – Hierarchy as between national sources – **The Constitution and other sources of domestic law.**

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

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

Keywords of the alphabetical index:

Judicial review, principle / *Mandamus*, remedy.

Headnotes:

The United States Government is one in which the various departments, including the legislature, exercise limited powers.

The judicial branch, like other departments of government, is bound by the written Constitution.

The Constitution is a superior, paramount law, unchangeable by ordinary means.

When a legislative act is in conflict with the Constitution, it is void and a court is obliged not to apply it in concrete cases before the Court.

Summary:

Shortly before the end of his term of office as President of the United States, John Adams appointed William Marbury to be a federal judge (specifically, a Justice of the Peace in the District of

Columbia). In doing so, President Adams signed a commission document following approval of Marbury's appointment by the U.S. Congress. However, James Madison, the Secretary of State in the new administration of President Thomas Jefferson, refused to deliver the commission to Marbury.

Marbury invoked the original jurisdiction of the U.S. Supreme Court, pursuant to Article III of the U.S. Constitution. The second clause of Section 2 of that article states in its first sentence that: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction." Marbury asked the Court to issue a writ of *mandamus* to Madison, a remedy authorized by the U.S. Congress in Section 13 of the Judiciary Act of 1789, ordering him to deliver the commission. A writ of *mandamus* is a judicial order addressed to a public official, compelling that official to perform an act required by law.

The Court determined that Marbury was entitled to receive his commission and that Madison had wrongfully withheld it from him. However, the Court was then required to address the question of the remedy. Here, although the Judiciary Act of 1789 provided for the *mandamus* remedy, the Court determined that it could not apply the legislative act without first assessing its conformity to the Constitution – in this case, the grant of original jurisdiction in Article III. The Court took this step, even though neither the Constitution nor legislation expressly conferred such power of review upon the judiciary, after addressing certain principles which it stated are "deemed fundamental". Among these principles is recognition of the limited powers of the U.S. Government, including the legislature, whose powers are defined and limited in a written Constitution. In this regard, the Court addressed the hierarchy of laws, stating that "the Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it". The Court concluded that the first of these propositions was correct, and that therefore a legislative act that conflicts with the Constitution is void and cannot receive judicial application.

The Court concluded that the grant of original jurisdiction in Article III was a limited grant that did not include the *mandamus* remedy. Therefore, the 1789 legislative provision authorizing such remedy was void and not available to the Court. As a result, although Madison's act was deemed wrongful, the Court lacked a remedy to provide Marbury with relief against it.

Supplementary information:

Marbury v. Madison was the U.S. Supreme Court's first articulation and application of the principle of judicial review. Under this principle, the Court asserted the judiciary's role in exercising constitutional control over legislative and other governmental acts. It is therefore one of the fundamental judicial opinions in U.S. constitutional history, not only because the Supreme Court is the highest Court in the federal judicial hierarchy, but also because the decision established the legitimacy of the exercise of judicial review by lower courts as well. Prior to the decision, certain lower federal courts and state courts had declined to apply legislative acts that they considered inconsistent with the federal or state constitutions. Thus, it can be said that *Marbury v. Madison* spurred the development of the diffuse system of constitutional control in the United States, where courts throughout the judicial system are authorized to exercise judicial review.

Languages:

English.



Identification: USA-1819-S-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 06.03.1819 / **e)** / **f)** *McCulloch v. Maryland* / **g)** 4 *Wheaton* (17 U.S.) 316 (1819) / **h)**.

Keywords of the systematic thesaurus:

3.6.3 General Principles – Structure of the State – **Federal State.**

4.5.2 Institutions – Legislative bodies – **Powers.**

4.8.7 Institutions – Federalism, regionalism and local self-government – **Budgetary and financial aspects.**

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

4.10.7.1 Institutions – Public finances – Taxation – **Principles.**

Keywords of the alphabetical index:

Supremacy, federal / Taxation, power / Powers, implied.

Headnotes:

The federal legislature possesses the power to take actions, not in themselves among the legislature's enumerated powers, which are necessary and proper for the implementation of powers that are expressly set forth in the Constitution.

The sovereignty of the states in the federal structure does not extend to taxation of agencies of the federal government.

Summary:

In 1791, the U.S. Congress approved the formation of a corporation: the First Bank of the United States. In 1811, Congress voted not to renew the Bank's charter, in large part because of concerns that the U.S. Constitution did not grant the federal legislature such authority. However, five years later, Congress changed its position and granted a charter to the Second Bank of the United States. The Bank was a for-profit entity, with most of its stock held by private persons.

The legislatures of several states, strongly opposed to the Bank's formation as a competitor to state-chartered banks, enacted laws that imposed taxes on its activities. One of these states, Maryland, in 1818 imposed certain taxes on all banks operating within the state that were not chartered by the state legislature.

A branch of the Bank located in Maryland, led by its cashier James McCulloch, refused to pay the taxes to the state. Maryland sued the Bank and obtained a state court judgment, which was affirmed by the Maryland Court of Appeals. McCulloch sought U.S. Supreme Court review, which the Court granted.

The case presented two specific issues to the Supreme Court: whether Congress possessed the power to incorporate the Bank, and if so, whether the Bank as a federal entity could be subject to taxation by a state. In an opinion authored by Chief Justice John Marshall, the Court ruled in the affirmative on the first question and against such an assertion of state power on the second.

As to the first question, the powers of the Congress are enumerated in Article I-8 of the Constitution. The power to grant corporate charters is not among those

listed. The Court, however, while acknowledging this and the principle that the federal government is one of enumerated powers, nevertheless ruled that the act of chartering a corporation lay within the scope of certain powers that are expressly set forth in Article I-8 of the Constitution including the power to lay and collect taxes, to pay the public debts, and to borrow money. The key to this conclusion, according to the Court, lay in the "necessary and proper" clause of Article I-8 of the Constitution which after listing the powers of Congress expressly grants to the Congress the power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Therefore, the congressional power was implied as a means of implementing those which were enumerated: "A power without the means to use it," the Court stated, "is a nullity."

In regard to the power of a state to tax the Bank, the Court invoked the Supremacy Clause of Article VI of the Constitution, which states that the Constitution, and federal laws made pursuant to it, "shall be the supreme law of the land." Therefore, the power of the states to tax, while certainly important to those units of the federal system, is subordinate to and controlled by the U.S. Constitution. Having determined that the Bank was an agency of the federal government, the Court observed that a state's capacity to tax federal agencies would give it the power to destroy those institutions, thereby defeating the purposes of government created under the Constitution. In sum, the Court ruled, a state cannot tax those subjects over which its sovereignty does not extend.

Supplementary information:

The Supreme Court's broad construction of the "necessary and proper" clause was a cornerstone for the vast expansion of federal power in the twentieth century in the United States, particularly during and after the "New Deal" policies of the 1930s.

Languages:

English.



Identification: USA-1938-S-001

a) United States of America / b) Supreme Court / c) / d) 25.04.1938 / e) 367 / f) Erie Railroad Company v. Tompkins / g) 58 *Supreme Court Reporter* 817 (1938) / h) CODICES (English).

Keywords of the systematic thesaurus:

1.6.3.1 Constitutional Justice – Effects – Effect *erga omnes* – **Stare decisis**.

2.1.2 Sources – Categories – **Unwritten rules**.

2.1.3 Sources – Categories – **Case-law**.

3.6.3 General Principles – Structure of the State – **Federal State**.

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

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

4.8.6.3 Institutions – Federalism, regionalism and local self-government – Institutional aspects – **Courts**.

Keywords of the alphabetical index:

Common law / General law / Law, choice / Precedent, judicial.

Headnotes:

Except in cases involving the application of the U.S. Constitution or federal legislative acts, the laws to be applied by federal courts must be the laws of the states.

The applicable law of a state to be applied by a federal court may be found either in acts of its legislature or in decisions of its highest court.

Summary:

I. Mr. Tompkins, a citizen of the state of Pennsylvania, was injured in the state of Pennsylvania by a freight train of the Erie Railroad Company. He was injured while walking at night alongside the railroad's tracks. He said he was struck by something projecting from the train, and brought a lawsuit against the railroad, claiming that the accident occurred because of the railroad's negligence. He also contended that he was rightfully on the railroad's premises because he was using a commonly-used footpath that ran for a short distance alongside the tracks. The railroad denied that it was liable for his injury.

Tompkins's lawsuit was heard in a federal district court in the state of New York. The railroad was a New York corporation and therefore citizen of that state. The federal court had jurisdiction because federal courts, in addition to their power over cases involving the application of federal law, have so-called "diversity" jurisdiction to hear disputes between citizens of different states.

The crucial question in the litigation involved the choice of law to be applied by the federal court. The railroad claimed that its duty to Tompkins should be determined in accordance with Pennsylvania law. It based this position on Article 34 of the 1789 Federal Judiciary Act, which states that the laws of the states shall serve as the rules of decision in federal court trials, except where the federal Constitution, treaties, or legislative acts otherwise require or provide. Under Pennsylvania law, the railroad asserted, a person who uses a pathway alongside a railroad track was a trespasser, and that a railroad is not liable for injuries to undiscovered trespassers resulting from its negligence unless its act was wanton or willful.

Tompkins denied that any such rule had been established by the decisions of the Pennsylvania courts, and contended that, since there were not any Pennsylvania legislative acts on the subject, the railroad's duty and liability in federal court proceedings were to be determined as a matter of general, or "common", law. This position was grounded in the U.S. Supreme Court's 1842 decision in *Swift v. Tyson*, in which the Court ruled that federal courts in diversity jurisdiction cases are not required to apply the unwritten laws of the states as declared by their highest courts. Instead, the Court stated, the federal courts are free to exercise independent judgment as to what the common law of a state is, or should be.

At the Court of First Instance, the judge declined to rule that any substantive law precluded sending the case to the jury. The jury ruled in Tompkins's favour, awarding him damages of 30,000 U.S. Dollars. The federal Court of Appeals affirmed the judgment, holding that it was not necessary to determine the rules of Pennsylvania law because the federal courts may instead apply federal common law on the question of the responsibility of a railroad for injuries caused by its employees. Under federal common law, the Court of Appeals stated, a jury may find that negligence exists toward pedestrians using a permissive path alongside the railroad if they are hit by some object projecting from the side of the train.

II. The U.S. Supreme Court reversed the decision of the Court of Appeals, holding that there is no federal general common law. Therefore, the Court ruled that,

except in cases involving the application of the U.S. Constitution or federal legislative acts, the laws to be applied by the federal courts must be the laws of the states. In this regard, the Court added, a state's applicable law may be found either in acts of its legislature or in decisions of its highest court. In arriving at this determination, the Court stated that it was not holding Article 34 of the 1789 Judiciary Act to be unconstitutional; instead, it set aside the statutory construction found in *Swift v. Tyson*. The *Swift v. Tyson* doctrine, the Court declared, was "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." In applying that doctrine, the Court stated, it and the lower federal courts had "invaded rights which in our opinion are reserved by the Constitution" to the states. The Court therefore remanded the case to the lower courts for determination of the applicable substantive law rules of the state of Pennsylvania.

Supplementary information:

Decided unanimously, the *Erie* decision represents an illustration of the Supreme Court's willingness, if so warranted, to overturn its own precedents. The Court's opinion includes a detailed listing of the reasons why the "mischievous results" of the *Swift v. Tyson* doctrine had become apparent. These included the impossibility of insuring equal protection of the law, because it made rights enjoyed under the unwritten "federal common law" vary according to whether enforcement was sought in the state or in federal courts, and hindered the promotion of legal uniformity.

More generally, and as background to the Court's decision, adherents of federal and state economic regulation had long criticised the federal courts' use of *Swift v. Tyson* to apply doctrines of federal common law such as substantive due process and liberty of contract to shield business corporations from state regulatory authority. For example, in its 1928 decision in *Black and White Taxicab and Transfer Company v. Brown and Yellow Taxicab and Transfer Company*, the Supreme Court had invoked such federal general law to block the application of a state's antitrust legislation.

It is important to note that while the *Erie* decision did away with the concept of general federal common law, it did not do so with the entire notion of federal common law. Thus, ever since, the Court has recognised the existence and validity of specialised bodies of federal common law. For example, the Court applies a judicially-developed body of federal law rules based on incorporation and interpretation of customary international law.

Cross-references:

- *Black and White Taxicab and Transfer Company v. Brown and Yellow Taxicab and Transfer Company*, 276 United States Reports 518; 48 Supreme Court Reporter 404; 72 Lawyer's Edition 681 (1928); *Swift v. Tyson*, 16 Peters 1 (1842).

Languages:

English.



Identification: USA-1942-S-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 09.11.1942 / **e)** 59 / **f)** Wickard v. Filburn / **g)** 63 Supreme Court Reporter 82 (1942) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.5.2 Institutions – Legislative bodies – **Powers**.
4.8.8.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods**.

Keywords of the alphabetical index:

Commerce, inter-state, regulation.

Headnotes:

The federal commerce power is not confined in its exercise to the regulation of commerce among the states; instead, its scope extends to intra-state activities that affect inter-state commerce by substantially interfering with or obstructing the federal government's exercise of its legislative competence.

A local activity that does not involve the marketing of a product in the stream of commerce may still fall within the scope of federal regulatory power if it substantially interferes with or obstructs the federal legislature's exercise of its power to regulate inter-state commerce.

Summary:

I. Mr. Roscoe Filburn owned and operated a small farm in the state of Ohio. He maintained a herd of dairy cattle and raised poultry, and sold milk, poultry, and eggs in the open market. He also raised a small amount of wheat.

In 1941, Filburn grew an amount of wheat that exceeded by 239 bushels his assigned quota under federal regulations issued by the U.S. Department of Agriculture pursuant to the Agricultural Adjustment Act ("AAA"), a legislative act of the U.S. Congress. Filburn did not sell any of his wheat crop in the open market. Instead, he saved it all for personal use: feeding animals on the farm, making flour for home consumption, and seeding in the next growing season.

Pursuant to the AAA, the authorities imposed a monetary penalty upon Filburn's excess wheat at the rate of 49 cents per bushel, for a total fine of 117 U.S. Dollars. Filburn contested the government's act as unconstitutional, claiming that the power of the federal legislature to regulate inter-state commerce under the U.S. Constitution did not extend to the intra-state production of wheat that never was placed on the market. The federal regulatory power is found in the so-called "Commerce Clause", Article I.8 of the Constitution, which includes among the powers of the U.S. Congress the regulation of "Commerce...among the several States." The first instance federal court accepted Filburn's argument and issued an injunction that prohibited the government from enforcing the monetary penalty.

II. The U.S. Supreme Court reversed the decision of the first instance court. The Court made a detailed analysis of the economics of the marketplace for agricultural products, noting that approximately 20 % of the wheat grown in the United States never left the farms on which it was produced. By consuming their own wheat, farmers reduced the overall demand, thereby depressing the market price of wheat. These actions, the Court ruled, therefore affected inter-state commerce and their regulation was within the scope of the Commerce Clause.

In making this ruling, the Court stated that the federal commerce power is not confined in its exercise to the regulation of commerce among the states. Instead, the commerce power extends to intra-state activities that affect inter-state commerce by substantially interfering with or obstructing the federal government's exercise of its legislative competence. Therefore, Filburn's activity, even though it was local and perhaps was not "commerce" in the strict sense of the term, nevertheless fell under the regulatory competence of the U.S. Congress.

Supplementary information:

Wickard v. Filburn was a unanimous decision of the Supreme Court. The Court's opinion includes a detailed survey, with numerous citations to the Court's case law, of the evolution of the federal commerce power. The decision is viewed as a leading illustration of the Court's recognition of the constitutionality of the nationalist economic policies of the "New Deal" programs advanced by the administration of President Franklin Roosevelt. Those programs were adopted to address the severe economic crisis of the 1930's depression.

Wickard also represents the culmination of the Supreme Court's effort to identify an appropriate standard for determining the constitutionality of federal economic regulatory legislation. For example, its adoption of the "substantial economic effect" standard, with its detailed economic analysis, was intended to replace the Court's earlier emphasis on whether or not a regulatory measure placed a "direct burden" on inter-state commerce. The Supreme Court has reiterated this approach in many subsequent decisions, the most recent of which was *Gonzales v. Raich* in 2005.

Cross-references:

- *Gonzales v. Raich*, 125 *Supreme Court Reporter* 2195, 162 *Lawyer's Edition Second* 1 (2005); *Bulletin* 2005/2 [USA-2005-2-004].

Languages:

English.

*Identification: USA-1954-S-001*

a) United States of America / **b)** Supreme Court / **c)** / **d)** 17.05.1954 / **e)** / **f)** Brown v. Board of Education of Topeka, Kansas, et al. / **g)** 74 *Supreme Court Reporter* 686 (1954) / **h)**.

Keywords of the systematic thesaurus:

5.2.2.2 Fundamental Rights – Equality – Criteria of distinction – **Race**.

Keywords of the alphabetical index:

Education, public / School, access, equal protection / Segregation, racial.

Headnotes:

Whether separate public school systems under a state-imposed system of racial segregation satisfy the constitutional requirement of equal protection of the laws cannot be assessed solely by comparison of tangible factors such as buildings, curricula, and the qualifications and salaries of teachers; instead, separate systems of public education based on race are inherently unequal.

Summary:

Plaintiffs in four separate legal actions challenged laws of the states of Delaware, Kansas, South Carolina, and Virginia that required them, as African-Americans, to attend racially segregated public schools. Their lawsuits were part of a broad-scale litigation campaign by the National Association for the Advancement of Colored People (NAACP) that challenged the constitutionality of systems of racial segregation in public accommodations and education imposed by a number of states. In three of the four lawsuits (those in the states of Kansas, South Carolina, and Virginia), the U.S. District Courts ruled against the plaintiffs. In the fourth case, the state courts of Delaware ruled in the plaintiffs' favor.

The U.S. Supreme Court, reviewing all four cases, found that they shared the same legal question – that of the validity of state school segregation laws under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution – even though many of the facts in the cases were different. Therefore, the Court joined all four cases together in a consolidated decision.

The Equal Protection Clause is found in Section One of the Fourteenth Amendment. It states that no state shall “deny to any person within its jurisdiction the equal protection of the laws”.

In its 1896 decision in *Plessy v. Ferguson*, the Court had construed the Equal Protection Clause to hold that state-imposed racial segregation in public facilities was not unreasonable under the “separate but equal” doctrine. Under that doctrine, equal treatment was achieved when the different races were provided substantially equal facilities, even though the facilities were separate.

In the instant case, much of the Court's opinion was devoted to consideration of the “separate but equal” doctrine. The Court concluded that the doctrine could no longer be applied in the field of public education, effectively reversing *Plessy v. Ferguson*. Central to this determination was the Court's conclusion that equality could not be measured solely on the comparison of tangible factors such as buildings, curricula, and the qualifications and salaries of teachers in the separate school systems. Instead, the Court said that it must look to the “effect of segregation itself”, including the psychological impact on African-American children, on public education. The result of this inquiry was the Court's conclusion that separate educational facilities based on race were “inherently unequal”. Therefore, the Court, in a unanimous decision, held that children in segregated schools were deprived of the equal protection guaranteed under the Fourteenth Amendment and that state laws requiring such segregation were unconstitutional.

Supplementary information:

Although one of the Supreme Court's landmark decisions, serving as a catalyst for the civil rights movement of the late 1950s and 1960s, *Brown v. Board of Education* (often referred to as *Brown I*) did not address the challenging question of a remedy for those challenging segregation in public education. That question was addressed in the Court's subsequent decision (rendered 31 May 1955), known as *Brown II*. In *Brown II*, the Court invited the Attorney General of the United States and the Attorneys General of all states that required or permitted racial segregation in public education to present their views on implementation of the Court's *Brown I* decision. In its *Brown II* opinion, the Court stated that while the factual record demonstrated the complexities involved in the transition to integrated systems of public education, the defendants were required to make a “prompt and reasonable” start toward full compliance with the *Brown I* decision. Meanwhile, the Court stated that the federal courts would retain jurisdiction of the lawsuits, taking steps as would be necessary to move with “all deliberate speed” toward integration. Under these conditions, the methods and pace of school integration remained matters of great controversy for many years.

Cross-references:

- *Brown v. Board of Education of Topeka, Kansas, et al. (Brown II)*, 349 *United States Reports* 294, 75 *Supreme Court Reporter* 753, 99 *Lawyer's Edition Second* 1083 (1955).

Languages:

English.

*Identification:* USA-1966-S-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 13.06.1966 / **e)** 759 / **f)** *Miranda v. Arizona* / **g)** 86 *Supreme Court Reporter* 1602 (1966) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

5.3.13.23.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – **Right not to incriminate oneself.**

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

Keywords of the alphabetical index:

Confession, admissibility on evidence / Evidence, exclusion / Interrogation, custodial / Waiver, of right, voluntary and knowing.

Headnotes:

The constitutional privilege against self-incrimination is available in any setting, including police custodial interrogations, where an individual's freedom to terminate the meeting is restricted.

A statement provided by an individual in the course of a custodial interrogation will not be admissible evidence unless the prosecution is able to demonstrate that procedural safeguards effective to secure the constitutional privilege against self-incrimination were employed.

Unless other means at least as effective are employed, for a person's statement to be admissible evidence he or she must have received prior to questioning a set of warnings regarding the right to

remain silent, the potential use against him or her of any statements made, and the right to counsel.

A person subject to custodial interrogation may waive his or her right to remain silent and right to counsel if such waiver is made voluntarily and knowingly.

Summary:

Mr. Ernesto Miranda was arrested at his home in the state of Arizona and taken directly to a police station where the victim of a kidnapping and rape identified him as the offender. He then was taken directly to an interrogation room where police questioned him for two hours. Neither before the questioning, nor during it, did the police inform him of a right to have an attorney present during the interrogation or to consult with an attorney before answering any questions. At first, Miranda maintained that he was innocent of the crime. However, later during the interrogation, he signed a written confession of guilt which contained a typed paragraph stating that the confession was made voluntarily with full knowledge of his legal rights and with the understanding that any statement he made might be used against him. At trial, the confession was admitted into the evidentiary record and Miranda was found guilty of kidnapping and rape. On appeal, the Supreme Court of Arizona affirmed his conviction. The U.S. Supreme Court granted Miranda's petition to review that judgment.

The U.S. Supreme Court reversed the Arizona Court's judgment on the grounds that Miranda's rights under the Fifth Amendment to the U.S. Constitution had been violated. The Fifth Amendment states in relevant part: "No person...shall be compelled in any criminal case to be a witness against himself." In a 1964 decision, *Malloy v. Hogan*, the Court had ruled that this privilege against self-incrimination applied to the states by means of incorporation through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

The *Miranda* decision broke new ground in three respects. First, it broadened the scope of the privilege against self-incrimination, which previously had been viewed only as a protection in the course of judicial proceedings. However, the Court in *Miranda* ruled that it is available in other settings as well, wherever the individual's freedom to terminate the meeting is restricted, including custodial interrogations. Second, recognising the "compulsion inherent in custodial surroundings," the Court ruled that statements obtained from an individual in such circumstances would not be admissible evidence unless the prosecution is able to demonstrate that "procedural safeguards effective to secure the privilege against self-incrimination" had been employed. Third, while

stating that the authorities could use other procedures if they are at least as effective, the Court did identify basic requirements for a statement to be admissible. Prior to questioning, the Court stated, individuals must be warned that they have a right to remain silent, that any statements they make may be used as evidence against them, and that they have a right to the presence of an attorney, either appointed or of their own choosing. In addition, if an individual indicates in any manner and at any stage of the process that he or she wishes to consult with an attorney before speaking, there can be no further questioning. Likewise, if the individual is alone and indicates in any manner that he or she does not wish to be interrogated, the police may not initiate questioning. Finally, the Court stated that if a person has answered some questions or volunteered some statements, that fact will not deprive him or her of the right to refrain from answering any further inquiries until consultation with an attorney has taken place and the person thereafter consents to be questioned.

Having identified these rights associated with the privilege against self-incrimination, the Court also stated that an individual may waive them, provided that the waiver is made voluntarily and knowingly. Thus, the *Miranda* decision did not require that individuals taken into custody consult with an attorney before questioning or have an attorney present during interrogation. Instead, it required that the right to counsel be made known to the person prior to the initiation of the interrogation.

Supplementary information:

Four of the nine Supreme Court Justices dissented from the *Miranda* judgment. Justices Clark, Harlan and White filed dissenting opinions. Although it long has been subject to criticism both by those who claim that it tilted the balance of interests too heavily in favour of criminal suspects and those who argue it did not go far enough (particularly by its allowance of waivers, made even without having obtained the advice of an attorney if made “voluntarily” and “knowingly”), the *Miranda* decision has never been overruled by the Supreme Court. However, it has been subject to the Court’s ongoing interpretation and application, including the Court’s declaration in the 1974 decision of *Michigan v. Tucker* that the *Miranda* warnings to be given to suspects are not in themselves constitutionally-protected rights, but instead “prophylactic standards” designed to safeguard or “provide practical reinforcement” for the privilege against self-incrimination.

Cross-references:

- *Malloy v. Hogan*, 378 *United States Reports* 1, 84 *Supreme Court Reporter* 1489, 12 *Lawyer’s Edition Second* 653 (1964);
- *Michigan v. Tucker*, 417 *United States Reports* 433, 94 *Supreme Court Reporter* 2357, 41 *Lawyer’s Edition Second* 182 (1974).

Languages:

English.



Identification: USA-1976-S-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 30.01.1976 / **e)** 75-436 and 75-437 / **f)** *Buckley v. Valeo* / **g)** 96 *Supreme Court Reporter* 612 (1976) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 4.9.8.1 Institutions – Elections and instruments of direct democracy – Electoral campaign and campaign material – **Financing**.
- 4.9.8.2 Institutions – Elections and instruments of direct democracy – Electoral campaign and campaign material – **Campaign expenses**.
- 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.
- 5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association**.

Keywords of the alphabetical index:

Election, campaign, contribution, limitation / Election, campaign, expenditure, limitation.

Headnotes:

The making of monetary contributions to candidates for elective public office, and the making of expenditures on behalf of one’s own candidacy or those of others, are not simply conduct with a potentially expressive element, but instead are activities that lie at the core of constitutional guarantees of freedom of speech and freedom of association.

Legislative acts that place limits on the making of monetary contributions to candidates for elective public office, and the making of expenditures on behalf of one's own candidacy or those of others, must be subject to strict judicial scrutiny which places a heavy burden on proponents to justify the regulations' constitutional validity because the spending of money to make political choices lies at the core of constitutional guarantees of freedom of speech and freedom of association.

The constitutional guarantee of freedom of speech does not allow for the concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others.

Summary:

A number of candidates for federal elective offices, political parties, and other political organizations filed a lawsuit challenging the constitutionality of various provisions of the Federal Election Campaign Act ("FECA"), first enacted by the U.S. Congress in 1971 and amended in 1974. The purpose of the FECA was to reduce the influence of money in campaigns for federal elective office. Among the challenged legislative measures were provisions that:

1. limited monetary contributions to candidates for federal elective office by an individual or group to 1,000 U.S. Dollars and by a political committee to 5,000 U.S. Dollars to any single candidate per election, with an overall annual limit of 25,000 U.S. Dollars by an individual contributor; and
2. limited monetary expenditures by individuals or groups directed toward a "clearly identified candidate" to 1,000 U.S. Dollars per candidate per election, and by candidates from their personal or family funds to specific limits depending upon the federal office they were seeking, and by candidates of funds from all sources (again depending upon the office they were seeking).

The primary argument of those challenging these provisions was that they violated freedoms of expression and association guaranteed under the First Amendment to the U.S. Constitution, which states in relevant part that: "Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The Federal Court of Appeals, however, ruling on the constitutional issues on a referral from the court of first instance, took the view that the challenged provisions regulated at most

expressive conduct, and not pure speech. Therefore, the Court of Appeals imposed an intermediate level of First Amendment scrutiny. The Court of Appeals concluded that the challenged provisions were constitutionally valid because they sought to advance a "clear and compelling" governmental interest in preserving the integrity of the political process and the provisions' incidental restrictions on the exercise of First Amendment freedoms were no greater than was essential to the furtherance of that interest.

In reviewing the Court of Appeals decision, the U.S. Supreme Court disagreed with the lower court's approach on the First Amendment question, although it did conclude that some of the challenged provisions were valid. The Supreme Court viewed the making of monetary contributions and expenditures as political expression in an area of the most fundamental First Amendment-protected activities: discussion of public issues and debate on the qualifications of candidates for public office.

These activities, the Court stated, "are integral to the operation of the system of government established by our Constitution": a restriction on the amount of money a person or group can spend on political communication during a campaign reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This, the Court reasoned, is because virtually every means of communicating ideas in mass society requires the expenditure of money: the electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech. As a result, the Court concluded, the expenditure of money in furtherance of such activities cannot be equated with conduct; therefore, the challenged FECA provisions would have to be reviewed under a strict scrutiny standard that places a heavy burden on the proponents of regulation.

Applying a strict scrutiny standard, the Court concluded that the FECA's limits on individual and group contributions were valid because their primary purpose – to limit the actuality and appearance of corruption resulting from large individual financial contributions – was legitimate, and because they entailed only a marginal restriction on a contributor's ability to engage in First Amendment-protected activity. The limits on candidate expenditures and on expenditures that groups could make on behalf of candidates, on the other hand, were invalidated as substantial and direct restrictions on political expression that could not be justified by the legislative purpose of equalising the relative financial resources

of competing candidates. The concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others, the Court stated, is “wholly foreign to the First Amendment”.

Supplementary information:

The Court also made a number of other important determinations in the *Buckley* decision. For example, it recognised that the First Amendment protects political association as well as expression. In regard to other FECA provisions, it upheld a new system for limited public funding of presidential election campaigns, as well disclosure rules that required political organizations to make available to the public information identifying their contributors and the amounts of their campaign contributions to candidates and expenditures on behalf of candidates. On a separation of powers question, the Court ruled that the FECA in certain ways unconstitutionally dictated the composition of the Federal Election Commission.

The Court’s opinion in *Buckley* is a *Per Curiam* (“By the Court”) opinion, that is, one whose authorship is not attributed to an individual Justice. However, five of the nine Justices filed separate opinions, all of which joined the *Per Curiam* opinion in part and dissented from it in part.

The impact of *Buckley* on the conduct of campaigns for public office has been great. The raising of funds and their expenditure, particularly on television advertisements, is a marked feature of political activity.

Languages:

English.



Systematic thesaurus (V19) *

* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

1 Constitutional Justice¹

1.1 Constitutional jurisdiction²

1.1.1	Statute and organisation	
1.1.1.1	Sources	
1.1.1.1.1	Constitution	
1.1.1.1.2	Institutional Acts	6
1.1.1.1.3	Other legislation.....	50
1.1.1.1.4	Rule issued by the executive	
1.1.1.1.5	Rule adopted by the Court ³	
1.1.1.2	Independence	
1.1.1.2.1	Statutory independence	
1.1.1.2.2	Administrative independence	
1.1.1.2.3	Financial independence	
1.1.2	Composition, recruitment and structure	
1.1.2.1	Necessary qualifications ⁴	
1.1.2.2	Number of members	6
1.1.2.3	Appointing authority	
1.1.2.4	Appointment of members ⁵	10
1.1.2.5	Appointment of the President ⁶	6
1.1.2.6	Functions of the President / Vice-President	
1.1.2.7	Subdivision into chambers or sections.....	6
1.1.2.8	Relative position of members ⁷	
1.1.2.9	Persons responsible for preparing cases for hearing ⁸	
1.1.2.10	Staff ⁹	
1.1.2.10.1	Functions of the Secretary General / Registrar	
1.1.2.10.2	Legal Advisers	
1.1.3	Status of the members of the court	
1.1.3.1	Term of office of Members	
1.1.3.2	Term of office of the President.....	6
1.1.3.3	Privileges and immunities	
1.1.3.4	Professional incompatibilities	
1.1.3.5	Disciplinary measures	
1.1.3.6	Remuneration	
1.1.3.7	Non-disciplinary suspension of functions	
1.1.3.8	End of office	
1.1.3.9	Members having a particular status ¹⁰	

¹ This chapter – as the Systematic Thesaurus in general – should be used sparingly, as the keywords therein should only be used if a relevant procedural question is discussed by the Court. This chapter is therefore not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only look for decisions in this chapter, the subject of which is also the keyword.

² Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

³ For example, rules of procedure.

⁴ For example, age, education, experience, seniority, moral character, citizenship.

⁵ Including the conditions and manner of such appointment (election, nomination, etc.).

⁶ Including the conditions and manner of such appointment (election, nomination, etc.).

⁷ Vice-presidents, presidents of chambers or of sections, etc.

⁸ For example, State Counsel, prosecutors, etc.

⁹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

¹⁰ For example, assessors, office members.

	1.1.3.10	Status of staff ¹¹	
1.1.4		Relations with other institutions	
	1.1.4.1	Head of State ¹²	
	1.1.4.2	Legislative bodies	
	1.1.4.3	Executive bodies	
	1.1.4.4	Courts	
1.2		Types of claim	
1.2.1		Claim by a public body	
	1.2.1.1	Head of State	
	1.2.1.2	Legislative bodies	104
	1.2.1.3	Executive bodies	
	1.2.1.4	Organs of federated or regional authorities	
	1.2.1.5	Organs of sectoral decentralisation	
	1.2.1.6	Local self-government body	
	1.2.1.7	Public Prosecutor or Attorney-General	
	1.2.1.8	Ombudsman	
	1.2.1.9	Member states of the European Union	
	1.2.1.10	Institutions of the European Union	
	1.2.1.11	Religious authorities	
1.2.2		Claim by a private body or individual	
	1.2.2.1	Natural person	15
	1.2.2.2	Non-profit-making corporate body	23
	1.2.2.3	Profit-making corporate body	21
	1.2.2.4	Political parties	
	1.2.2.5	Trade unions	
1.2.3		Referral by a court ¹³	26, 139
1.2.4		Initiation ex officio by the body of constitutional jurisdiction	
1.2.5		Obligatory review ¹⁴	
1.3		Jurisdiction	40, 51
1.3.1		Scope of review	33, 34, 38, 39, 43, 45, 47, 48, 57, 63, 71, 106, 125, 127, 129, 136, 140
	1.3.1.1	Extension ¹⁵	35, 53, 139
1.3.2		Type of review	
	1.3.2.1	Preliminary / <i>ex post facto</i> review	63
	1.3.2.2	Abstract / concrete review	
1.3.3		Advisory powers	39, 41
1.3.4		Types of litigation	
	1.3.4.1	Litigation in respect of fundamental rights and freedoms	18, 49, 50
	1.3.4.2	Distribution of powers between State authorities ¹⁶	
	1.3.4.3	Distribution of powers between central government and federal or regional entities ¹⁷	.12
	1.3.4.4	Powers of local authorities ¹⁸	
	1.3.4.5	Electoral disputes ¹⁹	33, 35, 39, 45, 47, 50, 53, 136
	1.3.4.6	Litigation in respect of referendums and other instruments of direct democracy ²⁰	
		1.3.4.6.1 Admissibility	136
		1.3.4.6.2 Other litigation	
	1.3.4.7	Restrictive proceedings	
		1.3.4.7.1 Banning of political parties	
		1.3.4.7.2 Withdrawal of civil rights	

¹¹ (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

¹² Including questions on the interim exercise of the functions of the Head of State.

¹³ Referrals of preliminary questions in particular.

¹⁴ Enactment required by law to be reviewed by the Court.

¹⁵ Review *ultra petita*.

¹⁶ Horizontal distribution of powers.

¹⁷ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁸ Decentralised authorities (municipalities, provinces, etc.).

¹⁹ For questions other than jurisdiction, see 4.9.

²⁰ Including other consultations. For questions other than jurisdiction, see 4.9.

	1.3.4.7.3	Removal from parliamentary office	
	1.3.4.7.4	Impeachment	
	1.3.4.8	Litigation in respect of jurisdictional conflict	
	1.3.4.9	Litigation in respect of the formal validity of enactments ²¹	
	1.3.4.10	Litigation in respect of the constitutionality of enactments	
	1.3.4.10.1	Limits of the legislative competence	
	1.3.4.11	Litigation in respect of constitutional revision	
	1.3.4.12	Conflict of laws ²²	
	1.3.4.13	Universally binding interpretation of laws	
	1.3.4.14	Distribution of powers between Community and member states	
	1.3.4.15	Distribution of powers between institutions of the Community	
1.3.5		The subject of review	45
	1.3.5.1	International treaties	27, 71
	1.3.5.2	Community law	
	1.3.5.2.1	Primary legislation	
	1.3.5.2.2	Secondary legislation	
	1.3.5.3	Constitution ²³	18
	1.3.5.4	Quasi-constitutional legislation ²⁴	
	1.3.5.5	Laws and other rules having the force of law.....	63, 71, 139, 140
	1.3.5.5.1	Laws and other rules in force before the entry into force of the Constitution.....	106
	1.3.5.6	Decrees of the Head of State	
	1.3.5.7	Quasi-legislative regulations	
	1.3.5.8	Rules issued by federal or regional entities	
	1.3.5.9	Parliamentary rules	34, 104, 125
	1.3.5.10	Rules issued by the executive	
	1.3.5.11	Acts issued by decentralised bodies	
	1.3.5.11.1	Territorial decentralisation ²⁵	
	1.3.5.11.2	Sectoral decentralisation ²⁶	
	1.3.5.12	Court decisions	
	1.3.5.13	Administrative acts	
	1.3.5.14	Government acts ²⁷	
	1.3.5.15	Failure to act or to pass legislation ²⁸	136
1.4		Procedure	
	1.4.1	General characteristics ²⁹	
	1.4.2	Summary procedure	
	1.4.3	Time-limits for instituting proceedings.....	50
	1.4.3.1	Ordinary time-limit	
	1.4.3.2	Special time-limits	
	1.4.3.3	Leave to appeal out of time	
	1.4.4	Exhaustion of remedies	
	1.4.5	Originating document	
	1.4.5.1	Decision to act ³⁰	
	1.4.5.2	Signature	
	1.4.5.3	Formal requirements	
	1.4.5.4	Annexes	

²¹ Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).

²² As understood in private international law.

²³ Including constitutional laws.

²⁴ For example, organic laws.

²⁵ Local authorities, municipalities, provinces, departments, etc.

²⁶ Or: functional decentralisation (public bodies exercising delegated powers).

²⁷ Political questions.

²⁸ Unconstitutionality by omission.

²⁹ Including language issues relating to procedure, deliberations, decisions, etc.

³⁰ For the withdrawal of proceedings, see also 1.4.10.4.

	1.4.5.5	Service	
1.4.6	Grounds	139
	1.4.6.1	Time-limits	
	1.4.6.2	Form	
	1.4.6.3	<i>Ex-officio</i> grounds	
1.4.7	Documents lodged by the parties ³¹		
	1.4.7.1	Time-limits	
	1.4.7.2	Decision to lodge the document	
	1.4.7.3	Signature	
	1.4.7.4	Formal requirements	
	1.4.7.5	Annexes	
	1.4.7.6	Service	
1.4.8	Preparation of the case for trial		
	1.4.8.1	Registration	
	1.4.8.2	Notifications and publication	
	1.4.8.3	Time-limits	
	1.4.8.4	Preliminary proceedings	
	1.4.8.5	Opinions	
	1.4.8.6	Reports	
	1.4.8.7	Evidence	
		1.4.8.7.1	Inquiries into the facts by the Court
	1.4.8.8	Decision that preparation is complete	
1.4.9	Parties		
	1.4.9.1	<i>Locus standi</i> ³²	21, 23
	1.4.9.2	Interest	15, 18, 23, 29
	1.4.9.3	Representation	
		1.4.9.3.1	The Bar
		1.4.9.3.2	Legal representation other than the Bar
		1.4.9.3.3	Representation by persons other than lawyers or jurists
	1.4.9.4	Persons or entities authorised to intervene in proceedings	18, 23
1.4.10	Interlocutory proceedings	6
	1.4.10.1	Intervention	
	1.4.10.2	Plea of forgery	
	1.4.10.3	Resumption of proceedings after interruption	
	1.4.10.4	Discontinuance of proceedings ³³	
	1.4.10.5	Joinder of similar cases	
	1.4.10.6	Challenging of a judge	
		1.4.10.6.1	Automatic disqualification
		1.4.10.6.2	Challenge at the instance of a party
	1.4.10.7	Request for a preliminary ruling by the Court of Justice of the European Communities	
1.4.11	Hearing		
	1.4.11.1	Composition of the bench	6
	1.4.11.2	Procedure	
	1.4.11.3	In public / in camera	
	1.4.11.4	Report	
	1.4.11.5	Opinion	
	1.4.11.6	Address by the parties	
1.4.12	Special procedures		
1.4.13	Re-opening of hearing		
1.4.14	Costs ³⁴		
	1.4.14.1	Waiver of court fees	
	1.4.14.2	Legal aid or assistance	
	1.4.14.3	Party costs	

³¹ Pleadings, final submissions, notes, etc.

³² May be used in combination with Chapter 1.2. Types of claim.

³³ For the withdrawal of the originating document, see also 1.4.5.

³⁴ Comprises court fees, postage costs, advance of expenses and lawyers' fees.

1.5	Decisions	
1.5.1	Deliberation	
1.5.1.1	Composition of the bench	6
1.5.1.2	Chair	6
1.5.1.3	Procedure	
1.5.1.3.1	Quorum	
1.5.1.3.2	Vote	6
1.5.2	Reasoning	
1.5.3	Form	
1.5.4	Types	
1.5.4.1	Procedural decisions.....	6
1.5.4.2	Opinion	
1.5.4.3	Finding of constitutionality or unconstitutionality ³⁵	
1.5.4.4	Annulment.....	5
1.5.4.4.1	Consequential annulment	
1.5.4.5	Suspension	5, 15
1.5.4.6	Modification	
1.5.4.7	Interim measures	
1.5.5	Individual opinions of members	
1.5.5.1	Concurring opinions	
1.5.5.2	Dissenting opinions	
1.5.6	Delivery and publication	
1.5.6.1	Delivery	
1.5.6.2	Time limit	
1.5.6.3	Publication	
1.5.6.3.1	Publication in the official journal/gazette	
1.5.6.3.2	Publication in an official collection	
1.5.6.3.3	Private publication	
1.5.6.4	Press	
1.6	Effects	
1.6.1	Scope.....	41, 44
1.6.2	Determination of effects by the court	26
1.6.3	Effect <i>erga omnes</i>	26, 44
1.6.3.1	<i>Stare decisis</i>	143
1.6.4	Effect <i>inter partes</i>	
1.6.5	Temporal effect	
1.6.5.1	Entry into force of decision	
1.6.5.2	Retrospective effect (<i>ex tunc</i>)	
1.6.5.3	Limitation on retrospective effect	26
1.6.5.4	<i>Ex nunc</i> effect	
1.6.5.5	Postponement of temporal effect	
1.6.6	Execution	
1.6.6.1	Body responsible for supervising execution	
1.6.6.2	Penalty payment	
1.6.7	Influence on State organs	41, 44
1.6.8	Influence on everyday life	
1.6.9	Consequences for other cases	
1.6.9.1	Ongoing cases	
1.6.9.2	Decided cases	

³⁵

For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

2 **Sources**

2.1 **Categories**³⁶

2.1.1	Written rules	
2.1.1.1	National rules	
2.1.1.1.1	Constitution	
2.1.1.1.2	Quasi-constitutional enactments ³⁷	34, 38, 49, 50, 58
2.1.1.2	National rules from other countries	
2.1.1.3	Community law	
2.1.1.4	International instruments	18
2.1.1.4.1	United Nations Charter of 1945	
2.1.1.4.2	Universal Declaration of Human Rights of 1948	
2.1.1.4.3	Geneva Conventions of 1949	
2.1.1.4.4	European Convention on Human Rights of 1950 ³⁸	6, 10, 77
2.1.1.4.5	Geneva Convention on the Status of Refugees of 1951	
2.1.1.4.6	European Social Charter of 1961	
2.1.1.4.7	International Convention on the Elimination of all Forms of Racial Discrimination of 1965	
2.1.1.4.8	International Covenant on Civil and Political Rights of 1966	77
2.1.1.4.9	International Covenant on Economic, Social and Cultural Rights of 1966	
2.1.1.4.10	Vienna Convention on the Law of Treaties of 1969	
2.1.1.4.11	American Convention on Human Rights of 1969	
2.1.1.4.12	Convention on the Elimination of all Forms of Discrimination against Women of 1979	
2.1.1.4.13	African Charter on Human and Peoples' Rights of 1981	
2.1.1.4.14	European Charter of Local Self-Government of 1985	
2.1.1.4.15	Convention on the Rights of the Child of 1989	
2.1.1.4.16	Framework Convention for the Protection of National Minorities of 1995	
2.1.1.4.17	Statute of the International Criminal Court of 1998	
2.1.1.4.18	Charter of Fundamental Rights of the European Union of 2000	
2.1.1.4.19	International conventions regulating diplomatic and consular relations	
2.1.2	Unwritten rules	143
2.1.2.1	Constitutional custom	
2.1.2.2	General principles of law	10, 48, 62
2.1.2.3	Natural law	
2.1.3	Case-law	143
2.1.3.1	Domestic case-law	
2.1.3.2	International case-law	
2.1.3.2.1	European Court of Human Rights	10, 26
2.1.3.2.2	Court of Justice of the European Communities	
2.1.3.2.3	Other international bodies	
2.1.3.3	Foreign case-law	

2.2 **Hierarchy**

2.2.1	Hierarchy as between national and non-national sources	
2.2.1.1	Treaties and constitutions	27
2.2.1.2	Treaties and legislative acts	
2.2.1.3	Treaties and other domestic legal instruments	
2.2.1.4	European Convention on Human Rights and constitutions	
2.2.1.5	European Convention on Human Rights and non-constitutional domestic legal instruments	

³⁶ Only for issues concerning applicability and not simple application.

³⁷ This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

³⁸ Including its Protocols.

2.2.1.6	Community law and domestic law	
2.2.1.6.1	Primary Community legislation and constitutions	
2.2.1.6.2	Primary Community legislation and domestic non-constitutional legal instruments	
2.2.1.6.3	Secondary Community legislation and constitutions	
2.2.1.6.4	Secondary Community legislation and domestic non-constitutional instruments	
2.2.2	Hierarchy as between national sources	48, 132
2.2.2.1	Hierarchy emerging from the Constitution	
2.2.2.1.1	Hierarchy attributed to rights and freedoms	
2.2.2.2	The Constitution and other sources of domestic law	140
2.2.3	Hierarchy between sources of Community law	
2.3	Techniques of review	
2.3.1	Concept of manifest error in assessing evidence or exercising discretion.....	57
2.3.2	Concept of constitutionality dependent on a specified interpretation ³⁹	14, 34, 57, 65, 66, 108
2.3.3	Intention of the author of the enactment under review	
2.3.4	Interpretation by analogy	
2.3.5	Logical interpretation	
2.3.6	Historical interpretation	
2.3.7	Literal interpretation	
2.3.8	Systematic interpretation	
2.3.9	Teleological interpretation	15
3	<u>General Principles</u>	
3.1	Sovereignty	70, 71, 71
3.2	Republic/Monarchy	
3.3	Democracy	64, 90
3.3.1	Representative democracy	
3.3.2	Direct democracy	136
3.3.3	Pluralist democracy ⁴⁰	104
3.4	Separation of powers	23, 56, 67, 83, 106, 140
3.5	Social State ⁴¹	74, 123, 129
3.6	Structure of the State ⁴²	
3.6.1	Unitary State	
3.6.2	Regional State.....	11
3.6.3	Federal State.....	5, 8, 9, 11, 141, 143
3.7	Relations between the State and bodies of a religious or ideological nature ⁴³	135
3.8	Territorial principles	
3.8.1	Indivisibility of the territory	69
3.9	Rule of law	77, 87, 110, 132

³⁹ Presumption of constitutionality, double construction rule.

⁴⁰ Including the principle of a multi-party system.

⁴¹ Includes the principle of social justice.

⁴² See also 4.8.

⁴³ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

3.10	Certainty of the law⁴⁴	21, 26, 87, 100, 101, 116
3.11	Vested and/or acquired rights	
3.12	Clarity and precision of legal provisions	57, 97, 123
3.13	Legality⁴⁵	36, 37, 42, 59, 138
3.14	<i>Nullum crimen, nulla poena sine lege</i>⁴⁶	11, 57, 87, 90, 97
3.15	Publication of laws	
	3.15.1 Ignorance of the law is no excuse	
	3.15.2 Linguistic aspects	
3.16	Proportionality	9, 15, 18, 90, 94, 117, 129
3.17	Weighing of interests	54, 74, 85, 117
3.18	General interest⁴⁷	50, 54, 56, 58, 65, 66, 96, 110, 119, 127, 132
3.19	Margin of appreciation	15, 29, 85, 97
3.20	Reasonableness	18, 136
3.21	Equality⁴⁸	
3.22	Prohibition of arbitrariness	57, 58, 66, 77, 87, 90
3.23	Equity	
3.24	Loyalty to the State⁴⁹	
3.25	Market economy⁵⁰	111
3.26	Principles of Community law	
	3.26.1 Fundamental principles of the Common Market	
	3.26.2 Direct effect ⁵¹	
	3.26.3 Genuine co-operation between the institutions and the member states	
4	<u>Institutions</u>	
4.1	Constituent assembly or equivalent body⁵²	
	4.1.1 Procedure	
	4.1.2 Limitations on powers	71
4.2	State Symbols	
	4.2.1 Flag	
	4.2.2 National holiday	
	4.2.3 National anthem	
	4.2.4 National emblem	

⁴⁴ Including maintaining confidence and legitimate expectations.

⁴⁵ Principle according to which sub-statutory acts must be based on and in conformity with the law.

⁴⁶ Prohibition of punishment without proper legal base.

⁴⁷ Including compelling public interest.

⁴⁸ Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

⁴⁹ Including questions of treason/high crimes.

⁵⁰ Including prohibition on monopolies.

⁵¹ For the principle of primacy of Community law, see 2.2.1.6.

⁵² Including the body responsible for revising or amending the Constitution.

4.2.5	Motto	
4.2.6	Capital city	
4.3	Languages	18
4.3.1	Official language(s)	
4.3.2	National language(s)	
4.3.3	Regional language(s)	
4.3.4	Minority language(s)	
4.4	Head of State	
4.4.1	Powers	
4.4.1.1	Relations with legislative bodies ⁵³	64, 83, 114
4.4.1.2	Relations with the executive powers ⁵⁴	83, 110
4.4.1.3	Relations with judicial bodies ⁵⁵	110
4.4.1.4	Promulgation of laws	
4.4.1.5	International relations	
4.4.1.6	Powers with respect to the armed forces	83
4.4.1.7	Mediating powers	
4.4.2	Appointment	51
4.4.2.1	Necessary qualifications	
4.4.2.2	Incompatibilities	
4.4.2.3	Direct election	
4.4.2.4	Indirect election	
4.4.2.5	Hereditary succession	
4.4.3	Term of office	51
4.4.3.1	Commencement of office	
4.4.3.2	Duration of office	
4.4.3.3	Incapacity	
4.4.3.4	End of office	
4.4.3.5	Limit on number of successive terms	
4.4.4	Status	83
4.4.4.1	Liability	83
4.4.4.1.1	Legal liability	83
4.4.4.1.1.1	Immunity	
4.4.4.1.1.2	Civil liability	
4.4.4.1.1.3	Criminal liability	
4.4.4.1.2	Political responsibility	110
4.5	Legislative bodies ⁵⁶	
4.5.1	Structure ⁵⁷	
4.5.2	Powers ⁵⁸	36, 37, 38, 41, 42, 54, 56, 58, 59, 60, 62, 63, 65, 83, 100, 101, 132, 141, 144
4.5.2.1	Competences with respect to international agreements	
4.5.2.2	Powers of enquiry ⁵⁹	
4.5.2.3	Delegation to another legislative body ⁶⁰	
4.5.2.4	Negative incompetence ⁶¹	
4.5.3	Composition	
4.5.3.1	Election of members	
4.5.3.2	Appointment of members	
4.5.3.3	Term of office of the legislative body	
4.5.3.3.1	Duration	

⁵³ For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵⁴ For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵⁵ For example, the granting of pardons.

⁵⁶ For regional and local authorities, see chapter 4.8.

⁵⁷ Bicameral, monocameral, special competence of each assembly, etc.

⁵⁸ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁹ In particular, commissions of enquiry.

⁶⁰ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁶¹ Obligation on the legislative body to use the full scope of its powers.

4.5.3.4	Term of office of members	
4.5.3.4.1	Characteristics ⁶²	
4.5.3.4.2	Duration	
4.5.3.4.3	End	
4.5.4	Organisation ⁶³	
4.5.4.1	Rules of procedure.....	68, 125, 134
4.5.4.2	President/Speaker	
4.5.4.3	Sessions ⁶⁴	
4.5.4.4	Committees ⁶⁵	68, 125, 134
4.5.5	Finances ⁶⁶	
4.5.6	Law-making procedure ⁶⁷	55, 64, 134
4.5.6.1	Right to initiate legislation	136
4.5.6.2	Quorum	
4.5.6.3	Majority required	
4.5.6.4	Right of amendment.....	68, 129
4.5.6.5	Relations between houses.....	129, 134
4.5.7	Relations with the executive bodies.....	60
4.5.7.1	Questions to the government	
4.5.7.2	Questions of confidence	
4.5.7.3	Motion of censure	43
4.5.8	Relations with judicial bodies	23, 56
4.5.9	Liability	
4.5.10	Political parties	
4.5.10.1	Creation	
4.5.10.2	Financing	
4.5.10.3	Role	
4.5.10.4	Prohibition	
4.5.11	Status of members of legislative bodies ⁶⁸	104, 123
4.6	Executive bodies⁶⁹	
4.6.1	Hierarchy	
4.6.2	Powers	36, 37, 38, 83, 85
4.6.3	Application of laws	
4.6.3.1	Autonomous rule-making powers ⁷⁰	
4.6.3.2	Delegated rule-making powers	37, 41, 42, 100, 101, 132, 138
4.6.4	Composition	
4.6.4.1	Appointment of members	
4.6.4.2	Election of members	
4.6.4.3	End of office of members	
4.6.4.4	Status of members of executive bodies	
4.6.5	Organisation	
4.6.6	Relations with judicial bodies	56
4.6.7	Administrative decentralisation ⁷¹	
4.6.8	Sectoral decentralisation ⁷²	
4.6.8.1	Universities	
4.6.9	The civil service ⁷³	

⁶² Representative/imperative mandates.

⁶³ Presidency, bureau, sections, committees, etc.

⁶⁴ Including the convening, duration, publicity and agenda of sessions.

⁶⁵ Including their creation, composition and terms of reference.

⁶⁶ State budgetary contribution, other sources, etc.

⁶⁷ For the publication of laws, see 3.15.

⁶⁸ For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

⁶⁹ For local authorities, see 4.8.

⁷⁰ Derived directly from the Constitution.

⁷¹ See also 4.8.

⁷² The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

⁷³ Civil servants, administrators, etc.

4.6.9.1	Conditions of access	
4.6.9.2	Reasons for exclusion	
4.6.9.2.1	Lustration ⁷⁴	
4.6.9.3	Remuneration	
4.6.9.4	Personal liability	
4.6.9.5	Trade union status	
4.6.10	Liability	
4.6.10.1	Legal liability	
4.6.10.1.1	Immunity	
4.6.10.1.2	Civil liability	
4.6.10.1.3	Criminal liability	
4.6.10.2	Political responsibility	
4.7	Judicial bodies⁷⁵	
4.7.1	Jurisdiction	140, 143
4.7.1.1	Exclusive jurisdiction	133
4.7.1.2	Universal jurisdiction	
4.7.1.3	Conflicts of jurisdiction ⁷⁶	
4.7.2	Procedure.....	119
4.7.3	Decisions	
4.7.4	Organisation	
4.7.4.1	Members	
4.7.4.1.1	Qualifications	
4.7.4.1.2	Appointment	45
4.7.4.1.3	Election	
4.7.4.1.4	Term of office	
4.7.4.1.5	End of office	
4.7.4.1.6	Status	45
4.7.4.1.6.1	Incompatibilities	
4.7.4.1.6.2	Discipline	
4.7.4.1.6.3	Irremovability	45
4.7.4.2	Officers of the court	
4.7.4.3	Prosecutors / State counsel ⁷⁷	
4.7.4.3.1	Powers.....	119
4.7.4.3.2	Appointment	
4.7.4.3.3	Election	
4.7.4.3.4	Term of office.....	119
4.7.4.3.5	End of office	
4.7.4.3.6	Status	119
4.7.4.4	Languages	
4.7.4.5	Registry	
4.7.4.6	Budget	
4.7.5	Supreme Judicial Council or equivalent body ⁷⁸	
4.7.6	Relations with bodies of international jurisdiction	
4.7.7	Supreme court	
4.7.8	Ordinary courts	
4.7.8.1	Civil courts	
4.7.8.2	Criminal courts	41
4.7.9	Administrative courts	
4.7.10	Financial courts ⁷⁹	
4.7.11	Military courts	
4.7.12	Special courts	

⁷⁴ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

⁷⁵ Other than the body delivering the decision summarised here.

⁷⁶ Positive and negative conflicts.

⁷⁷ Notwithstanding the question to which to branch of state power the prosecutor belongs.

⁷⁸ For example, Judicial Service Commission, *Conseil supérieur de la magistrature*.

⁷⁹ Comprises the Court of Auditors in so far as it exercises judicial power.

4.7.13	Other courts	
4.7.14	Arbitration	
4.7.15	Legal assistance and representation of parties	
4.7.15.1	The Bar	
4.7.15.1.1	Organisation	
4.7.15.1.2	Powers of ruling bodies	100
4.7.15.1.3	Role of members of the Bar	
4.7.15.1.4	Status of members of the Bar	
4.7.15.1.5	Discipline	
4.7.15.2	Assistance other than by the Bar	
4.7.15.2.1	Legal advisers	
4.7.15.2.2	Legal assistance bodies	
4.7.16	Liability	
4.7.16.1	Liability of the State.....	27
4.7.16.2	Liability of judges	
4.8	Federalism, regionalism and local self-government	
4.8.1	Federal entities ⁸⁰	8, 11
4.8.2	Regions and provinces.....	5, 69
4.8.3	Municipalities ⁸¹	5, 18
4.8.4	Basic principles	12, 59, 64, 143
4.8.4.1	Autonomy.....	8, 11
4.8.4.2	Subsidiarity	
4.8.5	Definition of geographical boundaries.....	8
4.8.6	Institutional aspects	
4.8.6.1	Deliberative assembly	
4.8.6.1.1	Status of members	
4.8.6.2	Executive	
4.8.6.3	Courts	143
4.8.7	Budgetary and financial aspects	141
4.8.7.1	Finance	12
4.8.7.2	Arrangements for distributing the financial resources of the State	
4.8.7.3	Budget	
4.8.7.4	Mutual support arrangements	
4.8.8	Distribution of powers.....	8, 59, 141
4.8.8.1	Principles and methods.....	9, 14, 144
4.8.8.2	Implementation	12
4.8.8.2.1	Distribution <i>ratione materiae</i>	5, 9, 11, 14
4.8.8.2.2	Distribution <i>ratione loci</i>	8
4.8.8.2.3	Distribution <i>ratione temporis</i>	
4.8.8.2.4	Distribution <i>ratione personae</i>	
4.8.8.3	Supervision	59
4.8.8.4	Co-operation	
4.8.8.5	International relations	
4.8.8.5.1	Conclusion of treaties	
4.8.8.5.2	Participation in international organisations or their organs	
4.9	Elections and instruments of direct democracy⁸²	18
4.9.1	Competent body for the organisation and control of voting ⁸³	
4.9.2	Referenda and other instruments of direct democracy ⁸⁴	85, 136
4.9.2.1	Admissibility ⁸⁵	
4.9.2.2	Effects	

⁸⁰ See also 3.6.

⁸¹ And other units of local self-government.

⁸² See also keywords 5.3.41 and 5.2.1.4.

⁸³ Organs of control and supervision.

⁸⁴ Including other consultations.

⁸⁵ For questions of jurisdiction, see keyword 1.3.4.6.

4.9.3	Electoral system ⁸⁶	
4.9.3.1	Method of voting ⁸⁷	
4.9.4	Constituencies.....	64, 66
4.9.5	Eligibility ⁸⁸	47, 50, 60
4.9.6	Representation of minorities	
4.9.7	Preliminary procedures	47
4.9.7.1	Electoral rolls	53, 60
4.9.7.2	Registration of parties and candidates ⁸⁹	
4.9.7.3	Ballot papers ⁹⁰	47
4.9.8	Electoral campaign and campaign material ⁹¹	34, 35
4.9.8.1	Financing	148
4.9.8.2	Campaign expenses	148
4.9.9	Voting procedures	
4.9.9.1	Polling stations.....	47
4.9.9.2	Polling booths	
4.9.9.3	Voting ⁹²	47
4.9.9.4	Identity checks on voters	
4.9.9.5	Record of persons having voted ⁹³	
4.9.9.6	Casting of votes ⁹⁴	47, 53
4.9.10	Minimum participation rate required	
4.9.11	Determination of votes	
4.9.11.1	Counting of votes	
4.9.11.2	Electoral reports	
4.9.12	Proclamation of results	
4.9.13	Post-electoral procedures	33
4.10	Public finances	61
4.10.1	Principles.....	40, 55, 61
4.10.2	Budget.....	55
4.10.3	Accounts	
4.10.4	Currency	
4.10.5	Central bank	
4.10.6	Auditing bodies ⁹⁵	
4.10.7	Taxation	38, 129
4.10.7.1	Principles	117, 141
4.10.8	State assets	36, 42, 103
4.10.8.1	Privatisation	65, 111
4.11	Armed forces, police forces and secret services	
4.11.1	Armed forces.....	83, 105
4.11.2	Police forces.....	52
4.11.3	Secret services	
4.12	Ombudsman⁹⁶	
4.12.1	Appointment	
4.12.2	Guarantees of independence	
4.12.2.1	Term of office	
4.12.2.2	Incompatibilities	

⁸⁶ Proportional, majority, preferential, single-member constituencies, etc.

⁸⁷ For example, Panachage, voting for whole list or part of list, blank votes.

⁸⁸ For aspects related to fundamental rights, see 5.3.41.2.

⁸⁹ For the creation of political parties, see 4.5.10.1.

⁹⁰ For example, names of parties, order of presentation, logo, emblem or question in a referendum.

⁹¹ Tracts, letters, press, radio and television, posters, nominations, etc.

⁹² Impartiality of electoral authorities, incidents, disturbances.

⁹³ For example, signatures on electoral rolls, stamps, crossing out of names on list.

⁹⁴ For example, in person, proxy vote, postal vote, electronic vote.

⁹⁵ For example, Auditor-General.

⁹⁶ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

	4.12.2.3 Immunities	
	4.12.2.4 Financial independence	
4.12.3	Powers	
4.12.4	Organisation	
4.12.5	Relations with the Head of State	
4.12.6	Relations with the legislature	
4.12.7	Relations with the executive	
4.12.8	Relations with auditing bodies ⁹⁷	
4.12.9	Relations with judicial bodies	
4.12.10	Relations with federal or regional authorities	
4.13	Independent administrative authorities ⁹⁸	67
4.14	Activities and duties assigned to the State by the Constitution ⁹⁹	74
4.15	Exercise of public functions by private bodies	
4.16	International relations	27
4.16.1	Transfer of powers to international institutions	
4.17	European Union	
4.17.1	Institutional structure	
4.17.1.1	European Parliament	
4.17.1.2	Council	
4.17.1.3	Commission	
4.17.1.4	Court of Justice of the European Communities ¹⁰⁰	
4.17.2	Distribution of powers between Community and member states	70
4.17.3	Distribution of powers between institutions of the Community	
4.17.4	Legislative procedure	
4.18	State of emergency and emergency powers ¹⁰¹	41, 63, 132
5	<u>Fundamental Rights</u> ¹⁰²	
5.1	General questions	
5.1.1	Entitlement to rights	
5.1.1.1	Nationals	
5.1.1.1.1	Nationals living abroad	
5.1.1.2	Citizens of the European Union and non-citizens with similar status	
5.1.1.3	Foreigners	21, 70, 99, 109
5.1.1.3.1	Refugees and applicants for refugee status	
5.1.1.4	Natural persons	85
5.1.1.4.1	Minors ¹⁰³	
5.1.1.4.2	Incapacitated	
5.1.1.4.3	Prisoners	
5.1.1.4.4	Military personnel	47
5.1.1.5	Legal persons	109
5.1.1.5.1	Private law	
5.1.1.5.2	Public law	
5.1.2	Horizontal effects	

⁹⁷ For example, Court of Auditors.

⁹⁸ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

⁹⁹ *Staatszielbestimmungen*.

¹⁰⁰ Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

¹⁰¹ Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

¹⁰² Positive and negative aspects.

¹⁰³ For rights of the child, see 5.3.44.

5.1.3	Positive obligation of the state	127
5.1.4	Limits and restrictions ¹⁰⁴	47, 54, 77, 85, 90, 99, 117, 127, 129
5.1.4.1	Non-derogable rights	
5.1.4.2	General/special clause of limitation	
5.1.4.3	Subsequent review of limitation	
5.1.5	Emergency situations ¹⁰⁵	
5.2	Equality	15, 23, 111
5.2.1	Scope of application	29, 65, 67, 69
5.2.1.1	Public burdens ¹⁰⁶	23, 50, 95, 117, 123, 129
5.2.1.2	Employment	99, 106
5.2.1.2.1	In private law	94
5.2.1.2.2	In public law	
5.2.1.3	Social security	15
5.2.1.4	Elections ¹⁰⁷	18, 60, 64, 66
5.2.2	Criteria of distinction	31, 50, 74, 98, 133
5.2.2.1	Gender	29, 60
5.2.2.2	Race	145
5.2.2.3	Ethnic origin	69, 105
5.2.2.4	Citizenship or nationality ¹⁰⁸	99
5.2.2.5	Social origin	
5.2.2.6	Religion	
5.2.2.7	Age	
5.2.2.8	Physical or mental disability	
5.2.2.9	Political opinions or affiliation	
5.2.2.10	Language	18
5.2.2.11	Sexual orientation	
5.2.2.12	Civil status ¹⁰⁹	26, 93, 94
5.2.2.13	Differentiation <i>ratione temporis</i>	
5.2.3	Affirmative action	60
5.3	Civil and political rights	
5.3.1	Right to dignity	73, 77, 85
5.3.2	Right to life	14, 29, 77, 85
5.3.3	Prohibition of torture and inhuman and degrading treatment	77
5.3.4	Right to physical and psychological integrity	
5.3.4.1	Scientific and medical treatment and experiments	
5.3.5	Individual liberty ¹¹⁰	52, 57, 61
5.3.5.1	Deprivation of liberty	14
5.3.5.1.1	Arrest ¹¹¹	108
5.3.5.1.2	Non-penal measures	
5.3.5.1.3	Detention pending trial	108
5.3.5.1.4	Conditional release	
5.3.5.2	Prohibition of forced or compulsory labour	
5.3.6	Freedom of movement ¹¹²	117, 129
5.3.7	Right to emigrate	

¹⁰⁴ The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in chapter 3.

¹⁰⁵ Includes questions of the suspension of rights. See also 4.18.

¹⁰⁶ Taxes and other duties towards the state.

¹⁰⁷ Universal and equal suffrage.

¹⁰⁸ According to the European Convention on Nationality of 1997, ETS no. 166, "'nationality' means the legal bond between a person and a state and does not indicate the person's ethnic origin" (Article 2) and "... with regard to the effects of the Convention, the terms 'nationality' and 'citizenship' are synonymous" (paragraph 23, Explanatory Memorandum).

¹⁰⁹ For example, discrimination between married and single persons.

¹¹⁰ This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

¹¹¹ Detention by police.

¹¹² Including questions related to the granting of passports or other travel documents.

5.3.8	Right to citizenship or nationality	
5.3.9	Right of residence ¹¹³	
5.3.10	Rights of domicile and establishment	
5.3.11	Right of asylum	
5.3.12	Security of the person	
5.3.13	Procedural safeguards, rights of the defence and fair trial.....	31, 57
5.3.13.1	Scope	
5.3.13.1.1	Constitutional proceedings	6, 10
5.3.13.1.2	Civil proceedings	31
5.3.13.1.3	Criminal proceedings	
5.3.13.1.4	Litigious administrative proceedings.....	97
5.3.13.1.5	Non-litigious administrative proceedings	
5.3.13.2	Effective remedy	31, 102
5.3.13.3	Access to courts ¹¹⁴	23, 29, 61, 98, 102, 106, 133
5.3.13.3.1	<i>Habeas corpus</i>	
5.3.13.4	Double degree of jurisdiction ¹¹⁵	102
5.3.13.5	Suspensive effect of appeal	
5.3.13.6	Right to a hearing	
5.3.13.7	Right to participate in the administration of justice ¹¹⁶	
5.3.13.8	Right of access to the file	
5.3.13.9	Public hearings	
5.3.13.10	Trial by jury	
5.3.13.11	Public judgments	
5.3.13.12	Right to be informed about the decision	
5.3.13.13	Trial/decision within reasonable time	
5.3.13.14	Independence ¹¹⁷	56, 106
5.3.13.15	Impartiality.....	10, 106
5.3.13.16	Prohibition of <i>reformatio in peius</i>	21
5.3.13.17	Rules of evidence	147
5.3.13.18	Reasoning	
5.3.13.19	Equality of arms	31
5.3.13.20	Adversarial principle.....	31
5.3.13.21	Languages	
5.3.13.22	Presumption of innocence	57
5.3.13.23	Right to remain silent	147
5.3.13.23.1	Right not to incriminate oneself	147
5.3.13.23.2	Right not to testify against spouse/close family	
5.3.13.24	Right to be informed about the reasons of detention	
5.3.13.25	Right to be informed about the charges	
5.3.13.26	Right to have adequate time and facilities for the preparation of the case	
5.3.13.27	Right to counsel	57, 147
5.3.13.27.1	Right to paid legal assistance.....	31
5.3.13.28	Right to examine witnesses	
5.3.14	<i>Ne bis in idem</i>	
5.3.15	Rights of victims of crime	
5.3.16	Principle of the application of the more lenient law	57
5.3.17	Right to compensation for damage caused by the State	85
5.3.18	Freedom of conscience ¹¹⁸	85, 93, 135
5.3.19	Freedom of opinion	62
5.3.20	Freedom of worship	93, 115

¹¹³ May include questions of expulsion and extradition.

¹¹⁴ Including the right of access to a tribunal established by law; for questions related to the establishment of extraordinary courts, see also keyword 4.7.12.

¹¹⁵ This keyword covers the right of appeal to a court.

¹¹⁶ Including the right to be present at hearing.

¹¹⁷ Including challenging of a judge.

¹¹⁸ Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

5.3.21	Freedom of expression ¹¹⁹	62, 90, 91, 110, 148
5.3.22	Freedom of the written press	91
5.3.23	Rights in respect of the audiovisual media and other means of mass communication	67, 91
5.3.24	Right to information	91
5.3.25	Right to administrative transparency	
	5.3.25.1 Right of access to administrative documents	
5.3.26	National service ¹²⁰	
5.3.27	Freedom of association	15, 49, 111, 148
5.3.28	Freedom of assembly	
5.3.29	Right to participate in public affairs	
	5.3.29.1 Right to participate in political activity	
5.3.30	Right of resistance	
5.3.31	Right to respect for one's honour and reputation	
5.3.32	Right to private life	52, 85
	5.3.32.1 Protection of personal data	80, 94
5.3.33	Right to family life ¹²¹	29
	5.3.33.1 Descent	26, 93
	5.3.33.2 Succession	26
5.3.34	Right to marriage	
5.3.35	Inviolability of the home	61
5.3.36	Inviolability of communications	
	5.3.36.1 Correspondence	
	5.3.36.2 Telephonic communications	
	5.3.36.3 Electronic communications	
5.3.37	Right of petition	
5.3.38	Non-retrospective effect of law	56, 97
	5.3.38.1 Criminal law	57, 87
	5.3.38.2 Civil law	21
	5.3.38.3 Social law	116
	5.3.38.4 Taxation law	
5.3.39	Right to property ¹²²	21, 58, 96, 99, 115
	5.3.39.1 Expropriation	96, 99
	5.3.39.2 Nationalisation	58
	5.3.39.3 Other limitations	58, 96, 103, 109
	5.3.39.4 Privatisation	74, 110, 111
5.3.40	Linguistic freedom	8
5.3.41	Electoral rights	18, 50, 70
	5.3.41.1 Right to vote	70
	5.3.41.2 Right to stand for election	47, 60
	5.3.41.3 Freedom of voting	
	5.3.41.4 Secret ballot	
	5.3.41.5 Direct / indirect ballot	
	5.3.41.6 Frequency and regularity of elections	
5.3.42	Rights in respect of taxation	96
5.3.43	Right to self fulfilment	135
5.3.44	Rights of the child	26, 29, 127
5.3.45	Protection of minorities and persons belonging to minorities	
5.4	Economic, social and cultural rights	
5.4.1	Freedom to teach	62
5.4.2	Right to education	93
5.4.3	Right to work	99
5.4.4	Freedom to choose one's profession ¹²³	

¹¹⁹ This keyword also includes the right to freely communicate information.

¹²⁰ Militia, conscientious objection, etc.

¹²¹ Aspects of the use of names are included either here or under "Right to private life".

¹²² Including compensation issues.

¹²³ This keyword also covers "Freedom of work".

5.4.5	Freedom to work for remuneration	
5.4.6	Commercial and industrial freedom	58
5.4.7	Consumer protection	
5.4.8	Freedom of contract	
5.4.9	Right of access to the public service	
5.4.10	Right to strike	54
5.4.11	Freedom of trade unions ¹²⁴	73, 132
5.4.12	Right to intellectual property	
5.4.13	Right to housing	
5.4.14	Right to social security	105, 129
5.4.15	Right to unemployment benefits.....	94
5.4.16	Right to a pension	
5.4.17	Right to just and decent working conditions	
5.4.18	Right to a sufficient standard of living	129
5.4.19	Right to health	
5.4.20	Right to culture	
5.4.21	Scientific freedom	
5.4.22	Artistic freedom	
5.5	Collective rights	
5.5.1	Right to the environment	
5.5.2	Right to development	
5.5.3	Right to peace	
5.5.4	Right to self-determination	
5.5.5	Rights of aboriginal peoples, ancestral rights	

¹²⁴

Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

Keywords of the alphabetical index*

* The précis presented in this *Bulletin* are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

Page numbers of the alphabetical index refer to the page showing the identification of the decision rather than the keyword itself.

	Pages		Pages
Abortion.....	85	Constitutional Court, <i>obiter dictum</i> ,	
Abortion, difference in treatment, father, mother	29	binding force	44
Abortion, regulation, competence	14	Constitutional Court, change in the wording of	
Act, enforceability.....	59	the contested provision, continuity of	
Adoption.....	127	the referral.....	139
Adultery, report establishing, legal aid	31	Constitutional Court, decision, binding force.....	44
Appeal, extraordinary, time limit.....	116	Constitutional Court, decision, grounds	44
Army, commanding function	83	Constitutional Court, functioning,	
Army, governing function	83	chamber, composition.....	6
Arrest and detention, safeguard.....	108	Constitutional Court, judge, challenging,	
Asset, revenue	96	participation in adoption of law examined.....	10
Association, non-profit-making.....	23	Constitutional Court, jurisdiction, international	
Association, registration.....	49	treaty, review.....	27
Authorisation, administrative, regime.....	67	Constitutional Court, plenary, tied vote,	
Authority, administrative, competence	106	casting vote.....	6
Authority, administrative, independent,		Constitutional Court, special jurisdiction	43, 45
power, scope.....	67	Constitutional public service, concept.....	65
Basic right, essence.....	77	Convention on the Rights of the Child of 1989	127
Bill, diverging versions	129	Co-operative, property	74
Bill, financial impact	40	Court of Cassation	45
Border, crossing.....	117	Court, class, creation	41
Border, crossing, tax	129	Criminal law powers.....	14
Border, tax	117	Criminal law, fundamental principles	57
Child, adoption, by an unmarried person	93	Criminal offence, determination,	
Child, born out of wedlock.....	26	competence of region	11
Child, born out of wedlock, parental authority	94	Customs duties	12
Child, mother, preferential assignment	94	Data-gathering	80
Child, neglect	127	Data-processing.....	80
Child, protection and assistance	127	Death penalty, abolition, tendency.....	77
Child, unborn, protection of life	85	Death penalty, criminological and statistical	
Church, property, restoration	115	finding	77
Civil-law partnership of persons, legal form,		Decentralisation, limits	59
obligation.....	15	Decision, administrative, judicial review.....	102
Collective agreement, legally binding	132	Denationalisation, regulation.....	110
Commerce, inter-state, regulation.....	144	Discrimination, nationals, by comparison with	
Common law	143	citizens of the European Union	99
Company, employees' association, formation.....	111	Divorce, by consent, maintenance, increase	98
Company, public, creation of a category.....	36	Divorce, maintenance	98
Confession, admissibility on evidence	147	Education, public.....	145
Constitution, direct applicability.....	136	Education, public, primary, compulsory	93
Constitution, preamble, legal value.....	49	Election, application for annulment, admissibility.....	34
Constitution, sources	34, 38, 49, 50, 58, 62	Election, campaign, contribution, limitation.....	148

Election, campaign, expenditure, limitation	148	Government, emergency decree,	
Election, candidate, military obligation	47	exceptional circumstances, interpretation	132
Election, candidate, substitute, eligibility	50	Hate speech	90
Election, conditions, eligibility, linguistic		Hatred, incitement	90
knowledge, presumption	18	Head of State, Constitution, guarantor	110
Election, constituency, delimitation	66	Housing, obligation to sell	103
Election, costs, reimbursement	33	Housing, right to buy	103
Election, electoral list, quota, sex	60	Income, family, establishment	129
Election, electorate, indivisibility	60	Information, monopoly	91
Election, equal representation	66	Inheritance, child born out of wedlock	26
Election, invalidity	47	Inseparable provision, concept	50
Election, irregularity, threshold taken into account	34	Interest, collective	23
Election, municipal	18	International law, direct applicability	18
Election, postal vote	47	Interrogation, custodial	147
Election, propaganda, corporative	35	Investment, foreign	109
Election, propaganda, discriminatory	35	Judge, auxiliary, appointment	45
Election, result, appeal, scope	33	Judge, post, assignment, temporary	45
Election, vote abroad, constituency, choice	53	Judicial guarantee, breach	23
Election, vote, by proxy	53	Judicial review, principle	140
Election, vote, sincerity	35	Language used by the administrative authorities	18
Election, voter, foreigner, resident	70	Language, use in employment matters,	
Emergency, state, declaration	63	criteria of location, business headquarters	8
Employee, redeployment	133	Language, use of languages in the public	
Employee, right of appeal	133	authorities	18
Employee, right to human dignity	73	Law assenting to an international treaty, review	27
Employment, dismissal	106	Law, adopted by referendum, constitutional	
Employment, dispute	106	review	71
Employment, employee, dismissal, unfair	94	Law, choice	143
Employment, labour, code	106	Law, definition	60
Enabling act, decree	132	Law, drafting conditions	134
Energy, supply of electricity and gas, regulation	5	Law, evolution	26
Environment, tax	12	Law, implementing	63
Equality and non-discrimination, scope,		Law, interpreting a previous law	123
born child, unborn child	29	Law, new deliberation	64
Equality, distinction, financial resources	31	Law, new reading	64
European Union, Treaty	71	Law, promulgated, examination, conditions	63
Evidence, exclusion	147	Law, reserved matter, delegation	100
Expropriation, authority to take		Law, reserved matter, delegation, limit	101
possession, procedure	99	Law, transitional	26
Expropriation, compensation, advance		Law, validity, retroactive effect	56
payment	99	Lawyer, removal	57
Expropriation, compensation, value	96	Lease, agricultural, amount, determination	37
Family allowance, compulsory contribution	95	Lease, lessee	103
Federal entity, territorial powers,		Legal aid, equality	31
principle of exclusivity	8	Legislation, regulation, scope	41, 42
Federal State, community, powers	14	Legislation, regulations, scope	36, 37
Federal State, entity, powers	8	Legislation, right to initiate, admissibility	136
Federal State, region, autonomy	9	Legislation, right to initiate, signatures,	
Federal State, region, criminal competence	11	verification	136
Finance Act, proper examination	55	Legislation, scope	60
Fine, conversion into a prison sentence in the		Legislation, scope, enlargement	48
event of failure to pay	138	Legislative validation	23
Fine, increase	138	Legitimate expectation	21
Foetus, dignity, right	85	<i>Lex mitior</i> , principle	97
Foetus, legal status	29, 85	Liability for negligence	21
Foreigner, work permit, difference in treatment	99	Liability, international relations	27
Free movement of goods	12	Local authority, act, administrative supervision	59
Freedom of enterprise, restriction	58	Local authority, free administration	59, 64
Freedom, liberty, broad interpretation	52	Maintenance, action for review, conditions	98
General law	143	<i>Mandamus</i> , remedy	140

Mayor, deputy, language used.....	18	Property, restitution, procedure.....	110
Mayor, language used	18	Public establishment, creation of a category	42
Media, public broadcaster, state influence.....	91	Public expenditure, concept.....	40
Media, public radio and television, independence ...	91	Public Prosecutor's Office, discretion	119
Media, radio, licence, fee, determination	38	Public Prosecutor's Office, participation	
Media, television, national, strike	54	in proceedings.....	119
Mortgage, attribution, competence	9	Public service, privatisation.....	65
Municipal, councillor.....	18	Punishment, mitigation, restriction	87
Municipality, association of municipalities.....	5	Referendum, law, constitutionality	45
Nationalisation, compensation, just and		Referendum, preparatory act, power to review.....	39
fair nature	58	Region, economic union	12
Offence, precise definition	97	Region, finance	12
Offence, public health	97	Region, own fiscal powers, limits	12
Order, validation.....	56	Region, special status.....	69
Pardon, restriction.....	87	Regulation, implementation of the law	100
Parental right, restriction	127	Regulation, law, conformity.....	101
Parliament, committee, competences.....	68	Regulation, scope	60
Parliament, committee, decision-taking,		Relationship to parents out of wedlock,	
quorum.....	134	inheritance right, child born out of wedlock.....	26
Parliament, committee, membership	134	Religion, instruction, compulsory	135
Parliament, mediation committee,		Religion, instruction, level, differentiation.....	135
rules of procedure	134	Religion, practice, on Saturdays	93
Parliament, member, allowance, exemption		Remedy, right.....	102
from tax	123	Reprivatisation, compensation.....	74
Parliament, rules of procedure, application.....	125	Reprivatisation, definition.....	74
Parliament, Senate, regulation.....	104	Salary, increase	132
Parliament, senator, oath, obligation	104	Sanction, criminal, reimposition	87
Parliament, standing bureau, membership	125	School, access, equal protection	145
Parliament, vote, without debate.....	68	Search and seizure, judicial guarantee.....	61
Parliamentary, system, rationalisation	34	Segregation, racial.....	145
Penalty, administrative.....	67	Social contributions, profession, independent	95
Penalty, certainty	57	Social security, sickness insurance, clinical biology,	
Penalty, disciplinary	97	combating overconsumption	15
People, concept	69	Social security, special scheme	40
People, unicity.....	69	Social welfare.....	129
Personal identification number (PIN), use	80	Sovereign power, transfer.....	70
Powers, implied.....	141	State of emergency, condition	41
Precedent, judicial.....	143	State of emergency, review	41
Pregnancy, voluntary termination, grounds		State of necessity.....	14
for justification	14	“State of previous legislation”, criterion.....	37
Pregnancy, voluntary termination,		Statute of limitations, change by region.....	11
state of distress.....	29	Statute of limitations, extension	87
President, death.....	51	Strike, advance notice.....	54
President, message to parliament, obligation		Strike, minimum service.....	54
to receive	114	Strike, restriction in public services.....	54
President, vacancy.....	51	Supremacy, federal.....	141
Pre-trial detention, extension	108	Tax, authority, powers.....	61
Principle, constitutional value.....	49, 54	Tax, evasion.....	61
Principle, constitutionally protected.....	52	Tax, income, calculation	96
Principle, legislative value.....	48	Tax, introduction	117
Prison sentence, extension by government		Tax, special.....	38
order.....	138	Tax, temporary, specified purpose,	
Privatisation, company, employee,		determination	129
participation in privatisation, advantage.....	111	Taxation system, automatic	50
Privatisation, definition	74	Taxation, power	141
Privatisation, procedure, methods	111	Trade union, bargaining, compulsory.....	132
Privilege, attribution, competence.....	9	Trade union, representation.....	73
Procedure, administrative, judicial	102	Transition, justice	87
Professional activity, malpractice.....	97	Treaty, approval	27
Property, acquisition, conditions	109	Umbrella, right.....	73
Property, agricultural, consolidation.....	96	Unemployment, benefit.....	94

Union, economic and monetary.....	12
University, teacher, independence	62
University, teacher-researcher, freedom of education, concept	62
Visas, common policy.....	70
Waiver, of right, voluntary and knowing	147
War, enforced mobilisation.....	105
War, invalid.....	105
War, veteran.....	105
War, veteran, social benefit.....	105
War, widow.....	105

Sales agents for publications of the Council of Europe
Agents de vente des publications du Conseil de l'Europe

BELGIUM/BELGIQUE

La Librairie Européenne
The European Bookshop
Rue de l'Orme, 1
B-1040 BRUXELLES 20
Tel.: 32 (0)2 231 0435
Fax: 32 (0)2 735 0860
E-mail: order@libeurop.be
<http://www.libeurop.be>

Jean de Lannoy
Avenue du Roi, 202 Koningslaan
B-1190 BRUXELLES
Tel.: 32 (0) 2 538 4308
Fax: 32 (0) 2 538 0841
E-mail: jean.de.lannoy@euronet.be
<http://www.jean-de-lannoy.be>

CANADA

Renouf Publishing Co. Ltd.
1-5369 Canotek Road
CDN-OTTAWA, Ontario, K1J 9J3
Tel.: 1 613 745 2665
Fax: 1 613 745 7660
E-mail: order.dept@renoufbooks.com
<http://www.renoufbooks.com>

**CZECH REPUBLIC/RÉPUBLIQUE
TCHÈQUE**

Suweco CZ S.r.o
Klecakova 347
CZ - 18021 PRAHA 9
<http://www.suweco.cz>
Tél: 420 2 424 59204
Fax: 420 2 848 21 646
E-mail : import@suweco.cz
<http://www.suweco.cz>

DENMARK/DANEMARK

GAD, Vimmelskafte 32
DK-1161 COPENHAGEN K
Tel.: +45 77 66 60 00
Fax: +45 77 66 60 014
E-mail : gad@gad.dk
<http://www.gad.dk>

FINLAND/FINLANDE

Akateeminen Kirjakauppa Keskuskatu 1
PO Box 218
FIN-00100 HELSINKI
Tel.: 358 (0) 9 121 4430
Fax: 358 (0) 9 121 4242
E-mail : akatilais@akateeminen.com
<http://www.akatilais.akateeminen.com>

FRANCE

La Documentation française
(Diffusion/distribution France entière)
124, rue Henri Barbusse
F-93308 AUBERVILLIERS Cedex
Tel.: 33 (0)1 40 15 70 00
Fax: 33 (0)1 40 15 68 00
comandes.vel@ladocfrancaise.gouv.fr
<http://www.ladocfrancaise.gouv.fr>

Librairie Kléber
Palais de l'Europe
F-67075 Strasbourg Cedex
Tel: 33 (0) 3 88 15 78 88
Fax: 33 (0)3 88 15 78 80
francois.wolfermann@librairie-kleber.fr
<http://www.librairie-kleber.com>

GERMANY/ALLEMAGNE

UNO Verlag
Am Hofgarten 10
D-53113 BONN
Tel.: (49) 2 28 94 90 20
Fax: (49) 2 28 94 90 222
E-mail: bestellung@uno-verlag.de
<http://www.uno-verlag.de>

GREECE/GRÈCE

Librairie Kauffmann
Stadiou 28
GR-10564 ATHINAI
Tel.: (30) 210 32 55 321
Fax: (30) 210 32 30 320
E-mail: ord@otenet.gr
<http://www.kauffmann.gr>

HUNGARY/HONGRIE

Euro Info Service kft.
1137 Bp. Szent István krt. 12
H-1137 BUDAPEST
Tel.: 36 (06)1 329 2170
Fax: 36 (06)1 349 2053
E-mail: euoinfo@euoinfo.hu
<http://www.euoinfo.hu>

ITALY/ITALIE

Licosa SpA
Via Duca di Calabria 1/1,
I-50125 FIRENZE
Tel.: (39) 556 483215
Fax: (39) 556 41257
E-mail: licosa@licosa.com
<http://www.licosa.com>

MEXICO / MEXIQUE

Mundi-Prensa México
S.A. De C.V.
Rio Pánuco
141 Delegation Cuauhtémoc
06500 México, D.F.
Tel.: 52 (01) 55 55 33 56 58
Fax: 52 (01) 55 55 14 67 99

NETHERLANDS/PAYS-BAS

De Lindeboom Internationale Publikaties bv
MA de Ruyterstraat 20 A
NL-7480 AE HAAKSBERGEN
Tel.: (31) 53 574 0004
Fax: (31) 53 572 9296
E-mail: books@delindeboom.com
<http://www.delindeboom.com>

NORWAY/NORVÈGE

Akademika,
Postboks 83
PO Box 84, Blindern
N-0314 OSLO
Tel.: 47 2 218 8100
Fax: 47 2 218 8103
E-mail: support@akademika.no
<http://www.akademika.no>

POLAND/POLOGNE

Ars Polona JSC
25 Obroncow Streeti
PL-03-933 WARSZAWA
Tel.: 48 (0) 22 509 86 00
Fax: 48 (0) 22 509 86 10
E-mail: arspolona@arspolona.com.pl
<http://www.arspolona.com.pl>

PORTUGAL

Livraria Portugal
(Dias & andrade,, Lda)
Rua do Carmo, 70
P-1200 LISBOA
Tel.: 351 21 347 49 82
Fax: 351 21 347 02 64
E-mail: info@livrariaportugal.pt
<http://www.livrariaportugal.pt>

**RUSSIAN FEDERATION /
FÉDÉRATION DE RUSSIE**

Ves Mir
9^a. Kolpacny per.
RU – 101000 MOSCOW
Tel: +7 (8) 495 623 6839
Fax: +7 (8) 495 625 4269
E-mail: orders@vesmirbooks.ru
<http://www.vesmirbooks.ru>

SPAIN/ESPAGNE

Mundi-Prensa Libros SA
Castelló 37
E-28001 MADRID
Tel.: 34 914 36 37 00
Fax: 34 915 75 39 98
E-mail: libreria@mundiprensa.es
<http://www.mundiprensa.com>

SWITZERLAND/SUISSE

Van Diermen Editions - ADECO
Chemin du Lacuez 41
CH-1807 BLONAY
Tel.: 41 (0) 21 943 26 73
Fax: 41 (0) 21 943 36 05
E-mail: mvandier@worldcom.ch

UNITED KINGDOM/ROYAUME-UNI

The Stationery Office Ltd.
PO Box 29
GB-NORWICH NR3 1GN
Tel.: 44 (0) 870 6000 55 22
Fax: 44 (0) 870 6000 55 33
E-mail: book.enquiries@tso.co.uk
<http://www.tsoshop.co.uk>

**UNITED STATES and CANADA/
ÉTATS-UNIS et CANADA**

Manhattan Publishing Company
468 Albany Post Road
CROTON-ON-HUDSON,
NY 10520, USA
Tel.: 1 914 271 5194
Fax: 1 914 271 5856
E-mail: Info@manhattanpublishing.com
<http://www.manhattanpublishing.com>

Council of Europe Publishing/Editions du Conseil de l'Europe

F-67075 Strasbourg Cedex

Tel.: (33) 03 88 41 25 81 – Fax: (33) 03 88 41 39 10 – E-mail: publishing@coe.int – Web site: <http://book.coe.int>

